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G. W. WATKINS, APPELLEE, V. JOHN HARRISON, APPELLANT.

FILED JUNE 27, 1923. No. 22420.

1. **Husband and Wife:** DEED. After dower had been abolished in this state, a husband and wife to whom certain real estate had been conveyed by deed of general warranty, naming each of them as grantee, executed a conveyance reciting, "We do hereby sell and convey unto" the grantee the land described in the conveyance to them. The deed contained the usual covenants of title and warranty. Said deed is sufficient to convey all the interest of the wife in the premises, even though it further recites that the wife "hereby relinquishes her dower and courtesy in and to the above described premises." Comp. St. 1922, secs. 5591, 5594.
2. **Specific Performance.** Evidence examined, and *held*, to sustain the decree of the trial court requiring specific performance.
3. **Vendor and Purchaser:** RESCISSION. In order to be entitled to rescind a contract for the sale of real estate, the vendee must place, or offer to place, the vendor *in statu quo*, and where the vendee has leased the premises and the tenant is in possession, and has placed the contract of sale upon record, thus clouding the title of the vendor, the vendee is not entitled to the return of the money paid until the contract has been released or satisfied of record, and he is ready, willing and able to surrender possession.
4. **Appeal.** Where no cross-appeal is filed, and the appeal is not well taken, the court will not change or modify the decree of the district court for the mere purpose of affording appellee a larger measure of recovery.

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

E. J. Lambe, for appellant.

C. D. Ritchie and *Stewart, Perry & Stewart, contra.*

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

LETTON, J.

Action for specific performance of a contract for the sale of real estate. The court found for plaintiff and awarded specific performance. Defendant appeals.

On July 17, 1920, plaintiff, the owner of the land, entered into a written contract with defendant for its sale,

which provided that the purchase price should be $31,000, $5,000 to be, *and was,* paid at the execution of the contract, and $14,000 on March 1, 1921. The purchaser agreed to pay a mortgage on which there would be due and unpaid on March 1, 1921, a balance of $12,000. The vendor agreed to furnish the vendee a "warranty deed and a good and merchantable abstract of title on or before March 1, 1921; to pay all taxes for 1919 and 1920; and to pay interest on the mortgage up to March 1, 1921." The vendee was to retain all crops grown on the land during the crop season of 1920. The $5,000 was paid when the contract was executed.

There is a slight conflict in the evidence, and in the following account we are stating the conclusions drawn by us from the testimony. At the time the contract was executed plaintiff inquired of defendant whom he desired to examine the title for him. Defendant named a lawyer in Indianola, the town in which he lived. Plaintiff resided at McCook. A few days afterwards the abstract of title was sent by plaintiff to this lawyer in Indianola, with a letter, part of which is as follows: "Please put this abstract in such condition that you would pass the title. You will have until next March 1, if necessary, but would like it gotten out between now and then."

In the latter part of January, 1921, plaintiff received a letter from this examiner suggesting that in a previous conveyance by Charles M. Garst and Nettie C. Garst, husband and wife, who each owned an undivided half interest in the land, the wife had only conveyed her dower interest; that at that time the right of dower had been abolished, and requesting a quitclaim deed from the wife because the deed did not convey all her interest. Plaintiff sent to Iowa, where the parties resided, and obtained a quitclaim deed, which he forwarded to the examiner. About the middle of February he received another letter from him, saying this quitclaim deed was not satisfactory, and inclosing a new form of deed. He sent this to Iowa, but it was not returned to him until March 2, 1921. He

then returned it for the signature of witnesses, and did not again receive it until March 7, properly executed. Defendant knew during the winter that the abstract had been sent to the examining attorney at Indianola. On September 12, 1920, the dwelling-house, which was uninsured, was destroyed by fire. After it became known that the house was burned, the parties had several conversations with respect to this fact, defendant insisting that he wanted the house restored or replaced, and plaintiff denying his liability to do so. In the interim defendant had some doubt as to whether he could raise the $14,000 necessary by March 1, 1921, and suggested to plaintiff that he could pay $7,000 at that time if plaintiff would be willing to wait some time for the balance, to which plaintiff assented. On March 1, 1921, defendant went to the lawyer in Indianola and asked him for his opinion as to the title. Being busy at the moment, the examiner later in the day, in a written communication addressed to both plaintiff and defendant, expressed his opinion that, since Mrs. Garst had done nothing more than convey her dower, she had never conveyed away her fee simple title in the land, and therefore plaintiff had a good marketable title to a half interest in the premises only.

On the same day defendant went to McCook and tendered to plaintiff a check for $14,000, payable to himself and unindorsed, and demanded an abstract showing a marketable title, the restoration of a house, and a deed for the land. A deed was duly tendered to defendant, and he was told that the abstract was in the office of the lawyer in Indianola. He asked for the money he had paid, and refused to take the deed. A day or two later he rescinded the contract by letter on the ground that plaintiff had failed to fulfil the terms of the contract on his part. The money to reduce the mortgage debt to $12,000 was remitted on February 27, 1921. On March 7, 1921, the quitclaim deed arrived, was placed of record, and the taxes for 1920 paid. A deed according to contract

was again tendered to defendant, which he refused to accept.

There is a controversy between the parties as to whether the Indianola lawyer represented the plaintiff or the defendant, but we are satisfied from the evidence that in passing upon the abstract and examining the title he was acting for the defendant. In preparing the quitclaim deed and advising plaintiff as to what he thought to be a defect in the title he acted for plaintiff. It is not unusual for abstracts to be furnished by a vendor to the attorney who will pass on the title for a vendee, and to authorize and empower him to clear the title so that he will be willing to approve it on behalf of the vendee. Under the terms of the Nebraska statute with respect to real estate, there was a merchantable title to the land even without the execution of the qutclaim deed from Mrs. Garst. Sections 5591, 5594, Comp. St. 1922. The deed recited that "we" "sell and convey" to the grantee named, and contained all the usual covenants of title, by both grantors.

We are also satisfied that the moving cause of defendant's refusal to accept the land was the destruction of the house by fire. This was not a valid excuse for failing to carry out the contract. *McGinley v. Forrest*, 107 Neb. 309.

On August 20, 1920, the defendant executed to one Fisher, then in possession as a tenant of plaintiff, a lease for the land beginning on March 1, 1921. Relying upon the terms of this lease, Fisher sowed from 250 to 300 acres of wheat that fall. He was in possession under the lease on March 1, 1921.

Furthermore, on February 25, 1921, defendant procured the contract to be recorded in the office of the county clerk. This was an assertion of an interest in the land, and cast a cloud upon plaintiff's title. On March 1 he did not offer to place plaintiff *in statu quo* by releasing or satisfying this instrument of record, and hence his tender, on that account, as well as upon others, was unavailing to establish performance on his part. While the contract provides

that "time is an essential element in this contract," we are satisfied that the contract was substantially performed by plaintiff upon the 1st day of March, and the defendant had no reasonable excuse for failing to perform on that day.

The decree of the trial court allowed defendant credit for $1,500, which was found to be the value of the house which had been destroyed by fire. He was thus given the benefit of the only substantial objection which he really had to the performance of the contract. There is no cross-appeal by plaintiff.

AFFIRMED.

GUY WEST, APPELLANT, V. DORA OFE, APPELLEE.

FILED JUNE 27, 1923. No. 22430.

Parent and Child: CUSTODY OF CHILD. "In a controversy for the custody of an infant of tender years, the court will consider the best interests of the child and will make such order for its custody as will be for its welfare, without reference to the wishes of the parties." *Schroeder v. State,* 41 Neb. 745.

APPEAL from the district court for Antelope county: WILLIAM V. ALLEN, JUDGE. *Affirmed.*

J. C. Alexander, R. H. Rice and *Lyle E. Jackson,* for appellant.

Williams & Kryger, contra.

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

LETTON, J.

This is an application for a writ of habeas corpus brought by the father of Mae West, a child about 8 years of age at the time of the trial. The petition alleges that, while she was in the lawful custody of the father, she was taken and carried away by persons unknown to him, and she is now unlawfully deprived of her liberty by Dora Ofe, the respondent.

The evidence shows that since a few days after the

birth of the child, and until June, 1921, her care and custody were with the respondent, who is her mother's sister; that respondent has the same affection for her that she would have if she were her own child; and that her mother died a short time after the birth of the child.

Respondent testifies that, just prior to her death, the mother requested respondent to take and care for her and act as a mother to her; but relator has produced testimony as to the statements made by respondent to others, which seems to cast doubt upon this testimony. For two years of this time respondent kept house for the relator, receiving nothing for her services and very little for the maintenance of the child. She also testifies that she told relator when she took the child that, if she was not to be permitted to keep her permanently, they must take her then and not wait until she had formed an affection for her, and under these conditions the child was left with her.

Respondent is a seamstress, she has a comfortable home, and if the child remains with her, she is willing to waive any question of compensation for what board and clothes she has already supplied. The child would rather remain with her than live with her father and step-mother.

The evidence on behalf of relator shows that he was married the second time in February, 1920; that he is 40 years old, living upon a farm which he owns; that he has been a farmer all his life; that his home is about two and a quarter miles from a schoolhouse, and five miles from a church; that the school is the ordinary country school of eight grades. The mother of the child died eight days after her birth. He testified that, after respondent decided not to keep house for him any longer, he wanted to take the child, but respondent objected and wanted to keep her, and that he finally agreed to leave the child with her for an indefinite time; that his mother at that time offered to take the child and was in a

position to have kept her; that he contributed all the money respondent said he owed her for the care of the child, $95 in all; that some times it was quite a long period between his visits to the child, once in six months in 1920, but that he has seen her probably once in every two or three months during the last two years. He has no other children.

The court found that the child was not unlawfully held in custody, and that the respondent is entitled to her care, custody and control.

The law is well settled as to the respective rights of these parties. We have said that the right of a parent to the custody of a minor child of tender years is not lightly to be set aside, and that the court may not deprive a parent of such custody unless he, or she, has forfeited the right, or is not a proper person, or not living under such conditions that it is for the best welfare of the child that it be kept in his, or her, custody. Our earlier decisions laid rather more stress on the rights of the parents than the later. The rights of the parents must not be disregarded, but if a parent has surrendered the care and custody of a child while it is a mere babe in arms to its maternal aunt, who has exercised a mother's care over it, whose love for the helpless infant has grown with its growth, and strengthened with its strength, whom the child regards as a mother, and who at the same time is able and willing to furnish the child a good home, care for and educate her, while the parent, by his own admission, has failed adequately to provide for the child, and only visited it at intervals of several months, it seems to us that the welfare of the child can better be subserved by leaving her with the aunt whom she loves and looks upon as a mother and who is lavishing upon her maternal affection. Furthermore, while there is nothing to show but that the stepmother is an estimable woman, there is evidently a coldness of feeling existing between the child and her, which tends to unhappiness for both.

The trial judge had the advantage of seeing the parties

and hearing their testimony. We find that his judgment is supported by the evidence.

AFFIRMED.

TEOFIL NENEMAN, APPELLEE, V. CHARLES E. RICKLEY, APPELLEE: THOMAS W. ARMSTRONG, APPELLANT.

FILED JUNE 27, 1923. No. 22450.

1. **Husband and Wife:** ANTENUPTIAL CONTRACT. An antenuptial contract in consideration of marriage, and the mutual exchange *in præsenti* of an interest in the property of the other, if fairly and equitably made and entered into in good faith, will not be disturbed after the death of one of the parties.
2. ———: ———: CONSTRUCTION. The antenuptial agreement set forth in the opinion *held* to be an executed and not an executory contract, and to convey *in præsenti* an undivided one-half interest in the proporety of each of the contracting parties to the other. *Held*, further, that it was sufficient to vest in the survivor all the property of the deceased party, subject to the claims of creditors.
3. ———: ———: CONSIDERATION. The subsequent marriage of the parties and the mutual grants contained in the instrument furnished sufficient consideration to uphold the instrument.
4. **Evidence:** ADMISSIBILITY: DEEDS. The certificate of a notary public in proper form to the acknowledgment of a conveyance of real estate is sufficient to authorize the deed to be given in evidence without further proof of its execution.
5. **Evidence** examined, and *held* not to sustain the charge of fraud, or the charge that the terms of the instrument are unconscionable.

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

W. W. Slabaugh and *A. H. Murdock*, for appellant.

E. C. Hodder, *W. L. Baughn* and *Joseph Rapp, Jr.*, *contra.*

Heard before LETTON, ROSE, DAY and ALDRICH, JJ., REDICK, District Judge.

LETTON, J.

Plaintiff, on September 3, 1920, entered into a written contract with Charles E. Rickley, as the owner of the property, for the purchase of certain real estate in Omaha.

Part of the price was paid in cash, and the balance was to be paid in monthly payments. None of these deferred payments has been made because one Thomas W. Armstrong claims an interest in the real estate as the heir of his mother, Mary A. Rickley, formerly Mary A. Armstrong. He asserts that on her death her husband, Charles E. Rickley, became entitled to only a one-fourth interest in the property, and that he, Armstrong, became the owner of a three-fourths interest. Plaintiff prays that the title to the property be quieted in him and Rickley, as against Armstrong, and that he be allowed credit on the contract for the amount that Rickley has collected as rent, with interest. Rickley filed a cross-petition setting upon an antenuptial agreement and contract whereby, on the death of his wife, Mary A. Rickley, the absolute title to the property vested in him. He alleges that, upon the settlement of his wife's estate, the decree of the county court established the heirship to the property in him; that he has been in possession of the same since 1909, and that Armstrong is guilty of laches, and is estopped from claiming any title to the property.

Armstrong pleaded to the petition, and to the cross-petition of Rickley, alleging that the contract referred to was procured by Rickley without consideration; that Rickley falsely represented to his mother that he was possessed of real estate of equal value to that of her property, and that he would convey to her a half interest in the same; that her property was worth $7,500, while his property was worth only $1,250; that the contract was abandoned, and that neither party ever received a part of the income arising from the property belonging to the other. He denies delivery of the contract, and pleads that by reason of Rickley's attitude toward the possession during the lifetime of Mrs. Rickley, and his filing an inventory, as her administrator, returning the property as a part of her estate, he is now estopped from claiming any benefit under the terms of the contract. He

prays that his title be quieted to a three-fourths interest. The court found against Armstrong, and he appeals.

The facts are that about June 1, 1909, Mary A. Armstrong, the mother of the defendant Armstrong, who was her only child, entered into an antenuptial agreement with Rickley. A few days afterwards they were married. She died September 10, 1913. After the marriage they occupied one of the flats on the property as their home for several years. Rickley testified that he had taken his wife on a trip to Oklahoma with him in 1913 and she became ill. They returned to Omaha; he employed two nurses to care for her, and while he was absent on business two of her sisters took her to their home in Lincoln, where she died. A copy of what appears to be an unprobated will executed by Mrs. Rickley in Lincoln a short time before her death was received in evidence. In this bequests of $500 each were made to her two sisters who lived in Lincoln, a one-fourth interest in the Omaha property was left to her husband, and Armstrong was made residuary legatee. There is no proof as to the condition of Mrs. Rickley, or the circumstances under which this document was executed.

Some sort of a compromise, or settlement, was afterwards had whereby Rickley furnished money to settle the claims of creditors and for funeral expenses, etc., and the alleged will was never offered for probate. Armstrong does not appear to have been a party to this agreement. Rickley was appointed administrator of the estate. He returned an inventory listing the property as belonging to the estate of his wife. It is said by Armstrong that, in the petition for the appointment of an administrator, Rickley alleged that he and Armstrong were the sole heirs at law of the deceased. This is an error; the petition alleges "that the heirs and *other persons interested* in the estate" are himself and Armstrong. Rickley also filed a claim against his wife's estate for money advanced to her and money expended on her property. He testifies that he paid off a number of creditors and took assignments

of their claims (which are included in the claim filed by him) to himself for the purpose of settling the estate promptly. These facts are relevant, but not controlling. It is worthy of note, also, that the county court made a finding in the final decree reciting the terms of the antenuptial agreement as to survivorship, so that Rickley was evidently claiming under it at that time.

The antenuptial agreement and conveyance is as follows:

"This agreement entered into this —— day of June, 1909, by and between Charles E. Rickley and Mary A. Armstrong, both of the city of Omaha and Douglas county, Nebraska, witnesseth:

"1. That these parties hereby agree to enter into the marriage relation and hereafter live together as husband and wife.

"2. That all moneys or property hereafter acquired or accumulated by them, or either of them, shall be held in joint and equal ownership.

"3. That each of these parties hereby grants, bargains, sells and conveys to the other an undivided one-half (½) interest in all the property, real or personal, which he or she now owns for the purpose and with the intent of vesting in both parties the joint ownership of all property at this date owned in severalty by either of them.

"4. In case of the death of one of these parties, all of said property shall, subject to the claims of creditors, vest absolutely in the survivor.

"5. Any property or interest in property owned by the said Charles E. Rickley and situated in Sheridan county, Nebraska, is not intended to be embraced within or affected in any way by this contract, but is, on the contrary, expressly excepted from its operation.

"6. The consideration for this agreement is the marriage to be entered into pursuant to its terms and the mutual promises and grants herein contained.

"Witness: J. J. Sullivan.

"C. E. Rickley,
"Mary A. Armstrong."

The instrument is acknowledged before a notary public in the usual form for a conveyance.

Armstrong insists that the antenuptial contract is void, and is contrary to the laws of this state; that it does not create a joint tenancy; that it is unconscionable and was a fraud upon Mrs. Armstrong and the appellant, there being no just consideration for it; that it was abandoned by the parties, and that there is no competent evidence that it was ever executed.

Under section 4818, Comp. St. 1922, the certificate of a notary public to the acknowledgment is made presumptive evidence of the execution of the instrument. Under this section the certificate of the notary "shall be received in all courts of this state as presumptive evidence of the facts therein certified to." In *Burbank v. Ellis*, 7 Neb. 156, it is said: "The function of an acknowledgment is twofold—to authorize the deed to be given in evidence without further proof of its execution, and to entitle it to be recorded." To the same effect are *Horbach v. Tyrrell*, 48 Neb. 514; *Linton v. Cooper*, 53 Neb. 400; *Wilson v. Wilson*, 85 Neb. 167.

It was stipulated that if J. J. Sullivan were present he would testify that he knew the signatures of the parties, and that the signatures annexed to the contract were those of Charles E. Rickley and Mary A. Armstrong. The proof is sufficient, and the instrument was properly received in evidence.

We cannot agree to the contention that the contract is void at common law, or that it is contrary to the laws of this state. The third paragraph constitutes and is a valid conveyance of an undivided one-half of the property of each to the other. The consideration was the mutual transfer and the contemplated marriage. The language of the paragraph constitutes a grant each to the other *in præsenti*. In the absence of fraud, or mistake, such a conveyance is valid.

As to the charge of fraud, the only ground of fraud alleged is that the property which was conveyed to Mrs. Armstrong by Rickley was disproportionate in value to that conveyed to him by her. Mr. and Mrs. Rickley lived together from June 5, 1909, until sometime in 1913, and there is no evidence that during any of this time the wife ever complained of the transaction. It is difficult to tell from the evidence just what the value of the respective properties was. When the incumbrance upon the property of the wife is considered, it probably did not much exceed in value that of Rickley. At all events, there is no ground to set aside the contract as unconscionable.

It is next said that the contract did not create a joint tenancy, which would vest the estate in the survivor. Whether it created a joint tenancy or not is immaterial. We see no reason why, upon the death of one party, the property may not vest absolutely in the survivor, subject to the claims of creditors, as the contract provides. This was evidently the intent of the parties, which section 5594, Comp. St. 1922, makes it the duty of the court to carry into effect. *Sanderson v. Everson*, 93 Neb. 606. At the time the parties executed the contract Armstrong had been following an occupation for more than 10 years. He was 40 years of age at the time of the trial. Both of the contracting parties were of mature age, each had property, the disposition of which by the law of descent and distribution, in case of the death of either, intestate, might result in depriving the survivor of comfort and support in his or her declining years. Each desired to provide for the future well-being and content of the other, a laudable and lawful desire. Such a contract is in favor of marriage and, especially in the case of persons of mature years possessing property, and having children by a former marriage, tends to prevent discord and unhappiness in the marital relation. *Rieger v. Schaible*, 81 Neb. 33; *Tiernan v. Tiernan*, 107 Neb. 563.

Both the present estate and the right of the survivor to take passed upon the execution of the contract. The con-

tract required nothing further to be done by either party. It was executed with all the formalities of a deed of conveyance, and was such in fact. It was not an executory but an executed contract, and required no trustee to carry it into effect. *Neves v. Scott*, 50 U. S. 196; *Smith's Exr. v. Johns*, 154 Ky. 274; *Collins v. Bauman*, 125 Ky. 846.

It is asserted that the contract was abandoned by the parties. It was recorded in the miscellaneous records of Douglas county in February, 1912. Both before and after the death of his wife, Rickley contributed substantially of his own funds for the repair and unkeep of the property. Other facts are in evidence which convince us that there was no intention on his part to abandon the estate conveyed, and even if Mrs. Rickley intended to abandon it, of which there is no definite proof, this could not affect a vested right of Rickley.

The judgment of the district court is

AFFIRMED.

GEORGE YOUNG, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL., APPELLANTS.

FILED JUNE 27, 1923. No. 22363.

1. **Findings** of the jury, if supported by competent evidence, will not be set aside on appeal unless clearly wrong.
2. **Costs:** ATTORNEY'S FEES. The statute authorizing the taxing of an attorney's fee as an item of costs, upon a recovery for damages growing out of the shipment or delivery of freight by a common carrier, does not extend to negligence in killing animals on a railroad track or in starting fires which destroy farm property. Comp. St. 1922, sec. 5422.

APPEAL from the district court for Lincoln county: HANSON M. GRIMES, JUDGE. *Affirmed, except as to allowance of attorney's fee.*

E. E. Whitted, J. L. Rice and *John F. Cordeal*, for appellants.

Hoagland & Carr, contra.

Heard before MORRISSEY, C. J., ROSE, DEAN and DAY, JJ., BLACKLEDGE and COLBY, District Judges.

ROSE, J.

This is an action to recover damages for alleged negligence in the starting of fires and in the failure to properly fence defendant's railroad right of way. Injury to grass and land, destruction of farm property, killing of hogs on the railroad track, and labor in fighting fire are pleaded in the petition as damages aggregating $1,523.01. Defendant denied the negligence charged and liability for damages. Upon a trial of the issues the jury rendered a verdict in favor of plaintiff for $1,464.79. From a judgment thereon defendant has appealed.

By motion plaintiff directs attention to the fact that, since the verdict was rendered, John Barton Payne, director general of railroads of the United States, has been succeeded by James C. Davis, director general and agent of the United States railway administration. The latter is therefore substituted for the former as defendant.

The principal argument is directed to the assignment of error that the evidence is insufficient to sustain the verdict or the amount of the recovery. There is testimony in support of each item of damage included in the verdict. There is some proof indicating losses exceeding the award of the jury. While the recovery, to some extent, seems to be questionable, the conclusion that the evidence is not sufficient to sustain the verdict can only be drawn by discrediting competent testimony which the jury must have believed. The case falls within the general rule that findings of the jury, if supported by competent evidence, will not be set aside on appeal unless clearly wrong.

The allowance of an attorney's fee of $200, recoverable as costs, is also assigned as error. Plaintiff attempts to justify the judgment therefor under the act relating to the adjustment of claims against common carriers. Comp. St. 1922, sec. 5422. The attorney's fee authorized

by that act applies alone to professional services in controversies growing out of the transportation or delivery of freight by common carriers. *Mayhall & Neible v. Chicago, B. & Q. R. Co.*, 107 Neb. 58. It has no application whatever to any item in plaintiff's claim. Injury or loss in shipping or delivering freight is not pleaded or proved. The claim exceeds $300 and does not fall within the terms of the statute authorizing an attorney's fee in a controversy involving a smaller amount. Comp. St. 1922, sec. 9126. Neither of these statutes can be extended by construction to the cause of action stated in the present case. There was therefore no authority for the allowance of the attorney's fee. The judgment is reversed as to that item. Otherwise it is affirmed at the costs of plaintiff in the appellate court.

JUDGMENT ACCORDINGLY.

J. H. SIMPSON, APPELLANT, V. CON HARLEY, APPELLEE.

FILED JUNE 27, 1923. No. 22413.

1. **Brokers:** COMMISSIONS. A commission cannot be collected by an agent for rejected services, if he wilfully disregarded, in a material respect, an obligation imposed upon him by the law of agency.
2. **Trusts:** CONSTRUCTIVE TRUST. "A person gratuitously or officiously assuming as agent or trustee to control or manage the property or interests of another is as firmly bound by the implied terms of his confidential relation as one who is regularly employed and paid." *Nebraska Power Co. v. Koenig*, 93 Neb. 68.

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

Williams & Kryger, for appellant.

J. J. Harrington, contra.

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

ROSE, J.

This is an action by plaintiff to recover a broker's commission of $2,980 for procuring a person ready, able and

willing to purchase from defendant 480 acres of land in Holt county and a lease for 160 acres of school land therein at the net price of $22,020, or $44 an acre for the land and $900 for the lease. Plaintiff pleaded two contracts in writing. One was dated September 18, 1919. According to its terms he was sole agent of defendant and entitled to a commission of all the purchase price in excess of $22,020. The other contract pleaded by plaintiff was dated September 19, 1919, and contained an agreement by defendant to sell, and by H. A. Callies to buy, the land and the lease for $25,000, being $50 an acre for the land and $1,000 for the lease. In the answer to the petition defendant admitted the signing of the contracts, but alleged that plaintiff procured them by fraud which prevented the sale, made the services of the agent worthless and defeated the claim for compensation. Upon a trial of the issues the district court directed a verdict in favor of defendant and dismissed the action. Plaintiff has appealed.

It is first argued that the answer admits facts entitling plaintiff to recover compensation, that it fails to show defendant was damaged by the fraud pleaded, and that therefore there is no defense to the cause of action stated. That position is clearly untenable. The action is one to recover compensation for the services of an agent. He and his principal are the only suitors. Rights of third persons are not involved. The answer pleads in detail facts showing that the contracts on which plaintiff's right to recover is based were procured by fraud which defendant promptly denounced in addition to rejecting the services of plaintiff upon discovering his perfidy. The answer states a defense under the following rule of law:

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

The only other question presented arises from the failure of the trial court to submit issues of fact to the jury. There was a conflict of evidence on some phases of the fraud pleaded, but undisputed proofs show conclusively that plaintiff was not entitled to recover compensation.

The testimony on behalf of defendant tended to prove that the preliminary negotiations between him and plaintiff resulted in an agreement authorizing a sale of the land for $45 an acre and of the lease for $1,000; that the commission was $1 an acre for the land and $100 for the lease, or $580; that plaintiff inserted the false terms in the contracts and tricked defendant into signing them in ignorance of the facts. On this phase of the controversy there was a conflict in the testimony, but other evidence not disputed showed that plaintiff was not entitled to compensation. The following conclusions are properly drawn from undisputed facts:

Before defendant signed the contracts pleaded in the petition, confidential relations extending to agency and terms of sale existed between him and plaintiff. Making use of the information thus acquired, plaintiff procured from Callies the latter's signature to a contract for the purchase of the land for $50 an acre, and of the lease for $1,000. Plaintiff had also procured from Callies for defendant a cash payment of $2,000. This is one of the contracts signed by defendant and pleaded in plaintiff's petition. While in possession of Callies' agreement and the cash payment of $2,000, which belonged to defendant in the event of a sale, plaintiff afterward went to defendant September 18, 1919, and, without disclosing that Callies had signed an agreement to purchase the land for $24,000, or $50 an acre, and the lease for $1,000, procured defendant's signature to the contract appointing plaintiff sole agent to find a purchaser, though one had already been found, and authorizing a commission of all the purchase price in excess of $44 an acre for the land and of $900 for the lease. This contract of agency

gave plaintiff, upon his own solicitation, at least four days to procure a purchaser already procured. While the negotiations between plaintiff and defendant were in progress immediately preceding the signing of the contract of agency, both parties considered the compensation of the agent an open question and discussed it as such. At that time plaintiff, according to his own testimony, said he had priced the land and could not raise the price, but did not disclose what that price was. The day following the signing of the contract of agency, September 19, 1919, plaintiff obtained defendant's signature to the contract of purchase previously signed by Callies, without disclosing that the latter, before the contract of agency was signed, had agreed to purchase the land for $50 an acre and the lease for $1,000. This is the other contract pleaded in the petition. Through a conference with Callies, defendant soon learned what plaintiff, the agent, had concealed. Callies then refused to pay more than $45 an acre and plaintiff demanded a commission of $2,980 without regard to sale or price. With the consent of Callies, defendant refused to perform the contracts or to accept the services of the agent or to ratify the agent's acts. Defendant had received the cash payment of $2,000 but returned it to Callies. Had defendant known in advance of Callies' agreement to pay $50 an acre for the land and $1,000 for the lease, neither contract would have been executed. The conclusions outlined are drawn from undisputed evidence.

It was the duty of the agent under the circumstances to disclose the facts which he concealed in procuring his principal's signature to the contracts. The failure to do so was a breach of confidential relations. His obligations in that particular did not begin with the execution of the written instruments. He had previously assumed, without authority in writing, to act for defendant in negotiating for a sale, in procuring a competent purchaser and in accepting a cash payment of $2,000. To procure a personal advantage at the expense of defendant,

he acted on information acquired through confidential relations previously established. If his services were legally authorized, he was bound by the law of agency to disclose what he had done for his principal. If he assumed to act as agent before he was authorized to do so, his conduct is measured by the following rule of law:

"A person gratuitously or officiously assuming as agent or trustee to control or manage the property or interests of another is as firmly bound by the implied terms of his confidential relation as one who is regularly employed and paid." *Nebraska Power Co. v. Koenig*, 93 Neb. 68.

That relation, however created, required of the agent a disclosure of the facts concerning the subject-matter of his agency. While both parties were considering the open subject of compensation during the negotiations immediately preceding the signing of the contract of agency, it was the duty of the agent to disclose that, assuming to act as such, he had procured a purchaser for $50 an acre and received for defendant a cash payment of $2,000. With knowledge of the facts defendant would not have signed the contracts and he was not obliged to perform either on demand of the agent. With the consent of the purchaser he had a right to reject the services of the agent and refuse payment therefor. He properly pursued this course. From a legal standpoint plaintiff gained nothing by taking advantage of information obtained from his principal in confidence to procure in writing a subsequent agreement exacting for himself the illicit fruits of silence when he should have spoken. His accountability to his principal is the same whether in abusing his trust he acted under a valid employment or officiously assumed to be an agent. The trial court made no mistake in directing a verdict. The dismissal of the action is therefore

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL., APPELLANTS, V. SCHOOL DISTRICT ET AL., APPELLEES.

FILED JUNE 27, 1923. No. 22446.

1. **Schools and School Districts:** TAXING POWER. The taxing power of a school district is statutory and must be exercised within the terms of the legislative grant.
2. **Statutes:** CONSTRUCTION. In construing a statute, effect must be given to all its provisions.
3. **Schools and School Districts:** TAXING POWER. In 1920 a school district organized with a board of six trustees under section 6798, Rev. St. 1913, did not have power at the regular annual school district meeting to impose for school purposes taxes in excess of a 35-mill levy, without the submitting of a proposition to do so after notice and the casting of the requisite vote in favor of the proposition. Laws 1919, ch. 145, sec. 1; Laws 1919, ch. 148, sec. 1.
4. **Taxation:** VOID TAX: INJUNCTION. The collection of void taxes may be prevented by injunction.

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

E. E. Whitted, J. Q. Dier and *J. L. Rice,* for appellants.

J. L. McPheely, contra.

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

ROSE, J.

This is an application for an injunction to prevent defendants from collecting school district taxes assessed on the property of plaintiffs in Axtell school district in excess of a 35-mill levy. The plea in equity is that the school district exceeded its powers by attempting to authorize a 61-mill levy at an annual school district meeting, while the statutory limit was a 35-mill levy, which could only be increased by the adoption of a proposition to do so at a general or special election held after legal notice stating the extent of the proposed increase—steps not taken. At a meeting May 3, 1920, the school board recommended a levy sufficient to raise $9,850. This recommendation was adopted at the regular

annual school district meeting June 14, 1920. To raise $9,850 the county board made a 61-mill levy on the taxable property in the school district. The burden falling upon plaintiffs amounted to $1,619.55. They paid $929.25 on the basis of a 35-mill levy. The difference between the two items, or the sum of $690.30, is sought to be enjoined. The application for an injunction was resisted by defendants on the following grounds: The powers of a school district may be exercised at the regular annual school district meeting which is held at a definite time fixed by statute. All electors are required to take notice of it. The vote at the regular school district meeting was sufficient. Upon a trial of the issues the district court dismissed the suit and plaintiffs have appealed.

The school district, as one containing more than 150 children between the ages of 5 and 21 years, had been organized with a board of 6 trustees. Rev. St. 1913, sec. 6798. Did it have power June 14, 1920, to authorize the assessment of taxes in excess of a 35-mill levy without any notice except that given by statute? The law then in force, after providing a method of raising the necessary school funds, contained the following provisos:

"Provided, the amount so levied shall not exceed, in any one year, thirty-five mills on the dollar of the assessed valuation in such school district. Provided, that a levy not exceeding 100 mills may be made after submitting the proposition of the increased levy at an election called for the purpose or at any regular election, notice whereof shall have been given for at least 20 days in one or more papers published in the district or county to the qualified voters of the district, and if 60 per cent. of the votes cast at such election shall be for the proposed increased levy, the board may make the levy in such amount as may be named in the election notice." Laws 1919, ch. 145, sec. 1; Laws 1919, ch. 148, sec. 1.

The taxing power of a school district is statutory. It must be exercised within the terms of the legislative grant. The statute declared:

"Said district may, at the annual meeting, vote such sums to be raised by tax upon the taxable property of said district, as may be required to maintain the several schools thereof, for the ensuing year." Laws 1919, ch. 145, sec. 1; Laws 1919, ch. 148, sec. 1.

The provisos are limitations on the power thus conferred. The first proviso confines the revenue to a 35-mill levy and the second proviso prescribes a method of increasing it to the limit of 100 mills. The statute clearly contemplates a school district election, either special or regular, after notice, if a 35-mill levy is to be exceeded. In no other way can effect be given to every part of both provisos. In the second proviso the clause introduced by the words, "notice whereof," relates to both special and regular school district elections. At either, after notice, a proposition submitting the question of an increased levy is required. The amount of the "proposed increased levy" must be stated in the notice. This is indicated by the concluding provision: "The board may make the levy in such amount as may be named in the election notice." Compliance with the terms of the provisos is not required at a regular annual meeting as a condition of authorizing a 35-mill levy. Relying on the school district to keep within the statutory limit at the annual meeting, in absence of notice that a proposition for an increase would be submitted, electors satisfied with any levy not exceeding 35 mills would be without a pecuniary motive to attend. With notice of an election calling for a vote on such a proposition, there might be an inducement to participate, including the right to publicly oppose the increase. Notice of an election would interest electors favoring an increase. It seems clear that, without disregarding some provision of the statute, the regular annual school district meeting held in 1920, in absence of notice of a proposition to increase the levy beyond 35 mills, was without power to do so. The school district, therefore, went beyond its powers. It follows that plaintiffs were entitled to an injunction to prevent

the collection of taxes based on the difference between a 35-mill levy and a 61-mill levy.

In *State v. Marsh*, 108 Neb. 749, though notice was not given according to statutory terms, the court said the election was not for that reason invalidated, but there was in fact an election and the notice actually given was sufficient to bring to the polls the requisite number of voters to carry the proposition submitted, if each absent elector had cast a ballot against it.

For the reasons given, the judgment is reversed and the cause remanded to the district court, with directions to allow an injunction conforming to the prayer of the petition.

REVERSED.

JOHN F. TIERNEY, APPELLEE, V. KARL F. DIETSCH ET AL., APPELLANTS: UNION CENTRAL LIFE INSURANCE COMPANY ET AL., APPELLEES.

FILED JUNE 27, 1923. No. 23137.

1. **Vendor and Purchaser.** Before acquiring title, vendee in an enforceable contract to purchase land may enter into a valid agreement to sell it.
2. ———: FRAUD. Where a vendee, before acquiring title to land which he has legally agreed to purchase, enters into a contract to resell it, his failure to disclose the terms of his own purchase to the purchaser upon resale is not necessarily of itself a fraud upon the latter.
3. ———: ABSTRACT: WAIVER. A vendee in a contract to purchase land may waive the furnishing of abstracts at the stipulated time.

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

Sullivan, Squires & Johnson, for appellants.

Kelly & Schnell and *Sullivan, Wright & Thummel, contra.*

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

ROSE, J.

This is a suit to forclose a mortgage on a farm in Custer county. The mortgagee, John F. Tierney, is plaintiff. The mortgagors, Karl F. Dietsch and Altha A. Dietsch, his wife, were owners of the mortgaged farm and are defendants. Other defendants have liens on the same farm. The mortgage was dated March 1, 1920, and was given to secure the payment of three promissory notes aggregating $26,000, one for $6,000 and each of the others for $10,000, all due March 1, 1921. Mortgagors being in default April 28, 1921, this suit was then begun. The answer to the petition contained pleas that the execution of the notes secured by mortgage on the farm in Custer county grew out of a contract by mortgagors to purchase from plaintiff a 6,460-acre ranch in Cherry county and personal property thereon, including 910 head of live stock, farming implements and household furniture; that the contract of purchase was procured by the fraud of plaintiff; that his title failed; that there was no consideration for the notes and mortgage; that plaintiff violated the terms of this contract of sale; that mortgagors paid plaintiff $10,000 on the purchase price; that after a short occupancy of the ranch in Cherry county they rescinded the sale for fraud and surrendered possession. The answer contained a prayer for the cancelation of the mortgage on the farm in Custer county and for the return of the money applied on the rescinded purchase of the ranch in Cherry county, less the rental value of the latter during the time mortgagors were in possession. The facts pleaded as defenses were denied in a reply to the answer. The district court, upon a trial of the issues, found the amount due plaintiff from mortgagors to be $30,689.35, including interest, and ordered a foreclosure of the mortgage. Mortgagors have appealed.

It is argued that the notes and the mortgage securing them should have been canceled on account of fraud perpetrated by plaintiff in inducing mortgagors to purchase

the ranch in Cherry county. This question requires a more detailed statement of the facts.

Robert S. Lee owned the ranch in Cherry county. By contract in writing April 22, 1919, he agreed to sell and J. S. McGraw to purchase it for $113,050, payable as follows: Cash, $1,000; June 1, 1919, $5,000; August 1, 1919, $9,000; each year thereafter for nine years on November 1, $10,000; November 1, 1929, $8,050. McGraw was entitled to a warranty deed and to possession as soon as he paid $50,000, the remainder of the purchase price to be secured by a mortgage on the ranch purchased by him. His purchase, as evidenced by the same instrument, included personalty consisting of 910 head of cattle and horses, ranch implements and household goods. His agreement also obligated him to pay $5,000 June 1, 1919, on the purchase price of the live stock and the remainder August 1, 1919.

Under a written agreement to perform McGraw's obligations to Lee, plaintiff, June 18, 1919, took an assignment of the contract of purchase.

Plaintiff entered into another contract June 26, 1919, to sell and "convey, or cause to be conveyed, by warranty deed" to mortgagors the ranch and personal property which McGraw had agreed to purchase from Lee The writing was signed by plaintiff and mortgagors, the latter agreeing to pay for the ranch $129,200, as follows: Cash, $10,000; note for $10,000 dated July 1, 1919, due March 1, 1920; two notes, each for $7,500, dated July 1, 1919, due March 1, 1920; nine annual payments of $10,000 each, due November 1, from 1920 until 1928; November 1, 1929, $4,200. The purchase by mortgagors included also the live stock and other personalty on the terms exacted by Lee in his sale to McGraw. By means of this contract and payments made by mortgagors, the latter obtained possession of the ranch and the live stock thereon and controlled both the real estate and the personal property as their own, operating the ranch and disposing of cattle, but finally surrendering possession to

Lee upon their failure to make the stipulated payments. They made their purchase when prices were high. Payments fell due after a contraction of the currency, a fall in prices and a period of liquidation had interfered with the procuring of funds to meet maturing obligations. They were unable to pay, at the date of maturity, March 1, 1920, the three notes aggregating $25,000, and, to procure a year's extension of time, executed three renewal notes for $26,000, including unpaid interest, and secured them by mortgage on their farm in Custer county. This is the mortgage foreclosed in the district court on petition of plaintiff. It is from the decree of foreclosure that mortgagors have appealed.

The position of mortgagors in praying for a cancelation of the notes and mortgage may be summarized as follows: Plaintiff did not have title to the ranch which he agreed to sell. He fraudulently concealed the terms of the contracts under which he procured his equitable interest. Mortgagors entered into the contract of purchase in ignorance of the facts. The title of plaintiff failed. There was no consideration for the purchase. Plaintiff failed to perform an agreement on his part to furnish abstracts of title within a reasonable time. The purchase was properly rescinded for fraud. Is the position thus taken tenable?

Plaintiff did not pretend to have title. He made no false representation in that respect. He had a valid agreement to acquire title. He and his assignor negotiated for the ranch to profit by a resale. Lee owned the ranch and had the right to sell it on the terms specified in his contract with McGraw. There was nothing to prevent the latter from making a valid assignment to plaintiff. The transactions, contracts and evidence as a whole do not show unreasonable prices. There is no complaint that the profits on resale were unconscionable. Mortgagors knew that plaintiff did not have title, that a deed from Lee was essential to a valid transfer to them, and that McGraw and plaintiff were speculating in the

ranch property. Plaintiff bargained to convey, "or cause to be conveyed," to mortgagors the title to the ranch. The means of doing so were created by the contract with Lee, the assignment to plaintiff and the purchase by mortgagors upon making their stipulated payments at maturity. Before acquiring title, a vendee in an enforceable contract to purchase land may enter into a valid agreement to sell it. *McNeny v. Campbell,* 81 Neb. 754. The evidence does not prove failure of title as a defense to the foreclosure of the mortgage.

Did plaintiff fraudulently conceal from mortgagors the terms on which McGraw agreed to purchase the ranch from Lee? The evidence does not tend to prove any agency, trust or other confidential relation requiring plaintiff to disclose in advance the terms upon which Lee had agreed to transfer his title. If those terms were material factors in the negotiations, mortgagors could have made disclosure a condition of their purchase. They were experienced farmers and dealers in live stock. They inspected the ranch and the cattle, understood the prices and other terms exacted by plaintiff, entered into their contract without any fraudulent inducement as to values or payments, took possession of the ranch, lived on it a year or more, recognized Lee as the holder of the title, renewed purchase money notes, sold cattle, and offered the ranch for resale at an advance in price. The better view of the evidence is that mortgagors relied on their own knowledge, skill and foresight, after inspection, and on plaintiff's ability to perform his agreement to convey, "or cause to be conveyed," the title of Lee. It may fairly be inferred from the evidence that their disappointment in completing their purchase resulted from their failure to make their payments at maturity. The record has been searched in vain to find any proof sufficient to support a finding that plaintiff fraudulently concealed the terms of Lee's contract of sale. On the contrary, there is proof that they were acquainted with

the facts. Mortgagors, therefore, are not entitled to relief on this ground.

Did the failure of plaintiff to furnish abstracts of title within a reasonable time justify a recission? On this issue the finding must be in favor of plaintiff. No definite time was fixed for the furnishing of abstracts. The agreement to do so was to be performed within a reasonable time. The evidence shows that Lee had title, was willing and able to furnish abstracts thereof, to execute a warranty deed in compliance with his contract of sale and to deal directly with mortgagors who had plaintiff's consent to pursue that course. They did not demand abstracts until they had been in control of the ranch and the cattle as owners for a considerable time. The abstracts were eventually furnished. Mortgagors were not injured by delay. Their failure to make deferred payments was not traceable to that source. The circumstances show a waiver of the right to require abstracts according to the letter of the contract. *McAlpine v. Reichenecker,* 56 Kan. 100; *Farmers Investment Co. v. O'Brien,* 109 Neb. 19. The plea for a rescission and for a recovery of the purchase money paid is not supported by the evidence. The deplorable losses sustained by mortgagors were attributable to the exercise of the right of contract and not to fraud.

The findings of the district court on all the issues seem to reflect the proper view of the evidence.

AFFIRMED.

HENRY DOTY, APPELLANT, V. LUTHERAN HOSPITAL ASSOCIATION ET AL., APPELLEES.

FILED JUNE 27, 1923. No. 22438.

1. **Physicians and Surgeons.** NEGLIGENCE: QUESTION FOR JURY. Plaintiff sustained a broken femur, or thigh bone, and a part of the treatment at a hospital consisted of pressure upon the fractured parts by means of a wire screen device, shaped like a legging, the pressure being adjusted by loosening or tightening straps as the condition of the leg seemed to require from time to time. The ad-

justment of the pressure was left to the patient who was bedfast and in a badly crippled condition. *Held*, that whether the leaving of such adjustment to the patient constituted negligence was a question of fact for the jury.

2. ———: ———: ———. The broken femur, or thigh bone, of a patient of 41 years was examined, at a hospital where he was a patient, only three times by the surgeon in the course of seven weeks and a day, when he was sent home. Each examination was concluded in about ten minutes. *Held*, that whether the infrequency of the examinations constituted negligence was a question of fact for the jury.

3. ———: ———: ———. A patient with a broken femur, or thigh bone, was at a hospital for treatment for seven weeks and a day when he was sent to his home, having in the meantime contracted smallpox, which was known to the physician at the hospital who sent him away, but without informing him that he had the smallpox. Within 15 hours after he reached his home the nature of the disease was discovered and for the first time made known to him and his home was then quarantined for two weeks. Subsequently a member of his family became infected with the same disease and the home was again quarantined for three weeks. *Held*, that whether negligence was chargeable to defendants in the failure to caution the patient or to instruct him with respect to the care he should observe in his contact with his family, and others, was a question of fact for the jury.

4. ———: ———: ———. Plaintiff sustained a fracture of the femur, or thigh bone, and at the end of seven weeks and a day he was discharged from a hospital without any instructions as to the subsequent care that should be given to the injured leg. The evidence tends to prove that the fracture was improperly set at the hospital and that a normal union of the broken parts was thereby prevented. *Held*, that whether the failure to give such instructions to plaintiff constituted negligence was a question of fact for the jury.

5. **Appeal:** DIRECTION OF VERDICT. When plaintiff announced his rest in the present case, the defendants severally moved for a directed verdict and the motions were sustained. The evidence examined, and *held* that the court erred in sustaining the motions.

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

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

Rinaker, Kidd & Delehant and *Reavis & Beghtol, contra.*

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

DEAN, J.

Plaintiff sustained a fracture of the femur, or thigh bone, of his left leg about midway between the knee and the hip, and other minor injuries to his head and face, caused by the overturning of an automobile, owing to a defect in a highway, at a bridge approach. When the car turned over, plaintiff was thrown to the bottom of a ditch which was about 22 feet deep. He was immediately taken to the defendant Lutheran Hospital Association at Beatrice for treatment. Plaintiff alleges that the defendant hospital and the defendants Dr. Hepperlen and Dr. Brown "were and are now jointly engaged in the general practice of medicine, surgery and nursing and working together in the establishment, maintaining and conducting of a public hospital for the nursing, medical and surgical care of the sick, injured and afflicted;" and that, after defendants were employed by him, the medical treatment and attention given him was "negligent, careless and unskilful," to his damage in the sum of $20,000. In their respective separate answers defendants denied generally the averments of the petition and each specifically denied plaintiff's allegations which charged carelessness, negligence, lack of skill, and the like.

When plaintiff concluded the introduction of his evidence, the defendants separately moved for a directed verdict on the ground, as alleged, that plaintiff "failed to introduce sufficient evidence to make a *prima facie* case in his favor and against the several moving defendants." The motions were sustained. Thereupon the jury, pursuant to the court's instruction, returned a verdict in favor of the defendants and each of them. Plaintiff appealed.

It was on the day of the accident that plaintiff was

taken to the defendant hospital for treatment and for about five days thereafter he was unconscious. Subsequently his injured leg was bandaged with cotton which was held in place by a circular screen made of light wire, in shape and form like an ordinary legging, the pressure on the leg being adjusted by straps and buckles. Plaintiff testified that Dr. Hepperlen advised him that if the pressure of the screen device hurt him he should loosen the straps, "'and if it don't hurt you buckle them up a little tighter,' he says, 'I leave that to you.'" He also testified that adhesive straps were used which reached "above the knee cap down over the foot," and that a weight was attached that "pulled a little on it;" that he was confined in the hospital seven weeks and a day and during all of that time he saw Dr. Hepperlen almost every morning, but that his limb was examined only three times, for about ten minutes each time, and that Dr. Hepperlen was the doctor who made each of the examinations.

It has been held that a physician is not chargeable with negligence where intervals elapse between his visits when the patient requires no attention during such intervals, but that he is chargeable with negligence where, during such intervals, the patient requires attention. *Tomer v. Aiken,* 126 Ia. 114.

Continuing plaintiff testified that the broken ends of the bones were not placed in apposition at the hospital but were so placed that one broken end lapped over the other broken end, which shortened the leg about two inches and caused it to be crooked and bow shaped, and that a lump was thereby caused to appear on the front of his leg; that he called attention of the nurses to the lump which was about the size of a goose egg, and that Miss Gerding, the head nurse, and some of the other nurses under her were present, and that one of them said, "That is all right, the doctor will take care of that. I could not tell you anything about it, the doctor will attend to that part of it;" that subsequently he asked Dr.

Hepperlen what caused the lump, and the doctor said, "'I don't know, we will look after that tomorrow.' That was the day that they came in and took the bandage off."

Plaintiff also testified that defendant Dr. Brown examined his jaw, which gave him great pain, for what was believed at the time to be a fracture, and he advised plaintiff that when he was able he would be taken into the X-ray room and they would find out the trouble, but that the jaw bone was given no further attention; that after he had been at the hospital about six weeks bed sores developed; that a few days afterwards, when the nurse gave him his shaving utensils and a looking glass, he, for the first time, discovered that blotches had broken out on his face, and when he asked the nurse what the blotches were she said she did not know but that she would call Dr. Hepperlen. When the doctor came to his bedside he said, "'That is a breaking out caused from your stomach,' he says, 'That will be all right in a day or two;'" that the next day, or about that time, Dr. Hepperlen told plaintiff that he had to go home; that he protested that he was ill and unable to leave his bed and could not place his foot on the floor and was in no condition to be moved, but the doctor said he must go; that the next day, over his protest, the attendants and nurses dressed him and, the hospital authorities having caused notice to be sent to his wife, he was wheeled out of the hospital on a chair to a truck, where his wife and a man from his neighborhood were in waiting, and under such conditions was sent to his home at Vesta, in Johnson county, 27 miles distant; that, about 15 hours after he was carried into his own house, a physician was sent for and it was discovered that the blotches on plaintiff's face and person disclosed smallpox; that his home was then quarantined for about two weeks, but not until after perhaps 50 friends and neighbors in his home community had called upon him; that, when he recovered and the quarantine was raised, almost immediately one

of his five little ones was stricken with the same malady and the home was again quarantined for about three weeks, or in all about five weeks; that neither Dr. Hepperlin nor the head nurse nor any other person at or connected with the hospital told him or his wife, when he left the hospital, that he had the smallpox and that he did not find it out until informed by a doctor after he arrived at his home.

Two physicians testified that a person becomes infected with smallpox about 14 days after exposure; so that it appears from the evidence that plaintiff acquired the disease while he was a patient at the hospital, but whether plaintiff became infected by the negligence of the defendants or any of them does not appear in the evidence.

That one or more at the hospital knew that plaintiff was so afflicted appears from the evidence of Dr. Ziegler, who testified that, just before plaintiff was sent from the hospital, Dr. Hepperlen telephoned him that "Doty was ready to come home and had the smallpox," and that if he did not go home he would be taken to the pest house. But plaintiff was sent to his home without being told that he was afflicted with a loathsome and contagious disease, and, of course, without any directions or necessary precautions respecting his own safety and the safety of his family and others with whom he would naturally come in contact. Whether negligence was shown was a question of fact for the jury. 30 Cyc. 1574.

That the smallpox was communicated by plaintiff to only one person, a daughter, so far as the record shows, was not due to the defendants' foresight. It may be added, however, that if plaintiff was put to any expense for medical treatment or otherwise, in this behalf, it is not made to appear in the bill of exceptions.

He also testified that when he left the hospital none of the doctors or nurses gave him any instructions about taking care of his injured leg which, up to the time of the trial caused him great and constant pain. It also appears from his evidence that when he walks he has to

keep one leg straight and the other bent, and when in bed he cannot turn over without taking hold of the broken leg and raising it, which causes great pain; that for more than six months after leaving the hospital he went about on crutches and subsequently used a cane, and that at the time of the trial the condition of the leg was practically the same as when he left the hospital.

Dr. Ziegler, of Vesta, testified that he took plaintiff to the defendant hospital shortly after the accident, but that he had nothing to do with setting his leg. With respect to plaintiff's treatment at the hospital the doctor testified that adhesive straps and bandages and weights were used, with sand bags at both sides of the fractured leg to support it; that he examined plaintiff's leg soon after he returned from the hospital and found there a hard lump, which he called a callus; that some fractures of the femur, or thigh bone, require more attention than others, but that in a case like plaintiff's it should be looked after every few days or at least once a week, and that he told plaintiff he should not use his leg for about four weeks. But on the cross-examination the doctor said that when he made the examination plaintiff's leg was in good condition, "that is, like it should be at that stage of the game," and that he found no lump there and nothing unusual or out of the ordinary. He was asked if the limb was shortened, and he said that he did not measure it, but that "there didn't seem to be, no nothing unusual about it." Nevertheless, the X-ray pictures, and the evidence of the doctor who developed them, which follows, all corroborate plaintiff's evidence with respect to improper setting and with respect to the lump and the bend or arch in the leg.

The surgeon who took the X-ray pictures testified: "Q. Now, doctor, you said that in treating the—reducing one of those fractures, that a weight is to be hung on; the sole purpose of that weight is to draw the ends so that the contraction of the muscles will not bring the ends past one another, isn't that it? A. That's the idea.

Q. In other words, the purpose of that is to get the parts of the bone here, as shown in this picture, to come and form into line and not slip past one another, as shown here? A. Yes. Q. That is a fact, isn't it? A. Yes."

It is elementary that such circumstances as are depicted in the foregoing evidence constitute questions of fact bearing on negligence or lack of skill which should be submitted to a jury. *Hickerson v. Neely*, 21 Ky. Law Rep. 1257; *Beck v. German Klinik*, 78 Ia. 696; *Rogers v. Kee*, 171 Mich. 551.

Another physician testified that he seldom let a fracture go more than a week without looking at it, and that sometimes the thigh bone when broken half way between the knee and the hip never unites, while some unite in two months and some in four or five weeks because the bone is large; that a doctor by examination can tell whether the bone will knit; that the open method, that is, cutting into the bone, and the Buck's extension and the double incline are all proper treatments and were customarily used in the vicinity of Beatrice in 1918. In explanation of the "open method" the doctor testified: "Where we are unable to obtain the apposition of the bones we open them, open down to the fracture and put on a Lane plate securing the plate with two or three holes in it, after the bones are put in apposition, securing the Lane plate down into the bones to hold them in position." But in the present case it appears that the "open method," as outlined by the witness, was not used.

Plaintiff testified that he was 41 years of age when the accident happened and was then a healthy and able-bodied man of unusual strength; that at times appropriate to the required work, he ran a threshing machine, a corn sheller and a wood saw, and at odd times worked in a garage, but that when the trial was on he could not do that sort of work but for the most part was confined to the performance of work which he could do while seated. From his evidence it also appears that before the injury his income averaged about $1,400 a year and about

$750 thereafter. Much of plaintiff's material evidence was corroborated by his wife and sister with respect to the injuries, the treatment and the like.

The argument that there is evidence that should have been submitted to the jury appeals to us. Among such evidence reference may here be had briefly to the following which tend to establish plaintiff's contention of negligence and malpractice, namely, that of the X-ray pictures and that of the surgeon by whom they were developed; that plaintiff in his crippled condition was left to regulate the adjustment of the pressure of the screen device upon his leg; that the fractured leg was examined only three times in a period of seven weeks and one day; that when plaintiff was discharged he was given no instructions about the treatment or the care of his broken leg; that Dr. Hepperlen knew that plaintiff had the smallpox when he was sent away from the hospital but did not reveal that fact to him; and whether the evidence shows, or fails to show, that plaintiff's limb was treated generally in a negligent, careless and unskilful manner, and whether the "open method" treatment should have been employed, were all material questions of fact, bearing on negligence and lack of skill, which should have been submitted to the jury.

The defendants contend that there is apparently no serious claim by plaintiff that any of the evidence tends to implicate either the Lutheran Hospital Association or Dr. Brown "under the allegations of the petition." Plaintiff does not concede the contention of the defendants on this point, but calls attention to the allegations of his petition, a portion of which appears in the first paragraph of this opinion. Inasmuch, however, as the case must be remanded for a trial on the merits, we do not find it necessary at this time, in the present state of the record, to decide the question of liability among the several defendants.

In its answer the defendant hospital admitted: "That on February 24, 1918, it was, ever since has been, and

still is a corporation duly organized under the laws of the state of Nebraska with authority to establish, maintain, and conduct a hospital for the accommodation, nursing, healing, and the medical and surgical care of the sick and afflicted, irrespective of race, sex, color, religious belief, or pecuniary circumstances, and to conduct a school for the education and training of nurses."

It may be added that two exhibits are in the record, one of them a bill against plaintiff, dated April 14, 1918, by the Lutheran Hospital Association for board, medicine, dressing and laundry, amounting to $75.25, and another bill for services in setting plaintiff's leg in the sum of $50, dated August 1, 1918, the latter being apparently on a bill-head of Dr. Hepperlen, Dr. Brown and two other physicians. But the bills are not, of course, conclusive on the question of whether the liability is joint or several.

The court erred in directing a verdict for defendants. The judgment is reversed and the cause remanded for a trial on the merits.

REVERSED.

SAM CURA V. STATE OF NEBRASKA.

FILED JUNE 27, 1923. No. 23208.

1. **Intoxicating Liquors:** UNLAWFUL POSSESSION: SUFFICIENCY OF EVIDENCE. Defendant was convicted under the state prohibitory law of unlawfully having in his possession certain stills for the manufacture of intoxicating liquor, 61 gallons of whiskey and 31 barrels of mash. The evidence examined, and *held* that the verdict is amply supported by the evidence.

2. **Criminal Law:** MOTION FOR NEW TRIAL. Where two or more defendants were informed against jointly, and both were convicted and separate motions for a new trial were filed, and the motion as to one defendant was sustained and as to the other it was overruled, *held*, that, the motions being separate, the defendant whose motion was overruled cannot predicate error upon the court's ruling.

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

Claudio Delitala, for plaintiff in error.

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

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

DEAN, J.

Sam Cura and Joe Pattavina were informed against under the prohibitory law of the state in the district court for Douglas county. In the first count of the information they were charged with the unlawful possession of a still; in the second count with the unlawful possession of mash and material to be used for making intoxicating liquor; and in the third count with the unlawful possession of intoxicating liquor manufactured by them for sale. The jury found both defendants guilty on all counts. Both defendants filed separate motions for a new trial. Pattavina's motion was sustained and subsequently the suit was dismissed as to him and he was discharged. Cura's motion was overruled and he was sentenced to serve 30 days in the county jail and to pay a fine of $600 and costs of suit. Cura prosecutes error from the denial of his motion for a new trial.

When this action was begun Sam Cura and wife, with their three children, lived in a story and a half frame house at No. 1352 South Twentieth street, Omaha. The house has five rooms down-stairs and a large room up-stairs with a light partition in one end.

Frank Williams, a sergeant of police, testified that June 1, 1923, he went with officers Sullivan, Nelson and Wade to defendant's residence about 8 o'clock in the evening and, under command of a search warrant, proceeded to search the house; that on entering he "smelled the mash" and, opening a door, went directly up-stairs where they found three stills, 31 barrels of mash and 61 gallons of whiskey; that the stills were operated on coal stoves with a coil attachment which ran down through a water-barrel, the whiskey coming out at the lower end of the coil; that fires were burning in the stoves at the

time and the stills "were running whiskey;" that they arrested both defendants, "called the patrol wagon and sent the stills and liquor and the two men in;" that kerosene was stirred into the mash and it was destroyed; that only the lower part of the house was occupied as a residence by the Cura family and there was nothing up-stairs except the stills, the stoves, the mash and the whiskey; that the only way to get to the room where the liquors and paraphernalia were found was through the kitchen in the back part of the house by a stairway; that the defendants were in the kitchen when the officers arrived and, upon inquiry, they denied ownership.

The evidence of the sergeant with respect to finding the "three stills in operation" and the 31 barrels of mash and the 61 gallons of liquor was corroborated by Officer Nelson. He added that they discovered "pails, funnels, and buckets," and that the liquor was "corn whiskey." Officer Sullivan corroborated the evidence of the sergeant and in addition testified that there was no furniture up-stairs.

Defendant Cura testified that he rented the house from the owner for $40 a month; that it had five rooms down-stairs and one up-stairs; that his family occupied the lower floor and, May 2, 1922, his wife rented the room up-stairs, unfurnished, to a man named Joe Bedra, whom he never saw but once, for $2.50 a week; that he never went up-stairs after the room was rented, but heard some one moving about the night that Bedra moved in. He admitted that to get the stills, barrels, jugs, stoves and fixtures up-stairs they would have to be carried through the kitchen, but that he never saw Bedra or any other person carry them up and never went up-stairs to see what was going on. He testified that his co-defendant Pattavina was at his house on the afternoon and evening of the arrest, with his family, visiting; that he saw him two or three times a week; that he was sure Pattavina was not operating in the attic; that he never smelled any mash about the house from the first of May to the first of

June; that he knows the odor of strong liquor but never discovered it in his house; that he talked to Bedra in his kitchen about a week after he got the room and he told him where he worked and that was all; that he does not know where Bedra is, but looked for him and could not find him and did not know where he was June 1.

Mrs. Cura testified that she had no knowledge of anything being up-stairs or that any person ever took any of the paraphernalia to the room that was found there by the officers; that she never was up-stairs after she rented the room to Bedra; that she never discovered the smell of mash about the house and did not know that stoves and stills were in active operation, nor that they were in the house, when the officers came.

Joe Pattavina testified that he and his wife and child visited at Cura's house once or twice a week. He denied any knowledge of the liquor, the stills, the stoves and the paraphernalia which the officers found in the attic. He testified: "When I go out there (to Cura's), stay two or three hours and I never smell nothing; that day I was over there afternoon, supper and dinner." On the cross-examination Pattavina testified that the reason for not working the day he was arrested was because he was not feeling well: that he never saw Bedra at Cura's house and that he was never in the attic.

Counsel for defendant argues: "Under the evidence * * * the main question for determination by the jury should have been whether or not Sam Cura and Joe Pattavina, or either of them, were in control of the premises on which the violation of the law was taking place: because, if it was true that the second floor had been rented, and this was entirely for the jury to determine, then Sam Cura would not have been guilty as charged." Counsel, in the belief that the jury should have been so instructed, tendered an instruction substantially to that effect. The court did not err in refusing the tendered instruction.

We think that it would serve no good purpose to take

up time and space in discussing the evidence at length. It speaks for itself. The verdict seems to respond in every material respect to the great weight of the evidence. The jury were plainly instructed, *inter alia,* that before the defendants could be found guilty the state must prove beyond a reasonable doubt that they had in their possession either the equipment, or the mash or the intoxicating liquor which was set forth in the respective counts of the information. And this was found by the officers at Cura's residence in a room in which there was no furniture. If the evidence of the defendants had been accepted by the jury the verdict would, of course, have been for acquittal. But the jury, as triers of fact, *inter alia,* determined the credibility of the witnesses and it did not accept defendant's version of the facts. And we do not see how the jury, in the performance of its sworn duty, could have returned any other verdict. Comp St. 1922, sec. 10186.

Counsel very properly filed separate motions for a new trial for each defendant and now contends that the court erred in refusing to sustain Cura's motion. The argument is that a motion for a new trial is indivisible, and that if Pattavina was entitled to a new trial Cura should also have been granted a new trial. In support of his contention he cites *Dutcher v. State,* 16 Neb. 30. The citation is not in point because three defendants there moved jointly for a new trial and the adverse ruling was based on the ground that a separate motion was not filed in behalf of the defendant who alleged error. To the same effect is *Long v. Clapp,* 15 Neb. 417. In the latter case it appears that the motion reads in part: "And now on this day come said defendants and separately move the court for a new trial." This was followed by the court's terse observation: "But the use of these words does not alter the fact nor make that two motions which was but one"—citing *Dunn v. Gibson,* 9 Neb. 513. The court did not err in overruling Cura's motion.

The record is without reversible error. The judgment is

AFFIRMED.

JOHN DAILY, APPELLEE, V. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, APPELLANT.

FILED JUNE 27, 1923. No. 22433.

1. **Carriers:** TRANSPORTATION OF LIVE STOCK: LIABILITY. "When live stock, unaccompanied by a caretaker, is received by a railroad company in good condition and is delivered later to the consignee in a damaged condition, a *prima facie* case is made against the railroad company by reason of a presumption that the damage resulted from some cause other than one which would exempt the company from liability. *Nye-Schneider-Fowler Co. v. Chicago & N. W. R. Co.*, 105 Neb. 151.

2. ———: ———: ———. A railroad company is not generally held liable for injuries to live stock due to a condition of pregnancy unless it has actual or constructive knowledge of this fact. In the absence of such knowledge, the condition will be regarded as a hidden or concealed defect, and the company will not be charged with greater care than that ordinarily exercised in handling animals not pregnant. But where the fact that the animal is in a pregnant condition is plainly apparent to the railroad company, or where it is in possession of facts that would lead a reasonable person to infer this condition, then the company will be liable for injuries due thereto, and caused by its negligence in not handling the animal with due care under the circumstances, though not expressly informed of the fact by the shipper.

3. **Constitutional Law:** COSTS: ATTORNEY'S FEES. Section 9126, Comp. St. 1922, providing for an attorney's fee to plaintiff's attorney, upon claims against any person or corporation doing business in this state, *held* to allow recovery in the nature of reimbursement of costs, and not unconstitutional as providing a penalty in favor of an individual.

4. **Evidence** examined, and *held* sufficient to sustain the verdict.

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

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

Murphy & Winters, contra.

Heard before DEAN, ALDRICH and DAY, JJ., COLBY, District Judge.

ALDRICH, J.

This is an action at law to recover damages for the loss

of one cow and injury to another, which plaintiff alleged was caused by negligence of the defendant railway company in handling and taking care of the shipment. As a defense defendant alleged that if any of the cattle and calves were injured, crippled, or died while in transit, such injury and death was due to the inherent nature, disposition and propensities of the animals to injure themselves and each other, and not due to any negligence on the part of defendant. Further answering, defendant alleged that plaintiff was negligent in shipping the cow, which was killed by the humane officer at Sioux City, Iowa, due to the fact that the cow was with calf at the time of shipment; that the animal was killed by the humane officer acting under the authority and direction of the law of the state of Iowa, and through no fault of defendant. Plaintiff replied by way of general denial, with an admission that the humane officer killed the missing animal after she was injured. The case was tried to a jury, resulting in a verdict and judgment for plaintiff in the sum of $143.85, and in addition the sum of $50 was allowed by the lower court as attorney's fees. Motion for new trial was overruled, and defendant appeals.

Appellant assigns four errors, which are as follows: (1) The verdict is not sustained by sufficient evidence. (2) The court erred in giving to the jury instruction No. 10 on its own motion. (3) The court erred in giving to the jury instruction No. 11 on its own motion. (4) The court erred in assessing an attorney's fee in the sum of $50 against defendant.

The shipment originated on June 15, 1917, in St. Paul, Minnesota, destined for Omaha, Nebraska, and consisted of 24 head of cows and 8 head of calves. When the cattle arrived at the stockyards in Omaha, one of the cows was missing and another badly crippled. The crippled cow was sold to the packers in Omaha for $65, her value for dairy purposes being $100 or $110, according to plaintiff's testimony.

The record discloses that the missing cow was found in

the chute by the humane officer at Sioux City, Iowa. She had been removed from the car and was nearly dead, was calving at the time, and was trampled and torn. There was but a partial delivery of the calf and, the condition of the cow warranting it, the humane officer shot her. He testified that she had been down in the car and trampled by other cattle, but could not tell whether trampled when lying in the car giving birth, or prior to delivery, and thereby causing premature birth. He stated that the excitement and hardship of shipment often causes cows heavy with calf to give birth prematurely.

Defendant produced all the records of the train crew, none of which showed notations of rough handling. In fact the record of Conductor Hennessy did not show a notation of rough handling from June 10 to June 20. This evidence is not sufficient to establish the defense, as we will hereinafter demonstrate.

With reference to the presumption in this class of cases the rule in this state is as follows:

"When live stock, unaccompanied by a caretaker, is received by a railroad company in good condition and is delivered later to the consignee in a damaged condition, a *prima facie* case is made against the railroad company by reason of a presumption that the damage resulted from some cause other than one which would exempt the company from liability." *Nye-Schneider-Fowler Co. v. Chicago & N. W. R. Co.*, 105 Neb. 151; *Church v. Chicago, B. & Q. R. Co.*, 81 Neb. 615; *Chicago, B. & Q. R. Co. v. Slattery*, 76 Neb. 721.

Plaintiff had been in the business of trading in live stock, milch cows and feeders, and dairy stock generally, for 27 years. In other words he was evidently a competent and discriminating judge of this class of live stock. He bought the cattle in question in St. Paul and personally examined each individual animal a short time before they were loaded. The shipment of which the injured cows were a part consisted of 16 cows heavy with calf (due to calve in a month or six weeks), and 8 had young calves.

Defendant had shipped hundreds of similar cows from St. Paul to Omaha, and, so far as the record shows, never had a loss. In order to pick cows which could be shipped safely, he took precautions to allow two or three weeks after they arrived at Omaha for them to become fresh. The cattle were delivered to the defendant company in good shape, so far as the record shows, and arrived at Omaha with one cow missing and another injured, as alleged in the petition.

Under all the facts and attendant circumstances the jury were justified in finding that defendant was negligent and their verdict is supported by sufficient competent evidence. The presumption of negligence on defendant's part in handling this shipment of cows is not rebutted by evidence introduced in its behalf. The train records and notations of no rough handling are entitled to but little weight or probative force because they were confined to the breaking of, or some actual damage done to, some part of a car, or the uncoupling of a car. There could be much rough handling amounting to negligence on defendant's part without obtaining any one of these results which would injure cows not pregnant. Whether or not the cow gave premature birth because of rough handling while being shipped in defendant's car was a question properly for the jury, and, there being ample and sufficient evidence to sustain it, their verdict will not be disturbed by this court.

Instruction No. 10, given by the court on its own motion, is as follows:

"The defendant claims that the death of the cow shot by the humane officer at Sioux City was brought about through the negligence of the plaintiff, and claims that said cow was in such condition with calf that an ordinarily prudent person would not have shipped it.

"The burden of proof on this proposition is upon the defendant, and if you find from a preponderance of the evidence that the plaintiff was guilty of negligence in shipping the cow in question, owing to its physical con-

dition, and you further find that the necessity for shooting the cow at Sioux City was the result of such negligence of the plaintiff, not contributed to any extent by negligence of the defendant, then your verdict should be for the defendant with reference to this cow.

"In this connection you are instructed that the defendant was bound to exercise reasonable care to protect the animals from any form of violence or improper handling which would tend to injure same, but would not be liable for any injuries resulting merely from the ordinary and proper operation of the train."

Instruction No. 11 is as follows:

"Defendant is not liable for the act of the humane officer in killing the cow in question unless the necessity for such killing was brought about by negligence of the defendant; if you are satisfied by the evidence that the necessity for killing the cow was due solely to the fact that it was with calf and could not stand the ordinary conditions of the trip, and not contributed to by any negligence of defendant, the defendant would not be liable therefor."

We have quoted these two instructions in full to show that the theories of both litigants were properly submitted to the jury for consideration and determination. The two instructions questioned, and all the instructions in general, are substantially correct and are without reversible error.

The following quotation demonstrates the correctness of the instructions and their applicability to the facts:

"The carrier is not generally held liable for injuries to animals due to a condition of pregnancy unless it has actual or constructive knowledge of this fact. In the absence of such knowledge the condition will be regarded as a hidden or concealed defect, and the carrier will not be charged with greater care than that ordinarily exercised in handling animals not pregnant. But where the fact that the animal is in a pregnant condition is plainly apparent to the carrier, or where it is in possession of

facts that would lead a reasonable person to infer this condition, then the carrier will be liable for injuries due thereto, and caused by its negligence in not handling the animal with due care under the circumstances, though not expressly informed of the fact by the shipper. In one of the cases announcing this principle it is said: 'It would certainly be most unreasonable to require shippers of live stock to seek the agent of the carrier and make known the physical condition of his stock, and for failure to do this discharge the carrier from all liability for negligence. As well require each passenger, upon purchasing his or her ticket, or upon boarding the train, to make known his or her physical condition, so that the carrier might exercise more care in running the train to avoid collisions or accidents from other causes.'" 4 Elliott, Railroads (3d. ed.) secs. 2338, 2339.

With reference to the fourth assignment, appellant contends and argues that the assessing of an attorney's fee, under the provisions of section 9126, Comp. St. 1922, was error, because the statute is unconstitutional in allowing a penalty upon a railroad company in favor of an individual, and in denying equal protection and due process of the law within the meaning of the Fourteenth amendment to the federal Constitution. This court has repeatedly held that attorneys' fees provided for in this manner by statute are in the nature of costs and may be properly allowed. *Smith v. Chicago, St. P., M. & O. R. Co.*, 99 Neb. 719; *Marsh & Marsh v. Chicago & N. W. R. Co.*, 103 Neb. 654; *Robertson v. Chicago, B. & Q. R. Co.*, 108 Neb. 569; *Mayhall & Neible v. Chicago, B. & Q. R. Co.*, 107 Neb. 58; *Nye-Schneider-Fowler Co. v. Chicago & N. W. R. Co.*, 105 Neb. 151.

In view of the foregoing discussion and citation of authority, the judgment of the district court is in all respects affirmed.

An attorney fee of $50 is allowed plaintiff in this court.

AFFIRMED.

STATE, EX REL. BLANCHE BISHOP, APPELLEE, V. CHARLES A. LISTON, APPELLENT.

FILED JUNE 27, 1923. No. 22457.

1. **Bastardy.** A preponderance of the evidence is all that is necessary to sustain the verdict of a jury in a bastardy proceeding.
2. **Evidence** examined, and *held* sufficient to sustain the verdict.

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

Beeler, Crosby & Baskins and *Stewart, Perry & Stewart,* for appellant.

Halligan, Beatty & Halligan, contra.

Heard before MORRISSEY, C. J., ALDRICH and DAY, JJ., COLBY and REDICK, District Judges.

ALDRICH, J.

This is a bastardy proceeding brought in Hayes county upon the complaint of Blanche Bishop against Charles A. Liston, defendant. Hearing was had in county court and defendant was bound over to the district court. The trial resulted in a verdict finding defendant guilty as charged in the complaint. Motion for new trial was overruled and judgment entered allowing complainant the sum of $3,063 for maintenance of the child, to be paid quarterly in installments covering a period of 15 years. Defendant appeals.

On the 21st day of April, 1921, there were bastardy proceedings held in the county court of Hayes county on complaint of one Blanche Bishop, appellee herein, charging one Charles A. Liston, defendant, with being father of her unborn child. Evidence was submitted on part of appellee and defendant. The first witness offered to sustain the charge was the appellee, Blanche Bishop. She told a story, plain, unequivocal, and without attempting to be unduly prejudicial, and in the main was corroborated in detail by other witnesses of respectable character. The first detail describes how defendant sought the ruin of the appellee and when it was accomplished. Medical men were called to detail and describe the period of gestation

and they agreed and fixed the time at 280 days. The birth of the child in question corroborates this statement.

The defendant is a ranchman owning extensive cattle interests and has a large and paying ranch. The appellee's father worked for him and resided near the Liston ranch. He noticed her condition and suspected who was the author of it, and upon the birth of the child, Blanche Bishop, the appellee, swore out a complaint against the defendant charging him with her seduction. She was unmarried. Defendant had a family consisting of a wife and one son. On the night of September 5, 1920, defendant broke into the bedroom where the appellee was sleeping, entering the same by breaking open a window.

The defense claims that the window was newly painted and stuck and could not be opened, when the evidence was that defendant pushed the window open. The man who did the painting was called as a witness on behalf of defendant, and on cross-examination testified the paint did not stick to the window but it was stuck when he came to do the painting. Anyhow, the appellee testified as to the condition of the window on the night of September 5, and this repudiated defendant's theory. The jury believed what the girl said and disbelieved the witnesses called against her. It suffices to say that the complainant's story is corroborated by every physical fact and circumstance in the case and the jury's verdict is the only one that could be arrived at under the evidence.

The defendant told his neighbors that, had Blanche Bishop come to him, he would have fixed matters and there would have been no trouble.

Appellant in his brief complains because of alleged contradictions in complainant's testimony, but we submit that there is not a single contradiction in a material point in her testimony. The screen, it is true, which was at the window is not before this court, and we submit that the examination of the screen, made at the time it was displayed to the jury at the trial of this case, showed that

it had either been fastened by hooks or nails, or, as related by the complainant, from the outside. There was a stop on the inside of the screen, but there was no testimony that the stop was in place or that it was caught on the night in question. Mrs. Liston testified that the stop in the window was so tight that she had to use a pair of pliers to pull it out. An examination of the screen however showed that the stop was perfectly loose, and Mrs. Liston, thereupon, in an attempted explanation of her testimony stated that she used the pliers as a matter of convenience, and not of necessity, as she first testified. An examination also proves that, on account of weakness of the spring in the stop when it was pulled up, it did not go back in place without being pushed in. We submit that the testimony of the girl as to how the screen was fastened is practically undisputed in the record of this case. This is a question of fact largely, and the verdict will not be disturbed upon the evidence introduced if the same is apparently true.

A preponderance of the evidence in this case is all that is necessary and the verdict of the jury will be sustained where there is evidence to support the same. This rule of law was followed in *Olson v. Peterson,* 33 Neb. 358, and *Strickler v. Grass,* 32 Neb. 811; and, also, in the well-considered case of *Parrish v. Hodges,* 98 Neb. 403. Also in *Walton v. Carroll,* 106 Neb. 138, the same doctrine is reiterated. Also in *Martin v. Leininger,* 103 Neb. 448, we find a reiteration of the same doctrine. We consider, then, this to be the law in Nebraska on this proposition.

Complaint is made on the part of defendant that appellee was allowed to testify as to the fact that she told Mrs. Stoetzel, the following morning, what had happened between her and the defendant. It was not error for this testimony to be allowed. *Oleson v. State,* 11 Neb. 276; *Welsh v. State,* 60 Neb. 101; *State v. Meyers,* 46 Neb. 152. As for that matter outside cases can be cited which hold this theory also. On this point see *Totten v. Totten,* 172 Mich. 565; *Gardner v. Kellogg,* 23 Minn. 463. This establishes the law on this proposition in this jurisdiction and

others. This matter that she told Anna Stoetzel that she had intercourse on the night before was brought out in the first place by defendant himself, and not by appellee.

It should be further noticed that all the medical experts testifying say that the baby should be born the 28th or 29th of May, 1921, if the act of intercourse took place on September 1, 1920, and such was the case as a matter of fact. All the evidence sustains the fact of defendant's sexual intercourse with the complaining witness and that is sufficient. Modern cases along this line are *Martin v. Leininger,* 103 Neb. 448; *Torske v. Johansen,* 104 Neb. 378; *Walton v. Carroll,* 106 Neb. 138. These, according to Nebraska authority, sustain the girl by the overwhelming weight of authority of the law, and such is the law.

Again we repeat the proposition, in a bastardy proceeding all that is necessary is to have a preponderance of the evidence as appears by authority. The testimony all shows and the argument of counsel sustains the proposition of the truthfulness of the complainant.

The case of *Hutchinson v. State,* 19 Neb. 262, in regard to the sufficiency of the evidence, dealt with a situation where there was but one act of intercourse. The period of gestation was 304 days, about 20 days longer than the normal period. Testimony of a number of experts was taken, and it was shown that, while the probabilities were against the complainant therein, yet they were not conclusively so. In the opinion it was said: "Pregnancy would probably follow from the intercourse testified to under the circumstances shown to have existed, and that the period of gestation was not extended beyond what medical science and experience proves to be possible. These questions were properly submitted to the jury under proper instructions. They were fully and carefully examined. Physicians of high standing in their profession were before the jury, and, in the main, supported the testimony of the complainant (although somewhat conflicting), to the extent that the facts of which she testified were not impossible. We cannot say that the verdict was

not supported by sufficient evidence."

The jury has already found that the period of gestation was as detailed by complainant. It should be noted here that: "A judgment will not be reversed upon the ground that the verdict is against the weight of evidence where the testimony is conflicting, if there is sufficient evidence to sustain the verdict." *Hutchinson v. State,* 19 Neb. 262.

As a matter of law the mother of the child is a competent witness in a case like this. Without doubt the act of sexual intercourse has been amply and abundantly proved. The conviction is sustained by the law and the fact.

Other propositions are urged by appellant which we do not consider necessary to discuss herein. We have carefully reviewed the law and all the facts in connection with this case. The instructions given by the lower court were substantially correct and were without reversible error. They reflect the law governing this class of cases and correctly and comprehensively inform the jury as to its application to the disputed question of fact submitted for their determination.

In view of the foregoing discussion the case is affirmed. The judge and jury found the law and facts correctly and should not be reversed.

AFFIRMED.

SIEBERT M. THOMPSON, APPELLEE, V. JAMES C. DAVIS, DIRECTOR GENERAL, APPELLANT.

FILED JUNE 27, 1923. No. 22499.

1. **Carriers:** FEEDING LIVE STOCK: LIABILITY. "Where the carrier fed and watered the stock, the owner being present, and it appears that some of the stock was injured by reason of poison being contained in the hay fed to them, the hay being furnished by the carrier, *held,* that in such cases the carrier is not an insurer of the stock against loss by reason of the poisoned hay, but would be liable only for

2 ———: ———: CARE REQUIRED. "Where the carrier undertakes to feed and water stock notwithstanding a contract imposing this duty negligence." *Starr v. Chicago, B. & Q. R. Co.,* 103 Neb. 645

on the shipper, it is bound to exercise due care to see that the stock are given suitable food and water." 10 C. J. 96, sec. 108.

3. **Evidence** examined, and *held* sufficient to sustain the verdict.

APPEAL from the district court for Keith county: J. LEONARD TEWELL, JUDGE. *Affirmed.*

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

George N. Gibbs and *William E. Shuman, contra.*

Heard before MORRISSEY, C. J., DEAN, ALDRICH and DAY, JJ., COLBY and REDICK, District Judges.

ALDRICH, J.

This is an action at law to recover damages for the loss of certain horses and injury to others, which plaintiff alleged was caused by negligence of defendant in feeding the animals certain timothy hay at McComb, Mississippi. The shipment originated at Paxton, Nebraska, a town on the line of the Union Pacific Railroad Company, destined for Amite, Louisiana, and consisted of two carloads of horses. The Union Pacific Railroad Company and the director general of railroads were named as defendants, the shipment moving over the Union Pacific Railroad and the lines of connecting carriers. Defendant by his answer admitted the shipment, but alleged that by the shipping contract it was the duty of the shippers, at their own risk and expense, to load, unload, care for, feed and water the horses while in transit. Defendant further alleged that the injury damage resulted from negligence of plaintiff, and not from negligence of defendant. Issues were joined by plaintiff's reply, which alleged that defendant assumed to feed the horses and to provide feed and forage at McComb, Mississippi, and that defendant required plaintiff to pay for the feed. The lower court sustained the motion of the Union Pacific Railroad Company to be dismissed from the action. The trial resulted in a verdict and judgment for plaintiff in the sum of $2,677.44. Motion for new trial was overruled, and defendant appeals.

In this case among the most important issues is: "Did the carrier know that the hay fed contained poison; or in the exercise of ordinary care should it have known?" This is the principal issue in the case, and "the burden is on the owner to show that the loss complained of was occasioned by the carrier's negligence." With these two issues clearly defined we should have no trouble in disposing of the merits of this case and arriving at a correct conclusion. We should remember that: "When the owner, or his agent, accompanies the shipment of stock, the duty of feeding and watering the stock when placed in the carrier's yards is primarily upon the owner. If he fails to do so, then the duty is upon the carrier. The duty is also upon the carrier to furnish the proper facilities for the feeding and watering of the stock." *Starr v. Chicago, B. & Q. R. Co.*, 103 Neb. 645.

This then adds another law question among those already quoted as to the issues to be determined in this case.

It is obvious from the record that plaintiff was the owner of the horses in question; that defendant, notwithstanding the ownership or any of the provisions of the shipping contract, undertook, as the facts appear, to feed the horses shipped for plaintiff. Then it follows and must be assumed that it guaranteed to feed these horses suitable food only and to take such other care of them as would be conducive to their good health. If in the course of the evidence it appears that defendant in feeding these horses was guilty of handing to them mouldy, dusty and smutty hay, then it would be liable for the consequences, and if it failed to exercise proper caution in feeding these horses then it would be guilty of negligence. It must be conceded by the record that defendant knew from its mouldy condition that the hay contained a certain poisonous substance. Then it would be liable under these circumstances and undisputed facts for whatever damage resulted by reason of feeding the same.

The case of *Starr v. Chicago, B. & Q. R. Co. supra,*

would be in point and the law therein announced governs this transaction. The law of this case governs the propositions that control this matter and is as follows: "Where the carrier fed and watered the stock, the owner being present, and it appears that some of the stock was injured by reason of poison being contained in the hay fed to them, the hay being furnished by the carrier, *held,* that in such case the carrier is not an insurer of the stock against loss by reason of the poisoned hay, but would be liable only for negligence."

It is admitted as a matter of record that some poisonous substance was the proximate and immediate cause of the deaths of those horses which died and the damage to others. This being true, then there is but little, if any, use of discussing any other issues of the case because they become obvious.

We might by way of quoting further say: "Where the carrier undertakes to feed and water stock notwithstanding a contract imposing this duty on the shipper, it is bound to exercise due care to see that the stock are given suitable food and water." 10 C. J. 96, sec. 108.

We adopt this as the rule of law as governing here in this case.

Alos in the case of *Louisville & N. R. Co. v. Tharpe,* 11 Ga. App. 465, we find the following language: "The evidence was conflicting. It may be that, under the terms of the contract requiring the shipper or owner to accompany the stock and feed and water them, the railroad was not bound to feed the stock. See, in this connection, *Weaver v. Southern R. Co.,* 11 Ga. App. 355. When the carrier undertook to feed and water the stock, it was, of course, bound to give them proper food, and exercise at least ordinary care and diligence in feeding and watering them. While there was direct evidence in behalf of the carrier that the food given the stock at Montgomery was not defective in any respect, there was evidence from which the jury were justified in finding that the stock were improperly fed at Montgomery, and that this improper

feeding was the cause of the death of eight of the mules. This being so, it can not be said that the jury were not authorized to find that the defendant had failed to overcome the presumption of its negligence arising from proof of the damage."

There is ample and sufficient competent evidence to sustain the verdict of the jury. Plaintiff in his testimony detailed what kind of hay was fed to the horses. The bales looked all right on the outside, but when opened showed a dusty and mouldy condition. He objected to the hay; but was told that it was "none of his business." At that time three bales had been given to the horses. The remainder, four bales, was fed while plaintiff was eating breakfast, disregarding his order to give them no more of that hay. Plaintiff also testified that the horses were in good shape when they arrived at McComb, that several of them died at Amite, and that they were all more or less sick. The veterinarian, who made a *post-mortem* examination of the dead animals at the instance of the railroad company, testified that they died from forage or food-poisoning. Every one showed symptoms of enteritis or intestinal trouble. On the main issue of whether or not the carrier was negligent in feeding spoiled hay, there was a substantial conflict in the evidence, and for the reasons given we will not disturb the jury's finding.

The law in this class of cases is shown to be clear, well-defined and positive, and leaves no room to doubt or guess what is the duty of the court in deciding the issues presented. Therefore, with this brief discussion and enumeration of points, we say this case without doubt should be affirmed.

AFFIRMED.

JAMES G. V. INGOLDSBY V. STATE OF NEBRASKA.

FILED JUNE 27, 1923. No. 23095.

1. **Criminal Law:** VERDICT: REVIEW. "A judgment of conviction in a criminal case will not be set aside because of conflicting evidence,

where the evidence of the state, if believed by the jury, is sufficient to sustain the verdict." *Denker v. State*, 106 Neb. 779.

2. **Evidence** examined, and found sufficient to sustain the verdict.

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

Stough & Dunn, for plaintiff in error.

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

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

ALDRICH, J.

Plaintiff in error, hereinafter called defendant, was charged with committing the crime of forgery on or about October 19, 1920, in Otoe county. The information in two counts charged, in substance: (1) Forging the check in question; (2) uttering and publishing. The first count having been dismissed by the county attorney, defendant was tried on the second count and was found guilty. The lower court sentenced him to confinement in the penitentiary for a term of not less than 10 nor more than 20 years, and ordered that he pay a fine of $200 and costs. Defendant prosecutes error.

A number of errors are assigned. We have considered and examined all of them, but do not find it necessary to discuss each one, since there was no reversible error occurring at the trial in receiving evidence and giving instructions.

Considering the sufficiency of the evidence, we find that all the essential elements of the crime charged have been proved. For a complete discussion of the evidence required in this class of cases, see 26 C. J. 959, *et seq.* There was a conflict in the evidence generally, but the record taken as a whole demonstrates and proves defendant's guilt beyond a reasonable doubt. One handwriting expert and several bankers were called to identify the handwriting on the check, and their testimony is strong and convincing as to defendant's guilt.

The check in question is in words and figures as follows:

"Cherokee, Iowa, Oct. 16, 1920.
"Security National Bank 72-1821
"Pay to the order of J. G. V. Ingoldsby $400.00
"Four-hundred and no/100 dollars.
"Thomas P. Benson."

Defendant presented this check at the Bank of Talmage, Talmage, Nebraska, and received for it $200 in cash and $200 in a bank draft. Upon presentation of the check to the Iowa bank, it was found that no such person as Thomas P. Benson had an account or did business there. Matters were held in abeyance for a time pending defendant's promises to pay and his alleged efforts to find and prosecute the maker of the check, who, the evidence tends to show, was fictitious without a doubt.

Defendant's evidence presents a contradictory and different story from that detailed by the witnesses for the state. The evidence is in direct conflict as to the existence or nonexistence of Thomas P. Benson. In this matter the jury were free to give credence and believe whichever set of witnesses they thought were telling the truth. In all fairness to the system of trial by jury, we cannot reverse their finding unless it is clearly wrong. The verdict is amply sustained by sufficient competent evidence and will not be disturbed.

The rule found in the case of *Denker v. State,* 106 Neb. 779, governs us in this matter. It is as follows: "A judgment of conviction in a criminal case will not be set aside because of conflicting evidence, where the evidence of the state, if believed by the jury, is sufficient to sustain the verdict." See *Wheeler v. State,* 79 Neb. 491.

The lower court erred in one respect. Defendant should have been sentenced under the provisions of section 9152, Rev. St. 1913, instead of section 10248, Comp. St. 1922. In other words, the indeterminate sentence law in force at the time the crime was committed governs the court in rendering judgment. In the instant case the sentence

under the provisions of the latter section has the effect of shortening the period within which defendant would be eligible to make application for a parole. The court is without authority to do this. *Seaton v. State,* 109 Neb. 828.

It follows that the sentence should be changed to a minimum of 1 year and a maximum of 20 years, and it is so ordered.

In all other respects the case is affirmed.

AFFIRMED: SENTENCE REDUCED.

MARY YERKES V. STATE OF NEBRASKA.

FILED JUNE 27, 1923. No. 23132.

1. **Prostitution:** DISORDERLY HOUSE: PROOF. In a prosecution under section 9764, Comp. St. 1922, for the crime of causing a female person to become an inmate of a house of prostitution, evidence of the general reputation of a house is admissible to prove its character, and particular acts of lewdness or prostitution need not be proved.
2. **Evidence** examined, and found sufficient to sustain the verdict.

ERROR to the district court for Platte county: A. M. POST, JUDGE. *Affirmed.*

Garlow & Long and *Organ & Delitala,* for plaintiff in error.

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

Heard before MORRISSEY, C. J., LETTON and ALDRICH, JJ., BLACKLEDGE and COLBY, District Judges.

ALDRICH, J.

Defendant was convicted in the district court for Platte county for pandering in the city of Columbus, Nebraska, under section 9764, Comp. St. 1922, and was sentenced to confinement in the penitentiary for a term of not less than one nor more than three years. Defendant prosecutes error.

The first assignment of error is that the lower court erred in admitting testimony as to the general reputation of the house owned by defendant and described in

the indictment. Defendant contends that the reputation of the place is not in issue, and that the state must show that the house was actually a house of prostitution. Specifically the assignment of error is directed at the testimony of the state's witnesses, Lehman and Adams, with the claim that the same is hearsay. Lehman was a police officer in the city of Columbus and Adams was the proprietor of a hotel situated within a block of the house in question. Both witnesses testified as to its general reputation. This evidence was admissible under well-established rules of evidence.

"The weight of authority seems to be that evidence of reputation is admissible to prove the character of a house, and particular acts of lewdness or prostitution need not be proved." 4 Ency. of Evi. 725. See, also, *Drake v. State,* 14 Neb. 535; *State v. Bresland,* 59 Minn. 281; *Hogan v. State,* 76 Ga. 82; *Betts v. State,* 93 Ind. 375.

Defendant contends that there was error committed in admitting the testimony of the witness Lehman as to his finding intoxicating liquor upon the premises in question. We find that this matter was brought out incidentally in Lehman's testimony in answer to a general question as to what was said and done during one of his visits to the house. No objection was made to the question when asked, but defendant's motion to strike from the record a part of the answer as a statement of a conclusion was sustained by the trial judge. This was the only objection made to the evidence at the trial. Defendant is not in a position now to complain.

The next issue presented is: Did the court err in overruling defendant's motion to strike the testimony adduced on cross-examination of defendant with reference to litigation pending in federal court at Omaha in connection with a liquor charge? The record shows that this matter was first brought out on direct examination of defendant as follows: "Q. Was there anything along about the time you moved in again, or just before that

was anything done by the state or federal officers in regard to locking the place up? A. Yes; they said they shut it up, but they never did." The questions asked were within the limits of proper cross-examination and, in view of the record made by defendant, are not prejudicial.

As to the sufficiency of the evidence, we find that defendant's assignment of error is not well taken. The evidence was in direct conflict as to the material facts. The testimony of the state's witness, Mabel Jones, was, in substance, that defendant gave her board and room with the understanding that she was to engage in prostitution and to give one-half the proceeds to defendant. Several witnesses who testified in behalf of defendant, and defendant herself, tell a story contradictory to this; but, it being a question purely of fact, the jury were at liberty to believe the witnesses they thought were telling the truth. In view of the record, we will not disturb their finding, which is sustained by sufficient competent evidence.

This being a question of fact, we cannot be called in to disturb the verdict of the jury, and could not do so as a matter of law. The case, then, is for affirmance.

AFFIRMED.

WILLIAM M. BRUCE, APPELLANT, V. ALVIN O. CADMAN ET AL., APPELLEES.

FILED JUNE 27, 1923. No. 22395.

1. **Trusts:** CONSTRUCTIVE TRUST: BURDEN OF PROOF. The burden of proof is upon one claiming the title to real estate by virtue of a constructive trust, to establish the trust by clear and satisfactory evidence.

2. ———: ———: SUFFICIENCY OF EVIDENCE. Evidence examined, and *held* not sufficient to establish a constructive trust.

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

Frank A. Anderson, for appellant.

Davis & Ellis and *George W. Prather, contra.*

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

DAY, J.

This action was brought by William M. Bruce against Alvin O. Cadman, and his wife, Mrs. Alvin O. Cadman, praying for a decree quieting the title in plaintiff to certain real estate in the city of Holdrege, Nebraska, and also for an injunction restraining the defendants from disposing of said real estate. Upon the filing of the petition a restraining order was granted which, by stipulation of the parties, was continued in force until the trial of the case on its merits. Upon the trial the restraining order was dissolved and the plaintiff's action dismissed. Plaintiff appeals.

The plaintiff's action is founded upon the theory of a constructive trust. It is his claim that the real estate in question was purchased with his money, and the title thereto was taken in the name of Alvin O. Cadman.

The record shows that the plaintiff, for some time prior to the transaction which forms the basis of this action, had been engaged in the business of buying and selling grain. In his business he operated nine elevators. Defendant Alvin O. Cadman was employed by the plaintiff as bookkeeper, but he performed the duties of office clerk and general utility man. As a part of his duties he drew checks on the plaintiff's banking account by signing the same, "W. M. Bruce, A. O. C." During his term of employment, which extended from the latter part of 1917 to the spring of 1920, he drew hundreds of checks in this manner. Defendant testified that he had authority to draw checks for his personal affairs on the plaintiff's banking account without limitation. Plaintiff denies that defendant's authority was as broad as the defendant claims.

Be that as it may, the fact is that defendant did draw checks in payment of his personal affairs on the plaintiff's banking account. Such checks bore the notation,

"Chg. A. O. C.," which meant that the same should be charged against the defendant's account on the books. The defendant kept no bank account, but transacted all his business by checks drawn on plaintiff's banking account. He would credit himself on the plaintiff's books with his salary. Other moneys received by him were deposited in plaintiff's name in the bank, and in turn credited to defendant on the plaintiff's books. In other words, the defendant treated the plaintiff as his banker, the status of his account with the plaintiff being disclosed by the plaintiff's books.

The record shows that during the period of his employment defendant drew 674 checks for his personal affairs, ranging in amounts from 43 cents to $1,500. That the plaintiff knew that defendant was using the bank account in this manner, there seems to be no doubt. He had access to the books, frequently examined them, and posted some of these very checks.

It appears that defendant drew 434 of these checks prior to August 7, 1919, at which time he drew a check for $1,500 in payment for the residence property which is the subject of dispute. This check bore the notation, "Chg. A. O. C.," and was charged against defendant's account on plaintiff's books. Some 15 months later, and when defendant had entered into a contract to sell the real estate, the plaintiff brought the present suit.

The evidence on behalf of the defendant tends to show that at the time he drew the $1,500 check in payment of the real estate he had a credit on the plaintiff's books for a much larger sum than $1,500. Defendant insists that in paying for the property he simply used his own money. The record shows that both the plaintiff and defendant at divers times speculated on the board of trade in grain transactions, and each had a separate account disclosing the status of these transactions. It appears that the plaintiff had a large credit with one of the large grain dealers. When plaintiff gave an order for the purchase or sale of grain in his own behalf, his

trade would be designated by the initial letter "A." When defendant made such a trade, his would be designated by the letter "C;" but in either instance the trading would be done in the name of the plaintiff. The credits and debits, as the case might be, were properly entered on the plaintiff's books. On August 9, 1919, when defendant drew the $1,500 check, his personal account on the books showed a debit of $2,616.28, and his option account a credit of $5,021.69, showing a grand balance to the defendant's favor and credit of $2,405.41. Later this balance was wiped out by losses, and at the time of the trial the books indicated that the defendant was owing plaintiff $6,623.38.

It is the contention of the plaintiff that if several grain deals, which were still open on August 7, 1919, had been closed, the credit in defendant's favor would have been very small, and not sufficient to pay the $1,500 check. He was unable to testify, however, what the outstanding trades were as his records had become misplaced. On this point the defendant testified that the trades were all closed at that time; that there was no way of determining from the books when the trades were made; that some of them were "open" and "shut" the same day; and that the only method of determining when the trades were made would be an examination of the confirmations.

The burden of proof was on the plaintiff to show the existence of the trust by clear and satisfactory evidence. This we think he did not do. The evidence shows that the plaintiff saw this $1,500 check when it came in. He had previously gone with the defendant to examine the property purchased, and advised with him concerning it. That he knew that the plaintiff purchased the property, and that the check was given in payment therefor, seems to be clearly established. This suit, which in fact was to declare a trust, was not commenced for 15 months after the defendant purchased the property, and not until the defendant's credit on the books had been wiped

out and he had become a debtor of the plaintiff in a large sum.

Considering the entire record, we are satisfied that the plaintiff has failed to show by clear and satisfactory evidence the existence of a trust.

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

AFFIRMED.

RICHARD H. SCHMIDT V. STATE OF NEBRASKA.

FILED JUNE 27, 1923. No. 22742.

1. **Husband and Wife:** ABANDONMENT: VENUE. Where the matrimonial domicile has been established in one county, and the husband sends the wife to another county to reside until such time as he could find a new home and send for her; and where a child is born to the wife in the latter county; and where the husband fails to establish a new home or communicate in any way with her except to write a letter that he has gone forever; such facts are sufficient to authorize the wife to institute proceedings for wife and child abandonment in the latter county. Comp. St. 1922, sec. 9584.
2. **Bastardy:** PRESUMPTION: REBUTTAL. A child born at any time during wedlock is presumed to be legitimate, but this presumption may be rebutted by evidence that the husband was impotent, or that he did not have access.
3. **Witnesses:** HUSBAND AND WIFE: ILLEGITIMACY OF CHILD. In an action in which the legitimacy of a child born in lawful wedlock is an essential issue of fact, neither the declaration nor the testimony of husband or wife is competent on the question of access, nor should either testify to collateral facts from which an inference of access or nonaccess may be drawn; but this rule does not preclude them from testifying concerning illicit relations in actions of adultery, incest, divorce or like cases not necessarily involving the illegitimacy of children born in lawful wedlock.
4. **Evidence** examined, and *held* sufficient to sustain a judgment of conviction.

ERROR to the district court for Pierce county: WILLIAM V. ALLEN, JUDGE. *Affirmed.*

H. B. Muffly, for plaintiff in error.

Clarence A. Davis, Attorney General, C. L. Dort and *George W. Ayres, contra.*

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

DAY, J.

This is a criminal prosecution brought in Pierce county, Nebraska, under section 9584, Comp. St. 1922, against Richard H. Schmidt, hereinafter called defendant, for abandoning his wife and child and wilfully neglecting and refusing to maintain or provide for them. Defendant was convicted and adjudged to serve a term of six months in the county jail. He has brought the record of his conviction to this court for review.

The facts will sufficiently appear in the course of the opinion.

It is first urged that the court erred in failing to sustain the defendant's motion to instruct the jury to return a verdict of not guilty, because the evidence showed that the venue was laid in the wrong county. Upon this phase of the case it is the contention of the defendant that the marital domicile of the defendant and his wife was at all times in Madison county, and that, therefore, if an offense was committed at all, which he denies, it occurred in Madison county and not in Pierce county.

It is now the settled law in this state that the county in which the matrimonial home or domicile of the husband and wife is located fixes the venue of a case prosecuted under section 9584, Comp. St. 1922, and that such a case cannot be instituted in another county. It has also been held that the husband has the right to establish the matrimonial domicile, and that it is the duty of the wife to recognize that fact. *Preston v. State*, 106 Neb. 848. The location of the matrimonial domicile depends in every case upon its own peculiar facts.

The defendant's motion for an instructed verdict in his favor was made at the close of the state's case. At that stage of the proceeding, the record showed that the defendant and his wife were married on September 10, 1919, in Madison county, in this state; that the defendant

and his wife lived at Newman Grove, in said county, at the home of defendant's parents until November 10, 1919; that at that time the defendant sent his wife to the home of her parents in Pierce county; that he purchased a ticket for her, and stated that he would go out and find a place for them to live, and would then come after her; that he stated he was going to Craig, which is in Burt county. He never called for her, or sent her any money, or communicated directly with her. On the contrary he wrote a letter to her father, dated at Omaha, Nebraska, November 18,1919, as follows:

"I am sure you will be somewhat surprised when you read this letter, but I am in trouble and forced to leave at once. Now don't think I am leaving because I did not love Violet, because I did love her, and now I will ask you to give her a home, and see that she is cared for. She is a good girl and I hate to leave her, but I am forced into it, and I am gone forever. My own folks don't even know I am gone. Now break the news easy to dear Violet or she is liable to do herself wrong. This letter will give her a divorce with my consent. Now there is three fellows in Norfolk watching to see you give Violet a home somewhere. Dick. I forgot to leave Violet's watch, so I will send it later on. The watch is broke so will leave it here in Omaha to get fixed and will have them send it to her. Am leaving for Great Lakes to-night. Don't know where I will go from there."

The record shows that on March 1, 1920, a child was born to the wife at Plainview, in Pierce county, where the wife and child have continued to reside with her parents. A complaint was filed against the defendant in July, 1920, in Pierce county, charging him with the offense upon which he was prosecuted. He was apprehended January 25, 1923, at Newman Grove, in Madison county.

Considering the wife's testimony in connection with the defendant's letter, it seems perfectly clear that it was defendant's intention to have his wife live in Pierce

county with her father until defendant established a new home. Under the condition of the record at the time the motion for a directed verdict was made, we are of the view that the court was right in refusing to direct a verdict in favor of the defendant.

While testifying in his own behalf, defendant stated that his home was in Madison county; that his wife had left him there; that she then told him she was going to leave, and she did not want him to bother her any more and she would not bother him. While this testimony appears to be inconsistent with the letter written by defendant, it was perhaps sufficient to raise a question of fact upon the issue of venue, and in all probability if the defendant had requested an instruction upon that issue, it would have been given. This he did not do. His only request was, as before stated, that the court direct a verdict in his favor because the evidence showed that the domicile of the parties was in Madison county. Defendant made no explanation of the circumstances which prompted him to write the letter, nor did he state whether in fact he went away as he stated in the letter he intended to do.

It is next urged that the court erred in excluding certain testimony offered in support of the defendant's theory that he was not the father of the child. While the defendant was a witness in his own behalf, he was asked, among other things, to detail a conversation had between himself and his wife on the evening prior to the wife's departure for Plainview, relating to the paternity of her unborn child. Objection was made to this line of testimony upon the ground that it called for a communication between husband and wife, and was not permissible under the statutes, and that it was incompetent. This objection was sustained. The defendant's counsel then offered to show by the witness that his wife had told him that she had deceived him; that he was not responsible for her pregnancy, but that another man was the father of her unborn child. Another witness was then

called by the defendant who testified that he had overheard the conversation between the defendant and his wife at the time in question, and he was asked to relate what he had heard. Objection was made to this line of testimony on the ground of incompetency, which was sustained by the court. Thereupon an offer was made to prove by the witness that he heard the wife state to her husband that her pregnancy was not caused by him.

The exchange of remarks between the court and counsel clearly indicates that the trial court's ruling was based upon the theory that the wife could not give testimony bastardizing her child born in lawful wedlock. The question is thus fairly presented whether a child born in wedlock can be proved to be a bastard by the testimony or declaration of the wife. In the early history of jurisprudence the rule upon this question swayed back and forth. It will serve no useful purpose to enter upon a discussion of the ancient rules, and the reasons given therefor. They can readily be found in any of the standard text-books on evidence. We think the rule settled by the weight of decisions in this country is that a child born in wedlock is presumed to be the legitimate offspring of the husband and wife, and this is so even though the birth of the child happen so soon after the marriage as to render it certain that it was the result of coition prior thereto. This rule is based in the main upon the reason that to permit such testimony would be against public policy. The following cases support this rule: *Dennison v. Page,* 29 Pa. St. 420, 72 Am. Dec. 644, and note, p. 649; *Wilson v. Babb,* 18 S. Car. 59; *Zachmann v. Zachmann,* 201 Ill. 380; *Tioga County v. South Creek Township,* 75 Pa. St. 433.

This presumption of legitimacy may be rebutted by competent proof that the husband had no access to the wife, or that he was absent at such time as in the course of nature the child was begotten; that he was impotent, or other circumstances showing that he could not have

been the father of the child. In *State v. Lavin,* 80 Ia. 555, it is said:

"When a child is born to a married woman, the law presumes it to be legitimate, and, unless born under such circumstances as to show that the husband could not have begotten it, this presumption is conclusive. But the presumption may be rebutted by facts and circumstances which show that the husband could not have been the father, as that he was impotent, or could not have access."

This rule finds support in *Wright v. Hicks,* 12 Ga. 155, and *Powell v. State,* 84 Ohio St. 165.

No attempt in conformity to the rules of evidence was made by the defendant to show any circumstances that rendered impossible for him to have been the father of the child.

The question is then presented, may the husband or wife testify concerning the illegitimacy of a child born in lawful wedlock? In 1 Jones, Commentaries on Evidence, sec. 97, the question is discussed, and numerous authorities cited. The author says:

"It is well settled on grounds of public policy, affecting the children born during the marriage, as well as the parties themselves, that the presumption of legitimacy as to children born in lawful wedlock cannot be rebutted by the testimony of the husband or the wife to the effect that sexual intercourse has or has not taken place between them; nor are the declarations of such husband or wife competent as bearing on the question. The rule not only excludes direct testimony concerning such intercourse, but all testimony of such husband or wife which has a tendency to prove or disprove legitimacy; for example, it was held incompetent to ask the husband, for the purpose of proving nonaccess, whether at a given time he did not live a hundred miles away from his wife, and whether at that time he was not cohabiting with another person. And the mother of a child born in wedlock, though begotten before, is incompetent to prove

that the child was not begotten by the man who became her husband before its birth. * * * The rule rests not only on the ground that it tends to prevent family dissension, but on broad grounds of public policy. * * * Nor does it depend upon the form of action or the parties; on the contrary, it obtains whatever the form of legal proceedings, or whoever may be the parties."

It is quite clear that, if the wife would not be permitted to testify to facts which would bastardize her child, her declarations could not be used in evidence to prove the same fact.

In view of the entire record, and the manner in which the defendant sought to establish that he was not the father of the child, we are of the opinion that the rulings of the trial court were clearly right.

While it seldom occurs that two cases are exactly alike, the general principles here involved find support in the following cases: *Wallace v. Wallace,* 137 Ia. 37; *People v. Overseers of the Poor,* 15 *Barb.* (N. Y.) 289; *Mink v. State,* 60 Wis. 583; *Egbert v. Greenwalt,* 44 Mich. 245; *Evans v. State,* 165 Ind. 369, 2 L. R. A. n. s. 619, and note; note under *Powell v. State* (84 Ohio St. 165), 36 L. R. A. n. s. 255.

It is next urged that the court erred in giving instruction No. 4, which reads as follows: "If the prosecuting witness, Violet Schmidt, and the defendant, Richard H. Schmidt, were lawfully married and thereafter a child was born to them in lawful wedlock, the law conclusively presumes its legitimacy and that it was the defendant's child." In this instruction we think there was a technical error in the use of the word "conclusively." As before pointed out, the presumption of legitimacy may be rebutted by proper testimony. In view of the record, however, that there was no proper testimony tending to overcome the legal presumption of legitimacy, the use of the word "conclusively" in the instruction was not prejudicial.

Complaint is also made of certain remarks of the trial

judge made during the progress of the trial, which, it is claimed, were prejudicial. It appears that quite a colloquy occurred between defendant's counsel and the court as to the admissibility of certain lines of testimony. Counsel was insistent in his efforts, and the court, in answering counsel, remarked: "If a man marries a woman voluntarily, he takes her for better or worse." Whereupon counsel stated "The evidence will show he did not marry her voluntarily." The court then remarked: "It doesn't make any difference, it is his business to support her regardless of who she is or where she was." In view of the testimony sought to be elicited, which gave rise to the argument between counsel and the court, the ruling of the court was entirely correct.

As we view it, the remarks of the court were without prejudice. No objection was made to the remarks at the time, and no request was made that the jury be instructed to disregard the statements made by counsel and the court.

Other assignments of error are made, which we have examined, and we find them to be without substantial merit.

No prejudicial error appearing in the record, the judgment of the trial court is AFFIRMED.

GUST W. JOHNSON, APPELLANT, V. S. M. ERICKSON ET AL., APPELLEES.

FILED JUNE 27, 1923. No. 22317.

1. **Executors and Administrators:** SALE OF REALTY: PURCHASE BY EXECUTOR. An executor's sale of real estate, made pursuant to a power conferred by the will of the decedent, at which the executor is, either directly or indirectly, the purchaser, is voidable.
2. ———: ———: ———. Where, at an executor's sale pursuant to a power contained in the will, the executor is, either directly or indirectly, the purchaser, it is immaterial that he paid full value for the land, and that no actual fraud was intended. The law forbids such a sale, and it may be avoided in a suit by the interested parties.
3. **Appeal:** TRIAL DE NOVO. While the law requires this court, in

determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying.

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

C. P. Anderbery, for appellant.

F. L. Carrico and *L. W. Hague, contra.*

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

GOOD, J.

This action was brought to cancel an executor's deed, made pursuant to a power of sale in the will of John F. Johnson, deceased, on the ground that the sale was made indirectly to one of the two joint executors. The testator left surviving him his widow and two sons, both of whom are of full age. The widow died intestate prior to the beginning of this action. S. M. Erickson and Will A. Johnson were nominated as executors and duly qualified as such. By the fifth paragraph of his will, testator directed his executors to sell a particularly described 80-acre tract of land, and directed the disposition of the proceeds of the sale.

Pursuant to the power of sale conferred by the will, the executors, on June 9, 1917, for a consideration of $6,000, sold and conveyed the land to Ferdinand Hulquist, a nephew of Erickson, one of the executors, and at the same time the widow and sons of testator joined in a quitclaim deed to Hulquist. Proceeds of sale were disposed of as directed in the will. Administration proceedings were completed and the executors discharged from their trust on August 24, 1917. On September 29, 1917, Hulquist, for a consideration of $6,000, conveyed the land in question to the said S. M. Erickson. This action is prosecuted by the sons of the testator to cancel

the quitclaim deed and executor's deed to Hulquist, and also the deed from Hulquist to Erickson. Plaintiffs offer to reimburse Erickson for the purchase price paid by him, together with interest thereon, and pray for an accounting of the rents and profits during the time that Hulquist and Erickson have been in possession of the land.

The district court found for the defendants, and that the executor's sale was made in good faith to Hulquist, and that he was not acting for Erickson in purchasing the land. Plaintiffs have appealed.

1. Defendants urge that the sale to Hulquist by the executors was not a judicial sale, because it was made pursuant to a power conferred by the will, and that it is, therefore, not governed by the provisions of section 1408, Comp. St. 1922, which declares that an executor's sale of a decedent's real estate shall be void if the executor is the purchaser, or is interested in the purchase, of the land. It may be conceded that said section refers only to judicial sales made pursuant to an order of the district court, but plaintiffs' right to maintain the action is not dependent upon this statute. Under the rule at common law, an executor could not purchase, either directly or indirectly, at a sale of his decedent's lands under a power in the will. *O'Dell v. Rogers,* 44 Wis. 136. The reason for the rule would be the same in either case. It is but a general application of the rule against the purchase by the trustee of property belonging to the trust estate. It is founded upon the unfairness that is likely to follow upon a sale in which the same person is both vendor and purchaser.

2. Defendants further urge that the sale is not subject to attack, because the land was sold for its full value and no one was defrauded. The rule, however, is that actual fraud is not necessary to invalidate such a sale. "And it matters not if he pays all the property is worth, nor if the sale is advantageous to the *cestui que trust.* It is a matter, of course, for courts of equity to

set the sale aside upon the application of the *cestui que trust*. The object of the rule is to afford the *cestui que trust* most ample protection against fraud and injustice, and to remove out of the way of the trustee all inducements and temptations to speculate upon the trust property, or to manage and manipulate the same for his own benefit." *Terwilliger v. Brown*, 44 N. Y. 237. And in *Miller v. Rich*, 204 Ill. 444, it is said: "It makes no difference, in such case, that the intentions of the administrator are honest, and that there is no fraud in fact. The sale will be set aside upon the general ground that trustees, and others occupying fiduciary relations, cannot purchase on their own account the property entrusted to their management." A full collection of the authorities upon this question may be found in the note to *Haymond v. Hyer*, L. R. A. 1918B, 1.

The record shows that $6,000 was the full market value of the land at the time it was sold to Hulquist by the executors. This fact would not make the sale valid, if there were any understanding, secret or otherwise, that Hulquist should subsequently convey the land to one of the executors, but it may properly be considered as a factor in determining the *bona fides* of the sale to Hulquist. There would be less incentive on the part of Erickson to acquire title by subterfuge, if he were paying full value for the land, than there would be if he were getting the land for less than its actual value. Another fact, which should not be overlooked, is that plaintiffs had knowledge of the conveyance to Hulquist for nearly three years before they instituted this action, and during that time the value of the land had greatly increased, in common with the rise in land values generally in Nebraska during the period from 1917 to 1920. Both the executors and their vendee, Hulquist, testified that there was no arrangement or understanding, secret or otherwise, when the sale was made to Hulquist, that he was purchasing it for Erickson, or that it should be

subsequently conveyed to Erickson for the same consideration or any other sum. There is no direct evidence to the contrary, but there is evidence in the record of a number of circumstances that, unexplained, would tend very strongly to indicate that it was an indirect sale to Erickson. Some of these circumstances are fully and fairly explained, and, as to some of the others, there is a sharp conflict in the evidence.

3. While the law requires this court to hear and determine, as a trial *de novo,* an appeal in an equity action involving questions of fact, and to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying. *Greusel v. Payne,* 107 Neb. 84; *Shafer v. Beatrice State Bank,* 99 Neb. 317.

After a careful examination of all the evidence, we are of the opinion that the judgment and decree of the district court is supported by the evidence and is in accord with equity and justice. The view we take of the question of fact makes it unnecessary to consider other issues that have been presented and argued in the briefs.

AFFIRMED.

IDA LEVIN, ADMINISTRATRIX, APPELLANT, V. LOUIS MUSER, ADMINISTRATOR: RICHARDSON DRUG COMPANY, APPELLEE.

FILED JUNE 27, 1923. No. 22447.

1. **Poisons:** SALES: LABELS. The statute of this state, regulating the sale of articles usually known as poisons, requires, if they are articles of medicine, that the word "poison" be marked on the label or wrapper of each package. There is no such statutory requirement as to the sale of poisons other than articles of medicine, and the sale thereof without being labeled as poisons violates no statutory requirement and does not constitute a wanton wrong.

2. ———: ———: LIABILITY. A wholesale drug company sold and delivered to a retail druggist a bottle of poisonous oil, which was

not an article of medicine, with a label bearing the correct name of the oil, but not marked "poison." The retailer sold and delivered it, bearing the same label, to a customer, who took it home, and later, mistaking it for a throat medicine he had been using, swallowed some of the oil, which caused his death. In an action by his administratrix against the wholesale drug company to recover damages for causing wrongful death, *held*, that the sale of the poisonous oil by the wholesale drug company was not the proximate cause of the injury.

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

Wymer Dressler and *Robert D. Neely,* for appellant.

Edwin M. Martin and *Alfred C. Munger, contra.*

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

GOOD, J.

Ida Levin, as administratrix of the estate of Louis Levin, deceased, brought this action against Richardson Drug Company, a corporation, engaged in the wholesale drug business, and Carl T. Schmidt, operating a retail drug store, to recover damages for the wrongful death of plaintiff's decedent. Since the commencement of this action defendant Schmidt has died, and the action has been revived in the name of Louis Muser, as administrator of his estate. A general demurrer to the petition was interposed by Richardson Drug Company, which was sustained and the action as to it dismissed. Plaintiff has appealed, and the only question presented for our consideration is the correctness of the ruling on the demurrer.

Plaintiff alleges in her petition that the defendant Richardson Drug Company owned and had in its possession one certain bottle containing oil of mirbane, a deadly poison, and that ordinary care and prudence required said drug company, as a dealer in said poisonous and deadly agency, to label the same as a poison, so that persons handling or using said oil of mirbane would not

inadvertently take the same internally and be injured or killed thereby; but that said drug company, disregarding its duties in the premises, sold and delivered the same to the defendant Schmidt, who in turn sold and delivered it to Louis Levin without any label thereon, except the words "oil of mirbane;" that Levin took the bottle home and on the same day, believing it to be a bottle of throat gargle, which he had been using, took some of the contents in his mouth and was thereby burned and choked, causing him to swallow some of the oil, which resulted in his death. Plaintiff alleges that each of the defendants was negligent in failing to label the bottle as a poison and that such negligence proximately caused the death of Levin.

1. Was the drug company negligent in selling the poisonous oil to a retail druggist without labeling it as poison? If such sale was negligence, was it the proximate cause of Levin's death? The statute of this state, regulating the sale of articles usually known as poisons, requires, if they are articles of medicine, that the word "poison" be marked on the label or wrapper of each package. There is no such statutory requirement as to the sale of poisons other than articles of medicine. There is no allegation in the petition that oil of mirbane is an article of medicine, or that it is ever used for medicinal purposes. Its sale without being labeled a poison violated no statutory requirement. That the drug company was not guilty of a wanton wrong is beyond question.

2. This court, in *Spratlen v. Ish,* 100 Neb. 844, has held: "The proximate cause of an injury is that cause which, in the natural and continuous sequence, unaccompanied by any efficient intervening cause, produces the injury, and without which the result would not have occurred." Whether an alleged act of negligence is the proximate cause of an injury is ordinarily a question of fact, but, to warrant a finding that the negligent act, not amounting to a wanton wrong, is the proximate cause of

an injury, it must appear that the injury was a natural or probable consequence thereof, and that, in the light of attending circumstances, it should have been foreseen or anticipated. *Bryant v. Beebe & Runyan Furniture Co.*, 78 Neb. 155; *Milwaukee & St. Paul R. Co. v. Kellogg*, 94 U. S. 469.

Tested by these principles, the drug company is not liable in damages for causing the death of Levin, unless, from the facts pleaded, the inference may be reasonably drawn that his death was the natural or probable consequence of the sale of the oil without being labeled as a poison, and that under the circumstances it should have been reasonably anticipated that death, or at least serious injury, to some person would occur. We think, under the facts pleaded, that neither the death of Levin nor a serious injury to any person could be reasonably apprehended or anticipated by the sale of a poisonous substance, labeled by its proper name, to one having full knowledge of its dangerous character. If Levin was ignorant of the dangerous character of the oil purchased by him and his vendor, Schmidt, knew or had reasonable grounds for believing him ignorant of its character, then the act of Schmidt would be a new and efficient intervening cause that produced the injury, and without which it would not have occurred. We do not wish to be understood as holding that defendant Schmidt is in fact liable, or that a cause of action is stated as against him. *McKibbin v. Bax & Co.*, 79 Neb. 577, was an action to recover damages for the unlawful sale of a poison by a druggist to a minor, who in turn administered it to a third person, who was injured. It appears in that case that the minor, who purchased the drug, was 18 years of age and had knowledge of its dangerous character. A recovery in that case was denied on the ground that the sale by the druggist was not the proximate cause of the injury complained of. In this case, as above pointed out, the sale by the drug company was not an unlawful act and was

made to one having full knowledge of its dangerous character. Other cases and authorities, supporting the views herein expressed, are: *Gibson v. Torbert,* 115 Ia. 163; *Meyer v. King,* 72 Miss. 1; *McCrossin v. Noyes Bros. & Cutler,* 143 Minn. 181; 9 R. C. L. 705, sec. 13; 19 C. J. 780, sec. 46.

The allegations of the petition do not warrant an inference that the sale of the oil of mirbane by the drug company was the proximate cause of the death of Levin. The demurrer was properly sustained.

AFFIRMED.

DANA L. DIMOND V. STATE OF NEBRASKA.

FILED JUNE 27, 1923. No. 23279.

Divorce: SUPPORT OF CHILDREN. While the decree rendered in a divorce action in this state, awarding the custody of the minor children to the mother and providing an allowance for their support and maintenance, remains in force, the father is not required to provide food, clothing and shelter for such minor children, the measure of his liability in that respect being the amount provided in the decree.

ERROR to the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Reversed and dismissed.*

John W. Cooper and *E. R. Leigh,* for plaintiff in error.

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

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

GOOD, J.

Plaintiff in error, hereinafter called defendant, was prosecuted in the district court on a complaint made by his former wife charging that he had, without good cause, refused and neglected to provide proper food, clothing and shelter for his minor children, D. L. Dimond, aged 18 years, and Carle E. Dimond, aged 20 years. On a trial he was convicted and sentenced to

imprisonment for 90 days in the county jail. He has brought the case here by error proceedings to review the record of his conviction.

Defendant and complainant were divorced in Douglas county in May, 1906. By the decree in that action the wife was awarded the custody of these children, then aged two and four years, and a monthly allowance for their support and maintenance. This decree has never been reversed or modified and remains in full force. Complainant has ever since had the custody of the children and has received their earnings.

Section 1526, Comp. St. 1922, provides that the district court, upon granting a divorce, "may make such further decree as it shall deem just and proper concerning the care, custody and maintenance of the minor children of the parties, and may determine with which of the parents the children or any of them shall remain." The next section of the statute provides: "If the circumstances of the parents shall change, or it shall be to the best interests of the children, the court may afterwards, from time to time, on its own motion, or on the petition of either parent, revise or alter, to any extent, the decree so far as it concerns the care, custody and maintenance of the children or any of them." Comp. St. 1922, sec. 1527.

These statutory provisions afford full opportunity to determine what amount the father is able to and should contribute to the support and maintenance of his minor children when their custody has been awarded to the mother in a divorce action. If the allowance is insufficient the court may, upon a proper showing, increase the amount. When, in a divorce action, there has been such a judicial ascertainment of the amount the father should pay for the support of his minor children, that amount is presumed to be just and reasonable until it is reversed or modified by a subsequent order of the court. The amount thus ascertained, so long as the decree remains in full force, is, in this state, the legal

measure of the father's liability for the support of such children. It the father fails, without good cause, to comply with the decree respecting the payment of alimony and the support of the minor children, he may be prosecuted under section 9588, Comp. St. 1922, which makes it a misdemeanor for a husband, against whom a decree of divorce and alimony for the support of his children has been rendered by any court of competent jurisdiction in this state, to refuse or neglect, without good cause, to pay the amounts and in the manner provided by the decree. However, defendant is not charged with a violation of this section, but of section 9587, Comp. St. 1922, which provides generally that if a father wilfully fails or neglects to provide proper food, clothing and shelter for his minor children, he may be punished as for a misdemeanor. While the decree in the divorce action, awarding the custody of the minor children to the mother and providing an allowance for their support and maintenance, remains in force, the father is not required to provide food, clothing and shelter for his minor children, the measure of his liability in that respect being the amount provided in the decree.

The record shows that the two boys, whom defendant is charged with failing to support, are each six feet or more in height, physically strong and able-bodied, and capable of earning their own living. They are both graduates of the Omaha high school, have attended the State University, and one is now in Dartmouth College, in New Hampshire, and the other in the State University of California. For more than 30 years the defendant has been a dentist, but for a number of years he has suffered to some extent from partial paralysis, which affects his right hand, and particularly the thumb and index and middle fingers, to such an extent that he is unable to do certain kinds of dental work and can work for a limited number of hours only at such kind of dental work as he is able to do. His gross income for the past few years has averaged about $125 a month, of

which approximately $50 a month is consumed in office rent and incidental expenses. The value of his property is insignificant. The evidence clearly shows that the two boys in question are better able to earn a living than is the defendant. While the efforts of the two young men to obtain a college education should not be decried, but rather commended, it does not follow that the partially disabled father, who is without means and able to earn but a meager living, is liable criminally for failure to furnish them a university education. We are impressed that the prosecution of this case was inspired by personal animus and malice on the part of the complainant, rather than a proper vindication of the law.

The judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

WILLIAM D. ENSOR, ADMINISTRATOR, APPELLEE, V. A. D. COMPTON, APPELLANT.

FILED JUNE 27, 1923. No. 22355.

1. **Death:** DAMAGES. The amendment to section 1429, Rev. St. 1913, made by ch. 92, Laws 1919 (Comp. St. 1922, sec. 1383), providing that, in actions for death by wrongful act, "the verdict or judgment should be for the amount of damages which the persons in whose behalf the action is brought have sustained," does not permit recovery for other than financial loss, either present or which may reasonably be anticipated to result in the future.
2. ———: ———. Loss of companionship should not be submitted to the jury as an element of damage in such actions, except under special circumstances where it can reasonably be said that under the evidence it has a money value.
3. **Evidence** examined, and *held* sufficient to sustain the verdict of the jury.

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

Stout, Rose, Wells & Martin, for appellant.

John O. Yeiser and *E. A. Conaway, contra.*

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

BEGLEY, District Judge.

On May 20, 1920, a collision occurred at the intersection of Fifty-second and Dodge streets, Omaha, Nebraska, between an Overland automobile driven from the north by Harry Montgomery, and a Buick automobile, driven from the east by A. D. Compton. Mrs. Inez Ensor, who was riding as a guest in the Montgomery car, was thrown from the car and seriously injured, from the effects of which she died within an hour. This action is brought by William D. Ensor, her husband, as administrator of her estate, who alleged that her death was caused by the negligent act of defendant in driving his automobile at a speed of about 50 miles an hour and without having his car under control. Defendant filed a general denial. Trial was had and verdict returned for plaintiff for the sum of $5,000, and from a judgment thereon defendant has appealed.

It is first alleged that the court erred in giving instruction No. 16, as follows: "The jury are instructed that, if they find for the plaintiff, then in assessing damages they should not allow plaintiff anything for pain and sorrow or anguish of mind, but may allow full compensation for loss of services and companionship sustained by her husband in so far as they have a monetary value. You may take into consideration her age and health and the probable life expectancy in estimating such damages, if any you may so determine, in a sum not greater than the amount prayed for in the petition." This instruction was given at plaintiff's request on the authority claimed in *Wood v. City of Omaha,* 87 Neb. 213. In that case it was held that a similar instruction was not prejudicially erroneous as applied to the evidence.

Appellant contends that there is no evidence in this case to support such an instruction, and that under our statutes damages recoverable are restricted to pecuniary

injuries resulting from such death, citing a long line of decisions, and also citing section 1429, Rev. St. 1913, which provides: "The jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death." However, section 1429 was amended in 1919 (Laws 1919, ch. 92), and now appears as section 1383, Comp. St. 1922, in which the above language has been omitted and instead this provision appears: "The verdict or judgment should be for the amount of damages which the persons in whose behalf the action is brought have sustained." This amendment was made by the legislature after this court had, by a long line of decisions, held that damages in this class of cases were limited under the statute to money loss or its equivalent. This change, while significant, does not provide a wide open door to all sorts of claims for damages. The loss under the statute is still a pecuniary loss. Nothing can be allowed on account of mental suffering or bereavement or as a solace on account of such death. Only such damages can be recovered as are shown by the evidence to have a monetary value. In states having a statute similar to our own, it has generally been construed as permitting recovery of damages for loss of service and companionship under special circumstances where the evidence shows they have a money value. *Evans v. Oregon Short Line R. Co.*, 37 Utah, 431; *McFarland v. Oregon E. R. Co.*, 70 Or. 27; *Mize v. Rocky Mountain Bell Telephone Co.*, 38 Mont. 521; *St. Louis & S. F. R. Co. v. Moore*, 101 Miss. 768; *Bond v. United Railroads*, 159 Cal. 270. However, recovery for loss of services and companionship by a surviving husband or wife can only be sustained where the evidence shows a reasonable probability that such services and companionship afforded the survivor was of such a character that it would be of advantage to such survivor, and that a disallowance thereof would cause a pecuniary loss to him or her. *Sanfilippo v. Lesser*, 59 Cal. App. 86.

We think the instruction was not prejudicially erroneous under the evidence in this case. The evidence established that the deceased was 39 years of age; that she was married to the plaintiff herein in 1916; that she was employed in Council Bluffs at a salary of $16 a week, and her husband was employed as a telegraph operator, working nights from 12 to 8 a. m.; that she cared for the house as a housewife; that she and her husband lived together in harmony, he being an ex-soldier and she assisting him in getting a start in life; that she contributed about one-half to the support of the home and purchased most of her wearing apparel. These facts might be taken into consideration by the jury for the purpose of estimating the amount of damages which the husband and next of kin have sustained. *Dickinson v. Southern Pacific Co.*, 172 Cal. 727.

Objection is made to the admission of certain evidence of witnesses who testified to the speed of a car going west about three blocks east of the place where the accident occurred. Two witnesses testified that immediately before the accident a car going at a rate of 40 to 50 miles an hour sped by them, going west, and that immediately thereafter they heard a crash, and upon coming to the intersection in question found the two cars had collided; and that no other car went by them at the time. Defendant testified that no other car passed at the time or immediately before or after the accident, and that he was driving at 18 to 20 miles an hour. The point of collision was west of the intersection; the witnesses disputed the distance as being between 24 to 50 feet west of the west curb line of Fifty-second street. After the collision appellant's automobile veered to the southwest, ran over the south curb, up a bank 3 or 4 feet high, and onto an adjoining lot about 52 feet from the apparent point of collison, before it could be stopped. We think this evidence constituted a sufficient circumstance, relating to the speed of defendant's car, to go to the jury, together with the other evidence in the case, as to

whether defendant was negligent and whether such negligence was the cause of Mrs. Ensor's death. The question of negligence was clearly a question of fact for the jury, and their verdict, based upon conflicting evidence, should not be disturbed.

Evidence of witnesses at the Dodge street garage as to the speed of a car going west, which they judged was larger than a Buick, might well have been excluded, but we do not think its admission prejudicial error.

The circumstances surrounding the accident, the position of the cars thereafter, the marks of damage, the wreckage, and all the other evidence, presented a dispute to be settled by the jury as to who was first in the intersection of the street and had the right of way. The court's instruction on this branch of the case embodied the request of defendant.

The case is, therefore,

AFFIRMED.

STATE BANK OF OMAHA, APPELLANT, V. MILTON C. MURPHY ET AL., APPELLEES.

FILED JUNE 27, 1923. No. 22403.

1. **Chattel Mortgages:** DESCRIPTION OF CHATTEL: QUESTION FOR JURY. Whether the description of a motor-truck set out in a chattel mortgage, together with other inquiries which the contract itself suggests, is sufficient to enable third persons to identify the property was, under the evidence in this case, a question of fact for the jury.
2. **Replevin:** DAMAGES. Where property replevied and delivered to plaintiff has a value on account of the use to which it may be put, other than its value for sale or consumption, the defendant, if successful, may recover the value of the use of the property during the time it was unlawfully withheld from him under the writ.
3. ———: ———: INTEREST. In an action of replevin, a plaintiff who wrongfully seized an automobile truck under the writ is liable for interest on its adjudicated value from the time of the seizure until he returns it or pays for it, where the net usable value is not shown by the evidence.

APPEAL from the district court for Lincoln county:

HANSON M. GRIMES, JUDGE. *Reversed and remanded, with directions.*

James T. Keefe, for appellant.

Halligan, Beatty & Halligan, George N. Gibbs and *Kennedy, Holland, De Lacy & McLaughlin, contra.*

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

BEGLEY, District Judge.

Plaintiff brought this action in replevin to recover possession of a Model 11, 1½-ton Republic motor-truck, No. 6609, by virtue of a chattel mortgage which it claimed to have thereon, but which described it as "Model 11, 1½-ton Republic truck, No. 1609," instead of No. "6609." Defendants Murphy & Murphy claimed to be the owners by virtue of having purchased the truck from a retail dealer for full value, in good faith, and without notice of any claims thereon by other persons by virtue of a chattel mortgage or otherwise. The intervener claimed to be entitled to possession by virtue of a chattel mortgage executed by defendants, Murphy & Murphy, which correctly described the truck. The jury found its value to be $1,500; that the right of property and right of possession at the commencement of the action were in defendants and intervener, and that Murphy & Murphy had sustained damages in the sum of $1,200 by reason of being deprived of the use of the truck. From a judgment on the verdict, plaintiff has appealed.

Plaintiff's chattel mortgage was filed for record prior to the purchase of the truck by defendants and the execution of the chattel mortgage held by intervener. A question litigated in the lower court was whether the description in plaintiff's mortgage was sufficient, aided by inquiry which the mortgage itself suggested, to charge defendants and intervener with notice that plaintiff's mortgage covered Model 11, Republic truck No. 6609, instead of No. 1609. This question was submitted as a

question of fact for the determination of the jury. Plaintiff contends this was error, in that the evidence was so conclusive that the court should have determined the question in its favor as a matter of law—citing *Crancer Co. v. Cooper,* 100 Neb. 335.

The evidence discloses that C. M. Trotter was a retail dealer in Republic trucks at North Platte, and, to secure part of the purchase price of a shipment of automobiles and trucks, he executed the mortgage held by plaintiff upon six automobiles and three Model 11, 1½-ton Republic trucks, serial numbers 1609, 1614, and 1622; and that at said time he had four Model 11, 1½-ton Republic trucks in stock. The correct serial numbers of the four trucks are not shown, except the three numbers set out in the mortgage. Trotter, having become deeply involved financially, absconded. It is a matter of common knowledge that trucks and automobiles are made in serial or factory numbers and the serial number is the usual method of identification. A truck is required to be registered and sold under this number, and a penalty is provided by law for altering or obliterating the number. Comp. St. 1922, secs. 8365, 8375, 9618-9621. Where the models are the same, the only means of identification is the serial number. Whether the truck embraced in plaintiff's chattel mortgage could be identified by the description contained in the mortgage, aided by inquiry which the mortgage itself suggests, was properly submitted as a question of fact.

The second error assigned is that the evidence is insufficient to sustain the judgment in favor of defendants for $1,200 by reason of being deprived of the use of the truck in controversy from the date of the seizure until the date of the verdict. There was some evidence offered by defendants as to the reasonable rental value of the truck per day during the seven months it was detained by plaintiff. The rule is that, where the property replevied and delivered to plaintiff has

a value on account of the use to which it may be put, other than its value for sale or consumption, the defendant, if successful, may recover the value of the use of the property during the time it was unlawfully withheld from him under the writ. *Schrandt v. Young,* 62 Neb. 254; *Blodgett v. Rheinschild,* 56 Cal. App. 728. However in the case of an automobile, there is a depreciation during use which lessens its value materially. The plaintiff, under its replevin bond, if unsuccessful, is required to redeliver the property to defendants without depreciation. *Wallace v. Cox,* 100 Neb. 601. To charge the plaintiff for the reasonable rental value of the property without deducting for depreciation and also to collect damages for depreciation from plaintiff on redelivery of the property would be exacting double damages. In the case of *Puckett v. Hopkins,* 63 Mont. 137, it was held that the measure of damages for wrongful detention of an automobile is the net usable value of the car, less depreciation which would have ensued from its use during its detention, and that an instruction which failed to so limit the measure of damages was erroneous. No such instruction limiting damages was given in this case, nor is there any evidence as to the net usable value of the car, less depreciation, during the period it was withheld from defendants. The evidence will not sustain a verdict for damages in the sum of $1,200 for loss of the usable value of the truck.

On account of the error in entering judgment on the verdict for $1,200 as damages sustained by Murphy & Murphy, because they were deprived of the use of the truck, the judgment below is reversed.

In view of the failure of proof relating to damages resulting from the wrongful conduct of plaintiff in procuring the writ of replevin, by which defendants were deprived of the use of the truck, the trial court, on the verdict of the jury, should have adjudged that defendants have a return of the truck and, for the wrongful de-

tention, damages equivalent to the interest on the valuation of $1,500 at the rate of 7 per cent. per annum from June 7, 1920, to the date of the return; or, in case a return cannot be had, that defendants recover of plaintiff $1,500 with interest thereon at the rate of 7 per cent. per annum from the date of the wrongful seizure, June 7, 1920, to the date of the rendering of judgment, July 22, 1921; that defendants, as a condition of overruling the motion for a new trial, remit from the verdict the award of $1,200, less interest at the rate of 7 per cent. per annum on $1,500 from June 7, 1920, to the date of the rendering of the judgment, July 22, 1921; that, in case defendants refuse to file said remittitur, a new trial be granted. For the purpose of entering such a judgment on the verdict the cause is remanded to the district court.

REVERSED AND REMANDED, WITH DIRECTIONS.

HARVEY LINDLEY ET AL., APPELLEES, V. WARREN E. WRIGHT, APPELLANT.

FILED JUNE 27, 1923. No. 22426.

1. **Landlord and Tenant:** VOLUNTEER CROPS. A farm tenant whose lease covered the crop year of 1919 and expired March 1, 1920, had, as such tenant, no interest in a volunteer wheat crop produced and maturing in 1920 on the ground from which he harvested the wheat the previous year.
2. **Statute of Frauds:** TENANCY: ORAL AGREEMENT. Evidence and offers of proof examined, and *held* insufficient to take the claimed oral agreement for future tenancy out of the operation of the statute of frauds.

APPEAL from the district court for Deuel county: J. LEONARD TEWELL, JUDGE. *Affirmed.*

Hainer, Craft, Edgerton & Fraizer, for appellant.

L. O. Pfeiffer, contra.

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

BLACKLEDGE, District Judge.

This is an action of replevin instituted by Johnson, the landowner, and Lindley, his lessee, as plaintiffs, against defendant, Wright, to recover possession of a crop of wheat grown and standing in shock upon the land in Deuel county.

The controversy submitted arises from these facts: That for the previous year one Castle held a lease for the land expiring March 1, 1920, and had fall wheat growing thereon in the year 1919, when he sold the same to Wright, who took charge of the crop and about July 7, 1919, commenced harvesting the wheat with a machine known as a "combine," which both harvested and threshed the grain. The harvesting lasted for a period of eight or nine days. Afterwards the defendant allowed his machinery to remain on the land until in September, following, when he removed the same. Soon thereafter he went to California, where he remained for the winter and spring, returning to the vicinity of this land July 6, 1920. In the meantime Johnson, the landowner, in February executed a lease to his coplaintiff, Lindley, for the land for a term of years beginning March 1, 1920. The lease to Lindley provided that the land should be summer-tilled in the summer of 1920. It is claimed on the part of plaintiffs that sometime in April, upon Lindley taking his machinery to the land for the purpose of commencing the cultivation, it was noticed by him that there was apparently coming upon it a crop of volunteer wheat, and that he and Johnson, after waiting for some time to see whether the wheat developed, concluded early in June to let it stand for the purpose of making a crop of volunteer wheat, which they would harvest and divide the proceeds between them, and that they by oral agreement modified their lease accordingly.

Upon the return of defendant, Wright, from California, about July 6, he examined the wheat in the field and proceeded upon the following day or a day later to put in

his machinery and commenced to harvest it. In this operation he was interrupted by the service of an injunctional order issued in a case commenced by these plaintiffs against him. This order, however, was later dissolved, and upon its dissolution plaintiffs instituted this action of replevin for possession of the wheat, threshed and marketed it to the amount of some 4,300 bushels, then of the value of approximately $2.25 a bushel.

The contention of the defendant upon which he bases his claim of title to the wheat is, as disclosed by his offer of proof, that on July 10, 1919, while he was engaged in harvesting, he and Johnson had a conversation, wherein "Wright said to Johnson that he would like to have the land to put back into wheat, to seed it back into wheat; that the said Johnson said to the said Wright that that was all right with him, that he should go ahead and put it back into wheat, and that he would leave it to his judgment how the land was to be put into wheat; that in the course of the conversation the defendant Wright asked Mr. Johnson if it would be all right to disc it back into wheat, and the said Johnson replied that it had been plowed the year before and the ground was in good condition, and as far as he was concerned he would leave it to Wright's judgment; that during the conversation the said Johnson said positively that it was all right with him for Wright to put the land into wheat."

Upon the trial the district court excluded this evidence offered by defendant upon the theory that it tended only to establish an oral contract for a lease to begin in the future, and which contract, whether a modification of the original lease with Castle or a new and subsequent agreement, was required by law to be in writing, and that there had been no part performance thereof shown or other matter sufficient to take the agreement out of the operation of the statute of frauds.

Some other offers of proof were made in the course of the trial, being of circumstances or other conversations

claimed to be corroborative of the claims of defendant, which were excluded by the trial court. As to some of these we are of opinion that the court came dangerously near to hewing over the line and excluding matters which might have been competent, but the case of the defendant must rest in that regard upon his own offer of proof as to the basis of his claim, and he cannot make his claim here, or in the trial court, upon a broader basis than is evidence by his offer of proof.

Upon the conclusion of the evidence each party moved for a directed verdict in his favor. The court directed a verdict in favor of the plaintiffs, and judgment was accordingly given.

Some of the offers of proof made tend to support a contention by defendant that he had intentionally set the machine so that it would waste or distribute considerable amounts of wheat rather evenly over the ground and that it was seeded in this manner. There is no dispute that machines of this kind do ordinarily in their operation waste or distribute some of the wheat, as it must be in a thoroughly ripe condition in order to be successfully harvested and threshed by this kind of a machine. There is, however, no offer of proof on defendant's part that he and Johnson agreed that the seeding should be done in this manner or that the machine should be so set for the purpose of seeding it for the next year's crop. Besides, this conversation took place on July 10, at which time defendant had already been engaged in harvesting for three days, and there is no contention that there was any agreement or conversation of any kind covering this prior period nor that there was any different adjustment of the machine made thereafter, nor that the matter of the adjustment or use of the machine for the purpose of seeding was talked over between the parties. One witness, who was employed by defendant, Wright, at the time of harvesting, says that they regulated the combine so that it would scatter the right amount

of wheat on the ground to be a good volunteer crop; but the defendant, Wright, does not so testify, nor that it was agreed to do so; and no one testifies to the effect that the plaintiff Johnson either agreed to that method or knew that it was being done or attempted, nor is there any offer of proof to that effect.

The court also excluded the offered testimony of another witness of a conversation between the witness and Johnson alleged to have been had on about March 4, 1920, which it will be noted was after the execution of the lease to plaintiff Lindley, to the effect that, in speaking of the wheat, Johnson said to the witness that Wright had some good wheat on this land. But, under the circumstances, and in view of the scope of the other offers of proof made by defendant, we do not believe this ruling was prejudicially erroneous, and such statement, if made, although possibly a declaration against interest, could not avail to make the necessary elements of contract upon which defendant could rely.

Defendant, Wright, does not by his own testimony or that of any of the witnesses for him show that he did anything, other than the claimed adjustment of the combine, in the way of seeding, cultivating or looking after the crop in any way. The land was otherwise unoccupied, and was without improvements except being under fence. When the defendant finished his harvesting and threshing in July, 1919, he left his machinery on the land. He at no time came back to do any work on it. In September he removed his machinery and betook himself to California, leaving nothing, so far as the record discloses, to show that he claimed any interest in or occupation of the land. He had no communication in the meantime with the landowner, and does not appear upon the scene until in July, when he undertakes to harvest and claims this wheat. Even if it be considered an unearned increment of the land, it would properly belong to the landowner and be subject to his disposal, rather

than that of a tenant whose lease had expired March 1 before.

Defendant objects to the joinder of plaintiffs herein, but is in no position to complain of arrangements between the plaintiffs which are satisfactory to themselves. Upon the whole record, we are satisfied that the judgment of the district court was right, and it is

AFFIRMED.

H. F. WILSON ET AL., EXECUTORS, APPELLEES, V. EDWARD PERRY ET AL., APPELLANTS.

FILED JUNE 27, 1923. No. 22466.

1. **Specific Performance:** DEFECTIVE TITLE. In an equitable action by executors and trustees, appointed by the will of a testator, to require of a purchaser specific performance of their contract for the sale of land in this state, a conveyance was tendered and the action tried prior to the closing of the estate in the county court or rendition of any decree therein determining heirship or directing distribution or assignment of the estate. There was no showing or finding in the conveyance, will or probate proceedings whether the decedent was a married man or had left a surviving widow. *Held*, that the conveyance was not sufficient to require acceptance as passing good and merchantable title.
2. ———: ———. No special equities being pleaded or proved, and such contract containing a clause making time an essential element, in the absence up to and including the time of trial of a showing by the vendor of ability to fully perform, the purchaser will not, over his objection, be required by decree to thereafter, and much later than the date fixed by the contract, accept a conveyance based upon the assumption that a particular finding and decree will be entered in the matter of the estate in the county court.

APPEAL from the district court for Wayne county: ANSON A. WELCH, JUDGE. *Reversed with directions.*

Kingsbury & Hendrickson, for appellants.

A. R. Davis and *H. E. Siman, contra.*

Heard before MORRISSEY, C. J., DAY, ROSE and DEAN, JJ., BLACKLEDGE and COLBY, District Judges.

BLACKLEDGE, District Judge.

This is an action for specific performance of a contract to sell and convey real estate.

The plaintiffs, as executors and trustees under the will of Phillip Sullivan, deceased, filed their petition, which includes as exhibits a copy of the contract, and transcript of the will and proceedings had in reference thereto in the county court of Wayne county. It appears that Phillip Sullivan died October 5, 1919, seised of the land in controversy. The will was admitted to probate November 7, 1919. The contract was made October 20, 1920, and fixed March 1, 1921, as the date of final performance. It required an abstract showing good title in the estate of Phillip Sullivan and a conveyance to the purchaser in fee simple by good and sufficient deed.

On the date fixed, plaintiffs tendered a deed executed by them "as executors and trustees of the estate," which defendants refused to accept, claiming that the same would not convey a good or merchantable title. Thereupon, March 12, 1921, plaintiffs filed their petition in the district court praying for specific performance. On the same date defendants filed an answer, admitting substantially all the allegations of the petition except that a sufficient conveyance had been tendered or could be given, and prayed for the denial of plaintiffs' petition and the return to them of a cash payment previously made on the contract, of $6,464.

The case stood in this situation until September 24, 1921, when it was determined by the district court upon the pleadings and a decree entered which finds, among other things, that plaintiffs, as trustees, had power to make the contract, and that upon the entering by the county court of a decree of final distribution in the estate distributing the estate remaining in the hands of the executors to plaintiffs, as trustees and sole devisees, plaintiffs can by their deed as such trustees convey full and perfect title, and that they are entitled to such final decree of distribution in the county court.

The court thereupon decreed that, upon the rendition of such final decree in the county court and tender by plaintiffs of their deed as such trustees, the defendants should perform their part of the contract by accepting the conveyance and making the payments by cash, notes and mortgage as specified in the contract.

Upon this appeal it is contended by defendants, the appellants: (1) That the plaintiffs have no title as trustees until the administration has been closed by a final decree assigning the property to them as devisees, and that, under the provisions of the will in relation to the property, the offices of executor and trustee are not coexistent; (2) that neither by the will nor otherwise in the probate proceedings has it been designated or determined whether the decedent had been married or left a surviving widow, and that the absence of some adequate determination of this matter rendered the title unmerchantable in its present condition; (3) that the trial court was unauthorized by its decree, of a materially later date than the contract day of performance, to allow the plaintiffs to thereafter perfect their title in the respects complained of, and then require the defendants to accept the same, the contract having specified that time should be an essential element.

The appellees answer: (1) That, because the contract contained the provisions that the cash payment due March 1 "is without interest until maturity and to draw interest at ten per cent. after maturity," the subsequent clause making time of performance an essential element of the contract is thereby rendered nugatory; (2) that, because the will devised the land of the estate to trustees and directed it to be sold and converted by them into money or securities and distributed in such form, an equitable conversion took place and the title vested in the trustees; (3) that, the will having been duly probated, the debts paid, the time for filing claims expired and an order barring claims entered, equity will "look upon that as done which ought to be done" as to a

decree of distribution and assignment in the county court, and consider it entered, although in point of fact it has not been made or entered.

We may assume that plaintiffs had power to make the contract, and pass over the question as to whether it resided in them as executors or as trustees; also as to whether the will worked an equitable conversion of the property so far as the estate was concerned, for here the question is as to the title to be passed to the defendants and the sufficiency of the conveyance by which it is proposed to be done.

The sufficiency of the conveyance tendered to pass good title is the principal question in the case. We may assume that these plaintiffs took under the will as any other devisees would take. The question remains whether, prior to the final decree of the county court in probate proceedings determining heirship and directing distribution, and without any recitals or finding in the will, or elsewhere in the probate proceedings, as to the domestic condition of the testator, equity should require the acceptance of a conveyance by plaintiffs as trustees. Certainly their power or authority in that regard is no broader than would be that of the testator. We may assume that Phillip Sullivan in life was party to the contract and tendered his deed without covenant or recital as to his domestic condition. It needs no argument to demonstrate that no prudent title examiner would accept it or pass it. True, such defects, usually, however, as to the deeds of some age, are sometimes cured by means of affidavits; but even that is not tendered here, and we take it that, due to the situation of this estate, something more tangible than an *ex parte* affidavit should be had. Nor can we consider the objection upon this ground as unimportant or technical. It is material and substantial. It is for the very purpose of providing against such contingencies that these things are required in probate proceedings, and the purchaser is entitled to have something upon which he can of right rely as a

protection. The whole matter of the estate still stands with no recital or finding as to the domestic condition of the testator, whether he was married, or has or has not left a widow surviving, and it requires no argument to demonstrate that a conveyance without some such showing in it, or upon which it rests, is not a good or sufficient conveyance.

As to the contention that we should consider that as done which ought to be done, and so assume what sort of decree will be entered in the county court, such rule is sometimes applied to prevent palpable injustice, but we have not known of its being used in aid of a plaintiff who in equity demands specific performance and is himself bound by the rule that, to entitle him to make such demand, he must show that he can perform fully on his part, and that he has been assiduous in the performance of his own contract obligations. We are impressed with the thought that neither this court nor the district court can authoritatively determine in advance what decree shall be entered in that matter in the county court. The county court is the court of original, exclusive and unimpaired jurisdiction in such matters, and may have before it different considerations than appear in this case.

It is also contended, principally upon the clause in the contract hereinbefore mentioned regarding interest after maturity upon the deferred payment, that the subsequent clause in the contract making time an essential element was waived; but it seems apparent from a reading of the provision that it was, by prescribing the highest lawful rate of interest, intended rather in the nature of a penalty against the payer to prevent his default, and does not indicate an intention to abrogate a subsequent clause deliberately inserted in the contract. To hold that such clause canceled the provisions of the subsequent one making time an essential element would be a strained construction. It is the duty of the court, where possible, to give effect to all the provisions of the contract. Neither are we convinced that, over defendant's objection, the trial

court could in effect properly make a new contract between the parties directing performance upon an unascertained date some time subsequent to the date of decree, September 24, 1921, which itself is nearly seven months subsequent to the date fixed by the contract. No special equities are presented in behalf of either party. Specific performance is not a matter of legal right. The granting or the withholding of the remedy rests in the sound discretion of the court. The plaintiffs, if the contract is not performed, will still have their property. The defendants have never taken possession and no accounting in that regard will be necessary. In argument it was suggested that there has been a decline in the market value of land; but this is not presented by the record for our consideration. If plaintiffs had been assiduous to perform their contract and could have done so, having been advised of defendants' specific objections at least as early as the filing of answer in the case, they might during the pendency of the action from March to September have procured the further decree of the county court and, by supplemental proceedings, presented it to the district court at the time of trial. It is not even alleged in the pleadings in this case that Sullivan was in fact unmarried and left no widow surviving. Whatever may have been the fact as it was locally known or understood, or as it existed, it has not reached the record in this case, and we must determine these questions upon the record as it is before us. No equitable reason is presented why the plaintiffs should be permitted in September, 1921, to perform the contract and require performance from the defendants, and, so far as the record discloses, they are in no better position at this time. The plaintiffs having failed to show themselves entitled to specific performance, and the defendants, resting upon their contract rights, as they may lawfully do, are entitled to a decree canceling the sale contract and for the return to the defendants of the cash payment of $6,464, with 7 per cent. interest thereon

from September 24, 1921.

The judgment of the district court is reversed and the cause remanded, with directions to enter a decree in accordance herewith.

REVERSED.

JOHN HOLLEY, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED JUNE 27, 1923. No. 22472.

1. **Appeal:** HARMLESS ERROR. Erroneous instructions to the jury will not work a reversal of a case unless they are prejudicial to the complaining party. *Rocha v. Payne,* 108 Neb. 246.

2. **Damages.** Award of the jury *held* not excessive.

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

John L. Webster and *R. B. Hasselquist,* for appellant.

McKenzie, Cox, Burton & Harris, contra.

Heard before MORRISSEY, C. J., LETTON and ALDRICH, JJ., BLACKLEDGE and COLBY, District Judges.

BLACKLEDGE, District Judge.

This action is by the plaintiff to recover of the street railway company for injuries alleged to have been negligently inflicted by the premature starting of a street car with a sudden jerk while plaintiff was in the act of alighting, thereby throwing him to the street and injuring his hip and leg. The defendant in its answer pleads: (1) A denial. (2) That plaintiff alighted in safety and took several steps away from the car and then slipped upon ice or snow and fell to the street.

There was a verdict and judgment for plaintiff. Upon the trial the court instructed as to the elements of the case which plaintiff was required to establish by a preponderance of the evidence in order to entitle him to a recovery, and of the general charge no complaint is made. The court also instructed upon the special features of the case, giving instruction No. 4, which in

substance is that, if the jury believed plaintiff safely alighted from the car and later slipped and fell on the street from any cause aside from the negligence of the defendant in the operation of its street car, then the plaintiff could not recover and the verdict must be for the defendant. Also instruction No. 8 in which it was stated that the only ground of negligence charged by plaintiff was that defendant, through its employees, started the car forward while plaintiff was in the act of alighting from the car, which had stopped to discharge passengers, and that the burden of proof was on the plaintiff to prove these acts of negligence by a preponderance of the evidence; and, if he failed to do so, he could not recover and the verdict should be for the defendant. The court further instructed in reference to an alleged diseased condition of plaintiff, sought to be established by defendant at the trial, and withdrew from the consideration of the jury, as being without sufficient evidence to support it, plaintiff's claim that the car doors were closed and the steps folded up while he was in the act of alighting.

The complaint here made, and principally relied upon in this appeal, is as to the giving of instruction No. 5 by the court, which submitted the matter of comparative negligence to the jury. It is contended that there was no contributory negligence pleaded or proved in the case, and hence no authority for the introduction of the doctrine of comparative negligence.

The defendant's theory of the case was presented to the jury, both affirmatively and negatively, by instructions Nos. 4 and 8, above noted, and it was therein stated, respectively, that if the finding was in favor of defendant's contention or if the plaintiff failed in proof as to his contention, in either event the verdict should be for the defendant. The argument is that, nevertheless, the instruction criticized would submit to the jury an issue not raised by the pleadings or evidence, and is therefore ground for reversal. It is much easier to keep these

theories of the case separate and distinct upon paper in the pleadings than upon the evidence. In view of the provisions of our statute (Comp. St. 1922, sec. 8834), whereby slight negligence of the plaintiff is no longer a defense but goes only to mitigation of damages, we are not convinced that it is necessary to be presented in the pleadings. *Pittsburgh, C., C. & St. L. R. Co. v. Cole,* 260 Fed. 357; *Kansas City S. R. Co. v. Jones,* 241 U. S. 181.

Defendant does not show how it was, or could have been, prejudiced by the giving of the instruction, or how the jury could have been misled thereby to defendant's injury, but argues that prejudice must be presumed, citing *White v. Trinidad,* 10 Colo. App. 327. That case, however, was upon an appeal by a defeated plaintiff; and it is easy to see how the giving of such an instruction under like circumstances might be prejudicial to plaintiff who was suing to recover. In the instant case, assuming, as we must, that the jury followed the instruction given, which was as plain and unambiguous in its terms as the wording of the statute permits, its only effect could have been to cause a diminution of the amount of plaintiff's recovery, the jury having failed to adopt defendant's theory as to the facts, and of this the defendant is in no position to complain.

The case of *Hatton v. Hodell Furniture Co.,* 72 Ind. App. 357, cited by appellant, holds that the giving of an instruction outside the issues is reversible error, "unless it clearly appears that the complaining party is not harmed." This court in *Webb v. Omaha & S. I. R. Co.,* 101 Neb. 596, held: "The giving of erroneous instructions is not cause for reversal, if the instructions are more favorable to the complaining party than he is entitled to under the law." And in *Rocha v. Payne,* 108 Neb. 246; "Erroneous instructions * * * will not work a reversal of a case unless they are prejudicial to the complaining party." To the same effect are the decisions upon similar propositions in *McCarthy v. Village of Ravenna,* 99 Neb.

674, *Fitzgerald v. Meyer,* 37 Neb. 50, and *City of South Omaha v. Fennell,* 4 Neb. (Unof.) 427. This assignment must therefore be overruled.

Defendant further contends that there was error in stating, in an instruction defining the issues, the amount for which plaintiff sued. This has been the general practice in the district courts of the state for many years. We think it is not to be commended and is often unwise; but in this case we do not think it authorizes a reversal.

There is further contention that the verdict for $5,000 in plaintiff's favor was excessive. The jury found in favor of plaintiff's claims as to his physical condition and as to his injury. It appears thereby that he was, prior to the injury, an able-bodied laborer, a married man, of some skill and industry, 38 years of age, and by the injury has suffered a paralysis of his left leg necessitating the constant use of a cane in moving about, and from which, a qualified physician and surgeon states, he will probably never recover. This award as made by the jury passed the scrutiny of the trial court, and we cannot hold that it is excessive.

The judgment of the district court is therefore

AFFIRMED.

HERMAN G. WEILAGE ET AL., APPELLEES, V. CITY OF CRETE ET AL., APPELLANTS: ALLIED CONTRACTORS, INTERVENER, APPELLANT.

FILED JUNE 27, 1923. No. 23009.

1. **Municipal Corporations:** MINISTERIAL ACTS: RESOLUTIONS. In the exercise by the city of the second class of its corporate functions, where the statute definitely prescribes a method of action, such method must be followed. Where this is not done, if the action taken by the city amounts to prescribing a permanent rule of conduct which is thereafter to be observed by the inhabitants of the city, or by the officers in the transaction of the corporate business, then the rule prescribed may be more properly expressed in the form of an ordinance; but it is entirely proper to act by resolution, if the

action taken is merely declaratory of the will of the corporation in a given matter, and is in the nature of a ministerial act.

2. ———: ASSESSMENTS: COLLATERAL ATTACK. Where, in the making of assessments for local improvements and the levy therefor, property owners have opportunity to present their objections to the municipal body and to there have a hearing and pursue proceedings for review of the final decision of that body whether by error or appeal, they cannot fail to do so and then, in the absence of a substantial jurisdictional defect in the proceedings, question the proceedings collaterally by an independent suit to restrain the making of the levy.

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

Glenn N. Venrick and *John E. Mekota,* for appellants.

McKenzie, Cox, Burton & Harris, for Intervener.

George H. Hastings, Robert R. Hastings, Stewart, Perry & Stewart and *T. J. Dredla,* for appellees.

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

BLACKLEDGE, District Judge.

In this an injunction suit the plaintiffs, some 90 in number, seek to restrain the defendant city and its officers from levying and collecting a special assessment upon certain of the real estate within the city of Crete, and within a designated sewer district, assessed for the purpose of being applied toward payment of the cost of construction of a storm sewer in the city to drain one of its principal streets. The city by its proper officers had taken the proceedings designated by chapter 189, laws 1919, for the purpose of constructing the sewer, and had substantially followed the same until it received a certificate of completion from the engineer with a statement of the costs and proposed assessments against the several pieces of property, including that of the plaintiffs, and had given notice and had a hearing thereon at which the proposed assessments against the several properties were approved. Up to this point there is no dispute as to the facts and no claim on the part of the

plaintiffs of serious irregularity or defect in the proceedings.

At the hearing before the council in reference to the adoption of this proposed assessment, the plaintiffs appeared, made and filed written objections to the proceedings, alleging substantially the same grounds as are alleged in the petition as grounds for this action, none of which are urged upon this appeal except that of gross injustice in some of the amounts charged against the respective properties, and that certain of the property included in the district is not assessed for any amount.

The plaintiffs base their claim of right to the restraining order principally, and upon the oral argument and submission of the case wholly, upon the ground that the city council assumed, following such hearing and the adoption of the proposed assessment, to make the levy for the amounts of the assessment by resolution, and not by ordinance. They contend that the levy could be made only by ordinance, and that, not having been so made, the want of the ordinance is a fatal jurisdictional defect in the proceedings, and that the whole matter of the assessments and disposition thereof as against their several properties should therefore be set aside, and are now in this action the subject of inquiry and adjudication as to their fairness and justness. Upon the other hand, the defendant city and the contractors, who were allowed to intervene in the case, contend that no jurisdictional defect exists or has been pointed out; that, in the absence of such jurisdictional defect as would render the proceedings based thereon void, the proceedings are not subject to this, a collateral attack by an independent action, and that, even if such an inquiry be allowed, it would not extend farther back into the proceedings than to making of the levy, which, if it should be held must be by ordinance rather than by resolution, could yet be made and proceedings had from that point onward without affecting the earlier proceedings in the matter.

We will consider first whether the failure to enact an

ordinance making the levy is such a fatal defect as to render the proceedings void. In adopting the resolution of necessity and in the other proceedings up to the time of the hearing and adoption of the proposed assessment, although many objections are alleged in the petition, none are now insisted upon and the provisions of the act of 1919 seem to have been substantially followed. We may concede that the evidence shows some apparent inequalities and injustices in the matter of spreading this assessment against the respective properties, but that was a matter which was properly before the council for hearing and determination and was by that body determined, and properly to be determined, prior to the adoption of the ordinance which plaintiffs contend should have been adopted. Before either ordinance or resolution could be adopted making the levy, the assessment itself must have been made, and this involves a determination of the property to be assessed and the specific amounts chargeable against the several lots and tracts. We fail to see therefore, and it has not been pointed out to us in the briefs or argument. how the enactment or non-enactment of an ordinance subsequent thereto could have relation back so as to invalidate or control proceedings theretofore had, and which were conducted, so far as appears, in conformity with the statutory provisions. If the ordinance was a necessity and jurisdictional in its nature, it seems that its presence or absence could affect only subsequent proceedings to be based thereon.

Passing this point, however, we are not convinced that the making of the levy could be done in this instance by ordinance only. The plaintiffs base their contention upon a construction of sections 4278, 4281, 4282, Comp. St. 1922, which are respectively 5105, 5108, 5109, Rev. St. 1913. They contend that the preamble (4278) to the effect that the city "may enact ordinances for the following purposes," followed by the other subdivisions, limits the authority of the city so that it can act in such matters by ordinance only; and that the clause, "to make all such or-

dinances," in section 4279, further indicates an intention to so limit the power.

In reference thereto it is well to note the relation of section 4279 to the other subdivisions with which it is connected. For this purpose, going back to the original act of 1879 (Laws 1879, p. 213), it will be seen that this section, which as placed in the revision now precedes all other subdivisions, was originally number 12 in the list, and was so carried through the laws of 1885 and 1887, and perhaps others. A reading of this, therefore, in connection with its context shows that the section originally provided that the city should enact ordinances (1) to levy taxes for general revenue purposes; (2) to levy any other tax or special assessment authorized by law; (3) to provide for grading and repair of streets; (4) to construct sidewalks. etc., and so continuing until, having made 11 specific provisions, this section (4279) then follows as number 12, authorizing the city, further: "To make all such ordinances, by-laws, rules, regulations and resolutions, not inconsistent with the laws of the state, as may be expedient, in addition to the special powers in this chapter granted, for maintaining the peace, good government, and welfare of the corporation, and its trade, commerce, and manufactories."

It thus appears to be the purpose of this subdivision to, in a measure at least, enlarge the powers of the city authorizing it to act in the manner there stated and upon subjects in addition to the specific things before stated. The subdivision, therefore, instead of being a limitation upon the power of the municipal authorities to act, is an extension of power; and specifically mentions a resolution as one means of acting in a proper case.

It has been several times held by this court, and is, we think, the universal doctrine, that where the statute definitely prescribes a method of action, that method must be followed. Where this is not done, if the action taken by the municipality amounts to prescribing a permanent rule of conduct which is thereafter to be observed by the

inhabitants of the municipality, or by its officers in the transaction of the corporate business, then the rule prescribed may be more properly expressed in the form of an ordinance; but it is entirely proper to act by resolution, if the action taken is merely declaratory of the will of the corporation in a given matter, and is in the nature of a ministerial act. *McGavock v. City of Omaha,* 40 Neb. 64.

It is also contended that section 4281, a subdivision under the general section 4278, providing, "To levy any other tax or special assessment authorized by law," controls as to the making of a special assessment in this case. This court in *Lincoln Street R. Co. v. City of Lincoln,* 61 Neb. 109, 145, specifically held that by this subdivision "is evidently meant such special assessments and taxes the levying or imposition of which is to be performed by an independent act or ordinance, complete in itself, and of such taxes as are more permanent and continuing in their nature than those of special assessments for local improvements."

In *McGavock v. City of Omaha, supra,* a resolution was held to be sufficient as the method of establishing a street grade. In *Lincoln Street R. Co. v. City of Lincoln, supra,* a resolution was held sufficient whereby to make the final levy for paving, and that an independent ordinance therefor was not required. In *Van Valkenberg v. Rutherford,* 92 Neb. 803, a resolution was held sufficient authorization for the transfer of title of real estate, owned by the city, fixing the terms of sale and the making of a deed, and that an ordinance was not required. And in *State v. Marsh,* 106 Neb. 547, following the doctrine of *State v. Babcock,* 20 Neb. 522, this court held a resolution sufficient for the calling of an election to vote bonds for the purpose of maintaining and extending the city water works.

In view of these considerations, we do not believe an ordinance was necessary to the valid making of the levy under consideration. We do not hold that resolutions and ordinances may be used interchangeably, but what we do

decide is, that under the circumstances of this case the making of this final levy was in the nature of a ministerial act, and that the action of the council by resolution for that purpose was not prohibited by law.

Plaintiffs' counsel have presented with considerable force, both in the brief and by oral argument, claims of unjust distribution of the assessments both as to property entirely omitted and as to properties which it is claimed were overcharged; but, in consideration of this phase of the case, it must be remembered that, no fatal defect in the proceedings prior to the time of the levy having been pointed out, the council had jurisdiction to create a sewer district and, necessarily, to define the boundaries thereof. It was also authorized to construct the improvement, and in making the assessment against the properties necessarily had the power and jurisdiction to determine what properties should be assessed and the amount thereof, and what property, if any, in the district should be omitted from the assessment as not receiving special benefits. All these are matters which, under the conceded facts appearing by the record, the council had jurisdiction and power to determine. Having such power, any errors or irregularities in reference to the matters suggested did not furnish ground for an independent suit by injunction. Considerations respecting the topography of the district, the distance of the different lots from the improvement itself, the value of the property, the benefits derived or to be derived therefrom were all matters properly for the consideration of the mayor and council and must be conclusively presumed to have been taken into consideration by them. The plaintiffs urge that there was gross injustice in the distribution and fixing of the amounts to be assessed and in the omission of property from assessment, but they do not charge fraud, do not allege that they were denied a hearing before the municipal body; and in fact the record conclusively shows they had a hearing, and their objections were there heard and overruled.. The plaintiffs having thus instituted a direct attack against

the proceedings, and at the hearing having met with an adverse decision by the city council, were authorized, to preserve their evidence, settle their bill of exceptions, and have the case reviewed upon error proceedings in the district court, and ultimately, if they thought proper, in this court. Such was the course pursued by the parties in the recently decided case of *Hurd v. Sanitary Sewer District,* 109 Neb. 384. Instead of pursuing that course, however, these plaintiffs chose to abandon their direct attack and, by the institution of this, a separate and independent suit, make a collateral attack upon the same proceedings, upon substantially the same grounds as were included in their objections filed before the council, with the additional claim only of the invalidity of the levy because made by resolution and not by ordinance.

It has become the well-recognized rule of law in this state that where the parties have an opportunity to be heard, as in this case, and to pursue proceedings for review whether by error or appeal, they cannot fail to do so and then, in the absence of a substantial jurisdictional defect in the proceedings, obtain relief by means of such collateral attack. This rule we take it is well settled in this state, and has been applied in *Diederich v. City of Red Cloud,* 103 Neb. 688; *Hahn System v. Stroud,* 109 Neb. 181; *Wead v. City of Omaha,* 73 Neb. 321; *Morse v. City of Omaha,* 67 Neb. 426; *Portsmouth Savings Bank v. City of Omaha,* 67 Neb. 50; *Webster v. City of Lincoln,* 50 Neb. 1, and in other cases.

It necessarily follows that the plaintiffs are not in a position to test out in this suit either in this court or in the district court the merits of their original claims and objections made before the city council; and that nothing has since occurred in the proceedings which may operate as a foundation for injunctional relief. Even if we are inclined to hold that the actual making of the levy was required to be done by ordinance, rather than by resolution, that could have no retroactive effect so as to open up for investigation the prior proceedings in reference to

which the plaintiffs permitted the adjudication by the municipal body to become final by failure to prosecute proceedings for review thereof, and relief, if given by setting aside the resolution and allowing the council to reconvene and enact an ordinance for the same purpose, would be of no consequence in its effect upon the rights or the property of the plaintiffs.

It therefore follows from these considerations that the judgment of the district court should be reversed and the cause dismissed.

REVERSED AND DISMISSED.

THOMAS COLLINS, JR., APPELLEE, V. JOHN WEISE, JR., APPELLANT.

FILED JUNE 27, 1923. NO. 22422.

1. **Negligence:** CARE REQUIRED: MINORS. In determining the degree of care which a boy 16 years of age should exercise, the jury should consider his age, experience, and discretion, as the law does not require of him the same degree of care as it does of an adult, but only such care as one of his own age and experience would ordinarily exercise in his own behalf.
2. **Master and Servant:** NEGLIGENCE: QUESTION FOR JURY. When an inexperienced minor is employed, known by the employer to be such, and put to loading hay and driving a team over dangerous ground, it is the duty of the employer to instruct such youth so that he will understand and appreciate the danger involved and the necessity for the exercise of due care, and if this instruction is not given, and the youth is injured, whether such facts constitute negligence on the part of the employer is a question of fact for the jury.
3. ———: ASSUMPTION OF RISK: QUESTION FOR JURY. There is no presumption that a boy 16 years of age, who has had little experience as a farm laborer, has as much prudence and understanding as an adult, and where such youth is injured while engaged in dangerous work, which he was ordered to do by his employer's foreman in charge of the work, it is for the jury to say, considering his age and experience, whether he assumed the risks of such employment.

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

J. S. Armstrong and *Williams & Williams,* for appellant.

Vail & Flory, contra.

Heard before MORRISSEY, C. J., DAY and ALDRICH, JJ., COLBY and REDICK, District Judges.

COLBY, District Judge.

This is an action for damages alleged to have been sustained by the plaintiff while at work on the farm of defendant as a hired man.

The petition alleges, in substance, that on or about September 14, 1920, and prior thereto the defendant was a farmer engaged in farming in Boone county, and the plaintiff an infant of 16 years, and that on said date the plaintiff was employed, through his father, by defendant to work as a farm hand; that the plaintiff had never been employed to do work of that character, and was wholly ignorant of the proper tools to work with and wholly inexperienced in farm work; that when defendant hired plaintiff he was told by plaintiff's father that plaintiff had never had any experience in driving a team or as a farm laborer, and defendant agreed to look after the teams to be used by plaintiff, and see that he was furnished with a good, reliable team and shown how to handle the team in a safe and careful manner; that defendant put plaintiff to work hauling hay with a team and rack with one Rudolph Hartman, a man 27 years of age, as manager or foreman; that defendant directed the plaintiff to follow the instructions of Hartman as to driving while hauling hay, and to perform his labor in the manner pointed out and to do his work and to get instructions from him as to his farm work; that it was the duty of defendant to provide a skilful and competent man to direct plaintiff in his work when defendant was not with him, but that the defendant, regardless of his duties, negligently and carelessly employed Hartman to supervise and direct the manner of plaintiff's work; that on said September 14, 1920, while the plaintiff was driving a team and hayrack loaded with hay under the direction of the said Hartman over and along a steep and rough hillside, the hayrack tipped over,

compelling plaintiff to jump to the ground, and that in so jumping plaintiff broke his leg in three places between the knee and ankle; that he was seriously and permanently injured and his body otherwise bruised thereby, from which injuries he became and continued to be sick and lame, suffered and still suffers great pain and distress; that such accident and injury were caused by the negligence of said Hartman as foreman of defendant; that the plaintiff, by reason thereof, has been unable to perform any duties as a laborer; that his earning ability, prior to said injury, was $80 a month; that plaintiff has been compelled to pay for medicines, doctors' bills and hospital bills in the sum of $279.16, and the sum of $100 for expenses to Columbus for consultation and entering the hospital there; and that plaintiff was injured in the sum of $10,000, for which he prayed judgment.

The answer is substantially as follows: Defendant admitted that the plaintiff sustained an injury while in the employ of defendant; alleged that plaintiff was well acquainted with all matters pertaining to his employment by defendant, the character of the ground where he was working and the dangers incident thereto, and had a full understanding of the work, and that he continued such work with such understanding; that the alleged injuries received by plaintiff were the result of the risks naturally and ordinarily incident to the work in which he was engaged, and that such injury was assumed by the plaintiff by virtue of his employment; that plaintiff's injury was treated by Dr. Evans of Columbus, Nebraska, and that the plaintiff was in the hospital from September 14, 1920, to October, 1920, when he was discharged and sent home, when the bones were still soft and his ankle in the plaster cast; that afterwards an elastic bandage was substituted, with instructions by the surgeon to be careful and wear a shoe with braces; that plaintiff negligently and carelessly, contrary to such instructions, engaged in wrestling and other rough sports, failed to brace his ankle as

instructed, and thereby caused the injuries complained of; that said injuries received by plaintiff were due to his own carelessness and negligence, and not through any act on the part of the defendant, and that plaintiff's acts were the direct and proximate cause of the injury. The defendant further denied each allegation in the petition not admitted in his answer.

The plaintiff, for reply to defendant's answer, admitted the facts therein as alleged in his petition, but denied all other matters alleged in said answer.

Under the instructions of the court the case was submitted to the jury, who rendered a verdict in favor of plaintiff in the sum of $1,000. A motion for new trial was filed by defendant, overruled, and judgment rendered for the amount of the verdict, and the case is brought to this court by defendant for reversal upon errors assigned.

The first errors in appellant's assignment which we will consider are that the verdict is not sustained by sufficient evidence, is against the weight of the evidence, and is contrary to law.

It is urged by counsel for defendant that it appears of record that defendant furnished plaintiff a gentle team and an experienced man to assist and direct him; that the plaintiff knew the ground over which they were driving, had raked the hay thereon previously, and that the way was open for him and he was told where to drive by the foreman, so that nothing was left undone that could have been done by any reasonable and prudent man for plaintiff's protection; that plaintiff was a boy 16 years of age and was presumed to know that it was dangerous to drive on a hillside, as this would cause the wagon to upset; that the plaintiff had arrived at sufficient years of discretion so that he should have known the dangers incident to driving over ruts, mounds and catsteps that existed along this hillside, and that the defendant was not obliged to tell plaintiff that it was dangerous to drive over these depressions and elevations

in his road and that he would upset if he did; that the upsetting of the hayrack was caused by the carelessness and negligence of the plaintiff, who should have known the danger incident to driving on a rough hillside, and that the injuries complained of were caused by his own carelessness and negligence.

A consideration of the record and of the evidence introduced does not bear out counsels' statement or convince this court that the injury was caused by the plaintiff's carelessness and negligence, but on the contrary it plainly appears that the road on the hillside along which the plaintiff was directed to drive the team and wagon was in a very dangerous condition; that the mounds and other elevations, ranging over four inches in height in some places, with corresponding depressions in other places, required a skilful and experienced driver, using more than ordinary care and having an accurate knowledge of the roadway.

On its face, under the evidence, it was a difficult and dangerous place to drive and the 16-year-old boy should have been very carefully guarded and instructed by the defendant or his foreman before being permitted to load the hay and drive the team over such a road. No 16-year-old boy could be presumed to have the knowledge and experience necessary to make such a drive in safety, and the evidence shows that the plaintiff was inexperienced in farm work, in driving a team, and in the use of wagons, hayracks and other farm machinery, and had had no experience in driving a team and load of hay on a hillside full of obstructions and depressions that made it unsafe even in the hands of a mature and experienced farmer. The evidence does not show that the defendant or his foreman properly instructed, advised or guarded the youthful and inexperienced plaintiff, or informed him of the dangers of the way.

It seems to this court that on the very face of the evidence the defendant was guilty of almost criminal negligence, and that the testimony was amply sufficient to

support the verdict of the jury, who would have been fully justified in finding for the plaintiff in a much larger amount of damages.

The appellant's next assignment is for errors occurring at the time of the trial objected to by the defendant.

Under this heading counsel for defendant make only the general objection in the assignment of errors and do not call the court's attention to any especially objectionable ruling in the exclusion or admission of evidence made by the lower court during the trial, hence it does not seem necessary for this court to invade the record for the purpose of finding errors in the introduction of evidence which the defendant has not seen fit to point out or specially call this court's attention to.

The remaining assignments of errors from the fifth to the fourteenth, inclusive, are directed toward the instructions given by the court on its own motion or at the request of plaintiff.

Of these instructions the first to which the court's attention is called is number 6, and the objection to it, as set forth, is that it is nowhere alleged in the petition that the work in which the plaintiff was engaged in defendant's behalf was hazardous, and that the plaintiff, being at work as a farm laborer, was not engaged in a hazardous occupation.

Defendant's counsel urged that this instruction was misleading and prejudicial to defendant's cause, because the word "hazardous" is defined to mean "involving danger accompanied with risk," and so a hazardous occupation would be a dangerous occupation, and that no court has so defined work upon a farm.

This argument of defendant's counsel does not appeal strongly to this court. The district court instructed the jury that the work in which plaintiff was engaged in defendant's behalf was hazardous. In this we perceive no error. The evidence shows that the immature youth of 16 years of age was put to work loading hay and driving

a team on a steep hillside, in which he was obliged to load hay and drive over an unknown track occupied and interspersed with mounds, gullies and cat-steps sufficient in size to overturn the wagon, unless the greatest diligence and care were used in its management. It further appears that no information was given as to these obstructions by the foreman to the inexperienced boy, who was loading hay on the rack, except to have the team follow along after him through the spaces where he was dividing the windrows, and that no instructions were given as to the dangers naturally arising from driving along a rough and almost impassable roadway. The instruction of the court in assuming that this work of driving the wagon along this dangerous and almost impassable roadway was hazardous is certainly within the evidence, and the jury could not have been misled by any general terms when they had the facts so plainly given them in the undisputed evidence. The instruction does not say to the jury that the work as a farm laborer, in general, is a hazardous occupation, but simply that this work in which the plaintiff was engaged in defendant's behalf in driving this team over this dangerous road was hazardous. Nor did the court say that hauling hay was a dangerous occupation, but certainly it must have appeared to the court, as well as to the jury, that hauling hay over this road with its mounds, gullies, cat-steps and obstructions was a hazardous occupation to a grownup, experienced man and much more so to an inexperienced boy of 16.

The next assignment of errors urged by counsel for defendant is contained in instruction No. 9, in which the court uses the expression, in referring to plaintiff, as "a youth of tender years," and the objection is made that the use of the word "tender" in the instruction was misleading, and that the word should be used only regarding persons under the age of 14 years, and that this instruction may have caused the jury to believe that they were to judge the plaintiff as they would a small child.

This is not a correct interpretation of this instruction. The law makes every child, during his minority, a person of tender years; that is, a person whom the law, especially in certain things, provides for and protects. He is not allowed to act on his own free will, make contracts or do the things which are part of the qualifications of one who has attained his majority, and in this case the jury could not have been misled.

The evidence discloses that the mother of plaintiff, at the time the defendant hired him, told defendant that he had had no experience in the farming business and would have to be taken care of, and that the father of plaintiff made stronger statements at such time. Not only this, but the plaintiff himself was on the witness-stand and testified and was subject to the inspection and view of the court, the lawyers and all the members of the jury. The jury had the opportunity and undoubtedly did personally observe the appearance, character and physical and mental developement of plaintiff, and no mere statement of a matter of law or fact in the court's instructions referring to him as a youth of tender years could have had any material bearing on the minds of the jury, so as to induce them to regard plaintiff as they would a small child. The distinction which counsel for defendant attempt to make that the instruction would be applicable to a child under 14 years of age, but not to one of 16 years or over, has no sound foundation in law. It is a matter of physical and mental development, not a question of years, and we see nothing misleading about the instruction as given.

The next objection urged by defendant's counsel is the giving of instruction No. 1 asked by the plaintiff. It is contended that in this instruction the court presupposes that there was evidence that this land was dangerous for any one to drive a wagon-load of hay over, and also that there was evidence that the employment of plaintiff at the time of his injury was dangerous, when, as a matter of fact, there was no such evidence; and, further, that such

instruction assumed that the defendant knew or should have known the danger of operating a team on such land; but counsel for defendant admit that these objections are partially done away with when the whole instruction is read. In the latter part of the instruction the court used the following language:

"If you find from the evidence that the employment of plaintiff at the time of his injury was dangerous, and that the plaintiff was known to be inexperienced, and that the defendant knew the danger or should have known the danger to which plaintiff would be exposed, and did not give him sufficient instruction therein, and if he from youth or inexperience failed to appreciate the danger and was injured in consequence thereof, and because of defendant's negligence, and the plaintiff was not guilty of contributory negligence, then the defendant is responsible and your verdict should be for the plaintiff."

This instruction, taken as a whole, is based upon and authorized by the evidence and fairly states the law applicable to this case. It conclusively appears from the testimony that the employment of plaintiff in driving the team over the rough road on the side-hill with its mounds, cat-steps and ditches was dangerous; it also appears that the plaintiff was inexperienced; that defendant had been told so by both plaintiff's father and mother at the time of his employment; that the defendant, being the owner of the land, knew the danger or should have known of the danger to which the plaintiff would be exposed; and there is no evidence that any sufficient instruction was given plaintiff by the defendant or his foreman or that plaintiff was in any way advised of the dangers confronting him.

Counsel for defendant next object to instruction No. 5, given by the court at the request of plaintiff, in the following language:

"You are instructed that there is no presumption that a young man 16 years of age, who had never had any

experience as a farm laborer, has as much prudence and understanding as an adult, and where such youth has been injured while engaged in dangerous work, by driving over dangerous ground upon a load of hay which he has been commanded to do by the master's foreman in charge of the work, it is for the jury to say, considering his age and experience, whether he assumes the risk of employment."

The authorities cited by defendant's counsel do not establish the fact that there is a presumption that a youth of 16 has as much prudence and understanding as an adult, while engaged in the kind of work he was doing, as claimed by defendant's counsel. We find no authorities sustaining such a presumption. There is no conflict in the evidence as to the hazardous kind of work plaintiff was doing when he received his injury. He was driving a team and load of hay on a steep hillside circling around the hill, following the way marked out and indicated by the foreman. It is proved beyond peradventure that this way leading over rough and dangerous places crossed mounds, depressions, cat-steps and ditches which would require more than ordinary care to prevent the upsetting of the load, and the court had the right to assume from uncontroverted evidence that the plaintiff was engaged in dangerous work by driving over such dangerous ground upon the load of hay, which he was commanded to do by the defendant's foreman. The instruction objected to assumes no more facts than the evidence conclusively shows, and the law stated therein is authorized by the adjudicated cases and is clearly announced.

The authority for the instructions objected to, as given by the district court, is to be found largely in the adjudicated cases of this court.

In *Breedlove v. Gates*, 91 Neb. 765, it is held: "If a servant, on account of his youth, lack of prudence and understanding, and because of want of proper instruction, fails properly to appreciate the risks involved in certain

labor which he is commanded by the master to perform, and is injured, the master will be liable."

In *Ittner Brick Co. v. Killian,* 67 Neb. 589, it is said: "Youth and inexperience being inherent, and not the result of carelessness or negligence, it is not error to state, in an instruction in an action for personal injuries, that if plaintiff, 'because of his youth and inexperience, failed to appreciate the danger,' without adding 'or by the use of reasonable care on his part could or would not have known it.'" And the court further say: "There is no presumption that a child of 14 years has as much prudence and understanding as an adult, and where such child has been injured while engaged in dangerous work which he has been commanded to do, it is for the jury to say, considering his age and experience, whether he assumed the risks of his employment." The court also stated: "Where a boy 14 years old undertakes dangerous work in obedience to the command of the master, the law will not deny him relief on the ground of contributory negligence, unless the danger was so manifest and glaring that it must have been known to one of his age and experience that he could not do it without injury."

In *Omaha Bottling Co. v. Theiler,* 59 Neb. 257, this court announces the doctrine: "Infants are entitled, however, to warning of dangers which, on account of their youth and inexperience, they do not fully comprehend; and if such warning be not given, or if it be inadequate, the master is in fault and must answer for the consequence."

In *Foley v. California Horseshoe Co.,* 115 Cal. 184, 56 Am. St. Rep. 87, the court say: "A minor cannot be expected to set up his opinion, however mature, against the judgment and experience of those maturer and older to whom he is given in charge, * * * and it would be an extreme case in which a minor should be held guilty of contributory negligence in obeying the orders of his foreman, representing his master."

"The measure of a child's responsibility is his capacity

to see and appreciate danger, and the rule is that, in the absence of clear evidence of the lack of it, he will be held to such measure of discretion as is usual in those of his age and experience. This measure varies of course with each additional year, and the increase of responsibility is gradual. It makes no sudden leap at the age of 14." *Greenway v. Conroy,* 160 Pa. St. 185, 40 Am. St. Rep. 715.

It will be seen that the adjudicated cases cited give a different rule under the law as to negligence and contributory negligence of a master and a minor servant, distinguishing a minor servant and the law applicable to his recovery from an adult servant.

In the instant case it does not appear from the evidence that any warning whatever was given plaintiff by the defendant or his foreman of the danger of driving a wagon along the steep hillside and the rough, dangerous and almost impassable roadway, the foreman telling plaintiff only to keep his team going or the wagon will tip over, and it appears that a six-inch hillock on the side of the steep ground was sufficient to overturn the wagon.

The evidence shows beyond question that the appellee was inexperienced as a farm hand, and knew nothing about the hillside on which he was driving except what he had learned in raking hay in that vicinity; the foreman went ahead, parted the windrows and directed the boy to drive on and keep the team going. The foreman in charge of the work certainly could see and must have known all about the mounds, depressions and obstructions along the way, but there is no evidence that the plaintiff was given any information on this subject. The immature youth had never had any experience in hauling hay over rough ground and could not have known the danger. He was not instructed that the land over which he was ordered to drive was dangerously rough, that he would have to act with great care and look out for the bad places, and that the wagon was liable to overturn.

He was not given the least warning to stop the wagon before the wheels struck the mounds or cat-steps and tipped the wagon over. It convincingly appears that an ordinarily prudent and experienced foreman would have instructed the boy on all of those matters and would have commanded him what to do and what not to do in order to avoid the dangers that were necessarily to be encountered in the work he was ordered to do.

From a consideration of the instructions given by the district court, we believe that the jury were properly charged in the matter of the law applicable to the case, and that from an examination of the testimony appearing in the record the jury were fully justified in finding for plaintiff under the law and the evidence.

The proceedings and judgment of the district court should be and are

AFFIRMED.

STATE, EX REL. CLARENCE A. DAVIS, ATTORNEY GENERAL, APPELLEE, V. BANKING HOUSE OF A. CASTETTER, APPELLEE: PLATEAU STATE BANK, APPELLANT: JAMES E. HART, RECEIVER, APPELLEE.

FILED JUNE 27, 1923. No. 22441.

1. **Banks and Banking:** GUARANTY FUND: "DEPOSIT." Under the facts stated in the opinion, *held* that the transaction constituted a deposit within the meaning of the depositors' guaranty fund act.
2. ———: ———: ———: EXCESSIVE INTEREST. A deposit represented by a cashier's check payable at a future date, and which includes interest at a rate in excess of that allowed by law, is not within the protection of the depositors' guaranty fund act.

APPEAL from the district court for Washington county: L. B. DAY, JUDGE. *Affirmed.*

E. B. Carrigan and *Brogan, Ellick & Raymond,* for appellant.

Gaines, Van Orsdel & Gaines, contra.

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

REDICK, District Judge.

Application of the Plateau State Bank for payment from the state depositors' guaranty fund of the sum of $1,323.30, alleged to have been a deposit with the Banking House of A. Castetter at the time of its failure, March 4, 1921. The facts are not in dispute and may be briefly summarized as follows:

In October, 1919, the applicant held two notes of Claude Hauschildt aggregating about $1,734.52, drawing 8 per cent. interest, and was insisting upon payment, and the Castetter bank, of which Hauschildt was a customer, for the purpose of assisting him and preventing immediate enforcement of the notes, guaranteed their payment to the applicant. The amount due upon the notes was reduced by payments made by Castetter bank until, on January 15, 1921, there was a balance of $1,292.31, and interest at 8 per cent. from December 14, 1920. After the guaranty all transactions were between the two banks, and applicant looked exclusively to the Castetter bank for payment. Several letters were written by applicant to Castetter bank requesting payment as per guaranty (the notes matured July 1, 1920), and finally a payment of $500 was made March 22, 1920, which operated as an extension to December 14, 1920. December 18, 1920, applicant wrote asking payment of $500, and agreeing to carry the balance for Castetter bank a few weeks. The payment was not made and January 12, 1921, applicant wrote the following letter:

"Pursuant to our conversation of a few days ago pertaining particularly to the two notes of Claude Hauschildt for $1,485.00 and $249.52, of which there is an unpaid balance of $1,292.31, and accrued interest from December 14, 1920, we have decided to leniently observe the position of your bank inasmuch as you indicated to me that you were 'hard up,' notwithstanding the fact that you signified your intention of remitting us in full on the 14th instant in payment of the notes referred

to, and accordingly have decided to deposit the money with you until April 1st, 1921, and trust that our action in so doing will assist you somewhat in the meantime.

"We have, therefore, computed the interest on the aforesaid notes to April 1st, next, and will ask that you kindly send us your cashier's check or certificate of deposit payable on the date last hereinabove stated in full and final settlement of the two notes enumerated herein."

In response to which the Castetter bank wrote:

"Herewith cashier's check $1,323.30 payable April 1st, 1921, as per your phone of today to take up notes of Claude Hauschildt; you may indorse the notes over to us without recourse and send to us."

Receipt of the check was acknowledged "in settlement of the Claude Hauschildt notes, payment of which was assumed by yourselves," and the notes were indorsed without recourse, and, together with two chattel mortgages held as collateral security properly assigned, were delivered to Castetter bank, which held them at the time the receiver was appointed. The sum for which the cashier's check was given is made up of $1,292.31, the principal sum due upon the notes, and $30.99 interest thereon at 8 per cent. from December 14, 1920, to April 1, 1921.

The district court found that the cashier's check represented a loan and not a deposit, dismissed the application, but allowed the amount as a general claim. The correctness of this ruling is challenged by the applicant by appeal to this court.

The receiver of the Castetter bank presents two propositions to sustain the judgment: (1) That the cashier's check did not represent a deposit within the meaning of the depositors' guaranty act. (2) That, if the same was a deposit, it is not entitled to share in the guaranty fund because the Castetter bank agreed to pay interest thereon in excess of 5 per cent. per annum allowed by law.

First, was it a deposit? A depositor is "one who de-

livers to or leaves with a bank money subject to his order. These may be either time deposits or open ones subject to check." *State v. Corning State Savings Bank,* 136 Ia. 79. This definition was approved in *Farrens v. Farmers State Bank,* 101 Neb. 285. The form the transaction takes, while important, is not controlling. *State v. Corning State Savings Bank, supra.* In that case claim was upon two certificates of deposit, but it was held that the true nature of the transaction could be inquired of to determine whether or not there had been a deposit, and it was decided that one of the certificates was a deposit and the other not.

In *Estate of Law,* 144 Pa. St. 499, it was said: "A deposit is where a sum of money is left with a banker for safe-keeping, subject to order, and payable, not in the specific money deposited, but in an equal sum. It may or may not bear interest, according to the agreement. Whilst the relation between the depositor and his banker is that of debtor or creditor simply, the transaction cannot in any proper sense be regarded as a loan, unless the money is left, not for safe-keeping, but for a fixed period, at interest, in which case the transaction assumes all the characteristics of a loan." But while the transaction may have these "characteristics of a loan," the same features are present in every case of a time certificate of deposit, and therefore do not determine the question.

It is suggested that the fund did not constitute a deposit because no money was deposited with the Castetter bank. We think the presence of the actual money is not a prerequisite to a deposit. If I discount a note at a bank and the proceeds thereof are placed to my credit, no actual money passes, but it could not be claimed that such proceeds were not a deposit. "Speaking generally, to create a deposit, within the meaning of the statute, money *or the equivalent of money* must in intention and effect be placed in or at the command of the bank, under circumstances which do not

transgress specific limitations of the bank guaranty law." *Fourth Nat. Bank v. Bank Commissioner,* 110 Kan. 380, 390.

In the instant case the consideration for the cashier's check was the guaranty and assignment of the Hauschildt notes. Whether they were of any value does not appear with any certainty, but the Castetter bank must have considered they were good at the time they guaranteed their payment. The fact that the discounted note, or the notes in question, turned out to be uncollectable would not change the nature of the original transaction, in the absence of fraud, as the status of the cashier's check was fixed when issued. *Fourth Nat. Bank v. Bank Commissioner, supra.* Suppose, instead of guaranteeing payment of the notes, the Castetter bank in October, 1919, had purchased the notes and issued a certificate of deposit to applicant for the amount due thereon at the time. Can it be doubted but that the certificate represented a deposit within the protection of the guaranty law? The legal effect of the transaction would be the same if applicant had been credited in his drawing account—received a cashier's check which he deposited, or one payable at a future date which he held. In each case the assets of the Castetter bank were increased to the extent of the issued obligation; it held the notes as an investment in place of the credit to applicant.

How does the transaction in question differ in principle from the above? It is said that the cashier's check merely extinguished the obligation of the bank on its guaranty, and changed its form; but this ignores the fact that the bank received an equal amount in notes from which to reimburse itself. "When the primary purpose is not to establish the relation of debtor and creditor between bank and depositor, but to discharge some matured obligation of the bank by giving a time certificate of deposit, the certificate is no more than a bill payable." *Fourth Nat. Bank v. Bank Commis-*

sioner, supra. If a bank owes $1,000 rent and pays the same by a certificate at three months, there is no deposit but merely a change in the form of the obligation; but if the lessor holds liberty bonds in an equal amount as security for the rent, and as a part of the transaction surrenders them to the bank, the form of the obligation is alike changed, but, in addition, the certificate represents an equivalent of money, the title and control of which has passed to the bank, and therefore a deposit. It was held in *American State Bank v. Bank Commissioner,* 110 Kan. 520, that a deposit may be effected by giving a bank credit in another bank, subject to check or draft.

The parties here considered it a deposit. The applicant calls it such in his letter and asked for a cashier's check or certificate of deposit payable April 1, "in final settlement of the two notes," and the defunct bank sent the check in response. The effect is the same as if the amount had been credited to applicant's account and, instead of drawing it out, he had accepted a certificate or check payable April 1. The circumstance that he did so to accommodate the bank does not make it a loan any more than the ordinary time certificate. If a certificate at 4 per cent. is due, and depositor, at request of the bank, permits it to remain upon a certificate at 5 per cent., this would not change the deposit to a loan.

We think the true position is that, so long as the guaranty remained, it constituted a general claim against the Castetter bank, but when, by the cashier's check and transfer of the securities, the guaranty was fulfilled, the transaction constituted a deposit.

Second, is this a deposit within the protection of the guaranty fund? Considered as payment for the notes, the amount due January 15, 1921, was $1,292.31 and 8 per cent. interest from December 14, 1920, or $1,301.30. The cashier's check was for $1,323.30, which amount was arrived at by calculating interest at 8 per cent. from

January 15 to April 1, 1921. Section 306, Rev. St. 1913, reads as follows:

"No banking corporation transacting a banking business under this article shall pay interest on deposits directly or indirectly at a greater rate than five per cent. per annum. Any officer, director or employee of a bank violating the provisions of this section, directly or indirectly, shall be deemed guilty of a felony and on conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the state penitentiary not exceeding three years, or both."

Applying this section in *Iams v. Farmers State Bank*, 101 Neb. 778, we held that, where a certificate of deposit was issued at 5 per cent, but the bank agreed to pay, and paid, an additional 1 per cent. as a bonus, the transaction was a device intended to evade the provisions of the act, and did not possess that statutory characteristic of a deposit which provides for interest at only 5 per cent. per annum; and, further, that applicant was estopped from claiming protection, Dean, J., remarking: "The act creating the depositors' guaranty fund was intended by the legislature to be a shield of protection against loss to those who in good faith deposit their money in state banks in compliance with the terms of the statute. Unless its provisions are fairly construed and impartially enforced, this salutary law might become a destructive sword in the hands of unscrupulous persons having unlawful designs on the depositors' guaranty fund."

If applicant was a depositor, as we have held, then he became such on January 15, 1921, to the extent of $1,301.30, on which he was lawfully entitled to contract for not more than 5 per cent. interest to April 1, 1921, $13.50, or a total of $1,314.80; but he demanded 8 per cent. and the bank issued its check for $1,323.30.

How may we look upon this transaction otherwise than as a violation of the statute? If a certificate

had been issued bearing upon its face 8 per cent. interest, no clearer evasion of the statute would be shown. The language of the act, however, covers all cases where interest in excess of 5 per cent. is paid "directly or indirectly." In *American State Bank v. Bank Commissioner, supra,* it was held: "A certificate of deposit bearing a higher rate of interest than the maximum allowed by the bank commissioner is not within the protection of the guaranty fund. And the payment by the bank of a bonus to obtain a deposit bearing such maximum is equivalent to contracting for a higher rate." Applicant attempts to distinguish *Iams v. Farmers State Bank, supra,* on the ground that there the transaction was fraudulently conceived and was a clear defiance of the statute. We are not supplied with any direct evidence as to what was in the minds of the parties in the instant case, but the principle is well established that a party is presumed to intend the natural consequences of his act and the transaction on its face carries its condemnation. To calculate interest at the illegal rate and include it in the amount called for in the certificate is as much a fraudulent device as to make the certificate regular on its face with a side agreement for a bonus.

Morrison State Bank v. Michael, 54 Okla. 257, is cited to the proposition that the claim should be allowed with legal interest. That case is clearly distinguishable. A question of public policy, not a positive statute was involved; the action was by the depositor against the bank; no questions such as are here presented were under consideration. The claim here is for the protection of a statute which the claimant has plainly violated; to allow it would be to recognize a contract prohibited by positive law.

The judgment is

AFFIRMED.

ELVA J. MUFFLEY, APPELLANT, V. VILLAGE OF ST. EDWARD, APPELLEE.

FILED JUNE 27, 1923. No. 22443.

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

APPEAL from the district court for Boone county: A. M. POST, JUDGE. *Reversed.*

Albert & Wagner and *Williams & Williams,* for appellant.

R. D. Flory, contra.

Heard before MORRISSEY, C. J., DAY and ALDRICH, JJ., COLBY and REDICK, District Judges.

REDICK, District Judge.

Action to recover damages for the flooding of plaintiff's premises caused by the insufficiency of ditches constructed by the village along the street to carry off the surface water collected therein from surrounding territory, and the failure of the village to remove the accumulated dirt and rubbish in such ditches causing the same to be choked up and to overflow upon plaintiff's premises. A demurrer to the petition was sustained by the lower court for the sole reason that it was not therein alleged that plaintiff had given the notice required by section 4384, Comp. St. 1922 (Laws 1915, p. 237), which provides:

"No city of the second class or village in the state of Nebraska shall be liable for damages arising from defective streets, alleys, sidewalks, public parks or other public places within such city or village, unless actual notice in writing of the accident or injury complained of with a statement of the nature and extent thereof, so far as the extent of the injury is known at the time, and

of the time when and the place where the same occurred, shall be proved to have been given to the mayor or chairman of the city, or board of trustees or to the city or village clerk within 30 days after the occurrence of such accident or injury."

The only question for decision is whether or not the giving of the notice referred to in the statute is a condition precedent to the maintenance of the action, and we are therefore called upon to discover the intention of the legislature, which is made manifest by a consideration of the language used, in connection with the purpose sought to be accomplished, the subject of the act, the evil to be corrected and the remedy to be applied.

To facilitate the inquiry we reconstruct the section:

"No city shall be liable for damages arising from defective streets, unless actual notice in writing of the accident or injury complained of shall have been given to the city within 30 days after the occurrence of such accident or injury."

It will be perceived at once that notice is not required of *all* claims for damages, but only for such as arise from *defective streets;* so we must find that the damages claimed by plaintiff come within that class or the act is not applicable. It is first suggested that the ditch is not a part of the street. We do not deem it necessary to discuss this question, but assume that the ditch is a part of the street, though circumstances might arise in a particular case requirng a different holding, as where the traveled roadway is separated from the ditch by curbs or barriers.

What, then, is meant by a "defective street?" It is difficult, if not impossible, to use this adjective without associating with it the purpose for which the object it qualifies is intended. When we speak of a defective sewing machine, a defective water pipe, a defective rail, or anything else, the mind is at once directed to the use ordinarily made of the article, and thus an understanding and comprehension of the defect is established. When

we speak of a "defective street," mental pictures instantly are presented of what might happen to the traveler as a result of the defect, the number and variety of them limited only by the power of the imagination; but in every such case it is the traveler who is considered because streets are built and kept in repair for travelers. True, roads are crowned and ditches or gutters are provided to take care of the surface water, but the primary purpose is to provide a way suitable for the traveler. Catch-basins are frequently placed at corners. If one of them should be broken or clogged up, it would be a defective catch-basin, not a defective street, because it has no relation to the use of the street. If the water washed out a part of the street and a traveler was thereby injured, the hole (defect) in the street would be the proximate cause, not the clogged catch-basin. If a pile of road material were left by the city in the street in such a position as to turn the surface water in a stream upon abutting property, and a traveler was injured by coming in contact therewith, doubtless his cause of action would be properly said to arise out of a defective street; but the damage to the abutting property would arise out of the improper use of his property by an adjoining proprietor, precisely the same as if he were a private person, and without the remotest relation to the fact that such premises constituted a highway, except for the purpose of identifying the culprit; the liability to the traveler is based upon a breach of the duty to keep the highway reasonably safe for travel, a duty owed only to travelers as such, while that to the abutter is founded upon the maxim, *"sic utere tuo ut alienum non lædas."*

At common law a municipal corporation was not liable for failure to keep its streets in repair, but such liability was affirmed in this state as early as 1892 (*City of Omaha v. Jensen*, 35 Neb. 68; *City of Beatrice v. Reid*, 41 Neb. 214), and the statute under consideration, by reason of its position, in the charter of municipal corporations, and its specific reference to claims arising out

of defective streets, would seem to have special and restrictive application to this newly declared liability peculiar to municipalities as such, rather than to obligations resting alike upon all persons and corporations.

We are of the opinion that the words, "defective streets," were used with reference to such conditions only as interfered with their use as such, and this conclusion is supported by the following cases: *Pye v. Mankato,* 38 Minn. 536; *Winchell v. Town of Camillus,* 109 App. Div. (N. Y.) 341; *Barber v. Town of New Scotland,* 88 Hun (N. Y.) 522 (all flooding cases); *Whitney v. Ticonderoga,* 127 N. Y. 40; *Hewison v. City of New Haven,* 34 Conn. 136; *Bliven v. City of Sioux City,* 85 Ia. 346; *Fugere v. Cook,* 27 R. I. 134. The only case coming to our notice militating against our construction is *Schleicher v. City of Mt. Vernon,* 107 App. Div. (N. Y.) 584, but it is clearly distinguishable because of the variant language of the statute. The case of *Willett v. City of Seattle,* 96 Wash. 632, cited by defendant, is not applicable because the statute reads, "All claims for damages against the city," and contains no reference to particular causes of damage. The cases of *Chaney v. Village of Riverton,* 104 Neb. 189, and *Nichols v. City of Minneapolis,* 30 Minn. 545, involved claims for injury to travelers or their property while using the highway. *Dovey v. City of Plattsmouth,* 52 Neb. 642, had under consideration a different statute specifying that notice must be given of all claims for negligence of the city, and not applicable to defendant.

The petition states a cause of action at common law and the district court erred in sustaining the demurrer.

REVERSED AND REMANDED.

ROBERT E. MOORE, PLAINTIFF, V. PATRICK E. MCKILLIP ET AL., APPELLEES: LOUIS A. BERGE ET AL., APPELLANTS.

FILED JUNE 27, 1923. NO. 22454.

1. **Specific Performance:** DEFENSES: INADEQUACY OF CONSIDERATION. Inadequacy of consideration alone is no defense to specific per-

formance of a contract, unless so great as of itself to furnish an irresistible inference of fraud.

2. ———: ———: ———. Inadequacy of consideration, although not sufficient of itself, accompanied by circumstances suggesting fraud or mistake inducing the assent of one of the parties, is an important factor upon the question of the specific enforcement of a contract.

3. ———: MISTAKE: REFUSAL OF RELIEF. It appearing that defendant signed the contract under mistake as to its subject-matter, and that to enforce the contract would be unjust and inequitable, a court of equity in the exercise of a sound judicial discretion may refuse specific performance, even though plaintiff was in no way connected with or responsible for defendant's mistake.

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

McCarty & Hager and *P. N. Johnston,* for appellants.

Albert & Wagner, contra.

Heard before LETTON, ROSE, DAY and ALDRICH, JJ., REDICK, District Judge.

REDICK, District Judge.

This is an action in equity for the specific performance of a contract for the exchange of certain lots with an apartment house thereon, in the city of Lincoln, for 160 acres of land in Iowa. The case is presented upon a cross-petition by Louis A. and Josephine B. Berge, filed in an action to foreclose a mortgage upon the Lincoln property, in which Patrick E. McKillip and others are named as defendants. For convenience the parties will be referred to in this opinion as Berge, plaintiff, and McKillip, defendant.

The plaintiff alleges that on September 11, 1919, a written contract was entered into by the parties whereby plaintiff agreed to convey to defendant clear a certain 160 acres of land in Iowa, in exchange for the Lincoln property subject to a mortgage of $6,000; that plaintiff delivered an abstract of the land to defendant, and on June 23, 1920, executed and delivered a deed of said lands to defendant, who retained and still retains the

same but refuses to convey the Lincoln property to plaintiff.

The defendant answered the cross-petition, admitting the execution of the contract, but averring "that he was thereunto induced by means of false and fraudulent representations made by the said cross-petitioners, their agents and others acting for them and in their interest," to the effect that the soil on the land so to be conveyed "was black sandy loam, productive and fit for cultivation and agricultural purposes; that 130 acres thereof was what is known as second-bottom land and the remainder first-bottom; that the Missouri river never flowed over, on or across any portion thereof and had never been nearer to said land than one and one-half miles; and was worth $16,000;" that said representations were false, and " that within recent years * * * all of the said land, excepting about 55 acres, had been covered by the said river and had formed a part of the bed thereof, in consequence whereof all of the said land, excepting about 55 acres, is sand, totally unproductive and unfit for cultivation and agricultural purposes, and the whole of the said land is not, and never has been, worth to exceed $2,000;" that the Lincoln property was worth $24,000; that upon discovery of the facts defendant repudiated and rescinded said contract, and now offers to return the deed and do any other act required by the court. Defendant further alleges that he signed said contract under mistake of fact as to the location, character, quality and value of said land, as above detailed, all of which, except about 15 or 20 acres, consists of white sand and gravel, subject to overflow and unfit for cultivation.

The facts alleged in the answer were put in issue by a reply, in which it was further alleged that defendant by himself and his agents examined said land and were fully advised as to its nature, location, quality and value.

Findings of fact were filed by the trial court, which may be summarized as follows: (1) That the defense

of false representations was not made out, finding for plaintiff on said issue of fraud: (2) that only about 60 to 65 acres of said land were tillable, the remainder being part of the old bed of the Missouri river and of little value; (3) that the value of the land did not exceed $3,000, and of the Lincoln property, not less than $7,000 above incumbrances; (4) that at the time of entering into said contract said McKillip understood and believed that said quarter section of Iowa land contained 130 acres of good, tillable land, and that only 30 acres thereof had ever been a part of the bed of the Missouri river, and that its value was equal to or greater than the value of the Lincoln property; (5) that said understanding, belief and mistake of said McKillip was induced and caused by the statements and representations of his agents, who examined the land and on whom he relied; (6) that if the land had been as understood by McKillip it would have been worth nearly as much as the Lincoln property; (7) that upon discovery of the truth said McKillip refused to proceed with the deal and so informed plaintiff by letter of November 24, 1919; (8) that June 23, 1920, plaintiff mailed to McKillip a deed to the land, which McKillip did not intend to and did not in fact accept, and tenders the same to plaintiff.

As conclusions of law the court found: (1) That plaintiff was not guilty of fraud or misrepresentation, and McKillip was not entitled to rescind: (2) that to decree specific performance is within the legal discretion of the court; (3) that, although a contract may be legal and enforceable at law, equity will not decree specific performance thereof unless it be just and fair in all its parts and not hard or unconscionable, nor unless it was entered into without misapprehension or mistake, where it would be unjust or unfair to require such performance; (4) a general finding for defendant.

Plaintiff appeals to this court, assigning a number of errors which need not be particularized.

It would extend this opinion to an unreasonable

length to quote and analyze the evidence, so we must be content to state our conclusions therefrom with such references thereto as seem necessary to sustain such conclusions.

Louis A. Berge, husband of plaintiff, was a dealer and trader in lands and other real estate, and resident in Lincoln. Patrick E. McKillip was in the same business at Humphrey, Nebraska. R. C. Alderman was a real estate broker in Omaha, not connected with either of the parties, but making deals upon commission. F. G. Kloke was in the employ of McKillip on a salary, engaged in looking up deals and inspecting properties to be dealt with.

The principals to the contract had no personal contact. The circumstances resulting in its execution were as follows. Alderman knew of Berge's ownership of the land through his connection with the deal by which Berge traded for it two tracts, one of 640 acres and the other 480 acres of land in northwestern Nebraska. He also knew of McKillip's Lincoln property from a list put out by McKillip. He suggested to Kloke that a trade might be made, and they went to inspect the land late in August, 1919, and again early in September, when Kloke, having reported to McKillip, on September 10 notified Alderman that the trade could be made. On September 11 Alderman first approached Berge on the subject, at Lincoln, and after an inspection of the apartments went to the office of Berge's attorney and had the contract prepared and signed by Berge; Alderman delivered it to Kloke, who mailed it to McKillip, and he, after executing it, mailed a copy back to Kloke.

Alderman represented no one but himself, his only interest being to secure a $640 commission from McKillip. Upon the occasion of the visits to the land, it seems from his evidence Alderman was very careful not to make any representations as to its character or value. He says that, when asked by Kloke how much of it was bench land, he answered: "I don't know; I never

measured it; I know nothing about it, but here is your east line and there is your north line, you can tell from that." "I couldn't tell him there was 80 acres. It would have been guesswork if I had told him. I did not." Later on he testified all but 65 or 70 acres was in the old river bed. Kloke says Alderman told him only about 15 or 20 acres were in the river bed, and he so estimated it. An unsuccessful effort was made to show that Kloke was shown the wrong land; but however this may be, it appears that he was grossly mistaken as to a number of important facts concerning the land. For example, he thought there was a two-story house and small orchard on the southeast corner of the land, but this turned out to be on adjoining property, and his estimate of 15 or 20 acres of old river-bed land was quite out of line, as it is practically beyond dispute that not to exceed 65 acres were on the bench, and of this 10 or 15 acres were very sandy.

There can be little doubt but that Kloke was materially deceived as to the vital questions concerning the land, not so much perhaps by any active misrepresentations of Alderman as by Alderman's refusal or failure to call attention to facts within his knowledge and by his own failure to exercise that degree of care and judgment, while inspecting the property, which his employer, McKillip, had a right to expect. To say the least, McKillip was extremely unfortunate in the selection of his agent. Kloke reported his misinformation as to the land to McKillip, who signed the contract in reliance thereon. Had Alderman been the agent of Berge, there would be little difficulty in finding that the contract was procured by unfair means; but as Berge was not responsible for Alderman he cannot be held for Alderman's fault, and it was in this view of the matter, we take it, that the district court found against defendant on the issue of fraud.

Defendant realized the difficulty just referred to, and during the trial obtained leave to amend his an-

swer by setting up that McKillip entered into the contract under a mistake of fact, as hereinbefore set forth, and that it would be inequitable to enforce the same. The finding and decree of the lower court was for defendant on this issue.

Upon a careful study of the record, we are convinced that when he signed the contract McKillip understood and believed that only about 15 to 20 acres of the land had ever been a part of the old river bed. Kloke drew and gave McKillip a rough plat of the ground, which showed the then location of the Missouri river, also the old bank, by an irregular line across the western portion of the tract depicted as two eighties. While in fact one lay west of the other and they were in the usual oblong shape, the two eighties were shown one north of the other and in square form, instead of oblong, and plaintiff claims that the plat represented the eastern eighty and correctly shows the old bank, with the result that defendant must have known that all land west of the irregular line (about 100 acres) had been a part of the river bed. We think the claim untenable. The plat purports to cover two eighties, and the exterior boundaries are plainly drawn, and the line of the old river bank, inclosing about 20 acres, is shown near the west boundary of the tract as drawn. The natural thing to do was to draw the exterior boundaries of the tract, and then show any special features within the same. To sustain plaintiff's contention would require us to find that Kloke did a most unnatural thing—drew a plat of only one-half the land—and to extend the lines according to the plaintiff's theory, so as to show the entire tract, would place the west boundary less than one-half mile from the river, while the words on the plat and the other evidence fix it at about a mile and one-half. In addition to these considerations, Kloke testifies that the west line on the plat was intended by him to represent the west line of the tract.

The clear weight of the evidence sustained and re-

quired the findings of fact of the district court. Defendant's mistake is not chargeable to plaintiff, nor to his own negligence, but to the failure of his agent to make adequate inspection of the land and report the actual conditions; such failure being at least partly due to his placing too much reliance upon Alderman.

Under these circumstances will a court of equity specifically enforce the contract, or should it exercise its discretion and refuse?

Inadequacy of price alone is not sufficient to prevent a decree, unless the disparity is so great as to shock the conscience of all reasonable men and thus afford an irresistible inference of fraud. Such a case was *Byers v. Surget,* 19 How. (U. S.) 303, where defendant attempted to sustain a public sale for $9.75 of land worth from $40,000 to $70,000. That was an extreme case, but serves to illustrate the general rule, which arose partly from the difficulty of determining by any definite standard what amount of inadequacy must exist to constitute the exception.

The general rule is announced in the cases cited by plaintiff, *inter alia, Heyward v. Bradley,* 179 Fed. 325; *Boyce v. Holloway,* 45 Ind. App. 535; *Sweeney v. Brow,* 35 R. I. 227. In all of these cases, however, and in all coming to our attention, it is recognized that the rule is applicable only in the absence of fraud, oppression or mistake. Where inadequacy of price is shown, though insufficient in itself, if accompanied by circumstances fairly establishing fraud or mistake, a case is presented for the exercise of a sound judicial discretion by the court.

The circumstance that plaintiff was not in any way responsible for the mistake does not deprive the court of jurisdiction to grant relief on such ground in this class of cases. In Kerr on Fraud and Mistake, p. 411, the doctrine is stated: "A court of equity will, however, in many cases refuse to grant a plaintiff the peculiar remedy of specific performance of a contract, which the defendant has entered into under a mistake, al-

though plaintiff was not privy to the mistake, nor implicated in its origin. A man who seeks to take advantage of the plain mistake of another cannot come to a court of equity to assist him in doing so, but must rest satisfied with the remedies which a court of law will give him." And 2 Pomeroy, Equity Jurisprudence (3d ed.) sec. 860: "A mistake which is entirely the defendant's own, or that of his agent, and for which the plaintiff is not directly nor indirectly responsible, may be proved in defense, and may defeat specific performance. This is indeed the very essence of the equitable theory concerning the nature and effect of mistake." See, also, *Somerville v. Coppage,* 101 Md. 519; *Kelley v. York Cliffs Improvement Co.,* 94 Me. 374; *Cawley v. Jean,* 189 Mass. 220; *Clitherall v. Ogilvie,* 1 Desaus. Eq. (S. Car.) 250.

The case principally relied upon by plaintiff is *Heyward v. Bradley, supra.* The case is illustrative of the tenacity with which the rule of mere inadequacy of consideration is adhered to. The subject of the contract was lands supposed to contain deposits of phosphate rock, but the existence of which could only be determined by prospecting involving considerable expense. The option was negotiated between two lawyers (one the husband of defendant), with the expectation that plaintiff would explore the lands at his own expense, and if paying deposits were found the option would be taken up, otherwise not. The defendant was perfectly familiar with the land. The only unknown feature was the phosphate content, the possibility of which gave it a value far beyond what it would otherwise have; in fact, only the mineral content was covered by the option. By the plaintiff's expenditure of over $2,500 it was manifested that there were phosphate deposits to the extent of 280,000 tons, which, when mined, would have brought defendant $70,000 in royalties, whereas she received but $20,000. At page 328 it is said: "Neither at the time the money was paid nor at any other time prior to the commencement of this suit, so far as appears from the rec-

ord, was there any contention that there had been any mistake." And the court stated the question to be (p. 329): "Shall the plaintiffs be deprived of the benefits of a contract, fair and unobjectionable at the time it was made, because it has turned out that as a result of their enterprise and expenditure a much larger quantity of rock has been discovered on the land than the defendant believed to be there at the time the contract was made?" There were no circumstances or appearances calculated to mislead defendant or create in her mind a mistaken belief as to the fact; the parties were dealing with an unknown quantity, with equal opportunity to form an opinion; the conditions were known, and the only mistake, if any, under which defendant labored was one of judgment, rather than of fact. The case is naked of any material with which to decently clothe the discretion of the chancellor, and so, with becoming modesty, he allowed it to remain in the privacy and seclusion of his unawakened conscience.

The instant case presents many different features. It is beyond question defendant was mistaken as to the quality of the land (his counsel refuses to classify it under this term, insisting that *"sand* is not *land"*). It was traded at $16,000, while its value at the highest estimate of real estate men was fixed at $3,000. Plaintiff offered no evidence except his own on this point, fixing it at $100 an acre. The evidence is conclusive that not over 60 acres were tillable, and the remainder practically valueless. On the other hand, defendant's property, at the lowest estimate of a loan man, was worth $13,000. The sum of $6,000 was borrowed upon it, which on the basis of 40 per cent, would indicate a value of $15,000. It produced an income of $135 to $185 a month, warranting a still higher estimate; and it was located across the street from the courthouse. Plaintiff had himself seen defendant's property, while defendant had not personally inspected that of plaintiff. Plaintiff, who is presumed to have known the quality of his own property, places

upon it a price of $16,000, which was more than five times its value. He was evidently unable to secure disinterested witnesses to place its value at his own figure. He accepts the services of Alderman without inquiry as to the means by which the contract was secured, was notified six months before any effort was made to close the deal, by exchanging deeds, that defendant claimed to have signed the contract under mistake and refused to go on; and now comes to a court of conscience asking it to assist him by compelling defendant to convey property of a clear value of $7,000 to $8,000 for $3,000. Can such a contract be truthfully characterized as "just and fair in all its parts," or fair and unobjectionable at the time it was made? We think not. "However strong, clear and emphatic the language of the contract, however plain the right at law; if a specific performance would, for any reason, cause a result, harsh, inequitable or contrary to good conscience, the court should refuse such a decree and leave the parties to the remedies at law. In an equity proceeding, the complainant must do equity and can obtain only equity." *Kelley v. York Cliffs Improvement Co., supra.*

In *Griffin v. Nash,* 187 Ia. 345, it was said: "Specific performance of a contract is seldom a matter of right, and should not be granted in aid of a party seeking to enforce an unjust or an inequitable contract"—citing *Smith v. Shepherd,* 36 Ia. 253; *Auter v. Miller,* 18 Ia. 405.

This language is applicable to the case at bar; the decree of the lower court is right, and is

AFFIRMED.

EMIL R. TUTSCH, APPELLEE, V. OMAHA STRUCTURAL STEEL WORKS, APPELLANT.

FILED JUNE 27, 1923. No. 22464.

Negligence: QUESTION FOR JURY. Under the facts detailed in the opinion, the questions of negligence and contributory negligence were for the jury.

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

Switzler, Ringer, Switzler & Shackelford, for appellant.

Joseph T. Votava, contra.

Heard before LETTON, ROSE, DAY and ALDRICH, JJ., REDICK, District Judge.

REDICK, District Judge.

This is an action to recover damages to plaintiff's automobile, claimed to have been caused by negligence of defendant. Plaintiff alleges that, as he was driving west on the Lincoln Highway about 6:30 a. m., December 15, 1915, he was suddenly confronted with a ditch about ten feet wide across the road; that he was traveling at a moderate speed, and upon discovery of the ditch applied his brakes and turned the car to the left to avoid the ditch, and ran into and upon a pile of dirt on the south side of the road, thereby upsetting his car and damaging it in the sum of $679.60. Plaintiff further alleges that there were no lights or barriers to warn travelers of the existence of the ditch. Defendant answered with a general denial, and allegation of contributory negligence, which was denied by a reply. Verdict and judgment for plaintiff for $437.50 and interest, and defendant appeals.

The evidence fairly establishes these facts: Defendant was the contractor of the county constructing a bridge at the place in question. He dug a trench across the road for the purpose of putting in a concrete abutment, which had been placed, but the ditch, about ten feet wide and nine feet deep, had not been filled, the wooden forms not having been removed. In digging the trench the dirt had been thrown up to the south side of the traveled way and encroached thereon to an extent varying from a few inches to nearly half way across; the witnesses differing. The dirt pile extended lengthwise of the road about fifteen feet, and was four or five feet high and sloping down. The abutment was at the east end of the bridge and the ditch

east of the abutment. Around the bridge a temporary road had been provided connecting with the highway a short space east of the pile of dirt. The morning in question was very dark and a slight covering of snow was on the ground. A red lantern was hung upon a post near the east end of the pile of dirt and was burning as late as 3:20 a. m., but was not there at 6:30, and later was found in the ditch. There was no barricade across the road east of the ditch, but a plank had been laid across the bridge resting upon the ground at an angle of 45 degrees toward the west. Plaintiff approached the bridge driving a Jackson car at the rate of 8 to 12 miles an hour, brakes in good order, and presto-lights which illumined the road for 25 to 30 feet ahead. The car could be stopped in ten feet. He saw the ditch when about 15 to 20 feet from it, had observed the plank just previously, and took it to be the floor of the bridge about a foot higher than the roadway. Upon observing the ditch, and not having seen the pile of dirt, he immediately put on his brake and turned to the left to avoid running into the ditch, and the car upset, throwing the occupants to the ground, but without injury to them.

Defendant assigns error in the overruling of his motion for a directed verdict at close of plaintiff's evidence and at close of all the evidence on grounds (1) that no negligence of defendant was proved, (2) that plaintiff was guilty of more than slight contributory negligence.

As to the first point, we think the evidence sufficient to present a question for the jury whether defendant was negligent in not placing a barricade across the road east of the ditch. One witness testified to such barricade, but he was clearly mistaken. It is a debatable question whether a red light placed at the side of the road on the pile of dirt was a sufficient warning of the impassability of the road itself. It was a warning to keep to the right of the light, but had no tendency to give notice of defects beyond. A red light upon an obstruction at the side of

a road gives notice not to come there, but impliedly invites the traveler to proceed, having observed the caution. This is a very common experience which must be reckoned with by those called upon to exercise ordinary care in such situations. Plaintiff would have passed the pile of dirt safely had it not been for the ditch.

On the second point defendant contends that, inasmuch as plaintiff testified that he could stop his car in ten feet, and that he observed the ditch at 15 or 20 feet, as a matter of law he was guilty of more than slight negligence. The conclusion is not inevitable; it is unsafe to draw a final conclusion from two isolated facts. In determining whether or not plaintiff acted as a reasonably prudent man, there must be considered the surrounding conditions, such as the darkness of the morning, the uncertainties of artificial light, the suddenness with which the danger confronted him, the quality of the danger, the absence of the red light which might have better prepared him to meet the danger, etc. While defendant might not be responsible for the absence of the light, it was a circumstance to be noticed in measuring plaintiff's conduct.

It may be true that if plaintiff had not turned he could have stopped short of the ditch, but the question remains whether, being placed in the position by defendant's negligence, he exercised ordinary care in the emergency. If he did, defendant is liable, though it may appear that by pursuing a different course he would have escaped. With these considerations in mind, even if the red light had been there, we think it would be a fair question for the jury whether it was so placed as to give sufficient warning of the real danger ahead, and notwithstanding plaintiff testified on cross-examination that the light would have been a suitable warning for him to watch himself and he would not have run so close to the ditch. It would hardly be fair to hold plaintiff irrevocably to an opinion based upon a suppositious case.

We are asked to apply a hard and fast rule that, where a driver of an automobile is going at such a rate of speed

that he cannot stop within the distance that he can plainly see obstructions ahead of him, he is not using ordinary care, as approved in *Lauson v. Fon du Lac,* 141 Wis. 57; *Scott v. O'Leary,* 157 Ia. 222; *West Construction Co. v. White,* 130 Tenn. 520; *Solomon v. Duncan,* 194 Mo. App. 517; *Ebling v. Nielsen,* 109 Wash. 355; and *Knoxville R. & Light Co. v. Vangilder,* 132 Tenn. 487. All but two of those cases involved obstructions in plain sight upon the side of the road, and involved other considerations, such as excessive speed, inattention, etc. They follow the Wisconsin case, in which plaintiff had only one light tilted down and his car ran through and knocked down barriers across the road 24 feet from the ditch. The Iowa case was a head-on collision with a horse and buggy on the proper side of the road, and involved excessive speed and inattention. Those cases are clearly distinguishable. A driver may expect to find obstructions at the side of the road, but can hardly be called upon to anticipate an unguarded ditch across it. In the former cases the danger may generally be avoided by turning out, as was stated. The asserted analogy is imperfect.

Error is assigned for refusal of the court to give instruction asked by defendant to the effect that, if defendant placed the light using ordinary care, its duty was fulfilled, and it would not be liable for its removal without notice. This was sufficiently covered by instruction No. 4 given by the court, after stating the duty resting upon defendant, in these words: "On the contrary however, if you find by a preponderance of the evidence that the defendant had taken such precautions to warn the plaintiff and others attempting to use the roadway at the point in question of the danger of so doing, then the plaintiff cannot recover and your verdict should be for the defendant."

Error is assigned for refusal of the court to give request No. 4 of defendant, but as the only objections urged thereon relate to the alleged error in overruling defendant's motion for a directed verdict for want of proof

of negligence of defendant, and for more than slight negligence of plaintiff, and these questions having been disposed of, we do not deem it necessary to further consider this assignment.

Finding no error in the record, the judgment is

AFFIRMED.

J. P. HESS, TRUSTEE, PLAINTIFF, V. GEORGE C. ESELIN ET AL., APPELLEES: JACOB L. KALEY, APPELLANT.

FILED JUNE 27, 1923. No. 23308.

1. **Homestead:** CONVEYANCE. The homestead interest of a judgment debtor may be conveyed or incumbered to the full extent of $2,000, and the vendee will take the title free of the judgment.
2. ———: EXTINGUISHMENT. Where there is a mortgage for $5,000 upon realty subject to a homestead interest, and the owner executes a second mortgage thereon for $2,000, reciting that, "The purpose of this mortgage is to mortgage * * * all of his homestead rights," the homestead is thereby extinguished as against an intervening judgment lien, which attaches to any excess in value above the two mortgages.
3. ———: ———: SALE UNDER EXECUTION. The homestead interest having been extinguished, the sheriff was not required to take notice of a written claim of homestead, and a sale of the property on execution upon the judgment was valid, and the sheriff's deed in pursuance thereof passed all title and interest of the claimant to the purchaser.

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

J. L. Kaley and *John M. Macfarland,* for appellant.

Charles W. Haller, contra.

Heard before MORRISSEY, C. J., DAY and ALDRICH, JJ., COLBY and REDICK, District Judges.

REDICK, District Judge.

This action was brought by J. P. Hess, trustee, for the purpose of foreclosing a mortgage upon certain real estate, but the questions arising on this appeal are between two defendants, George C. Eselin and Jacob L. Kaley, as to whether or not the property in question, to

the extent provided by statute, constituted a homestead of Eselin, and therefore not subject to the lien of Kaley's judgment against him. For the purposes of convenience Eselin will be referred to as plaintiff and Kaley as defendant. The facts are practically undisputed and may be summarized as follows:

March 1, 1918, Eselin acquired the property in controversy, consisting of less than two city lots, by means of a contract of purchase, and moved into the premises with his family, consisting of a number of minor children, and has ever since occupied the same. There is a single building upon the premises, but consisting of four apartments, in one of which Eselin and his family reside. The entire building is supplied with only one water system and a central heating plant, and the property is worth about $8,000, less incumbrances. There is no evidence tending to show that it is feasible or practicable to separate the apartment occupied by Eselin and set it off as a homestead, and no effort has been made in that direction. July 30, 1919, Eselin married Emma Morgan, who on June 6, 1921, obtained a divorce from him, which did not become operative under the statute for a period of six months thereafter. The decree was filed June 10, 1921.

Prior to the October, 1919, term, Kaley sued Eselin in the district court for Douglas county on a $10,000 note, and at said term, and on January 9, 1920, recovered a judgment for $11,284.42. Eselin appealed to the supreme court without a supersedeas and the judgment was affirmed June 8, 1921. In the fall of 1920, pending appeal, in garnishment proceedings on the judgment, Eselin filed his claim for personal exemptions, stating therein, as required by law, that he owned no homestead, and the court allowed the personalty exemptions, the sum of $400 impounded being awarded claimant.

December 29, 1919, Eselin entered into a written contract of exchange with one Vizzard by which he agreed to convey the real estate in question to Vizzard, and

Vizzard agreed to convey to Eselin another piece of real estate in the city of Omaha. January 9, 1920, Eselin and wife executed and delivered to Vizzard their deed, which was recorded, it being understood between the parties that Eselin should remain in possession until Vizzard's deed to him was executed and delivered. In the meantime Vizzard took charge of the Eselin property, collected the rents and paid the expenses, but collected no rent from Eselin, but never executed a conveyance to Eselin, for the reason that the Kaley judgment rendered the same day but a little later than the delivery of Eselin's deed to Vizzard, by reason of the lien thereof relating to the first day of October term, constituted an apparent cloud upon Eselin's title and would so continue until the appeal was determined. The execution of the contract of exchange remained in abeyance under the conditions above stated until June 8, 1921, the date of the affirmance of the judgment, and on that date Vizzard rescinded the agreement, rendered a full accounting, and reconveyed to Eselin the property in controversy. On the same day Eselin executed and delivered a mortgage upon the property to the First National Bank for $2,000, reciting that he was a single man, and that "the purpose of this mortgage is to mortgage * * * all of his homestead rights and other rights in said premises."

Execution upon Kaley's judgment having been levied upon the property, upon June 6, 1921, Eselin served notice in writing upon the sheriff that he claimed the property as his homestead, but the sheriff disregarded the notice and sold the property to Kaley for $1,000. Eselin filed objections to the confirmation of the sale on the ground that the property was his homestead, and, the objections being overruled, appealed to this court, where the judgment confirming the sale was affirmed for the reason that the question of homestead could not be litigated upon the motion to confirm the sale, but holding that, notwithstanding such sale, Eselin had the right in a proper proceeding to litigate the homestead question,

which he seeks to do in this proceeding by way of answer to the cross-petition of Kaley filed in the foreclosure case. The district court entered a decree foreclosing the plaintiff's mortgage and a mortgage in favor of the First National Bank of Omaha, finding that Eselin was entitled to a homestead interest to the amount of $2,000 as against the Kaley judgment, but that, subject to the mortgages and said $2,000 homestead interest, the sheriff's deed to Kaley was valid, and Kaley appeals to this court. Eselin filed a request for stay, which Kaley moved to strike, and Kaley also appeals from the order overruling said motion.

It will therefore be noted that a single question is presented for determination, namely, whether or not Eselin is entitled to a homestead exemption in the property described as against the Kaley judgment, as in view of the conclusion we have reached it will not be necessary to consider the error assigned relating to the overruling of the motion to strike the request for a stay.

The moment Eselin entered into a contract for the purchase of the premises and took possession of a portion thereof and occupied it as a homestead for himself and family, the premises became impressed with a homestead interest to the extent of $2,000 of its value over and above incumbrances, and this interest subsists and will be protected unless the homestead has been conveyed in the manner required by statute or intentionally abandoned as such by the plaintiff.

It is first suggested that, by the contract with Vizzard and the conveyance to Vizzard by Eselin and wife, the homestead interest was extinguished. No doubt if that contract had been carried out the result would have been as claimed, and other necessary conditions being present the homestead interest would attach to the property received in exchange. This would not help Kaley, however, because, if Eselin had a homestead interest, he had a right to sell it to Vizzard free of defendant's judgment,

and within six months thereafter reinvest it in another homestead which would not be subject to sale under the judgment. Comp. St. 1922, sec. 2828. Until he acquired another homestead he was entitled to the existing one, never having completely abandoned it by giving up possession.

However, we think the transaction between Eselin and Vizzard must be looked upon as an unsuccessful and uncompleted attempt to transfer the homestead right, and that Eselin, never having given up possession, always retained a sufficient interest to support the claim of homestead, and that the reconveyance by Vizzard simply restored the situation as it was before the contract. In this view of the matter it is immaterial whether the attempt at a conveyance was before or after the incipiency of any lien arising from the judgment.

It is also contended that by the mortgage to the First National Bank, placed expressly upon the homestead interest and being executed subsequent to the judgment, such interest was extinguished and the judgment lien let in.

In December, 1919, Eselin, on his personal note, borrowed from the First National Bank $2,800 for the purpose of paying the remainder of the purchase price and obtaining a deed of the property in question, and the money was so applied; the loan was reduced by $800 through payments made by Vizzard on Eselin's account from the surplus revenue derived from rentals of the apartments, and when the Vizzard contract was rescinded and an accounting had, the mortgage for $2,000 was given as security for the balance due on the loan. It was dated June 8, two days after the decree of divorce was pronounced and two days before it was journalized, and this accounts for the recital that Eselin was a single man, though in law and in fact the decree was not effectual to sever the marriage tie until six months later, and Eselin attempted to defeat it on the ground that he was still married and the instrument, being upon the home-

stead and not signed by the wife, was void; but the lower court held the mortgage valid and that question is not presented by this appeal. The mortgage recited that it was upon the homestead interest, but the effect would have been no different if it had merely been for a loan without such recital; in either case it operated, as against the judgment lien, to secure to Eselin his full homestead exemption of $2,000. The property was sold under the Kaley judgment June 14, 1921, after the mortgage to the bank. The real question, therefore, to be decided is whether or not the sheriff's sale was void, and this depends upon whether or not Eselin had a homestead interest at the time. We held in *Kaley v. Eselin,* 108 Neb. 544:

"When an execution debtor has a valid right of homestead in real estate levied on and gives the sheriff, holding the execution, the statutory notice of his claim of homestead therein, a subsequent sale of said property without compliance with the provisions of chapter 29, Rev. St. 1913, is void; but, as the statute provides no method of determining the validity of such claim of homestead, when the same is disputed, the question should be determined in a proper action upon issues regularly joined, and unless and until such disputed right is so determined such sale will not be held to be invalid."

Let us see, then, how the matter stands. Prior to the giving of the mortgage to the bank, Kaley's judgment was a lien upon any excess of value in the property over and above the $5,000 mortgage and the $2,000 homestead exemption, and if the sale had been made prior to the giving of the mortgage we would be compelled to hold it void, because, as we have seen, notwithstanding the Vizzard transaction, Eselin had a homestead interest in the property to the extent of $2,000. This interest he might sell or mortgage and Kaley would have no cause to complain; but he would have no right to increase liens upon the property, after the lien of the judgment attached,

beyond what they were at that time, plus the homestead interest. But what was his position after having given the mortgage for $2,000? He had loaded the property to the full extent he might lawfully do as against the Kaley judgment. He had, by the mortgage, in effect conveyed his homestead right in the premises to the bank and had nothing left as against the judgment. The mortgage to the bank may have been void, not having been signed by the wife, but the decree found it a valid lien, and as no error is assigned in this respect the finding of the validity of the mortgage has become the law of the case and cannot be disturbed. But Kaley is not thereby placed in any worse position, because his lien was only upon the excess over and above the mortgage and homestead exemption; in fact, his position is improved because, the mortgage having extinguished the homestead right, the sheriff's sale under which he claims escapes being held void.

We are of the opinion that at the time of the sheriff's sale, Eselin had no homestead right in the property, and that thereby Kaley has succeeded to all the right and title of Eselin therein. The effect of the decree is to preserve and secure to Eselin all the protection to which he is entitled under the homestead laws. The judgment creditor is in the same position he would have been in had the mortgage not been given, except the point as to the validity of the sale; the mortgage simply taking the place of the homestead interest. The writer is not clear whether it is contended that Eselin is entitled to a homestead interest over and beyond the bank's mortgage, but such contention would be clearly untenable, for the reason that it would increase the liens upon and interests in the property prior to the judgment to the sum of $9,000 and thus put the creditor, after his lien had attached, by the act of the debtor alone, in a worse position than he occupied before the giving of the mortgage. *Beach v. Reed*, 55 Neb. 605.

Notwithstanding some diversity of opinion between this and the district court as to some of the legal questions involved, we think the result reached by the decree of the lower court is correct and it should be affirmed.

AFFIRMED.

SIOUX CITY BRIDGE COMPANY, APPELLANT, V. DAKOTA COUNTY, APPELLEE.

FILED JULY 9, 1923. No. 21252.

1. **Decisions Overruled.** Following the decision of the supreme court of the United States in *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, principles of law announced in the third paragraph of the syllabus of this same case in 105 Neb. 843, and in *Lincoln Telephone & Telegraph Co. v. Johnson County*, 102 Neb. 254, are overruled.
2. **Appeal:** ERRONEOUS THEORY OF LAW. Where it appears that in the district court an equity case was tried on the wrong theory of the law, this court, in the exercise of its discretion and in the interest of justce, may remand the case with permission to introduce further evidence based upon the proper theory of the law.

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

Jesse L. Root and *Wymer Dressler*, for appellant.

George W. Leamer and *Gaines, Van Orsdel & Gaines, contra.*

Heard before LETTON, ROSE, ALDRICH, and DAY, JJ., REDICK, District Judge.

PER CURIAM.

The assessor of Dakota county, for the year 1918, fixed the actual value of the Sioux City Bridge Company's bridge, or that part of it assessable in Nebraska, at $600,000. On appeal by the bridge company to the board of equalization, on complaint that the assessment was excessive, the value was increased to $700,000. Thereupon the bridge company took an appeal to the district court, where

upon a trial a judgment was entered affirming the findings of the board of equalization. On appeal by the bridge company to this court, the judgment of the district court was affirmed, our opinion being found in 105 Neb. 843, where the facts upon which the opinion is based are fully set forth. Upon the trial in the district court, as well as on the appeal in this court, two main grounds were presented by the bridge company for a substantial reduction of the value of its property as found by the assessor: First, that the valuation placed upon the bridge company's property was excessive; and, second, that the valuation placed on the property was inequitable and not in proportion to the value placed upon other property in the district; that the value of the bridge property was fixed at more than 100 per cent. of its true value, while the value of other property in the district was fixed at 55 per cent. of its true value; that by so doing the bridge company has been deprived of due process and equal protection of the law as forbidden by the Fourteenth amendment to the Constitution of the United States. In our former opinion we reviewed the facts bearing upon the question of the value of the bridge, and came to the conclusion that the findings of the board of equalization on that issue were not so manifestly wrong as to warrant the court in disturbing them. With reference to the objection that the other property in the district was undervalued, which resulted in an unlawful discrimination against the bridge company, we said:

"It is finally urged that this court should reduce the true value of the bridge as found by the court to 55 per cent. of such value, for the reason that other property in the district is assessed at 55 per cent. of its true value, and that it would be manifestly unjust to appellant to assess its property at its true value while other property in the district is assessed at 55 per cent. of its value. While undoubtedly the law contemplates that there should be equality in taxation, we are of the view that the

plan of equalization proposed by appellant is not the proper remedy. The rule is now settled by a recent decision of this court that when property is assessed at its true value, and other property in the district is assessed below its true value, the proper remedy is to have the property assessed below its true value raised, rather than to have property assessed at its true value reduced. *Lincoln Telephone & Telegraph Company v. Johnson County,* 102 Neb. 254. In the argument of appellant the soundness of this ruling is assailed, and authorities in other jurisdictions are cited which seem at variance with our holding. We are not willing, however, to recede from the rule of that case."

The case was then taken on a writ of certiorari to the supreme court of the United States, where our judgment is reviewed. *Sioux City Bridge Co. v. Dakota County,* 260 U. S. 441. The opinion in that case is apparently satisfied with our conclusions on the question of the value of the bridge company's property.

In discussing the question raised by the bridge company that there had been an unlawful and intentional discrimination against it, by an undervaluation of other property in the district, the United States supreme court, after quoting from our opinion the matter above quoted, and citing authorities, said:

"The charge made by the bridge company in this case was that the state, through its duly constituted agents, to wit, the county assessor and the county board of equalization, improperly executed the Constitution and taxing laws of the state, and intentionally and arbitrarily assessed the bridge company's property at 100 per cent. of its true value, and all the other real estate and its improvements in the county at 55 per cent.

"The supreme court does not make it clear whether it thinks the discrimination charged was proved or not, but, assuming the discrimination, it holds 'that the bridge company has no remedy except 'to have the property as-

sessed below its true value raised, rather than to have property assessed at its true value reduced.' The dilemma presented by a case where one or a few of a class of taxpayers are assessed at 100 per cent. of the value of their property, in accord with a constitutional or statutory requirement, and the rest of the class are intentionally assessed at a much lower percentage, in violation of the law, has been often dealt with by courts, and there has been a conflict of view as to what should be done."

The supreme court then say: "This court holds that the right of the taxpayer whose property alone is taxed at 100 per cent. of its true value is to have his assessment reduced to the percentage of that value at which others are taxed, even though this is a departure from the requirement of statute."

That court then say: "But we construe the action of the court (Nebraska supreme court) not to be equivalent to a finding that such intentional discrimination existed between the valuation of the bridge company's property and that of all other real property and improvements in the county, but rather a ruling that, even if it did exist, the bridge company must continue to pay taxes on a full 100 per cent. valuation of its property."

The United States supreme court has correctly interpreted our decision. Our theory was that the bridge company should have made complaint before the board of equalization of the inequality of valuation between its property and other property in the district, and asked that other property be raised. It was on this same principle, no doubt, that the district court failed to pass upon the issue of discrimination.

The supreme court then say: "It is therefore just that, upon reversal, we should remand the case for a further hearing upon the issue of discrimination, inviting attention to the well-established rule in the decisions of this court, cited above, that mere errors of judgment do not support a claim of discrimination, but that there must be something more, something which, in effect, amounts to

an intentional violation of the essential principle of practical uniformity."

We have been asked by both sides to pass upon the issue of discrimination on the record before us.

It was evidently the theory of the trial court that testimony on the issue of discrimination was immaterial under our former ruling in *Lincoln Telephone & Telegraph Co. v. Johnson County,* 102 Neb. 254. The bridge company undertook to establish its claim of undervaluation of other property by introducing testimony based upon an examination of the deed record in Dakota county. The consideration named in certain deeds was taken as indicative of the value of the real estate. The assessed value of the same property was then taken, and from a large number of such comparisons a percentage was worked out which indicated to the mind of the witness that the real estate in the county was assessed at 55.70 per cent. of its value. The witness admitted that in making his calculations he did not take into consideration all of the deeds, but only those which in his judgment presented a reasonable proportion between the consideration named and the assessed value. While this method, no doubt, is entitled to probative force, it is manifest that it is not conclusive and is subject to many imperfections. It is a matter of common knowledge that many sales are based on trades in which the consideration is inflated. The true test in all cases is to arrive at the fair value of the property.

On the issue of discrimination in the district court, the defendant obviously relied on the doctrine previously announced by this court in *Lincoln Telephone & Telegraph Co. v. Johnson County,* 102 Neb. 254, to the effect that the relief sought by the bridge company required the raising of the value of other property, rather than the reduction of the value of the bridge company's property. The trial court evidently so held, and in that view of the law the defendant in meeting the issue did not go extensively into proof of the value of specific property upon

which the bridge company relied to form the basis of its calculations tending to show discrimination.

Under the different rule announced by the supreme court of the United States, it seems just that the defendant county and the taxpayers generally should have an opportunity to offer further testimony.

While it might be inconvenient, it is not impossible to prove the value of any particular piece of property by calling witnesses who are competent to testify on that question. The assessor did testify that it was his aim and purpose to place fair value upon all of the property. With reference to a few instances named by the witness for the bridge company where the assessment was about one-half of the consideration named in the deed, the assessor gave good reason for the apparent discrepancy, stating in one instance that the land had been washed away by the river.

Without going into detail, we have concluded that, in the interest of justice, the case should be remanded to the district court for a retrial upon the issue of discrimination.

REMANDED FOR FURTHER PROCEEDINGS.

ALEXANDER M. HUGO, APPELLANT, V. WILLIAM M. ERICKSON, APPELLEE.

FILED JULY 9, 1923. No. 22391.

Vendor and Purchaser: CONTRACT: REFORMATION. Where the owner of a city lot, on which is situated a house designated in the business directories of the city under a certain number, exhibits the property to a prospective purchaser in such a way as to leave in the mind of the latter the firm conviction that the entire lot is offered to him to purchase, and the parties enter into a memorandum agreement wherein the property is designated by the number it bears in the directories, and a payment is made on the purchase price by the purchaser and accepted by the seller, a court of equity will reform a more formal contract subsequently signed by the parties wherein only a portion of the lot is covered by the contract, when it appears that the purchaser signed the formal contract believing that it covered the entire tract shown him by the seller, and that he

would not have entered into the contract except for the deception practiced by the seller.

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

Bigelow, Peterson & La Violette, for appellant.

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

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

MORRISSEY, C. J.

This is an action in equity to reform a contract. From a decree denying the relief prayed, plaintiff has appealed.

Defendant was the owner of two adjoining lots, numbered 21 and 22, each 50 feet wide and 130 feet long, in the city of Omaha. Lot 21, which is involved in this suit, was known as 4005 Charles street, and lot 22 was known as 4001 Charles street. Lot 21 had a frontage of 50 feet on Charles street, and lot 22 had a frontage of 50 feet on Charles street and 130 feet on Lowe avenue. The lots fronted the north. An alley extended the full length of the block running from east to west and the lots extended from Charles street to the alley. There was a house on each lot.

May 17, 1920, defendant listed for sale with a real estate firm the property designated as 4005 Charles street, at the price of $4,500. On the "listing form" the dimensions of the lot were given as 50 feet by 90 feet. The lot is also shown to abut upon an alley. Much other detail was set out which is not of consequence here. The property was immediately advertised for sale by the real estate firm.

Plaintiff was on intimate terms with a family named Crozier, and a tentative agreement had been reached between plaintiff and Mr. and Mrs. Crozier that plaintiff should purchase a residence, Mr. and Mrs. Crozier occupy it, and plaintiff makes his home with them. Mrs. Crozier telephoned to the real estate firm for information in regard to the property. She was advised to call upon

defendant, who lived at 4001 Charles street, and was assured that he would show the property. Following this direction plaintiff, together with Mr. and Mrs. Crozier, went to defendant's home, where they found him eating his evening meal. He directed them to go to the house at 4005 Charles street, saying that the tenant would permit its inspection. They immediately did as directed. When their inspection of the interior of the house was completed they were joined by defendant, who accompanied them on an inspection of the lot.

There is but slight conflict in the testimony as to where they went and as to the conversation that occurred. Plaintiff and Mr. Crozier walked to the rear of the lot. According to the testimony of Mrs. Crozier, she and defendant walked to an apple tree which is located 32 feet north of the alley. According to the testimony of defendant, they stopped a few feet north of this tree and approximately 16 feet south of the house. Some discussion was had as to trees growing upon the lot and as to a tree growing on the line between lot 21 and lot 22. Plaintiff and his witnesses testified that in the presence and hearing of defendant they discussed the erection of a garage on the end of the lot abutting upon the alley and the necessity for opening a gate to permit ingress and egress. Defendant denies that he heard any discussion relative to a garage or a gate. Mrs. Crozier testifies, also, that, inasmuch as she was to make the place her home, she was greatly interested in the lot, and that in her conversation with defendant she commented upon its ample size. Plaintiff and Mr. and Mrs. Crozier expressed their approval of the premises, and the defendant informed them that the contract of purchase and sale must be made with the real estate firm. Plaintiff went to the office of the real estate firm and signed a memorandum agreement whereby he agreed to purchase at the price fixed by the owner in the listing contract the "property known as 4005, Charles street, Omaha, Nebraska." Ten dollars was paid on the

purchase price, and it was agreed that $190 should be paid the following day, and $800 more was to be paid within five days, if the abstract of title was found to show a merchantable title in the owner; and provisos were inserted covering the balance of the purchase price. Plaintiff made the payment of the amount falling due the following day, and in due season there was delivered to him an abstract of title which upon its caption page in bold lettering purported to show an abstract to "Lot 21, block 3, size of lot 50 ft. x 130 ft." Underneath this caption is a plat of 18 blocks for Orchard Hill addition to Omaha. This plat shows lot 21, block 3, to be 50 feet wide and 130 feet long and extending from Charles street to the alley, and the entire lot is shown in red; all other lots and parts of lots being in white. The cover of the abstract, however, contains the caption "Abstract of Title to North 85 feet of Lot 21, Block 3, Orchard Hill." It consists of 25 pages, some of which are written in longhand on both sides of the paper; some are in typewriting.

This abstract, however, does not cover all of lot 21 as shown by the caption page, but covers only the north 85 feet of the lot. Plaintiff, without noticing the description on the cover of the abstract, and believing that it covered all the ground he had inspected, sent the same to his attorney for examination. June 2 the attorney returned the abstract to plaintiff, pointing out certain defects in, or clouds upon the title, and these matters were satisfactorily arranged by the real estate agents. In addition to the contract heretofore mentioned, there is also found in the record a paper marked exhibit 5, which is long and intricate, bearing date May 26, 1920, and in this the property is described as the north 85 feet of lot 21, in block 3. Another paper marked exhibit 6, and designated "Agreement," appears to be a contract between the same parties for the purchase and sale of this property, and therein it is likewise described as the north 85 feet of lot 21, and block 3. There is some dis-

pute as to the dates when these papers were signed, but the dates are not material. It is the contention of plaintiff that the contract signed May 20, when the first payment was made, is the real contract between the parties, and that the court should so hold and direct the conveyance of the entire lot to plaintiff, or if the subsequent papers signed, or either of them, is held to be the contract between the parties, that it should be so reformed as to include all of lot 21.

Plaintiff went into possession of the premises about July 1, 1920, believing that he was the owner of the entire lot. His tenants, Mr. and Mrs. Crozier, soon thereafter, in conversations had with neighbors, learned that defendant claimed the title to the south 45 feet. Plaintiff at once took steps to assert his right to all the property, and this suit followed. To our minds the conduct of defendant as shown by his own evidence should control the finding. He nowhere contradicts or questions the testimony of plaintiff and his two witnesses, except only on the immaterial matter as to the exact point where he stood while showing the lot. According to the testimony for plaintiff, defendant went upon the 45-foot tract that is in dispute, and stood under an apple tree growing thereon while plaintiff and his friends were inspecting the premises. According to defendant's testimony he walked to a point which, if this decree is upheld, is approximately the dividing line between the property sold and the property retained. He was asked if his stopping at this point had "anything to do with the fact that you were only seeking to sell 85 or 90 feet?" He answered: "I don't think so." When pressed as to whether he mentioned to these parties that he was selling less than the whole lot, he replied: "I didn't need to say anything." To the question, "And when they went back to the alley you suggested nothing as to how far the lot ran back?" he answered: "Didn't say anything about it." Further on in his examination he gave the following testimony: "Q. Did you remember at the time

that you were showing this property that you had listed 50 by 90 feet? A. Yes; I knew I had. Q. Why didn't you tell them that when they were in the back yard? A. Well, I don't know why I didn't, because I decided afterwards I had made a mistake on it. Q. When was that? A. I decided afterwards that I had made a mistake on that 90 feet, I had fixed out the boundaries over there so they would run right through and make a jog of 5 feet. Q. Well, assuming that you would only show 85, as you did in the contract, finally, why didn't you tell them in the back yard about that, when they were talking back in the yard? A. I don't know why I didn't."

Defendant saw plaintiff make the inspection of the entire lot; knew he was contracting with reference to the whole and not for a part only. Defendant stood mute when it was his duty to speak the truth, and thus he perpetrated a fraud against which a court of equity will grant relief.

It is not material which one of the papers signed is held to be the real contract. The whole transaction is before the court. The conclusion is irresistible that plaintiff by the conduct of defendant was led to believe, and did believe, that the papers and contracts signed called for the entire plot of ground shown him by defendant, and he is entitled to his bargain.

The judgment of the district court is reversed and the cause remanded, with directions to the district court to enter a decree reforming the contract as prayed in the plaintiff's petition.

REVERSED.

LARS LINDSTROM, APPELLEE, V. JOHN BEACOM ET AL., APPELLANTS.

FILED JULY 9, 1923. No. 22488.

1. **Bills and Notes:** PAYMENT: BURDEN OF PROOF. "If the maker elects to pay a negotiable promissory note to one who cannot and does not produce the note, by so doing he assumes the burden of showing that the party to whom he paid it was the owner of the

note, or was authorized by the owner to receive the money for him." *Coddington Savings Bank v. Anderson,* 64 Neb. 205.

2. *Peterson v. Kuhn, ante,* p. 372, followed.

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

Horth & Ryan, for appellants.

Hainer, Craft, Edgerton & Fraizer, contra.

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

LETTON, J.

This is an action to foreclose a mortgage upon certain real estate in Hamilton county. The defendant, Beacom, procured a loan from W. C. Wentz Company of Aurora, loan brokers. He executed a note to that company as payee and a mortgage upon the property involved to secure the payment of the same. Before maturity of the note the plaintiff, Lindstrom, who is a retired farmer 80 years old, living in Aurora, purchased the note of the Wentz Company with money derived from the sale of a piece of property he owned, and the note, interest coupons and assignment of mortgage were delivered to him. The mortgage was at that time in the county clerk's office for the purpose of being recorded, but he received it about a week later. He took these papers to the Fidelity Bank, where he did his banking, and where he had a safety deposit box, and placed them in the box. They remained there until after the W. C. Wentz Company went into the hands of a receiver. The assignment of mortgage was not recorded until after this occurred. The plaintiff had done no business with the Wentz Company before this, except to renew an insurance policy upon some property which he had purchased. When he bought the note, Mr. Wentz told him he would cash the coupons. Two of the three coupons were paid to him at the office of the Wentz Company by that company. Another coupon the Fidelity Bank cashed for him. He never notified defendant that he owned the note and

mortgage. Plaintiff had never bought from or sold property to the Wentz Company, and had no business transactions with them prior to this, except the renewal of the insurance policy mentioned. The Wentz Company never had the notes or mortgage in their possession after delivery to plaintiff, except that the coupons were surrendered to them when they paid plaintiff the amounts due upon them.

Defendant paid one interest coupon, and the note for the principal, before it became due, to the Wentz Company without receiving the note or the coupon. He now contends that the Wentz Company had ostensible, implied and apparent authority to collect the same, and was in fact the agent of plaintiff at that time for the collection of the debt and interest, and that this was sufficient to satisfy the mortgage.

The same contentions were made in the case of *Peterson v. Kuhn, ante,* p. 372. The facts in that case are very similar to the facts in this case. There was just as much reason for the contention in that case that the Wentz Company had ostensible authority to collect the principal and interest as there is in this case. The legal points involved are considered in the opinion in the *Peterson* case, and no good purpose can be subserved by a repetition of the discussion.

AFFIRMED.

ROBERT HAYES ET AL., APPELLEES, V. CHARLES PILGER ET AL., APPELLANTS.

FILED JULY 9, 1923. No. 23087.

1. **Habeas Corpus:** RELEASE: FEDERAL PRISONERS. As a general rule, state judges and state courts have no right to release a party on habeas corpus if it appears upon the application that he is confined under the authority, or claim and color of the authority, of the United States, by an officer of that government.
2. ———: ———: JURISDICTION. The jurisdiction in such a case rests with the courts of the United States, and not with the courts of the state.

3. **Criminal Law:** PRISONERS: UNLAWFUL DETENTION. Unexplained delay in filing a complaint and having a warrant issued for about 36 hours after the petitioners were arrested, without warrant, or complaint, and incarcerated in jail on a charge of violation of the national prohibition law, is unreasonable, oppressive, and unlawful.

4. **Habeas Corpus:** RELEASE: UNLAWFUL DELAY. Under such circumstances, the authority to detain in custody without a warrant ceases, even on the part of those asserting themselves to be officers of the United States, and a state court has the right to discharge persons so unlawfully held without warrant or complaint.

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

James C. Kinsler and *Don W. Stewart,* for appellants.

Webb Rice, contra.

Heard before MORRISSEY, C. J., LETTON and ALDRICH, JJ., BLACKLEDGE and COLBY, District Judges.

LETTON, J.

Petition for a writ of habeas corpus; the petitioners were discharged; respondents appeal.

The proceeding was brought against Charles Pilger, chief of police of Norfolk, Nebraska, who has charge of the city jail, and three other defendants. It is alleged, in substance, that the latter three defendants "claimed to be police officers of the United States," commonly known as "booze hounds;" that the petitioners were arrested in Tilden, Antelope county, Nebraska, on July 5, and placed in the custody of Pilger at the jail in Norfolk, Madison county, on July 6; that no charge of any kind has been filed, or is pending against them in any court, or before any magistrate, or federal commissioner; that no warrant has been issued, and that they are detained at the caprice of the defendant; that they have been denied any right to consult an attorney, or to give bail; and that no charges will be filed until a representative of the federal district attorney arrives upon July 8; and that the imprisonment is unlawful.

The return alleges that the defendants, except de-

fendant Pilger, are "general prohibition agents of the United States of America;" that the applicants were arrested without a warrant, and that complaints were filed about 2:30 p. m. on July 7, and warrants issued.

The court found: "That the petitioners Brittell and Wendt were arrested and taken into custody by the defendants McMillan, Whitney and Gibson in the town of Tilden, Nebraska, at about the hour of 10:30 o'clock p. m. on the 5th day of July, 1922; that the petitioners Hayes and Casey were arrested and taken into custody by the said defendants at about the hour of 1:30 o'clock a. m. on the 6th day of July, 1922; and that said arrests were made by said defendants without any warrant or other process, and without any complaint having been filed before any magistrate or in any court, and without any charge or purported charge having been filed with any officer; but the said defendants claim that the petitioners Hayes and Casey were taken in the act of violating the national prohibition laws, and that the petitioners Wendt and Brittell were claimed by defendants to have violated the national prohibition laws.

"The court further finds that following said arrests the said defendants transported said petitioners to the city of Norfolk at about the hour of 4:00 o'clock a. m. on the 6th day of July, 1922, and placed said petitioners in the city jail of the city of Norfolk, and in the custody of Charles Pilger, who is chief of police and *ex officio* jailer of said city.

"The court further finds that said petitioners were imprisoned in said jail all of the 6th day of July, 1922, without any charge having been filed before any magistrate, and were further imprisoned without any charge having been filed against them until about the hour of 2:30 o'clock p. m. on the 7th day of July, 1922, and that no warrant or other process was served on the said petitioners during any of the times herein stated.

"The court finds that the imprisonment and detention of said petitioners for said time without process or any

charge filed against them was and is wrong and unlawful, and that said petitioners and each of them are entitled to be discharged upon their petition in habeas corpus.

"It is therefore ordered and adjudged that the petitioners be, and they hereby are, discharged, at the defendants' costs."

It is not clear whether any evidence was adduced other than what purports to be a stipulation of facts made at the trial. This is attached to the transcript, but was not settled and allowed as a bill of exceptions and is not a part of the record, and cannot be considered. *Backes v. Schlick,* 82 Neb. 289. We can only determine whether the pleadings support the judgment.

The contention of the United States district attorney on this appeal is that a state court has no authority to discharge in habeas corpus proceedings a prisoner held under the authority, or claim, or color of authority of the United States. Reliance is placed on *Ableman v. Booth,* 62 U. S. 506, and *Tarble's Case,* 80 U. S. 397, 409. In the first case the prisoner was held under complaint and warrant. In the latter the relator had been enlisted in the military service of the United States, and was held under claim and color of authority of the United States by a military officer of the government. It was held that the courts or judicial officers of the United States alone had authority to release the petitioner. It is said in *Tarble's Case*:

"State judges and state courts, authorized by laws of their states to issue writs of habeas corpus, have undoubtedly a right to issue the writ in any case where a party is alleged to be illegally confined within their limits, unless it appear upon his application that he is confined under the authority, or claim and color of the authority, of the United States, by an officer of that government. If such fact appear upon the application, the writ should be refused. If it do not appear, the judge or court issuing the writ has a right to inquire into the cause of imprisonment, and ascertain by what

authority the person is held within the limits of the state; and it is the duty of the marshal, or other officer having the custody of the prisoner, to give, by a proper return, information in this respect. His return should be sufficient, in its detail of facts, to show distinctly that the imprisonment is under the authority, or claim and color of the authority, of the United States, and to exclude the suspicion of imposition or oppression on his part. And the process or orders, under which the prisoner is held, should be produced with the return and submitted to inspection, in order that the court or judge issuing the writ may see that the prisoner is held by the officer in good faith, under the authority, or claim and color of the authority, of the United States, and not under the mere pretence of having such authority."

There is no finding that the respondents are officers of the United States; but, assuming them to be such, the circumstances in the present case do not "exclude the suspicion of imposition or oppression" at the hands of officers of the United States. There are no facts shown which excuse or palliate the delay in filing complaints and procuring the issuance of warrants, within a reasonable time. It is clear that an unexplained delay of more than 36 hours after arrest before filing a complaint is unreasonable and oppressive, where the arrested person is confined in jail nearly all of this time. There is no proof that any one of the petitioners was in the act of violating the prohibition law, or that he had violated this law before his arrest. More than a reasonable time had elapsed after the arrest within which to file a complaint and procure the issuance of a warrant, the detention was unlawful thereafter, and petitioners were entitled to discharge.

AFFIRMED.

ADOLPH GOLDMARK & SONS, APPELLEE, V. SIMON BROTHERS COMPANY, APPELLANT.

FILED JULY 9, 1923. No. 22388.

1. **Sales:** NONACCEPTANCE: RESALE: In the resale of goods which the consignee unreasonably refuses to accept, the manner of sale is within the reasonable discretion of the seller, and when made in good faith and so as to produce a fair price for the goods, the consignor cannot ordinarily be charged with negligence.
2. ———: INSTRUCTION: "MERCHANTABILITY." The court submitted the following instruction: "The term 'merchantability' does not require that the article shall be of first quality, but means that the article shall be vendible upon the market in the ordinary course of business and at the average price of such article, having in view the kind of article referred to in the contract." The instruction conforms in all essential respects to the accepted rule as applied to the term used. Error cannot be predicated upon the fact that the jury were so instructed.

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

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

Kennedy, Holland, De Lacy & McLaughlin, contra.

Heard before MORRISSEY, C. J., LETTON and DEAN, JJ., BLACKLEDGE and COLBY, District Judges.

DEAN, J.

Plaintiff sold to defendant for delivery at Omaha a car-load of Madagascar Lima beans, consisting of 40,000 pounds, at 12½ cents a pound f. o. b. New York. Upon arrival of the shipment, defendant, alleging that the beans were inferior to the quality which plaintiff contracted to deliver, refused acceptance. Thereupon plaintiff, as alleged, "in order to mitigate the damages, retook possession of the car and, after due notice to defendant," sold the shipment in small lots. The net receipts were $1,927.31, after deducting $573.28 for expenses which it was alleged were necessarily incident to the resale. The net proceeds were applied to defendant's credit and this action was brought to recover $2,666.69 with interest at

7 per cent. from January 1, 1920, that being the balance alleged to be due plaintiff at the contract price. A verdict was returned for plaintiff for $2,666.69 and $255.63 interest. After disallowing a few expense items, the court ordered that the verdict be reduced to $2,854.09, and rendered judgment in that amount for plaintiff. Defendant appeals.

The material part of the contract entered into by the parties follows:

"Contract for Madagascar Lima beans. New York, Oct. 11, 1919. Sold by Adolph Goldmark & Sons, Inc., to Simon Brothers Co., Omaha, Neb.

"Quantity, Article and Description. Forty-thousand (40,000) pounds of Madagascar Lima beans, fair average quality, current crop, packed in bags of about 80 to 110 pounds each, seller's option.

"Shipment or Delivery. October November shipment from Europe, or equivalent delivery. No arrival no sale.

"Price and Terms. Twelve and one half (12½) cents per lb., duty paid, f. o. b. New York, New York weights, gross for net. Net cash, sight draft against B. L. Privilege inspection upon arrival. * * * Accepted, Adolph Goldmark & Sons, Inc."

Ralph W. Goldmark is the president of plaintiff corporation, its legal residence being in New York City. He testified that the words "privilege inspection upon arrival" were inserted in the contract upon the request of Mr. W. J. Simon who signed for defendant, and that they have a well-recognized meaning in the bean trade, which in effect is that the buyer has the privilege of examining the merchandise upon arrival to satisfy himself that the goods are in accordance with the contract of sale, and if they do conform thereto the buyer is obligated to accept the goods. The secretary of the plaintiff corporation testified that his firm had dealt in and he had examined Madagascar Lima beans since 1913, and that the quality of the samples in question

was equal, if not superior, to the fair average quality of Madagascar Lima beans of the current 1919 crop.

Additional evidence was submitted by the parties on the question of quality and as to whether the shipment was merchantable. Three grain inspectors in the employ of the Omaha Grain Exchange took 50 samples of the beans at random out of the car January 2, 1920. For examination and report they gave one third of each sample to the Kohn Brothers Brokerage Company, of Omaha, and took the remainder to the Grain Exchange office, and sent about one third of the remaining samples to the New York Dried Fruit Association, where they were examined by a committee consisting of three disinterested members, appointed by the president, who were familiar with the trade. The evidence of one member of the committee was in substance that the samples were equal, if not superior, "to the fair average quality of Madagascar Lima beans of the crop which was current in October, 1919." The report of another was in effect that the beans were fully equal to, if not better than, the fair average quality of the 1919 crop, and, in the opinion of the third member, the sample was one of the best of the lots of the 1919 crop and above its fair average quality.

W. S. Frisbie, chief of the bureau of food products of Nebraska, testified that he made an examination from samples sent to the bureau for inspection and analysis, and that a laboratory chemist made an official inspection which he, the witness, saw, but that he did not make a record of his findings. He testified: "Q. Now, what would you say as to the percentage of infestation shown here, 6 and a fraction per cent., as an unusual amount of infestation for beans gathered from the field without being hand-picked? A. I wouldn't class that percentage as unusual. * * * Q. What per cent. of beans are usual to be infested as they come out of the field, do you know that? A. Why, yes; 5 per cent., anywhere around 5 or 6 per cent. is not at all unusual," and that

"there are some so called picked beans which will run that high." It appears that his evidence was based, not only upon his own experience, "but upon the past experience of the bureau of chemistry of the United States department of agriculture," that department having examined thousands of cases.

On the part of defendant Mr. Jake Simon, who is its general manager, testifed on the question of quality. He said that some of the bags "turned up as high as 20 to 25 per cent. bad," or what he would call worm infested; that he found no worms, but found beans with worm holes in them; that he "took a pile here, a pile there, and kind of estimated the piles of beans there were that was bad," and estimated that from 10 to 12 per cent. were bad, and that a blemished bean is one with a spot on it. He said he knew that in some years Madagascar Lima beans "run damaged."

A witness who was in defendant's employ when the consignment arrived testified that under Mr. Simon's direction he tested 15 or 20 bags and found no worms, but that he found "wormy" beans among them, but had no opinion as to the general condition of the shipment.

Some evidence was introduced on the part of defendant tending to prove that the beans were not merchantable, and that beans which showed that 6 11/12 per cent. were damaged could not be sold in the usual course of trade in Omaha except at a reduced price. The attention, however, of a witness on the part of defendant was directed to certain named grocery houses in Omaha, Sioux City, and Beatrice, to which considerable quantities of the shipment were sold, and he testified that they were reputable grocers and that they sold to a good class of trade. There was also evidence offered by defendant tending to prove that plaintiff, as an inducement to the contract, represented that the beans were equal to and larger than California beans;

but this was denied by plaintiff. This, among others, was a question of fact for the jury.

Defendant contends that the resales were not made within a reasonable time and that due diligence was not exercised to procure the best prices obtainable. Mr. H. L. Scott is a member of the Kohn Brokerage Company, and as such had charge of the resale of the shipment and his evidence was submitted to the jury. From this it appears that he made repeated sales in June, July, and August, 1920, to one of the leading grocery firms in Omaha, aggregating 9,488 pounds at 9 cents a pound, and that he sold quantities to grocers in Sioux City, Beatrice, Crawford, Deadwood, South Dakota, Pipestone, Minnesota, and to other concerns elsewhere, and that the purchasers were all reputable dealers selling to a good class of trade. With respect to the standing of the purchasers he was corroborated by other witnesses, at least one of whom appeared on the part of defendant. As tending to show diligence, the witness testified that he circularized the trade at considerable expense.

It appears that for the beans sold from June to August, inclusive, 9 cents a pound was realized, but in September the sale price was only 7 cents and 7½ cents, and finally the price fell to 4¼ cents on the last sales. He said that the market depression was caused in part by competition with the California product. Mr. Scott also testified concerning other sales, and a conditional offer from Chicago, at 10 cents for the entire lot, less freight, which, under the circumstances, plaintiff was apparently justified in rejecting. Anyhow, it was not a question of law for the court, but was a question of fact for the jury. From all the evidence we conclude that, in respect of making sales and obtaining as good prices as the circumstances of a falling market permitted, and with respect to the standing of the purchasers, the jury were justified in finding that plaintiff exercised reasonable diligence.

The rule is that, in the resale of goods which the consignee unreasonably refuses to accept, the manner of sale is within the reasonable discretion of the seller, and when made in good faith and so as to produce a fair price for the goods, the consignor cannot ordinarily be charged with negligence. 35 Cyc. 523, and cases cited.

A large part of defendant's argument is devoted to the proposition that the beans were not of a merchantable quality, and exceptions were taken to instructions given by the court on this and other submitted questions. The fact that the shipment was sold in separate parcels to five or six dealers whose trade consisted of a good class of customers appears to answer the argument of defendant. And to one of the largest dealers in Omaha sales were repeatedly made. On this point the court properly instructed the jury that by the contract "plaintiff impliedly warranted that the beans should be fit for human food and merchantable in character, and if you believe from the evidence that they failed to comply with either of these requirements you should find for defendant."

The court further instructed the jury: "The term 'merchantable' does not require that the article shall be of first quality, but means that the article shall be vendible upon the market in the ordinary course of business and at the average price of such article, having in view the kind of article referred to in the contract, and, therefore, if you find from a preponderance of the evidence that the beans in question were Madagascar Lima beans, fair average quality, current crop, as provided in the contract, and you further find from the evidence that they were merchantable as above defined, and fit for human consumption, your verdict should be for the plaintiff."

We think the instruction conforms in all essential respects to the accepted rule as applied to the term "merchantable." In *Warner v. Arctic Ice Co.*, 74 Me. 475, it was held: "While the purchaser without special

warranty cannot insist that the article should be of any, especially, particularly, good, quality, there would be an implied warranty on the part of the seller that it is of fairly merchantable quality." In the same case the court submitted this question for special finding to the jury: "'Was or was not the ice on board these vessels, fair, merchantable ice for the market for which both the parties knew it was intended, when it was put on board at Woolwich?' And the jury answered, 'It was.' Exceptions being taken to the submission of this inquiry, held, no error."

"The word 'merchantable' in a contract, means generally vendible in market (2 Bouvier, Law Dictionary, p. 400); and, when unqualified in any way, such is its general meaning. It would be difficult, if not impossible to give an inflexible definition of the word 'merchantable.' Much in each case would depend on whether the article to be dealt in is susceptible to a fixed and uniform standard, or is of a variable nature, and is also dependent upon the conditions and circumstances surrounding each case." 5 Words and Phrases, 4490.

The case appears to have been fairly submitted to the jury under instructions in which error does not appear. The judgment of the district court is therefore

AFFIRMED.

WILBUR LARSON, V. STATE OF NEBRASKA.

FILED JULY 9, 1923. No. 23199.

1. **Rape:** CORROBRATIVE EVIDENCE. Opportunity alone, to commit the crime of rape, is not corroboration of the evidence of the complainant.

2. ———: REVERSAL: INSUFFICIENT EVIDENCE. While we recognize the rule that the jury are the judges of questions of fact, we do not hesitate to set aside a verdict where the evidence is clearly insufficient to sustain it. And this is of particular importance in a case involving the question of liberty or of life.

3. ———: CORROBORATIVE EVIDENCE. "In a prosecution for the crime commonly called statutory rape, where the prosecuting witness

testifies positively to the facts constituting the crime, and the defendant as positively and explicitly denies her statements, her testimony must be corroborated by facts and circumstances established by other competent evidence in order to sustain a conviction." *Mott v. State,* 83 Neb. 226.

4. **Evidence** examined, and *held* insufficient to support the verdict.

ERROR to the district court for Nuckolls county: RALPH D. BROWN, JUDGE. *Reversed.*

J. H. Agee and *F. H. Stubbs,* for plaintiff in error.

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

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

DEAN, J.

Wilbur Larson, defendant, aged 21, was convicted in Nuckolls county of committing statutory rape upon the person of Georgia Stinnett, under the age of 15 years, and was sentenced to serve a term of four years in the reformatory for men. He alleges error and has brought the case here for review.

Defendant is complainant's brother-in-law, he having married her sister in October, 1920. It is charged that the offense was committed August 13, 1921, when defendant and his wife were living at Superior and complainant and her mother were living eight blocks away in the same town. The complaint was filed a little more than eight months after the alleged commission of the offense, namely, May 10, 1922. Complainant testified that defendant came to her mother's home, August 13, in the forenoon when she was there alone; that as soon as he entered the house he at once announced the lewd purpose for which he came, which was followed by the assault of which complaint is made; that afterward she drove him away and the next morning she told her mother about it. She further testified, without objection, that not long before that time, on a certain evening, he conducted himself in an unseemly manner toward her

in her sister's home where she was visiting; that at the time she and her sister and defendant were all lying on a bed, her sister being drowsy for a part of the time; that defendant took hold of her hands and "dragged" her into a sitting-room which joins the bedroom, and took certain liberties with her, and that her sister, defendant's wife, looking from the darkened room through the open door into the lighted sitting room watched "this that was going on in the front room."

Mrs. Matilda Larson, defendant's wife, was called as a witness and, without objection, in part corroborated the evidence of her sister with respect to defendant's conduct while visiting at defendant's home. She testified that she, Mrs. Larson, went into the adjoining front room, and that her sister said she wanted to go to bed, and that the three went up-stairs together; that her husband, because he is crippled in one arm and one leg, walks just about half as fast as a person who is physically normal; that when he goes up-stairs he "puts his good foot up first and then his other one next, a step at a time; that instead of walking straight up the stairway he turns sideways so that he can put his right foot up first;" that she talked with her husband about the alleged offense and he denied that he was guilty. It appears that they were not living together when the case was tried.

Mrs. Stinnett is complainant's mother and was employed in a hospital at Superior in the daytime. She testified that, on the evening of August 13, complainant came to the hospital and, appearing to be quite warm, she asked her "what she had been running for," and that she answered that she was in a hurry and that defendant "had been out there;" that when she returned from her work at the hospital that evening she noticed that the bed in the front room was rumpled and the pillows were out of place; that her daughter did not then tell her that anything unusual had happened, but the next day told her of "defendant's having had or

attempting to have sexual intercourse with her."

When the prosecution announced its rest, defendant's counsel demurred to the evidence on the ground that it "failed to make out a case to prove the offense charged against the defendant in the information, and particularly failed to prove any corroboration of the offense." The demurrer was overruled and defendant's evidence was submitted.

Defendant by occupation is a moving picture operator. He denied all of the evidence which tended to prove his guilt. With respect to complainant's evidence concerning the alleged happenings at his home on the occasion of her visit there, and concerning which his wife testified, his version is that in the evening the complainant and his wife left him seated in the front room reading, where he remained while his wife and her sister lay down on the bed in the adjoining room; that some time afterward he went into the bedroom and told complainant to get up and go upstairs to bed; that she said she was afraid to go up-stairs in the dark, and he told his wife to go with her; that his wife also appeared to be afraid of the darkness and asked him to go along, and that he did so because his wife, being a short woman, could not reach an electric bulb to change it from one room to another, and, it being dark, she would experience some trouble if she tried to do so: that complainant, "who was always running and being at the head all of the time," was the first to go up-stairs; that as soon as he changed the bulb in the light fixture he immediately went down-stairs. He specifically denied all of the testimony which was introduced by the state with respect to his improper conduct on all the occasions referred to by the state's witnesses. He corroborated his wife's statement wherein she said she talked to him about the charge against him, but to that he added that she told him at the same time that "she didn't believe it at all, that there was nothing to it, she couldn't

understand why her mother would start anything like that."

With respect to his physical condition, defendant testified that he was paralyzed in one arm and in one leg as the result of an accident when he was a child of five years; that his right arm, which is crippled, has about half the strength of the other, and that he has always been compelled to wear a brace on his paralyzed leg in order to move about. It may here be recalled that his wife's evidence corroborates that of defendant with respect to his crippled condition.

The state's evidence appears to be lacking in respects that appear to us to be material. If complainant was abused, as charged in the information, it is reasonable to believe that a physical examination, of a person of her age, would have afforded some corroborative evidence of the charge of mistreatment, though it would not, of course, be conclusive against the person charged without other corroboration. As corroborative of the complaint, a neighbor woman testified that she saw defendant in a grape arbor in the yard of his mother-in-law in the forenoon of August 13, and said that the complainant, who had promised that day to come to her house for dinner, failed to come. It is urged that defendant had the opportunity to commit the offense. But a moment's reflection will convince a reasonable person that opportunity alone is not corroboration. *Fitzgerald v. State,* 78 Neb. 1; *Mott v. State,* 83 Neb. 226.

The rule which has long prevailed in this state is that, in a rape case, "where the prosecuting witness testifies positively to the facts constituting the crime, and the defendant as positively and explicitly denies her statements, her testimony must be corroborated by facts and circumstances established by other competent evidence in order to sustain a conviction." *Mott v. State,* 83 Neb. 226; *Fitzgerald v. State,* 78 Neb. 1. If the legislature is desirous that the rule which has so long prevailed shall be superseded by a different rule,

it is within its power to enact such rule. In its wisdom it has not done so, and we are not disposed to usurp the function of the law-making body. Doubtless the legislature, whose attention has been directed to the rule in question, takes notice of the universally conceded fact that the charge of rape is easy to make but is one of the most difficult to defend against, and this in part because it is the most dastardly offense that is known to the calendar of crime.

Under the law a complainant in a rape case, who is under the age of consent, is not required to resist her assailant's advances. But in the present case the complainant, though under the age of consent, testified that defendant forcibly committed the offense without her consent. She also testified that, though an elderly couple was living in another part of her mother's six-room house at the time, she made no outcry, giving as a reason therefor that she "wouldn't scream to let all the neighbors know this rumpus was going on." After the offense was committed she said she drove defendant away. Whether the act was committed with or without her consent would of course be immaterial so far as constituting an offense under the statute is concerned. But the circumstances which complainant details are proper to be considered as affecting her credibility.

The evidence with respect to the charge against defendant taxes our credulity. It seems that a man who from his infancy has been a cripple, and who has ever since been compelled to hobble about on a paralyzed leg with an artificial brace, and from whose right arm the strength has departed would be incapable of exerting the physical activity attributed to him in the premises. In the oral argument counsel did not hesitate to charge that the filing of the complaint was a plot, or conspiracy, deliberately planned by complainant's family, and in this connection it was observed that the fact was unusual that a complaint was not filed for more than

eight months after the alleged commission of the offense. It may be added that the prosecution frankly concedes that "the evidence is not as satisfactory as in some cases."

While we recognize the rule that the jury is the judge of questions of fact, we do not hesitate to set aside a verdict where the evidence is clearly insufficient to sustain it. And this is of particular importance in a case involving the question of liberty or of life. That the record discloses a reasonable doubt of defendant's guilt sufficiently appears. *Gammel v. State,* 101 Neb. 532; *Force v. State,* 105 Neb. 175.

Upon a review of the entire record, we conclude that the verdict is not supported by the evidence. The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

GUST LINDBERG, APPELLANT, V. OSCAR W. CHALLBURG ET AL., APPELLEES.

FILED JULY 9, 1923. No. 22428.

Highways: DRAINAGE: INJUNCTION. "Public authorities may construct drains along the side of highways if necessary to render the road passable. If in so doing they divert the waters of a pond out of the natural course of drainage and upon the lands of one not consenting to the work, they may not, ordinarily, if the work is done in good faith, be enjoined; but they may be liable for damages to persons whose lands or crops are injured." *Wachter v. Lange,* 94 Neb. 290.

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

John B. Scott and *Epperson, Massie & Epperson,* for appellant.

W. L. Minor and *C. L. Stewart, contra.*

Heard before MORRISSEY, C. J., ALDRICH and DAY, JJ., COLBY and REDICK, District Judges.

DAY, J.

By this action the plaintiff sought a permanent injunction against the defendants, who are the county supervisors of Clay county, restraining them from making certain road improvements along the public highway abutting the plaintiff's farm. It is the claim of the plaintiff that the effect of the proposed improvement will be to cast additional surface water upon his land.

Upon the filing of the petition a temporary restraining order was granted by the county judge, which was upon a hearing by the district court continued in force until the trial of the case. Upon the trial of the case on its merits the court dissolved the temporary injunction, denied a permanent injunction, and dismissed the plaintiff's action. Plaintiff appeals.

It appears that the plaintiff is the owner of the northeast quarter of section 5, township 7, range 5, in Clay county. The northwest quarter of section 4 lies immediately east of plaintiff's land. North of sections 5 and 4 are sections 32 and 33. A public highway, popularly known as the "D. L. D.," extending east and west, separates sections 5 and 4 from sections 32 and 33, and a county road running north and south separates sections 5 and 32 from sections 4 and 33. The natural surface of the ground at the intersection of these two highways presents a depression or basin; its lowest point being near the center of the intersection. From the rim of the basin the land slopes from every direction toward the center. This basin has no outlet. The only escape of the surface water is by evaporation or percolation. The rim of the basin which presents an irregular outline is from three to five feet higher than the lowest point in the basin. At times of heavy rainfall or melting snow the surface water forms a pond at the intersection of the two roads which at times seriously interferes with the use of the highways by the public. To remedy this difficulty the highway at the intersection was graded up a trifle over two feet; the grade extending back from the intersection in each direction for a considerable distance. Along

the sides of the highway ditches were dug and culverts constructed in such a manner that the surface water which congregated at the intersection was carried south along the ditches about 600 feet, at which point, when the water in the ditch rose about two feet, it would be discharged in a low place upon the plaintiff's land.

It was charged in the petition that the construction of the roads and ditches in the manner proposed by the defendants would divert the water from lagoons located on sections 32 and 33 onto the plaintiff's land. This charge is not sustained by the evidence. The evidence shows that the only surface water which would be diverted upon the plaintiff's land is the water in the basin having its center at the intersection.

That the improvement contemplated and being carried out by the defendants when the restraining order was served was a necessary improvement for the benefit of the public appears to be well sustained by the evidence. That the defendants were acting in good faith is not questioned. The point at which the water left the ditches and entered upon the plaintiff's land is described by the witnesses as a "swale." From this point the water would spread out in an irregular outline and, after following the low places for some 1,400 feet, it would enter a ditch with well-defined banks which formed a natural drainage for the lands in that vicinity.

A good deal of discussion appears in the brief as to whether this "swale" was the heading of a natural channel. In the view we have taken of the case a number of questions discussed need not be considered. Without expressing any opinion as to the merits of the plaintiff's claim, we are of the view that in seeking an injunction he has mistaken his remedy. The facts in this case bring it within the rule announced in *Wachter v. Lange,* 94 Neb. 290, in which, following the reasoning of *Churchill v. Beethe,* 48 Neb. 87, it is held:

"Public authorities may construct drains along the

side of highways if necessary to render the road passable. If in so doing they divert the waters of a pond out of the natural course of drainage and upon the lands of one not consenting to the work, they may not, ordinarily, if the work is done in good faith, be enjoined; but they may be liable for damages to persons whose lands or crops are injured."

It follows from what has been said that the judgment of the trial court is right, and it is, therefore,

AFFIRMED.

T. B. BUSBOOM ET AL., V. STATE OF NEBRASKA.

FILED JULY 9, 1923. No. 23130.

Constitutional Law: SCHOOLS: FOREIGN LANGUAGE LAW. Chapter 61, Laws 1921, appearing as sections 6457 to 6462, inclusive, Comp. St. 1922, is void, because it violates the Fourteenth Amendment to the federal Constitution.

ERROR to the district court for Lancaster county: ELLIOTT J. CLEMENTS, JUDGE. *Reversed and dismissed.*

C. A. Sorensen and *F. L. Bollen,* for plaintiffs in error.

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

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

GOOD, J.

Defendants, as officers and persons in authority of St. John's Evangelical Lutheran Church, a religious organization located at Emerald, in Lancaster county, Nebraska, were convicted of unlawfully passing and enforcing and attempting to enforce a prohibition and discrimination against the English language in certain religious meetings and proceedings, held and sought to be held in said county and state, contrary to the provisions of section 6460, Comp. St. 1922, and they bring the case to this court on error.

Said section 6460 was enacted into law as section 4,

ch. 61, Laws 1921. Said act appears in the Compiled Statutes of 1922 as sections 6457 to 6462, inclusive. Since the submission of this case in this court, the statute has been held void by the United States supreme court, because it violates the Fourteenth Amendment to the federal Constitution. *Nebraska District of Evangelical Lutheran Synod v. McKelvie,* 262 U. S. 404. See, also, *Meyer v. State,* 262 U. S. 390. These decisions supersede the opinion of this court in *Nebraska District of Evangelical Lutheran Synod v. McKelvie,* 108 Neb. 448, and in *Meyer v. State,* 107 Neb. 657.

Since the statute under which the prosecution was had is void, it follows that the defendants were unlawfully convicted. The judgment is reversed and the action dismissed.

REVERED AND DISMISSED.

WADE A. WILSON, APPELLANT, V. CHARLES E. MATSON, APPELLEE.

FILED JULY 9, 1923. No. 23451.

1. **Elections:** CONTEST: BOND. Section 2070, Comp. St. 1922, construed, and *held* to require a contestant in an election contest proceeding to file a bond for costs within 20 days after the votes are canvassed.

2. ———: ———: SPECIAL PROCEEDING. The right, conferred by statute on a candidate for public office to contest the election of his apparently successful rival, is a special statutory proceeding, and all the conditions prescribed for its exercise must be strictly followed.

3. ———: ———: BOND. The filing of a bond for costs within 20 days after the votes are canvassed, as required by section 2070, Comp. St. 1922, is necessary to give the court jurisdiction to hear and determine an election contest.

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

C. A. Sorensen and *F. L. Bollen,* for appellant.

Peterson & Devoe, contra.

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

GOOD, J.

Appellant and appellee, who will be hereinafter referred to, respectively, as contestant and incumbent, were rival candidates for the office of county attorney of Lancaster county, Nebraska, at the general election held in November, 1922. The votes cast at said election were officially canvassed on November 15, 1922, and the results showed that incumbent received 304 more votes for said office than were cast for contestant. On November 28, 1922, contestant filed his complaint in the county court of Lancaster county, to contest the election of the incumbent to said office, and summons was issued thereon on December 2, 1922. On December 7, 1922, and more than 20 days after the official canvass of the votes, incumbent filed a motion to dismiss the proceedings, for the reason that contestant had not filed a bond as required by section 2070, Comp. St. 1922. On December 9, 1922, contestant filed a bond, which was approved by the court, and incumbent's motion to dismiss was later overruled. A trial in the county court resulted favorably to incumbent. The contestant appealed to the district court. Thereupon, incumbent filed in the district court a motion to dismiss the appeal for want of jurisdiction, because of the failure of contestant to file a bond in the county court within the time required by statute, which motion was sustained, and judgment entered dismissing the appeal. Contestant brings the case to this court to review the judgment of the district court dismissing his appeal.

Two questions are presented by this appeal: (1) Does section 2070, Comp. St. 1922, when properly construed, require contestant, in an election contest, to file a bond within 20 days after the official canvass of the votes? (2) Is the filing of such bond within 20 days after the votes are canvassed necessary to confer jurisdiction on the court to hear and determine the contest?

Section 2070 provides: "The contestant shall file in the proper court, within 20 days after the votes are canvassed, a complaint, setting forth the name of the contestant, and that he is an elector competent to contest such election, the name of the incumbent, the office contested, the time of the election, and the particular causes of contest, which complaint shall be verified by the affidavit of the contestant that the causes set forth are true as he verily believes. The contestant must also file a bond, with security to be approved by the clerk of the court or county judge, as the case may be, conditioned to pay all costs in case the election be confirmed, the complaint dismissed, or the prosecution fail."

Contestant argues that the statute, properly construed, does not fix any time within which the bond for costs must be filed, and, inferentially, that the provision relating to the filing of such a bond is directory only; that the giving of a bond is intended for the benefit of incumbent, and that none need be filed unless demanded by him. Contestant cites *Nicholls v. Barrick*, 27 Colo. 432, as sustaining his position. There is language in the opinion apparently supporting this position, but a careful examination of the case shows that such language is dictum. In that case, a bond had been given within the prescribed time, but it did not comply with the statutory requirements. Its sufficiency was not attacked until after issue had been joined. The court held the motion to dismiss, because contestant had failed to file the bond provided by law, was in the nature of a plea in abatement, which could not be interposed after answering to the merits. The case is therefore not in point.

1. The statutory provision, "the contestant must also file a bond," is in form, and is clearly intended to be, mandatory. The question is, within what time it must be filed. The purpose of the legislature was to protect the incumbent and make contestant liable for all costs. To effect its purpose fully, the bond should be given before any substantial part of the costs has been incurred.

The word "also," as used in the statute, is significant and has a definite meaning. Some of the definitions given the word by lexicographers are: Too; in addition; likewise; in like manner. Had the word been used in the sense of "too," or "in addition," it would be mere surplusage; but, used in the sense of "likewise," or "in like manner," it makes it clear that the bond should be filed in the same manner as the complaint, *i. e.,* "shall file in the proper court, within 20 days after the votes are canvassed, a bond," etc. The statute has the same meaning as if it read: "The contestant shall file in the proper court, within 20 days after the votes are canvassed, a complaint * * * and must in like manner file a bond with security." A like view is expressed in *Howell v. Commonwealth,* 97 Pa. St. 332, wherein the supreme court of Pennsylvania construes an ordinance containing similar language. Section 2070, properly construed, requires the bond for costs, therein provided, to be filed within 20 days after the votes are canvassed.

2, 3. Is the filing of the bond for costs within 20 days after the votes are canvassed necessary to give the court jurisdiction to hear and determine the contest on its merits? Contestant insists that it is not, for various reasons which will now be considered. He calls attention to section 2075, Comp. St. 1922, which provides that, in election contests, the proceedings shall be assimilated to those in actions, and cites the case of *Kelso v. Wright,* 110 Ia. 560, in which, under an identical statutory provision, the court held, where an incumbent sets up in his answer counter-charges against a contestant, that he is not required to give bond. The Iowa statute, like our own, requires contestant to give a bond, but there is no such statutory requirement concerning the incumbent. The case seems to have no bearing on the question under consideration.

Contestant further argues, since this court has held that the giving of a cost bond under statutory requirement, that nonresident plaintiffs and companies suing in a

partnership name shall furnish security for costs, is not jurisdictional, that therefore this court should hold that the giving of a cost bond in election contest proceedings is not jurisdictional. It must be borne in mind, however, that those statutory provisions have reference to actions in the proper sense of the word, and not to special proceedings. The rule is quite generally recognized that, in special proceedings, statutory requirements must be strictly complied with. Where a new remedy is created by statute, all the conditions prescribed for its exercise must be strictly observed. The legislature, in conferring the right of a candidate to contest the election of his rival, may impose such conditions as it deems proper. That the right to contest is a special proceeding and that the prescribed procedure and conditions must be strictly followed is generally recognized by the authorities. The following authorities support the views herein expressed: *Ogburn v. Elmore,* 123 Ga. 677; *Dorsey v. Barry,* 24 Cal. 449; *Whitney v. Board of Delegates,* 14 Cal. 503; *Saunders v. Haynes,* 13 Cal. 145; *Pearson v. Alverson,* 160 Ala. 265; *Bowen v. Holcombe,* 204 Ala. 549; *Wilson v. Duncan,* 114 Ala. 659; *Gillespie v. Dion,* 18 Mont. 183, 33 L. R. A. 703; *Wilkinson v. La Combe,* 59 Mont. 518; *Moritz's Contested Election,* 256 Pa. St. 537; *Watkins v. Forkner,* 50 Ind. App. 35; *Murtha v. Howard,* 20 S. Dak. 152.

Both reason and the authorities sustain the view that the county court of Lancaster county was without jurisdiction to hear and determine the election contest on its merits because contestant did not file a bond, with security for costs, within 20 days after the canvass of the votes.

It follows that the motion to dismiss the appeal was properly sustained and the judgment dismissing the appeal was properly entered.

AFFIRMED.

STATE, EX REL. FRED FUNKE ET AL., RELATORS, V. LANCASTER COUNTY ET AL., RESPONDENTS.

FILED JULY 13, 1923. No. 23158

1. **Highways:** PAVING: "PROPORTION." The word "proportion" as used in the second paragraph of section 2625, Comp. St. 1922, means or signifies part, or portion.
2. **Mandamus:** PAVING: ASSESSMENTS: CORRECTION OF ERRORS. Mandamus is not a proper remedy to obtain redress from errors in making assessments for special benefits by a board of equalization, when the statute affords an adequate legal remedy.

Original proceeding in mandamus to compel respondents to relevy special assessments for paving roads. *Writ denied.*

Peterson & Devoe, for relators.

Charles E. Matson and *Hainer & Flansburg, contra.*

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

PER CURIAM.

In this, an original action in this court, the relator, the owner of land in improvement district No. 38, in Lancaster county, Nebraska, on behalf of himself and others similarly situated, brings this action against Lancaster county and the county commissioners of said county, praying for a writ of mandamus to compel the county commissioners of said county to give notice, as provided by law, and thereupon to reconvene as a board of equalization and relevy special assessments on all of the property in said district, in accordance with the net special benefits to such property, and to allow damages to any such property by reason of the improvement made, as provided by law. To the petition the respondents have interposed a general demurrer. The issue for determination is the sufficiency of the averments of the petition to entitle relator to the relief sought.

Besides the necessary formal allegations, relator alleges that the county board did not, in the resolution creating the district designate and fix the proportion of

the total cost of such work and improvement that would be paid out of the county paving fund, as required by statute, but arbitrarily fixed the amount which should be paid out of the county paving fund at $10,000 per mile, but which should not exceed one-half the total cost per mile; and that the board of equalization thereafter levied assessments upon the property within the district for the total cost of said improvement, less $10,000 per mile, without any reference to proportional benefits and proportional expenditures as between the county and property owners within the district, and without reference to the excess of such cost over the estimate fixed by the county surveyor; that said estimates of the total cost of the improvement ranged from $178,779.23 to $257,970, and that the total cost of the construction was approximately $300,000; that relator owned 77 acres of land within the district which was assessed for benefits at the sum of $10,175.88, being six times the value of the special benefits accruing from the improvement.

Other irregularities in the proceedings are alleged, but apparently are not relied upon, as they are not discussed in the briefs, and they will not be considered in this opinion. Relator claims that by reason of the irregularities the board of equalization was without jurisdiction to make the assessments for benefits conferred upon the properties within the district by reason of the construction of the improvement.

The question presented for determination depends on the proper construction to be placed upon section 2625, Comp. St. 1922. Said section, *inter alia*, provides: "Such districts shall be created by resolution of the county board, and said board shall in said resolution designate and fix the proportion of the total cost of such work and improvements which shall be paid out of said county paving fund which proportion shall in each case be not more than one-half the total cost, and in fixing such proportion of cost said board shall use its discretion and judgment, taking into consideration the whole nature

and value of the territory of the district and the benefits to be derived thereby from such improvement. To pay the remaining cost of such work and improvements said board shall levy special assessments upon all such lots, tracts and parcels of land, or portions thereof in such district in proportion to benefits from such improvements."

It will not be contended that assessments in excess of special benefits derived from the improvement could be lawfully levied against the property within the district. Relator concedes, and we think it reasonably clear from a consideration of the entire statute, that it is intended that assessments shall not exceed the benefits accruing from the construction of the improvement. Relator contends, however, that the part of section 2625 quoted above requires the county board to take into account, not only special benefits, but also the public benefits to be derived from the improvement, in fixing the proportion of the total cost of construction which shall be paid out of the county paving fund; that the county board erred in fixing an arbitary sum which should be paid out of the paving fund; that, instead, it should have required a certain percentage of the total cost of construction to be paid from the paving fund, and that the board, in fixing the sum of $10,000 a mile, was not following either the spirit or letter of the statute, and its action in that respect worked a grievous wrong to the property owners of the district, in that the balance of the cost of construction over $10,000 a mile was, in fact, assessed against the property within the district.

Relator insists that it was the intention of the legislature that the board of county commissioners should consider and determine, at the time of creating the district, the relative benefits to the public at large, on the one hand, and the benefits to the property of the district, on the other, that would accrue from the construction of the improvement, and that it should fix the ratio of one to the other, or fix the percentage of the total cost that

would be paid from the county paving fund, which would automatically fix the percentage of the cost that the property owners would pay; that the question of fixing this ratio was not open to the board of equalization, and that, if the county board did not have in mind some ratio when it fixed $10,000 a mile as the proportion of cost to be paid from the paving fund, then the proceedings are void, and, if it did have in mind some ratio or percentage of the cost which the county paving fund should pay, then such ratio or percentage must be followed by the board of equalization in making the assessments for benefits to the several tracts and parcels of land in the district; and he assumes that the ratio the county board had in mind was that existing between $10,000 a mile and the estimated cost per mile, and that, since the final total cost is greatly in excess of the estimated cost, such excess of cost over the estimate should be apportioned to the paving fund and the property in the district, in the ratio existing between $10,000 a mile and the estimated cost per mile. Relator contends that he is entitled to the writ; regardless of whether the board of county commissioners had in mind a definite percentage of cost which the paving fund should pay. The argument is ingenious, but not convincing. If, as contended by the relator, the failure of the county commissioners to fix a definite percentage of the cost which should be paid from the paving fund would render the proceedings void, then it would follow that the board of equalization would not be authorized to make any assessment for benefits, and no writ could issue to compel it to reconvene and relevy assessments, when it had no authority to make such assessments. Relator's suggestion, that the county board, in designating $10,000 a mile as the proportion of cost to be paid from the county paving fund, fixed the amount with reference to the estimated cost per mile, is untenable for the reason that the statute requires the proportion of cost payable from the paving fund to be fixed in the resolution creating the district, while the estimate

of cost of the improvement cannot be made until a later date.

1. The final solution rests on the meaning of the word "proportion," as used in that part of section 2625, above quoted. Among other definitions of the word "proportion," given by Webster's New International Dictionary are the following: "The relation of one portion to another, or to the whole, or of one thing to another, as respects magnitude, quantity, or degree." "The portion one receives when a whole is distributed by a rule or principle." "A share." Among the definitions given by the Century Dictionary are: "The relation of one part to another or to the whole with respect to magnitude." "Just or proper share; in general, portion."

In determining the meaning that should be given the word as used, it is proper to consider the situation and conditions under which the county board must act in creating an improvement district. At that time, the board has accurate knowledge of the amount available in the paving fund and may know approximately the amount that can be raised by any levy that has been made for the fund, but it cannot, at the time the district is created, have even approximate knowledge of the cost of the improvement, for no estimate of cost has then been made and the kind of paving has not been determined, and the power to determine the kind of paving to be used then rests in the property owners, and not in the county board. It is well known that one kind of paving may cost twice as much as another. The county board could not, in the nature of things, if it designated a percentage of the cost payable from the paving fund, know whether there would be sufficient for the purpose, unless it should fix a very small percentage as the share the paving fund should bear. It will not be presumed that the legislature intended to impose on the county commissioners an impossible condition. The board could intelligently act in the premises by fixing a specific sum that the paving fund should contribute to the whole im-

provement, or a specific amount per mile, but could not act in that respect if a percentage of cost was fixed. Reason dictates that the proper meaning to be given the word, as used in the statute, is, "share, part or portion." That the legislature used the word "proportion" in the sense of "part" is indicated by the following language in the first proviso in said section 2625: "No such work and improvements shall be finally ordered or constructed unless a petition shall be signed by the owners of a majority of the property chargeable with the cost of the improvement or *part* thereof." The word "part" has reference to the cost and is used in the same sense that the word "proportion" is used in the earlier part of the section. With this construction adopted, the board of equalization was required, then, to levy the remaining amount of the cost, over and above $10,000 a mile, against the property within the district, but in no event to exceed the benefits conferred by the improvement.

2. Relator has alleged that the amount assessed against his property is six times the benefits derived from the improvement. If he was wronged by an assessment in excess of benefits, the statute afforded him an adequate remedy which he should have pursued, but mandamus is not a proper remedy to obtain redress from errors in making assessments for special benefits by a board of equalization, when the statute affords an adequate legal remedy. Comp. St. 1922, sec. 9225; *State v. Drexel,* 75 Neb. 751.

The allegations of the petition are insufficient to justify the issuance of the writ, and it is accordingly denied.

WRIT DENIED.

DEAN, J., dissenting separately.

I adhere to the views expressed by me in my dissenting opinion in the former case of *Brown Real Estate Co. v. Lancaster County,* 108 Neb. 514, so far as applicable here in respect of exorbitant taxation. The *Brown* case involved the same paving district which is

under consideration here and in that case two judges besides the writer dissented. As shown in that case, the paved highway is 5¾ miles in length and the total cost approximates $300,000. It is known as the "Penitentiary-Insane Hospital Loop."

This is an original action in mandamus brought in this court for relief from the imposition of a special assessment for paving purposes which is so grossly excessive as to be confiscatory. Relators allege that they own 77 acres of land in the paving district which is assessed for $10,175.88 for paving purposes, and that the special assessment so made is six times the value of the accruing special benefits. The case coming on to be heard on the demurrer of respondents, the pleaded facts are therefore admitted. The demurrer was sustained and the writ was denied.

It appears that relators went before the board June 20, 1922, and demanded that it reconvene as a board of equalization under section 3, ch. 200, Laws 1915 (Comp. St. 1922, sec. 2627) and relevy special assessments on all the property in the district, not exceeding special benefits. The act provides:

"In cases of omission, mistake, defect, or any other irregularity in the proceedings on any special assessment said board, sitting as a board of equalization, upon giving notice, as provided in the first instance for levying assessments, shall have power to correct such mistake, omission, defect or irregularity, and levy or relevy, as the case may be, a special assessment on any or all property in the district, in accordance with the net special benefits to the property on account of such improvement, and may also make allowance or reallowance, as the case may be, of damages to any such property by reason of such improvement."

So that it plainly appears that the board had legislative authority and was clothed with jurisdiction to remedy an "omission, mistake, defect, or any other irregularity" in its former proceedings. However, the

board arbitrarily refused to comply with relators' lawful demand. Upon discovery by the board of the havoc which had been wrought under its mistaken application of the law, it seems that under the statute it should have complied with relators' reasonable request.

In view of the record I do not find it necessary to discuss all of the facts which are stressed in the opinion of the majority, but have devoted my attention to some other features suggested by the record and such law as appears to be applicable thereto. The act appears to be so involved and so lacking in coherency and clearness of expression that it is incapable of intelligent enforcement. That it is unworkable, and consequently void, is established by what the board did under the act, rather than by what counsel now say the law intended that the board should have done. It need scarcely be observed that the board is not vested with authority, nor is the court, to add anything to or to take anything away from a legislative act by strained construction or otherwise. A legislative act which is meaningless must so remain until remedied by a future legislature.

This excerpt from respondents' brief fairly sums up the main points of the argument upon which they rely:

"Even though the assessment is in excess of the benefits; or in excess of statutory provisions; or is disproportionate to benefits; or where the improvement is of no benefit to the property; or even where the improvement has been injurious to the property; or where the assessment is in excess of the cost of the improvement; or where the assessment was made without regard to benefit; or where extra charges are included in the assessment; or where there has been an exclusion of property benefited from the district; or where the improvement was of a general and of no special character and creates no special benefit, he is foreclosed if he does not appear before the board and appeal from its decision."

In view of the practical confiscation of relators' property which by the demurrer is admitted to be true, and in

view of the provision for a relevy in the act above cited, respondents' argument lacks much of being persuasive. Counsel go far and ask much. The topmost peak of technicality is touched by their contention. But technicalities cannot outweight equities. If counsel's argument is sound, the relators, and all in like situation, are indeed in a pitiable plight.

The rule which respondents invoke is merciless in its technical severity. But relators come with clean hands. They offer to do equity. They do not seek to destroy nor to invalidate the paving district. They say they are ready to pay the part of the paving cost which is properly chargeable against their property. All they ask is that the board be compelled to reconvene and perform a legal duty which it has not yet performed, and which under the law, if the court holds it valid, it is bound to perform. Their only protest is that they shall not be despoiled of their lands. The facts present a situation akin to forfeiture, which courts of equity abhor and from which equity unhesitatingly grants relief when in harmony with equitable principles. Relators would not gain anything but that which is their lawful due and the county would not lose anything to which it is lawfully entitled if the relief which relators seek were granted. They do not ask that the board be compelled to do anything more than it should be required to do under the plainest provisions of equity. In the case before us there is an entire absence of bad faith, or deceit, or fraud, or any other like compelling circumstance which should tend to prevent the granting of relators' prayer. Substantial grounds appear for equitable relief and should be applied to the end that so grievous a wrong may be righted. In a case where the scales are evenly balanced and a technical rule is to be invoked, let it be invoked on the side of justice, and not on the side of oppression. In this case the equities are clearly on the side of relators, and a rule should therefore be applied which would relieve from an injustice, rather than one which would impose an in-

justice. A governing body should set a good example.

It is common knowledge that judicial notice is a part of the equipment of the legal mind. The court is supposed to bring to the consideration of every case a knowledge of things which all persons are supposed to know, and when, under the circumstances disclosed by this record, a direct appeal for relief is made to this court in a case where a person is about to be despoiled of his property without due process, its hand should be raised to stay impending disaster. Clearly the right to be heard should not be denied. The law was made for man and not man for the law, and when by technical interpretation it fails to apply the principle of even-handed justice in the affairs of men its power for good will depart, and, if the law so fails of its purpose, respect for it will be lost. In every civilized society the law should be permitted to grow and expand with the growth of the race and to keep step with its normal needs.

The normal development of law as applied to the relations of men is not a new subject. This observation has been attributed to Aristotle:

"When the law speaks universally, and something happens which is not according to the common course of events, it is right that the law should be modified in its application to that particular case, as the lawgiver himself would have done, if the case had been presented to his mind. Accordingly, the equitable man is he who does not push the law to its extreme, but, having legal justice on his side, is disposed to make allowances." 9 Encyclopedia Britannica (11th ed.) p. 726.

It is elementary that the title to an act is that which conveys to the members of the legislature and to the world generally its contents. It is said that some of the ruling despots of a period not so very long ago, as history is reckoned, formed the habit of writing the laws of their country in small print on placards which were placed at so great a height that they could not be read by the people. When an unsuspecting subject was charged with violating a law, about which he knew nothing,

oftentimes, whether guilty or innocent, he was apprehended, tried and punished in his person or deprived of his property, as the terms of the law might warrant. And so, the tyrants said, the law was vindicated. But when the people became wiser and demanded that the laws be written so that they might be read by all persons, it was discovered that even under the new system drastic provisions for the deprivation of life, liberty or property, for inconsequential acts were frequently hidden away and surreptitiously concealed in an avalanche of written words. Subsequently and after a toilsome struggle, and to prevent the repeition of this very thing, demand was made by the people that a title be given to every act, and this demand, upon being granted, in a crude way outlined its contents. At a later period it came to pass that a title to an act became what its name implied, so that now the Bill of Rights of nearly all of the states provides that a title be given to every act and that its one and only subject be "clearly expressed" therein. This was not done in the act under consideration, though the reason for the rule remains.

The argument is made in relators' brief that they had not heard and did not know of any meeting by the board at which their protesting presence was required. Ordinarily this does not excuse, but there is here substantial basis for their plea in the fact that the title to the act under consideration (Laws 1915, ch. 200) made no reference to a vital subject, herein discussed, which was not embodied in the original act (Laws 1911, ch. 25) and which for the first time appeared in the body of the amendatory act. This was in direct violation of section 14, art. III of the Constitution, which provides:

"No act shall contain more than one subject, and the same shall be clearly expressed in its title."

So that as a matter of law, under the extraordinary facts presented here, relators' plea should be entitled to consideration. Of course, it is not intended that every end and every means that may be necessary to ac-

complish the general object of an act should be the subject of a separate act. Cooley, Constitutional Limitations (7th ed.) p. 205. But the title to the act involved here should have had some apt allusion to disclose fully and clearly its contents. Cooley, Constitutional Limitations (7th ed.) pp. 211, 212, 214.

A reference to the title of the amendatory act in question (Laws 1915, ch. 200), which is complete in itself, as hereinafter noted, will disclose that there is not a sentence nor an expression therein directing attention to the fact that such objection to an excessive special assessment as a landowner may have must be submitted to the board of equalization, nor is there any reference in the title to the fact that "no court shall entertain any complaint" which was not theretofore made to the county board of equalization. The title to the act follows:

"An act authorizing county boards of counties containing a city of the first class, having a population of over 40,000 and less than 100,000, to grade, pave, repave or macadamize roads, highways and boulevards outside such cities and other cities and villages in the county, levy a tax to aid in such work, issue bonds and warrants therefor, create improvement districts and levy special assessments upon real estate therein in proportion to benefits for such work, providing for the performance of such work, and repealing sections 2916, 2917, 2918, and 2919 of the Revised Statutes of Nebraska for 1913, and declaring an emergency."

Titles to legislative acts, in almost all states, by reason of constitutional provisions, exclude everything from effect and operation as law which is incorporated in the body of the act, but is not within the purpose indicated by the title. Cooley, Constitutional Limitations (7th ed.) p. 202; *People v. Mahaney,* 13 Mich. 481; *Sun Mutual Ins. Co. v. Mayor,* 8 N. Y. 241.

A very familiar provision of the Bill of Rights is this: "The right to be heard in all civil cases in the court

of last resort, by appeal, error, or otherwise, shall not be denied." Const., art. I, sec. 24.

And the relators, upon advice of counsel and in the firm belief that they had a real grievance and were about to be deprived of their property without just compensation therefor, and without due process, under a provision of the fundamental law, appeared in the court of last resort to obtain relief. True, the appearance was not by appeal, nor by error. But they appeared and they believed that the fundamental law meant what it said when it guaranteed that their "right to be heard" in that court should not be denied.

The act by its terms purports to set at naught the effect of section 24, art. I, of the Constitution. Strange as it may seem, the act provides for nothing less. While, of course, it could not achieve that purpose, it appears, when the entire act is considered, to have been the inducement for its passage.

The especially objectionable feature of the act follows, and it is clearly violative of the constitutional provision above referred to:

"No court shall entertain any complaint that such party was authorized to make and did not make to said board when sitting as a board of equalization." Laws 1915, ch. 200, sec. 4 (Comp. St. 1922, sec. 2628).

That provision introduces a new and drastic measure, a stranger to the act which it amends, into the jurisprudence of the state. However, whether it was referred to in the title or omitted therefrom, for the reasons stated, it is an invalid provision. It is not to be presumed that the legislature intended to provide that the property of any person should be taken or damaged for public use without just compensation therefor, nor that it intended to enact a confiscatory act, nor that, after discussion and deliberation, it intended to impose so sweeping a curtailment of the right of the court of last resort to exercise its function in a proper case, even though the party litigant did not first appear before a county board

to make a protest. Clearly a statute which attempts to place a limitation upon the exercise of the equitable jurisdiction of this court, in violation of a provision of the Bill of Rights, is to that extent void.

In the main opinion it is said:

"Relator has alleged that the amount assessed against his property is six times the benefits derived from the improvement. If he was wronged by an assessment in excess of benefits, the statute afforded him an adequate remedy which he should have pursued."

I do not agree with the conclusion of the majority, nor do I believe that the language of the act is applicable to the pleaded facts here. In my judgment that part of the act which provides for a hearing before the board of equalization for obvious reasons does not afford an adequate legal remedy against a confiscatory special assessment; but, even if it does, the remedy is not exclusive nor is it within the power of the legislature to make it so under the Bill of Rights herein cited.

For relief from an excessive and illegal levy the act, which purports to be complete in itself, as hereinbefore pointed out, undertakes to provide for an appeal, but the terms it fixes are so arbitrary as to be prohibitive. The terms are "inadequate" in the statutory sense. The remedy which the majority opinion says is adequate follows:

"Any party feeling aggrieved by any special assessment, allowance of damages, or proceeding for paving or improving as by this act provided, may pay the said special assessments levied upon the real estate of such party, or such instalments thereof as may be due at any time before the same shall become delinquent, under protest, and with notice in writing to the county treasurer that such party intends to sue to recover the same, which notice shall particularly state the alleged grievance and the grounds therefor; whereupon such party shall have the right to bring a civil action within 60 days thereafter, and not later, to recover so much of the

special assessments paid as such party shows to be illegal, inequitable and unjust, the costs to follow the judgment or to be apportioned by the court as may seem proper." Laws 1915, ch. 200, sec. 4 (Comp. St. 1922, sec. 2628).

The remedy is not adequate as to the aggrieved person, because it provides that he shall pay the special assessment under protest and afterward try out the question of its legality in the courts. It is obvious that a remedy that is conditioned upon assuming a burden so onerous as paying a large sum of money into the public treasury under protest, there to remain for an indefinite period, awaiting the last and perhaps long delayed word of any court, is not an adequate remedy in this class of cases. From the fact that the statute which provides for the remedy also provides that the costs which follow the judgment will be apportioned by the court as may seem proper seems to indicate that any recovery by the aggrieved person shall be chargeable to the county and be paid out of the county treasury. But, as with other features of the act, much is left to conjecture on this point.

"An adequate remedy is a remedy which is equally beneficial, speedy, and sufficient; not merely a remedy which at some time in the future will bring about a reversal of the judgment * * * complained of * * * but a remedy which will promptly relieve the petitioner from the injurious effects of that judgment, and the acts of the inferior court or tribunal." *State v. Guinotte,* 156 Mo. 513, 50 L. R. A. 787. See also, *Walla Walla City v. Walla Walla Water Co.,* 172 U. S. 1; *San Jose L. G. I. R. Co. v. San Jose R. Co.,* 156 Fed. 455.

"The existence of a remedy at law does not deprive equity of jurisdiction unless such remedy be adequate. By this is meant that it must be clear, complete, and 'as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.'" 16 Cyc. 41.

State v. Drexel, 75 Neb. 751, is cited in the majority opinion, but, in view of the circumstances and the law there involved, as compared with the facts and the fundamental law which is applicable here, that case is not authority here.

The questions presented by this record are comparatively new not only to the jurisprudence of this state, but of every state. The introduction of motor propelled vehicles into the already complex relations of life has brought about conditions which were unthought of only a few years ago. The automobile, which is here to stay, is the greatest factor in the business and social life of this age, and by it the fundamental activities of our people have been vastly changed. The building of paved highways in the open country, which is mainly involved here, and the making of paved streets and concrete boulevards in and adjacent to cities, towns and villages are among the principal and most costly of the innovations which have followed closely upon the development of the automobile and of trucks for freighting. And all of this has imposed new and untried duties and burdens upon all the people in their mutual relations everywhere. Small wonder that, in view of the premise, the legislature should inadvertently combine impossible conditions and legislative incongruities in an unworkable act. In passing it may be noted that the same difficulties, and greater, will be encountered when the congress and the legislatures of the several states undertake to regulate the use of the radio and the air lanes in the skies.

It is said by a modern writer that, while courts of equity may not assume jurisdiction which is nonexistent, they may avail themselves of new remedies and unprecedented orders to meet emergencies when based on sound principles which are calculated to afford necessary relief without imposing illegal burdens. 10 R. C. L. 263, sec. 9.

I concede that a long recognized and firmly established rule of law, which does no violence to the

supreme law, under which rights of persons and of property have grown up and have been developed, is entitled to recognition, even though some hardship may result in its application to the individual case, and this because of the importance of having a settled rather than a vacillating system of law. But that question is not at all involved here, because the conditions under consideration are new and the law which is here involved is a pioneer in its field.

The majority of the court having sustained the act in question, I respectfully submit that, under the admitted facts, the writ should have been allowed and a relevy ordered. The application having been denied, I dissent from the judgment herein rendered.

IN RE ESTATE OF ELIZA M. VANDEVEER.
HARRY B. WOODING, APPELLEE, V. WILLIAM B. WILLIAMS, APPELLANT.

FILED JULY 13, 1923. No. 22336.

Wills: CONSTRUCTION. When it becomes necessary to construe a will, the entire instrument will be considered, and if, from its language, the intention of the testatrix can be ascertained, such decree will be entered as best effectuates the intention therein expressed.

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

H. A. Lambert, for appellant.

Kelligar & Ferneau, contra.

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

MORRISSEY, C. J.

This is an appeal from the judgment of the district court for Nemaha county construing the will of Eliza M. Vandeveer, formerly Kimberley. November 6, 1893, Eliza M. Kimberley, widow of George G. Kimberley, executed her last will and testament. Subsequently she married Absolem Vandeveer. She died February 6, 1895. Her will was admitted to probate March 19, 1895.

The testatrix had no children by either marriage, but while her first husband was still living there was taken into the family a boy, who was never regularly adopted, but was reared by testatrix and her husband; known by the name Kimberley and treated as if he were a son.

The will provided for the payment of debts and funeral expenses, and devised a specific tract of land to testatrix's sister for life, with remainder to the sister's son, Harry B. Wooding. Certain personal property is also given to the sister. No question is raised as to these devises and bequests, but the third paragraph of the will gives rise to this litigation and reads as follows:

"I give, devise and bequeath unto my son George H. Kimberley the east 1/2 south west quarter sec. 33, town 4, range 15, 80 acres, to be used by him during his natural life and in case he should die without legal heirs said 80 acres to revert to Harry B. Wooding or his heirs.

"And whereas there are certain sums of money due me upon notes given by said George H. Kimberly, it is my will that such indebtedness immediately after my death shall be canceled by my executor and I do hereby release the person aforesaid from the payment of all debts due me.

"Furthermore, whereas there is likely to be personal property left over and above the amount necessary to pay my just debts and funeral expenses.

"I therefore give, devise and bequeath from said amount remaining the sum of five hundred (500) dollars to be used for the purpose of building a house on above mentioned 80 acres for said George H. Kimberley. My executor will see that the above wish is fully carried out.

"The above five hundred (500) is not to be used for any other purpose.

"Furthermore I give to George H. Kimberley one team of horses and harness."

Another paragraph provided that George H. Kimberley should have all her farming implements and tools

if he went upon the farm and used them, but otherwise they should revert to the nephew, Harry B. Wooding. Executors were duly appointed. They paid all debts and claims against the estate and made proper distribution of the property except the $500 mentioned in the third paragraph of the will. The sum which the executors were authorized to spend in the erection of a house was never so used, but was properly invested, and the principal sum together with the accrued interest are now in the hands of the executors. All other matters connected with the estate having been duly closed, the executors prayed for a decree disposing of this sum and granting them a final discharge from their trust.

After the death of the testatrix, George H. Kimberley was placed in possession of the land, tools, farming implements, and other property, as provided by the will, but he never established his home upon the farm. He soon departed from Nemaha county leaving creditors, one of whom caused an attachment to be levied upon his interest in the land and a judicial sale of his interest was made. George H. Kimberley has not been heard from for many years and is presumed to be dead. It is claimed, however, that, if dead, he left surviving him a wife and child. These matters we regard as unimportant in the disposition of the question presented. By a petition in intervention, appellant, in the county court, set up his ownership of the life estate of Kimberley and also his ownership of the interest of Harry B. Wooding, the remainderman. The petition alleged that immediately upon the death of the testatrix, not only the land, but the sum directed to be spent in the erection of the house became vested in Kimberley, and asked that the court direct the executors to use the fund in their hands to erect a house upon the land. The county court entered a decree as prayed by the intervener, but on appeal to the district court this decree was set aside, and the court found that the $500 mentioned in the third paragraph of the will was bequeathed for the personal use of

George H. Kimberley, and that when he abandoned the premises and permitted them to be sold the gift lapsed and became impossible of fulfilment; that the sum in the hands of the executors became intestate estate; ordered distribution accordingly, and dismissed the petition of the intervener.

Appellant earnestly contends that the court erred in finding, as a matter of law, that the sum mentioned was for the personal use and enjoyment of George H. Kimberley; that the bequest lapsed when he abandoned the premises, or that the bequest became intestate estate.

There is no disputed question of fact, and we are left to a consideration of the will as a whole to determine what was in the mind of the testatrix at the time of its execution. At the outset it may be noted that she did not direct the payment of this sum of money to George H. Kimberley that he might erect a house, but the language employed is in the nature of a direction to her executor to retain control and possession of the money until he had spent the same in building a house "for said George H. Kimberley," and there is added the further admonition that the money shall be used for no other purpose. This final admonition certainly does not indicate an intention on the part of testatrix to build a house for the use and benefit of attaching creditors. But the paragraph in the will whereby she gave this foster son the farm, implements and machinery on condition only that he use them upon the farm, and that upon his failure so to do they should go to her nephew, indicates a desire on her part that the young man settle down and make a home upon the farm. The conditions imposed, however, show that she had doubts of his stability of character, and therefore provided for the disposition of the machinery in case it was not used upon the land. The fund was placed with the executor that he might use it in the erection of a house "for said George H. Kimberley." A limitation was placed upon the use of the fund. It was not an unqualified direction to expend

the money upon the land. It was to be expended only for a definite and specific purpose, and for the use and benefit of George H. Kimberley, and, in the language of the will itself, "not to be used for any other purpose."

By his own conduct Kimberley made it impossible for the executor to use the money for the purpose directed. It will not be doubted that, had some friend pointed out to testatrix when she was executing her will the train of events which subsequently transpired, and had told her that the court would direct this fund paid over to the purchaser of the land at judicial sale, she would at once have denied any intention to have the fund so used. It is the duty of the court to carry out the intention of the testatrix when such intention can be gathered from the instrument. We hold that the district court did not err in holding that the fund in the hands of the executor is intestate estate, and in dismissing the petition of the intervener. The judgment is

AFFIRMED.

HOLMQUIST ELEVATOR COMPANY, APPELLEE, V. OMAHA ELEVATOR COMPANY ET AL., APPELLANTS.

FILED JULY 13, 1923. No. 22451.

1. **Appeal:** ENTRY OF JUDGMENT WHERE FACTS ADMITTED. After all the testimony in the action had been introduced, the court discharged the jury and entered a judgment for the plaintiff upon the undisputed facts and admissions in the pleadings and in open court. *Held* that this was not prejudicial error, since under the evidence it would have been the duty of the court to direct a verdict for the plaintiff, if the jury had not been discharged.
2. **Sales:** GRAIN EXCHANGES. Sales of grain made upon the floor of the Omaha Grain Exchange by one member of the exchange to another member are governed by the rules of the grain exchange.
3. **Evidence** examined, and *held* to support the findings and judgment of the trial court.

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

James C. Kinsler and *George A. Keyser*, for appellants.

Smith, Schall, Howell, Howard & Sheehan, contra.

Heard before MORRISSEY, C. J., LETTON and DEAN, JJ., BLACKLEDGE and COLBY, District Judges.

LETTON, J.

Appellants were found by the trial court to be liable to the Holmquist Elevator Company, appellee, for the value of two cars of corn. A jury was impaneled and evidence taken. At the close of the testimony the court discharged the jury and entered a judgment for the value of the corn in favor of the plaintiff. This action of the court is complained of; but upon the undisputed facts the court had the right to determine the question as one of law. The real controversy is as to whether the conclusion drawn is justified by the undisputed and admitted facts.

On August 3, 1917, the Holmquist Elevator Company received two cars of corn and sold them on the floor of the Omaha Grain Exchange to one William R. Richter, doing business as United States Commission Company, also a dealer on the exchange.

Section 9 of rule VI of the Omaha Grain Exchange, so far as material here, is as follows:

"On all sales of cash grain to go to elevators, mills or warehouses in this market, made on the floor of the exchange, on the 'Call' board, or by private sale, in accordance with the rules and regulations of the exchange, the buyer shall order the grain to the elevator, the ownership of such grain to remain in the seller until the grain is paid for. On such sales payment shall be made by the purchaser before 2 o'clock p. m. of the day following the day on which the grain is unloaded at the elevator. * * * No grain shall be paid for until unloaded, or at the expiration of 144 hours from 2 o'clock p. m. of the date of the sale of the grain."

The custom among dealers upon the Omaha Grain Exchange is that, when a car of grain is consigned to them at Omaha, a bill of lading is sent with a draft attached. As soon as the car arrives the inspection department of the exchange procures a sample of the

grain in the car and fixes the grade. A sale is made, based upon the grade and sample, during the first session of the exchange following the receipt of the sample. After the sale is made the bills of lading are turned over to the buyer for the purpose of procuring the moving of the cars to the elevators or industries for which they have been bought. The payment for the grain in the car is not required until after it is weighed.

On August 3, 1917, the cars were sold to Richter. They were ordered by him to the Omaha Elevator Company to be weighed. Richter became insolvent before the grain was paid for.

The Albers Commission Company answered, alleging that on August 7 and 8, 1917, it bought the two cars from Richter, and received from him the bills of lading for them; that a rule of the Omaha Grain Exchange provides:

"Where a bill of lading is transferred and the party receiving the same issues and delivers to the person surrendering the bill of lading a receipt therefor, stating that the title to the grain covered by said bill of lading shall remain in the party holding said receipt until the same is fully paid for, then the person issuing such receipt is hereby prohibited from accepting or receiving advances on said bill of lading, or negotiating the same, so long as the receipt therefor is outstanding. Where a bill of lading is transferred and receipt issued therefor as above provided, the party transferring the same shall plainly stamp or write across the face of said bill of lading the words: Receipt issued for this bill of lading under rules of Omaha Grain Exchange to (name of holder of receipt)."

That neither of the bills of lading bore any stamp as provided in this rule; that defendant had no notice of any kind that the plaintiff herein claimed any interest in the cars of corn, and that it purchased the same without notice that plaintiff had any such interest; that at the time of the purchase Richter was indebted to de-

fendant in an amount much greater than the value of the grain bought, and the same was purchased to apply on the account of Ritcher, and the purchase price credited in the regular course of business to him. It denies that the cars were sold on the floor of the exchange, and were known as floor sales.

The evidence establishes that the grain was sold upon the floor of the exchange, and that neither bill of lading bore any stamp showing that a receipt had been issued.

The question to be determined is: Did the Albers Commission Company in fact purchase and pay for the grain without notice of the rights of the plaintiff? As between plaintiff and Ritcher, under section 9, the title remained in plaintiff until after the grain was weighed and paid for. The rule that appellants rely upon, to wit, "Where a bill of lading is transferred and the party receiving the same issues and delivers to the person surrendering the bill of lading a receipt therefor, stating that the title to the grain covered by said bill of lading shall remain in the party holding said receipt until the same is fully paid for," and the fact that such receipt has been given shall be stamped upon each bill of lading, is not mandatory, but only permissive. The seller is not obliged to take a receipt and have the bill of lading stamped, but if he does so he can thereby protect himself from the risk of the sale and transfer of the bills of lading and the grain to an innocent purchaser. The imprinting of such a stamp upon the bills of lading gives actual notice to any person receiving the same that the title to the grain still remains in the original holder of the bill. Without such stamp the bill of lading furnishes no notice to a subsequent puchaser. The stamp not appearing upon either of these bills of lading, they conveyed no notice to the Albers Commission Company that the title had not passed to Richter.

It is not clear from the record when the grain was unloaded; one car seems to have been unloaded on August 13, and the other one afterwards. Richter de-

livered the bills of lading to the Albers Commission Company, one on August 7, and one on August 8. The grain had not been weighed or paid for. Under rule 9, the ownership remained in the seller at that time. The Albers Commission Company was in the habit of dealing with Richter and carried a running account with him. In June, 1917, it loaned to Richter the sum of $5,000 and took his demand promissory note for the same. At the time the alleged sale was made the open book account of Richter showed that he was indebted to the Albers Commission Company in the sum of $4,500, but at the same time the company held his demand note of $5,000 covering the same debt, for which note he had never received credit, and part of the account seems to be a claim for damages. No one testifies as to any conversation which took place at the time of the alleged sale. The note was not delivered to Richter when the bills of lading were transferred. The bookkeeper for the Albers Commission Company testifies that he received two account of sale slips showing the purchase of the corn, and he credited the book account with the market value of the corn on the respective dates. The account of sale slips show that the grain was sold by Richter at a much higher price. At either figure the value of the grain much exceeded the amount due the Albers company, even if the promissory note is not taken into consideration.

It also appears that when Mr. Holmquist spoke to Mr. Albers on August 13, with respect to payment for these cars, Albers said there was a question about it, but he thought they would be willing to settle on the basis of the market. Holmquist told Albers he might be willing to accept either the corn or the value on that day. One car had not been unloaded. "It was understood that we had not been paid for the corn for the reason that it had not been weighed." The next day Albers refused to pay for the cars, saying there had been advances made which he did not know about the day before.

The bills of lading contain no notation of "shippers

weights," so that there can be no room for doubt that the grain was sold on "Omaha weights."

It is no doubt true, as appellants point out, that the lawful holder of bills of lading, not bearing the stamp showing the grain had not been paid for, could order a railroad company to forward the cars containing it to another market, but we fail to see what bearing this has upon the question here. If the Albers Commission Company was not a *bona fide* purchaser of the grain, under the facts in evidence the title would remain in plaintiff wherever the cars might be.

Upon the undisputed facts, we are convinced that the title did not pass to Richter, that the Albers Commission Company is not an innocent purchaser for value, and, not having paid Richter for the grain, its retention after demand constituted a conversion and it is liable for its value.

The judgment of the district court is

AFFIRMED.

GEORGE W. HOPPERTON V. STATE OF NEBRASKA.

FILED JULY 13, 1923. No. 23226.

1. **Criminal Law:** NEW TRIAL: NEWLY DISCOVERED EVIDENCE. A motion for a new trial in the district court on the ground of newly discovered evidence was properly overruled, when the testimony set forth was merely cumulative and corroborative of other testimony, and its reception would not be likely to change the result.

2. ———: REQUEST FOR INSTRUCTIONS: PRACTICE. In order to present for review an assignment of error that the court refused to instruct upon one or more propositions of law, it is essential that, if the request was made orally, the page of the record at which the request is shown be pointed out in the brief. Unless the instruction refused concerns such an essential part of the issues that it would constitute prejudicial error to fail to instruct upon the point, "the better rule is that suitable instructions be prepared and submitted to the court, thereby obtaining a ruling thereon, which, if adverse, would constitute a foundation for review." *Curtis v. State,* 97 Neb. 397.

3. ———: EVIDENCE: REVIEW. In order to preserve for review the alleged error that a tobacco cutter, with which it was alleged that the assault was committed, but which after being introduced in evidence was withdrawn as not having been sufficiently identified, was permitted to remain upon a table in the courtroom in view of the jury during the trial, it is essential that a request should have been made to opposing counsel, or to the trial court, to have the same removed from the view of the jury. Where no such request was made, it is too late to present the point to a reviewing court as prejudicing the defendant's rights.

4. **Assault and Battery:** SUFFICIENCY OF EVIDENCE. Evidence of defendant and witnesses upon his behalf examined, and *held* to support the verdict.

ERROR to the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Samuel L. O'Brien and *Allen G. Fisher,* for plaintiff in error.

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

Heard before MORRISSEY, C. J., LETTON and ALDRICH, JJ., BLACKLEDGE and COLBY, District Judges.

LETTON, J.

Plaintiff in error, hereinafter termed Hopperton, was convicted of assault with intent to inflict great bodily injury. He seeks to have this conviction reversed.

Hopperton owns and conducts a pool-hall in Crawford. On the afternoon of August 19, 1922, the complaining witness, Dotson, with one Knott, went into the pool-hall; Knott desiring to purchase some tobacco. Hopperton testified that, after buying the tobacco, Knott and Dotson sat down across the room; that he called Dotson over to the counter, or glass case, behind which he stood; that Dotson crossed the room, some high words passed between the men, Dotson using an opprobrious epithet; that Dotson reached across and tried to strike him, and that he jerked backwards; that he told Dotson to go out; that Dotson threw his hand behind him, and, said the witness, "I guess I must have thrown something at him." Other undisputed testimony is to the effect that a moment later

Dotson received a violent blow in the face from some instrument, which caused a compound fracture of the maxillary bone, forced his nose to one side, caused a wound both above and below his left eye, and cut his upper lip through to the teeth.

Defendant testifies on cross-examination in part as follows: "Q. Now, you said in your direct examination that after this talk with Dotson, and his attempt to strike you, you kind of forgot everything. Just what do you want the jury to understand by that? A. Well, I got mad. I didn't realize what I was doing at the time. Q. You got mad? A. Yes, sir. Q. And have you any recollection of picking up the tobacco cutter there and striking him with it? A. No, sir; I don't. Q. Are you swearing you didn't do that? A. I don't remember it at all. Q. Do you swear you didn't do it at all? A. I don't remember of it. I wouldn't swear positive I did or didn't, for I don't remember. Q. You might have done it? A. I might have done it."

The evidence of defendant himself and that of witnesses called by him is practically sufficient to establish his guilt of the crime charged, and, when considered in connection with the undisputed testimony on the part of the witnesses for the state, we cannot see how the jury could have done otherwise than find defendant guilty.

A motion for a new trial was filed during the term on the ground of newly discovered evidence. The testimony of the witnesses, as set forth in the application, was mainly to the effect that there had been some hard feelings between the parties before the time of the assault, and that Dotson attempted to assault Hopperton before he took any hostile action toward Dotson. As to both of these matters the testimony was only cumulative and corroborative of other testimony in defendant's behalf, and a new trial was properly refused. Moreover, in our consideration of the evidence we have given little weight to the testimony of the state's witnesses as to the immediate facts, and base our conclusions very largely upon the testimony of

defendant and the witnesses produced in his behalf. Defendant has thus had the full benefit of all that these witnesses might have testified to, had they been present at the trial.

A request for a continuance was made by defendant during the progress of the trial, and the refusal to grant it is assigned as error. The witness desired was unable to attend on account of illness, and his illness had only been ascertained by defendant that day. His testimony had been taken in shorthand at the preliminary examination on behalf of the state and transcribed, and defendant had exercised the privilege of cross-examination at that time. This fact was stated by the court and defendant was given the privilege of reading it if he desired. The state objected to the reading of the transcribed testimony for the reason that the witness was present in the county and subject to subpœna. Upon this objection being made the court offered to continue the case over the term. The objection was then withdrawn, and the testimony at the preliminary was read in behalf of the defendant. We are unable to find any prejudice to the substantial rights of defendant in this.

It is charged that there was misconduct on the part of the county attorney in offering in evidence a tobacco cutter which was not shown to be the implement used, and allowing the same to remain upon the counsel's table during the trial. The tobacco cutter was offered and received in evidence, but upon further examination of the witness producing it, and not being sufficiently identified as the one thrown, it was stricken as evidence upon the motion of defendant. The defendant made no objection at the time of the trial to this exhibit being in view of the jurors or being referred to. It is too late now to raise this objection. No doubt the court would have compelled its removal if the matter had been called to its attention.

The evidence does not support the contention as to other alleged misconduct on the part of the county attorney. Errors are assigned by the giving of instructions

Nos. 6, 8 and 9, and in refusing certain instructions requested by defendant. The substance of instruction No. 6 is that, if the jury were convinced beyond a reasonable doubt that the defendant assaulted Dotson with a tobacco cutter, and if it further believed beyond a reasonable doubt that the tobacco cutter was a dangerous and deadly weapon, and that the assault was made purposely and maliciously, there is a presumption that he intended the natural and probable consequence of his acts, and they would be justified in finding him guilty. Instructions 8 and 9 are concerned with the right of self-defense. We find nothing erroneous in these instructions as applied to the facts in this case.

It is also assigned that the court erred in refusing to instruct, at the request of defendant, that the defendant had the right to remove disorderly trespassers from his place of business. No such instruction was tendered, and no complaint is made in the motion for a new trial of a refusal to give any such instruction. Furthermore, the brief nowhere points out in the record where any such oral request was ever made.

As to the assignment that the court erred in refusing to instruct, upon the request of defendant, upon the different grades of assault, the record does not show that the defendant ever made such request. If proper instructions of this nature had been tendered, we cannot say but that the court would have given them. Under the facts in this case, the court was under no obligations to volunteer such instruction. We have said that error cannot be predicated upon such refusal without calling the attention of the trial court to the subject, and that the better rule is that suitable instructions be prepared and submitted to the court for a ruling thereon. *Curtis v. State,* 97 Neb. 397.

The real fact is that the defendant is exceedingly fortunate, for if the missile thrown had varied even a slight degree, the defendant might have been on trial for his life instead of for an aggravated assault. We find no

prejudicial error in the record, and the judgment of the district court is therefore

AFFIRMED.

BROWN REAL ESTATE COMPANY ET AL., APPELLANTS, V. LANCASTER COUNTY ET AL., APPELLEES.

FILED JULY 13, 1923. No. 23386.

1. **Highways:** PAVING: SPECIAL ASSESSMENTS. The provision in section 2627, Comp. St. 1922, relating to special assessments, that the county board shall by resolution "fix and determine and levy the assessments upon each lot, tract and parcel of land, or portion thereof, in proportion to the net benefits derived by each by reason of such improvement," construed, and *held* to mean, in proportion to such benefits, but not in excess of the special benefits derived from the improvement by each lot or tract.

2. ———: ———: ———. The language of section 2627, Comp. St. 1922, as to the assessment of benefits and the provisions of section 6, art. VIII of the Constitution of Nebraska, by implication limit the amount of assessment for local improvements to the special benefits severally accruing to the lots or parcels of land thereby affected.

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

Field, Ricketts & Ricketts, for appellants.

Hainer & Flansbury, Charles E. Matson, Max G. Towle, L. R. Doyle, C. J. Campbell and *H. R. Ankeny, contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE, ALDRICH, DEAN and DAY, JJ., BLACKLEDGE and COLBY, District Judges.

LETTON, J.

The purpose of this action is to enjoin the county treasurer of Lancaster county from selling any of the properties of the plaintiffs in paving district No. 38 for nonpayment of special assessments; to declare that section 1, ch. 152, Laws 1917, section 2625, Comp. St. 1922, requiring that the costs of a public improvement made under said act, less the aid that shall be voted by the

county, shall be levied as special assessments upon the property of the district is void, being in conflict with the Constitution of the United States, and with section 21, art. I of the Constitution of the state of Nebraska; and that the respective titles of plaintiffs to property owned by them respectively in the paving district be quieted as against such special assessments.

The petition sets forth a resolution by the board of county commissioners of Lancaster county, creating paving district No. 38. This resolution designates the proportion of the total cost of the improvement to be paid out of the county paving fund at $10,000 per mile, "which proportion shall not be more than one-half the total cost per mile." The resolution also provided that the entire cost of the improvement, "less the above designated county aid and less any state and federal aid which may hereafter be designated, shall be assessed against the property benefited in said district in proportion to the benefits derived from said improvement not exceeding the actual cost thereof." It is alleged that the improvement was made and accepted; that the county board pretended to sit as a board of equalization, passed a resolution finding that all the property within the district had received net blanket benefits in the amount of $244,222.60; that the recitals in the resolution as to the assessment of benefits to the properties in the district being just and equitable were untrue, because the county board did not visit and identify the respective properties, nor take any evidence; that the board was governed by section 1, ch. 152, Laws 1917, section 2625, Comp. St. 1922; that this section fixes an arbitrary proportion of the cost of the improvement that should be levied on the property of the district, and is unconstitutional and void. Demurrers to the petition were sustained by the court. From a judgment dismissing the action plaintiffs appeal.

The argument, both oral and in the printed briefs, was devoted practically to one proposition, which is, the

unconstitutionality of the second and third paragraphs of section 2625, Comp. St. 1922, which is part of the act relating to paving county roads. The contention is that, after the proportion which the county shall pay has been designated, the provision that "to pay the remaining cost of such work and improvements said board shall levy special assessments upon all such lots, tracts and parcels of land, or portions thereof in such district in proportion to benefits from such improvements" is void, as allowing or commanding an assessment, which may, and in this case does, exceed the benefits derived.

It is said: "This levy and distribution of the special assessment was intended to comply with the letter of the statute. The language of the statute seems clear, free from doubt and ambiguity. It cannot be construed to convey a different meaning or method of levy without violation to the express letter of the statute." On the other hand, the position of defendants is that the words "in proportion to benefits from such improvements" must be read in connection with the fundamental principle that, under the Constitution, special assessments must not exceed the special benefits which accrue to the property by reason of the improvements.

The vital question is, whether the facts alleged establish that an arbitrary sum was levied on the property without any reference to the special benefits derived from the improvement. The record of the board of equalization, set forth as an exhibit to the petition, recites, among other things, that the board had before it for inspection a map and plat of the district prepared by the county surveyor, showing the location of the improvement and the tracts, lots and parcels of land or portions thereof included in the district, and a tentative levy of assessments and allowance of damages with respect to each. It is further recited that the board has taken into account the special benefits derived and damages sustained by reason of the improvement to each in proportion to the net benefits derived by each;

that the board had received written objections and protests to the tentative assessments by certain property owners, naming them, and had "taken evidence in support of the same and on behalf of all other property owners relative to the proportion of the net benefits derived by each by reason of such action." It therefore overruled the objections, found that the net benefits to all the property in the district was $244,222.60, that the assessments on each lot and tract are legal, just and equitable, and ordered their collection.

In determining the meaning and intention of the legislature, we may consider the whole enactment. In addition to the provision in section 2625, that the special assessments shall be made "in proportion to benefits," section 2627, part of the same original act, provides that, in case of a reassessment, it shall be the duty of the board to levy, or relevy, a special assessment on the property in the district in "accordance with the net special benefits" to the property. Both of these clauses evidently are intended to have the same meaning. It would be absurd to say that an original levy could exceed special benefits, and a re-levy for the same purpose could only be "in accordance with" special benefits. A levy in accordance with special benefits could not exceed them. If it did it would not be in "agreement," "conformity," or "harmony" with them, to substitute synonyms of "accordance" given in the Standard Dictionary.

Again, long before the passage of this act, this court had held that assessments made in excess of special benefits are void. *Hanscom v. City of Omaha,* 11 Neb. 37; *Cain v. City of Omaha,* 42 Neb. 120. And the supreme court of the United States in *Norwood v. Baker,* 172 U. S. 269, had so decided. We must consider that the legislature enacted this statute having knowledge of the law thus declared and of the limitations of the Constitution. We think there can be no question but that the legislature, in using the words "in proportion to special benefits" and "in accordance with the net special benefits," excluded the idea

that the assessment might be in excess of the special benefits derived from the improvement.

In *Smith v. City of Omaha,* 49 Neb. 883, a very similar question arose. The language of an ordinance of the city of Omaha then considered was that the damages for change of the grade of streets "be, and the same is hereby, levied according to special benefits by reason of said change of grade upon the following lots." The statute, which is set forth in the opinion, gave the mayor and council power "to assess the damages * * * upon the lots and lands benefited." The court held: "Both section 6, article IX, Constitution 1875, and the charter of the city of Omaha by implication limit the amount of assessment for local improvements to the special benefits severally accruing to the lots or parcels of land thereby affected." This decision is a clear precedent against plaintiffs' contention, and is probably sufficient upon which to base the decision.

But other courts have taken a like view. A Massachusetts statute, providing for the construction of sewers or drains, provided that the board of commissioners "shall assess upon the several estates specially benefited by such sewer or drain, a proportional part of the cost thereof, not in excess of the amount of four dollars per lineal foot." The court said: "That clause confines the assessment in terms to the estates specially benefited and limits it to a proportional part of the cost, not exceeding four dollars per lineal foot, but does not limit it in clear terms to the special benefit received. We are of the opinion, however, that the word 'proportional' as here used must be taken to mean proportional to the special benefit received." *Hall v. Street Commissioners,* 177 Mass. 434.

In *Cheney v. City of Beverly,* 188 Mass. 81, the court said: "The statute authorizes an assessment at 'a fixed uniform rate, * * * according to the frontage of such estates on any street or way where a sewer is constructed, or according to the area of such estates within a fixed depth from such street or way, or according to both such frontage and area.' " The court said: "We are of opinion that

the Pub. St. c. 50, sec. 7 (R. L. c. 49, sec. 5), taken in connection with other parts of the statute, shows an intention that the assessment shall be proportional, and while it determines that the specified methods may be adopted as giving assessments which are proportional under the usual conditions, it was not intended to authorize an assessment of an amount which exceeds the special benefit. We are of opinion that the statute should be construed as if it contained the words, 'but in no case shall an assessment be made that exceeds the special benefit received by the estate assessed.'"

In *Tyler v. City of St. Louis*, 56 Mo. 60, the charter provided that property owners adjoining lands condemned for streets should be assessed "in proportion that such property may be respectively benefited by the proposed improvement." An instruction was given that the jury might find a verdict for an amount in excess of the actual benefits derived by the property. The judgment was reversed, the court construing this language to mean that the assessment should be in proportion to the amount that the property was respectively benefited, and could not exceed the special benefits. *Hughes v. Farnsworth*, 137 Minn. 295.

Appellants argue that the construction contended for by the defendants would leave a large portion of the costs and expenses of the improvement unprovided for, that such a construction renders the statute unworkable, and that it must be plain that the legislature did not intend such unreasonable construction. This argument assumes the existence of such a fact. The petition does not so allege. Probably the legislature had in mind that before a county board would order such an improvement to be made it would take into consideration whether there was a reasonable probability that the special benefits to be derived by the property affected would equal or exceed the cost of the improvement, and would refuse to order that it be made unless the board could see its way clear to provide for payment for the work. It may

be noted that the legislature at its last session limited the amount that may be levied upon outlying property in such a district. Laws 1923, ch. 45.

Other questions which might be raised upon the demurrer have been settled in the following cases: *Brown Real Estate Co. v. Lancaster County* 108 Neb. 514; *State v. Lancaster county, ante,* p. 635; *Broghamer v. City of Chadron,* 107 Neb. 532; *Weilage v. Crete, ante,* p. 544.

AFFIRMED.

DEAN, J., dissenting separately.

So far as applicable here, my dissent in the case entitled *State v. Lancaster County, ante,* p. 635, may be considered as a dissent here. Both cases involve the same paving district. This case was brought here on appeal from the district court. Defendants demurred to plaintiffs' petition. The demurrer was sustained and plaintiffs electing to stand on their demurrer appealed to this court.

In plaintiffs' petition it is alleged that the special assessments, which aggregate approximately $100 an acre, are 10 times greater than the benefits which accrue to the property. The demurrer in effect admits the pleaded facts. Plaintiffs insist that the act is unconstitutional and therefore void. Nevertheless they express in the brief an entire willingness to pay a reasonable assessment for the improvement as made, if the court should "find the statute in question is a valid statute." Should the court so find, they request that the defendants be ordered to give notice and reconvene and reassess the property of the district under the prayer of the plaintiffs "for alternate or other and different relief." It is but natural that they should protest their unwillingness to have their property taken without due process or, as they observe, "have it confiscated to provide what is largely a pleasure drive for the benefit of the people of the city of Lincoln."

In the belief that the prayer of plaintiffs should have

been granted, I respectfully dissent from the opinion of the majority.

WILLIAM B. ENGDAHL, APPELLANT, V. JAY LAVERTY ET AL., APPELLEES.

FILED JULY 13, 1923. No. 22473.

1. **Parties:** INTERVENERS. The statute permitting intervention before trial as a matter of right does not prevent a court of equity, in the exercise of discretion in furtherance of justice, from allowing intervention after the trial has begun.
2. ———: FORECLOSURE: INTERVENTION AFTER DECREE. While leave to intervene after the entry of a final decree is not allowable as a matter of right and is generally denied, a court of equity, subsequent to the entry of an unexecuted decree foreclosing a mortgage, may, in the exercise of discretion in furtherance of justice, permit the owner of the mortgaged land to intervene in the foreclosure suit, upon proper pleas and sufficient proof, disclosing that he had good reasons for not appearing earlier, that he was deprived of his title without consideration by means of fraud, and that plaintiff is chargeable with knowledge of the fraud and of intervener's rights.
3. **Deeds:** CANCELATION. A court of equity may cancel a deed procured from the owner of the land without consideration by means of fraud and may also cancel a mortgage given to secure a debt owing by a subsequent grantee to the mortgagee, if the latter is chargeable with notice of the fraud and of the equitable rights of the person defrauded.
4. **Vendor and Purchaser:** POSSESSION: NOTICE. Possession of land is notice to the world of the possessor's interests therein.
5. ———: ———: ———. Possession of land by a tenant is not only notice to the world of his rights as lessee, but is notice of other interests of which inquiry would elicit knowledge.

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

A. H. Murdock, for appellant.

Sullivan, Squires & Johnson, contra.

Heard before LETTON, ROSE, DAY and ALDRICH, JJ., REDICK, District Judge.

ROSE, J.

This litigation was begun by the filing of a petition to foreclose a mortgage on a tract of land in Cherry county. The mortgage was given to secure the payment of a note for $4,000, dated August 5, 1912, and due August 1, 1913. William B. Engdahl was payee and mortgagee. He was plaintiff in the foreclosure suit. The makers of the note were Laverty Brothers, by Jay Laverty; "Laverty Brothers" being the name of a corporation of which Jay Laverty was an officer. The mortgagors were Jay Laverty and wife, defendants. There were other defendants whom plaintiff alleged claimed some interest in the land described in the mortgage. The suit was begun June 17, 1918. There was no defense by any defendant. October 1, 1919, the district court found the amount due plaintiff on the note and mortgage to be $6,796.66, and entered a decree of foreclosure. October 18, 1919, before the decree was executed, William E. Gregory was allowed to intervene as a party defendant. He filed on that date an answer and a cross-petition, containing pleas that he is sole owner of the land; that he acquired it as a homestead, having made final proof April 19, 1910, and having subsequently received the patent; that Emmett Nutter, one of the defendants, procured from intervener without consideration by means of fraud a warranty deed to the land; that, through mesne conveyances from the fraudulent grantee, Jay Laverty, mortgagor, claimed to have title; that intervener by himself or lessees had been in continuous possession of the land, and that his ownership and rights were known to the grantees in all the transfers and to plaintiff, the mortgagee. Intervener prayed for the cancelation of the mortgage and all conveyances, except the final receipt and patent, and for the quieting of his title. After the district court overruled a motion to strike the pleadings of intervener from the record, plaintiff filed an answer, claiming to be a mortgagee in good faith and putting in issue the facts upon which the equitable rights of intervener were based. Upon a full hearing the

trial court set aside the decree of foreclosure, canceled the apparent lien of the mortgage and the conveyances through which Jay Laverty acquired title, and quieted the title in intervener. Plaintiff has appealed.

It is first argued that a petition to intervene must be filed before trial, that the right of intervention terminates with the final decree, and that the trial court erred in overruling the motion to strike intervener's pleadings from the record. In this connection reference is made to the statutory right of intervention before trial. Comp. St. 1922, sec. 8552. Intervention under this statute is a matter of right, but does not prevent a court of equity in the interests of justice from allowing a proper party to intervene after the trial has begun. *State v. Farmers State Bank,* 103 Neb. 194.

Was intervention properly allowed 17 days after entry of the unexecuted decree of foreclosure? Leave to intervene after the entry of a final decree is not allowable as a matter of right and should seldom be granted, but equity sometimes requires a departure from the general rule. In the light of both reason and precedent it has been said:

"Applications for leave to intervene after entry of a final decree are unusual, and generally have been denied. There are instances, however, where petitions for leave to intervene have been filed and granted after decree." 21 C. J. 345, sec. 346.

The present instance seems to be one for the granting of leave to intervene after entry of the decree of foreclosure. If intervener pleaded the truth, his land was subject to judicial sale to discharge an apparent lien having no foundation in justice or equity but tainted with fraud. In a suit to which he was not a party, a court of equity had ordered the sale of his land at the suit of a mortgagee chargeable with knowledge of his rights and of the fraud perpetrated upon him. The decree of foreclosure had not been executed. Considering plaintiff a mortgagee in good faith, the right of the

equitable owner to redeem the land still existed. The court had jurisdiction of the decree for the purpose of enforcing it or for setting it aside for fraud upon a proper showing and notice. The land was a subject of equitable action common to both the petition of plaintiff and the cross-petition of intervener. After intervener appeared, the necessary parties were before the court. In an independent suit in equity the facts pleaded would have been sufficient to justify the vacating of the decree. To permit a judicial sale under the decree after the fraud had been called to the attention of the court would tend to lower the purchase price, to complicate the equitable title still further, to increase the costs of litigation, and to embarrass without reason both the real owner and the purchaser. The evidence upon which the trial court acted in sustaining the application to intervene is not in the record and there is nothing to show that it was insufficient. The circumstances pleaded sustain the court of equity, in the exercise of discretion, in permitting the intervention after the entry of the decree. To have done otherwise would have been inequitable. An independent suit by intervener to protect his right was unnecessary.

On the merits of intervention it is argued that the evidence does not sustain the finding that Nutter procured the deed from intervener by fraud. The position thus taken does not seem to be tenable. Without going into details, the more convincing proofs tend to show that Nutter got intervener drunk, pretended to enter into partnership with him to deal in horses, exacted the deed for the purpose of borrowing $5,000 to be invested as intervener's capital, betrayed his trust, paid no consideration for the deed except $70, which intervener offers to return, refused to reconvey the title and transferred it to a third person in furtherance of a scheme to swindle intervener out of his land. On the issue of fraud the finding on appeal is the same as that of the trial court.

Plaintiff argues further, as a reason for reversing the judgment of the lower court, that he lent $4,000 to Jay Laverty and accepted the mortgage as security on the strength of the latter's title without any notice or knowledge of intervener's right, that a representative of plaintiff had made an inspection and had found the land vacant, and that the evidence is insufficient to sustain a finding that intervener had been in continuous possession. It seems to be shown by a fair preponderance of the evidence that intervener, from the time of establishing his homestead rights, had been in continuous possession of the land either by himself or tenant. Possession of land is notice to the world of the possessor's interests therein. Possession of land by a tenant is not only notice to the world of his rights as lessee, but is notice of other interests of which inquiry would elicit knowledge. *Dengler v. Fowler,* 94 Neb. 621. While a representative of plaintiff testified that, before the making of the loan, he approved the title of mortgagors, visited the premises, found no one in possession and so reported to plaintiff, the better view of the evidence on this issue leads to the conclusion that his inspection and inquiry did not extend far enough to refute the evidence that intervener at the time, by himself or tenant, was in actual possession as owner. A sufficient inspection of the land, consisting, as it did, of an area equivalent to a section, and a proper inquiry, would have disclosed the possession and equitable rights of intervener. No error has been found upon consideration of all assignments.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FARMERS BANK OF PAGE, APPELLEE: FRED CRONK, INTERVENER, APPELLANT

FILED JULY 13, 1923. No. 23135.

1. **Banks and Banking:** DEPOSITORS' GUARANTY ACT: "DEPOSIT." A customer paid to a state bank approximately $650 with which the bank was to obtain a liberty bond and war savings stamps

of the face value of $500 and $150 respectively. Subsequently the bank failed and in the usual court proceedings which followed it was shown that four liberty bonds in the denomination of $500 each had been received by the bank before it failed, but no bond and no war savings stamps were ever delivered to the customer. By leave of court the customer intervened and filed a claim for $650 praying that it be allowed out of the depositors' guaranty fund. *Held*, that the intervener was not a depositor within the meaning of the depositors' guaranty act; and, also, *held*, that the court did not err in denying claimant's right to have his claim paid from the fund in question.

2. ———: "DEPOSIT." Ordinarily a general deposit consists of money which is mingled with other money of a bank, the entire amount forming a single fund from which depositors are paid.

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

H. M. Uttley and *John A. Harmon*, for appellant.

J. A. Donohoe, contra.

Heard before MORRISSEY, C. J., ROSE, DAY and DEAN, JJ., BLACKLEDGE and COLBY, District Judges.

DEAN, J.

On and before January 29, 1921, an action was pending in the district court for Holt county, wherein the state of Nebraska was plaintiff and the Farmers Bank of Page, Nebraska, was defendant. The pending action had to do with the affairs of the defendant bank, which had recently failed, and for which a receiver had theretofore been appointed. January 29, 1921, Fred Cronk, by leave of court, filed a petition of intervention, alleging that he had two valid claims against the bank, aggregating $650 and accrued interest, as for money deposited therein, and prayed for judgment for that amount with interest at 7 per cent. per annum from November, 1917, to be paid out of the depositors' guaranty fund.

The court decreed that the intervener was a general creditor of the bank, and not a depositor, and rendered judgment in his favor for $650 with interest at 7 per cent. per annum from November 17, 1919. The judgment, however, expressly provides that intervener, as holder of

the judgment, is not entitled to share in the depositors' guaranty fund nor to have his claim paid therefrom. From that part of the judgment denying his right to share in the fund in question the intervener has appealed.

It appears that the intervener, Cronk, in November, 1917, subscribed for a $500 liberty bond. He paid to the defendant bank $500 and arranged with it to obtain the bond for him. Subsequently, but at different periods, four liberty bonds in the sum of $500 each were received by the bank from the treasury department at Washington, but a $500 bond was never delivered to him. He also purchased war savings stamps of the face value of $150, for which he paid into the bank $124.50, with the understanding that the stamps were to be obtained by the bank from Washington for him, but none of the stamps were ever delivered by it to the intervener. It is under substantially the foregoing facts that intervener maintains that he is a general depositor.

Section 8024, Comp. St. 1922, provides generally that a guaranty fund shall be provided for the protection of state bank depositors and that such banks shall be subject to certain assessments to raise funds therefor, and section 8025 provides that the assessment shall be made on the average daily deposits.

The statute is so plain that it is not susceptible of strained construction. This court has held that a certificate of deposit issued by a state bank which, by special arrangement with a depositor, drew a bonus of only 1 per cent. above the lawful rate of 5 per cent. interest was not a deposit within the meaning of the act, and that where the bank subsequently fails the certificates so obtained cannot lawfully be paid out of the depositors' guaranty fund. *Iams v. Farmers State Bank,* 101 Neb. 778.

There is no evidence in the record going to show that intervener was a general depositor. Ordinarily a general deposit consists of money which is mingled with other money of a bank, the entire amount forming a single

fund from which depositors are paid. 7 C. J. 628, sec. 305. It has been held that, where a customer delivered certain liberty bonds to a state bank for safekeeping and the bank converted the bonds to its own use and afterwards failed, the customer was not entitled to payment from the bank guaranty fund. *Spry v. Hirning,* 191 N. W. (S. Dak.) 833.

We do not think the intervener is a general depositor within the meaning of the depositors' guaranty fund law. In the present case the bank was merely the agent of intervener for the purchase of government securities.

The intervener's theory that he was a depositor and entitled to the protection afforded by the depositors' guaranty fund law is not sustained by the facts or the law. We do not, however, hold that the intervener might not in a proper action present his claim for allowance, if so advised, on the theory that such money as he may have paid to the bank was being held by it as a trust fund.

The judgment of the district court is

AFFIRMED.

MIKE GLARIZIO, APPELLEE, V. JAMES C. DAVIS, APPELLANT.

FILED JULY 13, 1923. No. 22458.

1. **Trial:** QUESTION FOR JURY. Whenever there is evidence of so positive and significant a character as, if uncontradicted, would support a verdict, it is the duty of the trial court to submit the case to the jury, under proper instructions. It is not the function of the court to weigh the evidence for the purpose of saying how the verdict should go.
2. **Master and Servant:** QUESTION FOR JURY. The trial court in this case committed no error prejudicial to defendant in submitting the case to the jury upon the doctrine of "the last clear chance," as applied to the charge of negligence submitted for their consideration.
3. **Damages.** The amount of verdict *held,* under the circumstances of this case, not so large that a remittitur should be required by this court.

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

J. A. C. Kennedy and *Yale C. Holland,* for appellant.

James C. Kinsler and *Herman Aye, contra.*

Heard before MORRISSEY, C. J., LETTON and DEAN, JJ., BLACKLEDGE and COLBY, District Judges.

BLACKLEDGE, District Judge.

This is an action to recover for personal injuries sustained by plaintiff, defendant's employee, in the Missouri Pacific yards at Omaha, July 15, 1919. Defendant was engaged and plaintiff employed in interstate commerce, and the case is governed by the provisions of the federal employers' liability act.

The petition states a cause of action which would authorize a recovery under the rule of the last clear chance; it being alleged that, while the plaintiff was engaged in his work in a place of danger, the defendant's employees, who were conducting the movements of the cars in question, saw him in such situation, and in danger of being struck by the cars, but negligently failed to stop the cars or give him any warning. Defendant, in addition to denials, pleads negligence on the part of plaintiff, in that he was an experienced laborer in that occupation, could easily have observed, and in fact did see, the approach of the cars by which he was injured, and assumed the risk of such movements, the same being incident to his employment.

In addition to the argument that the trial court should have instructed a verdict for defendant, the propositions principally relied upon in this appeal involve the application of the doctrines of assumption of risk and last clear chance. The trial court, in submitting the case to the jury, told them as part of instruction No. 1:

"This, then, leaves for your consideration but one question of negligence as to which and upon which the defendant is liable, if at all, namely, the question as to whether the trainmen in charge of said string of cars

saw or reasonably could have seen plaintiff in a place of apparent danger, unaware of his danger, and could have avoided the accident by the exercise of reasonable care, and by the prompt use of the instrumentalities at hand failed and neglected to do so. This is the plaintiff's claim as outlined in the first charge of negligence upon which, and which only, the defendant can be found liable, should you find it liable."

It also instructed, upon the question of assumed risk, to the effect that plaintiff assumed all the ordinary risks and dangers inherent in, or incident to, his employment where the business of defendant was carried on with due care, but did not assume the risk of injury arising from a danger which was the result of negligence of defendant, unless such danger was known to him or was apparent or should in the use of ordinary care have been apparent to him, or to persons of his experience and understanding. Other instructions defined negligence, ordinary care, proximate cause, and covered the matters of contributory and comparative negligence, measure of damage; and withdrew from consideration the question of failure to sound whistle or bell as distinct grounds for a finding of negligence. It further instructed specifically that if the jury should find, as was the contention of the defendant, that plaintiff was injured while sitting in his wheelbarrow near the track, and that he knew the cars were approaching long enough in advance to have enabled him to move to a place of safety, then he had all the notice of the danger that a bell, whistle or other warning would have given him, and the giving of a warning signal was unnecessary.

The final weight to be dropped into the scale, and which, in this case, determines whether the award shall fall to the plaintiff or to the defendant, is the fact of plaintiff's personal location and position at and immediately prior to the infliction of the injury. As to this the theories of the two parties were conflicting and irreconcilable. The yard includes a number of tracks

extending in a northerly and southerly direction, connected by switches and crossovers, the easternmost known as the main line, the one next to it as the old main line, and, west of that, other tracks designated by name or number.

Plaintiff's duties were to gather up and remove pieces of paper, wood, iron, etc., which in the course of operations were dropped on and between the tracks, so as to keep the premises free from accumulations thereof. In this work he used, as his equipment, a wheelbarrow, broom and shovel. He had been in this employment in this yard five years.

Plaintiff contended that in the performance of his work he had approached from the west and was on the old main line facing southward, stooped over and in the act of edging his barrow over the east rail of this track, when, without warning, he was struck from the rear by the approaching cars. On behalf of defendant it was contended that plaintiff had previously crossed said track, and was seated in his barrow in the space between that track and the main line immediately east of it, facing northward—the direction from which the cars came—and hence must have seen them as they approached. As to the connected acts and details of movement of cars and persons, there is much conflict and confusion of statement, both as between the two sides of the case and as between the witnesses produced by either side themselves. It all happened very quickly. The switchman Downing, who, 25 feet from plaintiff, threw the switch which turned the cars in on this old main line track, says there was possibly 30 seconds from the time he got the signal to throw the switch until he saw plaintiff coming out from under the cars. Irving, who testifies to three different switching movements, says it was possibly 45 seconds or a minute, or less than that, from the first to the last, the last one causing the injury. This witness further states that, in the first of these

movements, plaintiff "was going to reach for something in the wheelbarrow, I judge. He was partly stooped over. I thought he was reaching for his broom or shovel." The engineer says he saw plaintiff during the whole time, and that he was sitting in the barrow east of the track.

There was ample evidence to sustain either theory, and we need not give further consideration to the argument that the case should have been taken from the jury. Whenever there is evidence of so positive and significant a character as, if uncontradicted, would support a verdict, it is the duty of the court to submit the case to the jury, under proper instructions. It is not the function of the court to weigh the evidence for the purpose of seeing how the verdict should go. *Mount Adams & E. P. I. R. Co. v. Lowery,* 74 Fed. 463.

It is urged that plaintiff assumed the risk of injury in this manner. The court, perhaps unnecessarily, submitted that question to the jury. This is true because, as appellant also here urges, the case went to the jury upon the question of the last clear chance. Now, the thing that gives rise to the last chance rule is not an ordinary or incidental risk which may be known and assumed. In the necessary sequence of events we have passed that stage before reaching the place where the last chance doctrine is to be applied. It is a condition of impending and unanticipated danger approaching one who is unaware, and which may be averted by another, by control of the dangerous force, or the giving of proper warning. It may arise from an unusual operation or from an ordinary operation. The point is, that the one in danger is unaware of it, and the master or his agent seeing the situation may, by reasonable and ordinary care and the use of the means at hand, avert an apparent and impending disaster to a human being.

However, defendant had the benefit of its submission, and of that cannot complain. It complains here, not

so much of the submission of the proposition, as that it was erroneously stated, in that the instruction, in effect, said the plaintiff did not assume a risk arising from defendant's negligence, which, counsel say, is bad law. There are cases in which so broad a statement of the rule would be improper. For example, the case cited by counsel, *Preble v. Union Stock Yards Co., ante,* p. 383. The negligence consisted in the nearness of the different tracks to each other, but with which situation the injured person was acquainted, and on which he had worked without objection for a considerable time. As applied to the case being tried, we think the language of the court was entirely correct. The supreme court of the United States has, we think, laid down the authoritative rule which governs this case, in *Chesapeake & O. R. Co. v. De Atley,* 241 U. S. 310, wherein it is stated:

"According to our decisions, the settled rule is not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer, or of those for whose conduct the employer is responsible, but that the employee may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them."

Supporting the same rule are *Huxoll v. Union P. R. Co.,* 99 Neb. 170; *Fitzpatrick v. Hines,* 105 Neb. 134.

Appellant further argues that, the case being sent to the jury on the question of last clear chance only, if the evidence leaves no room for the application of the doctrine of last clear chance, then the verdict and judgment are without any foundation. This is based upon a consideration of the evidence, all of which we have examined as set out in the briefs, and in full as it is contained in the record. The jury determined the

facts adversely to defendant's present contention. We believe there is hereinbefore set out a sufficient reference to the issues and evidence to indicate the propriety of the submission as made, and hold that appellant has not just cause of complaint in reference thereto. *Wilson v. Union P. R. Co.*, 107 Neb. 111. We reach the same conclusion as to the alleged inconsistency between the statement of the issues as given in the instruction from which quotation is made herein and the one next following which required plaintiff to establish by a preponderance of the evidence "that the defendant was negligent in some particular as alleged in the petition."

We do not consider it necessary to discuss in detail the instructions requested by defendant. We have examined all of them. Aside from those which were, in effect, instructions directing a verdict for defendant, they were mostly open to the criticism of improperly commenting upon the evidence, and the weight which should be given to it. We find that the trial court reasonably and fairly covered by its instructions given all essential issues involved under the pleadings and the evidence in the case, including those represented by defendant's requests in so far as they were proper and material to go to the jury.

Finally, it is insisted that the amount of the verdict, which was for $13,000, is excessive. The plaintiff at the time of the injury was an experienced laborer in that capacity, 62 years of age, of robust physique, and earning $3.20 a day. His right leg was severed between the hip and the knee, and he complained still, two years later, of suffering from the injury to his head. We concede that the award was liberal, probably more liberal than would be made by the same jury in the same case at this time. The injury was sustained in July, 1919, and the verdict returned in May, 1921, which we must recall was during the time when labor and all other things were at war-time prices, which condition probably to some extent affected the amount of the

verdict. Assuming that this was so, the plaintiff had the same right as others to have his financial matters adjusted on the current basis. He has, by the delays incident to legal procedure, been prevented during two additional years from receiving the amount found to be his due, and we do not find the amount so unreasonable that he should now by this court be required to accept a reduction.

The judgment of the trial court is

AFFIRMED.

AUGUST BRANDEEN, APPELLANT, V. RALPH M. BEALE ET AL., APPELLEES.

FILED JULY 13, 1923. No. 23354.

Insane Persons: APPOINTMENT OF GUARDIAN: VALIDITY. A proceeding in county court for the appointment of a guardian for the person and estate of an alleged incompetent person, which is based upon a petition by a creditor, and not by any relatives or friends of the alleged incompetent, as prescribed by statute (Comp. St. 1922, sec. 1589), and in which the alleged incompetent did not appear and was not represented by guardian *ad litem* or otherwise, and none of the relatives or friends were notified or appeared, and in which there is no finding that the individual was mentally incompetent to have the charge and management of his property, is void and subject to collateral attack.

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

C. C. Flansburg and *John S. Bishop,* for appellant.

Sterling F. Mutz, Claude S. Wilson and *Albert S. Johnston, contra.*

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

BLACKLEDGE, District Judge.

The controversy in this case is submitted upon a case stated by agreement of the parties. It arises upon a petition by the plaintiff, appellant, alleging that he had been engaged in operating a general store at Waverly,

Nebraska; that defendants, having conspired together to ruin him and destroy his business, unlawfully obtained possession of his stock of goods and converted them to their own use to the plaintiff's damage. The defendants answer, admitting ownership of the goods, denying the other allegations of the petition, and further alleging that the plaintiff had no capacity to maintain the action for the reason that he was under guardianship by reason of mental incapacity; that defendant Ralph M. Beale had been duly appointed guardian of plaintiff by the county court of Lancaster county prior to the time of the acts charged in the petition, and that he had ever since continued to act as such guardian, and had not been discharged. It is the issue raised by this part of the answer as to the status and effect of the guardianship proceedings with which we have to do on this appeal. This was tried as a plea in abatement in the trial court, and it was then, and is now, agreed by counsel that if the alleged defense was good the action must fail, otherwise it might still be tried. The district court held the defense good, and dismissed the action. The plaintiff has appealed, and the question submitted to this court for determination is the validity of the guardianship proceedings, or, rather, whether the same are subject to collateral attack.

The petition in the county court for the appointment of a guardian was by J. D. Lau, one of the defendants, and alleged the residence of the parties; that the petitioner was a creditor of August Brandeen, who was possessed of certain property in the county; and that by reason of advanced age and mental and physical weakness the said Brandeen was incompetent to take charge of and manage said property; that Ralph M. Beale of said county was a suitable and competent person to act as guardian, and prayed for the appointment of Beale as such guardian. A notice was personally served upon Brandeen, as to the form and substance of which no question is raised herein, and on June 22, 1921, a decree was entered finding: "That it is necessary and convenient that a guardian be ap-

pointed of his person and estate for the reasons as set out in the petition filed herein and that Ralph M. Beale is a fit and suitable person to act as such guardian." Other matters are contained in the case stated, but it is not deemed necessary to set them out in the present discussion.

The plaintiff contended, and here contends, that the proceedings were void, and hence subject to collateral attack, and constituted no defense in the present action, because the county court was without jurisdiction, as disclosed thereby, to appoint a guardian, and with this contention we are inclined to agree.

The statute by which an appointment in proper cases is authorized (Comp. St. 1922, sec. 1589) provides:

"When the relatives or friends of any insane person, or of any person who, by reason of extreme old age, or other cause, is mentally incompetent to have the charge and management of his property, shall apply to the county court to have a guardian appointed for him, the court shall cause a notice to be given to the supposed insane or incompetent person of the time and place of hearing the cause, not less than fourteen days before the time so appointed."

It will be noted that the petitioner in this case described himself as a creditor, and it is contended that such a person does not come within the authorization of the statute, but that the only persons authorized to institute the proceedings are the relatives or friends of the incompetent person. It is argued on behalf of appellee that, the county court being a court of general jurisdiction in such matters, all presumptions are to be indulged in support of its judgments and proceedings, and that the fact that the petitioner described himself as a creditor is not inconsistent with the fact of his being also a relative or friend, and that this court should indulge such presumption in support of the proceeding. We think, however, that we are precluded from indulging such presumption. If the petitioner had been either

relative or friend, it would have been as easy to so describe himself as to say that he was a creditor, and if he had regard to the provisions of the statute under which he was applying to the court, the fact that he did not describe himself by either of the terms used therein would lead logically to the inference that he was not entitled to do so. In this particular portion of the statute three classes of guardians are mentioned, namely, those for minors, for insane or incompetent persons, and for spendthrifts. No provision seems to be made as to what particular person or class of persons shall invoke the action of the court in the case of minors. In the case of incompetent persons the statute provides that, when the relatives or friends of the incompetent person apply to the court, then proceedings may be had. It is true, as cited from the case of *Foote v. Chittenden,* 106 Neb. 704, that all matters necessary to give the court jurisdiction upon which the record is silent are presumed. We think, however, that the answer to the argument has been made by the highest court in the land in the case of *Galpin v. Page,* 18 Wall. (U. S.) 350, wherein, in the opinion by Mr. Justice Field, it is said that the presumptions which the law implies in support of the judgments of courts of general jurisdiction only arise with respect to jurisdictional facts concerning which the record is silent. Presumptions are only indulged to supply the absence of evidence or averments respecting the facts presumed. They have no place for consideration when the evidence is disclosed or the averment is made. When, therefore, the record makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that the fact was otherwise than as averred. Were not this so, it would not be possible to attack collaterally the judgment of such court, although a want of jurisdiction might be apparent upon its face; the answer to the attack would always be that, notwithstanding the evidence or the averment, the necessary facts to support the judgment are presumed.

The rule, we think, is that, if the record on the whole shows that something was done to acquire jurisdiction which was insufficient, it will not be presumed that some other thing not shown by the record was done which would confer jurisdiction; and if the court cannot try the question except under particular conditions or when approached in a particular way, the law withholds jurisdiction unless such conditions exist or the court is approached in the manner provided. 12 Ency. Pl. & Pr. 120. The proceeding, so far as the jurisdiction of the county court is concerned, is purely statutory; and as it is one involving both the rights of person and property, according to all rules of law applicable to such proceedings, the statute must be strictly followed or the court or officer exercising the authority will not obtain jurisdiction and their proceedings will be void. This was held by the supreme court of Wisconsin in the *Appeal of Royston,* 53 Wis. 612, which was determined under a statute requiring that in such cases a relative or friend of the person for whom the appointment of a guardian was sought should present to the county court of the proper county a verified petition. The petition in that case showed it was made by a friend, but it was not verified, and upon that ground the court held the proceedings void. This was an appeal from the circuit court, the case had been tried *de novo* in that court upon appeal from the county court, and the supreme court held that the circuit court acquired no jurisdiction because the county court had none and dismissed the whole proceeding. Although dismissing the case upon the ground stated, it is said in the opinion that the county court should not proceed in such cases, even upon the application of a friend, unless it appears from the petition that there is some good reason why the application is not made by the relatives.

In this case the alleged incompetent did not appear in person or otherwise at the hearing, no guardian *ad litem* was appointed for him, and no relative or friend was notified of, or appeared at, the hearing. This court in

Prante v. Lompe, 77 Neb. 377, held that in such cases the next of kin are proper parties and may appear in court and contest the proceeding. The supreme court of Michigan, under a statute identical in terms with ours, has held that notice must be given to the heirs presumptive and next of kin in order to confer jurisdiction. *In re Myers,* 73 Mich 401; *In re Bassett,* 68 Mich. 348. It is also held by the same court that it is necessary that there be a decree by the judge of probate adjudging the person mentally incompetent and that the adjudication should appear of record. *North v. Joslin,* 59 Mich. 624. It would seem that jurisdictional requirements have not been met.

It is urged that we should follow in this case the rule which has been prescribed in reference to proceedings for the administration of estates as stated in *Larson v. Union P. R. Co.,* 70 Neb. 261, to the effect that even a stranger may make the necessary petition or application to the county court. We think, however, that there are material and substantial reasons which would render the application of that rule improper in cases of this kind. Administration proceedings are essentially *in rem* and their primary purpose the collection and distribution of assets of a deceased person. This proceeding is essentially *in personam* and has to do with the liberty of an individual and incidentally the control of what property he may have. In administration proceedings the court, before action, gives a notice which is binding upon all the world; in this guardianship proceeding no notice was given, other than to the incompetent. The statute under consideration in the *Larson* case does not prescribe the person by whom the application is to be made, but the classes of persons to whom administration may be granted; it was therefore, properly held that the determination of that fact had relation to the manner of exercise of jurisdiction. In this case we are upon its threshold met with the statutory requirement that, when the relatives or friends of the supposed incompetent apply to the court,

then the court shall act. This would seem to exclude the right of action by the court except under the conditions prescribed. And so we have here an instance wherein the application to the court was not made by any one of the classes of persons prescribed by the statute, none of those persons were notified of, or were present or participated in, the proceeding; no guardian *ad litem* was appointed for the alleged incompetent; he was not otherwise represented and did not appear at the hearing; nor does the decree contain a specific finding that he was mentally incompetent to have the charge and management of his property. Under these circumstances, and for the reasons stated, we are constrained to hold that the guardianship proceedings in question were void and subject to collateral attack.

Other questions are discussed in the briefs, but they are incidental, and this disposition of the principal controversy disposes of the case. The judgment of the district court is therefore reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED.

R. A. BENNETT, APPELLANT, V. C. W. MOON, APPELLEE.

FILED JULY 13, 1923. No. 22390.

1. **Specific Performance.** Under a proper state of facts, courts of equity will take cognizance of actions requiring the specific performance of agreements concerning real property, including leases as well as deeds.
2. ———. While the granting of the equitable remedy for the specific performance of a contract to convey or lease real property is a matter of discretion, yet this means a sound discretion controlled by established principles of equity, and when the contract is in writing, is certain in its terms, is fair and just and capable of being enforced without hardship, the remedy should be granted as a matter of course.
3. ———: LEASES: IMPLIED COVENANTS. Where a written executory contract to lease contains a definite statement of the particular elements of the lease, but is silent as to the general, usual and ordinary covenants and conditions, these will be implied and a decree for specific performance granted.

APPEAL from the district court for Polk county: GEORGE F. CORCORAN, JUDGE. *Reversed, with directions.*

Edward A. Coufal, for appellant.

Matt Miller and *Mills, Beebe & Mills, contra.*

Heard before MORRISSEY, C. J., DAY and ALDRICH, JJ., COLBY and REDICK, District Judges.

COLBY, District Judge.

This action was instituted by the plaintiff, R. A. Bennett, to compel the defendant, C. W. Moon, to specifically perform their written agreement, under the terms of which the defendant had agreed to execute a lease for the first story and basement of a brick building owned by the plaintiff and located in the business section of David City, Butler county, Nebraska. The following is a copy of the agreement:

"This agreement made in duplicate, this 27th day of December, 1919, by and between R. A. Bennett of David City, Nebraska, as party of the first part, and C. W. Moon of Shelby, Nebraska, as party of the second part,

"Witnesseth: That the party of the first part has this day sold to the party of the second part, and the party of the second part has purchased from the party of the first part, all the stock of merchandise owned by first party located in David City, Nebraska.

"It is further and specifically agreed by and between the above parties that possession of said stock is to be given second party on the 1st day of February, 1920; that it is reserved to first party to sell any of said stock in a sale that first party may hold, and first party is to deliver to second party only so much of said stock as shall be left in said store after said sale, and on the 1st day of February, 1920; when said second party shall come into possession of said stock, then the parties agree that so much of said stock as shall remain in said store shall be invoiced, and second party shall pay to first party as the purchase price for said stock eighty (80) cents for each

one dollar of invoice price of said stock at the time of invoice.

"Second party has this day paid first party, and first party hereby acknowledges the receipt thereof, the sum of one thousand dollars ($1,000) as a part payment on said stock, and as earnest money on this contract. The balance of the invoice price of said stock over and above said $1,000 so paid, it is to be paid by second party to first party when possession is given and the invoice completed.

"It is further understood and agreed by and between the parties hereto that the first party is to lease to the second party for a term of five years the first floor and basement of the building where the Bennett store is now located in David City, Nebraska, which is the property of the first party, and second party agrees to pay therefor the sum of $100 per month payable on the first of each month. It is agreed that a lease shall be executed covering this agreement between the parties hereto as to said building.

"In testimony whereof the parties have hereunto set their hands this 27th day of December, 1919.

"(Signed) R. A. Bennett, First Party.

"C. W. Moon, Second Party."

"Executed in the presence of R. D. Fuller."

It is alleged in the pleadings and undisputed in the evidence that all the provisions of the agreement were completed and complied with, excepting those relating to the execution of the lease of the property; and it further appears that the defendant took possession of the property in February, 1920, pursuant to such written agreement, and paid the stipulated rental until January, 1921, when he removed his effects and ceased to pay rent, and that a lease was executed by the plaintiff with the usual covenants and tendered to the defendant for his execution, but that defendant refused to execute such lease, after formal demand, and plaintiff then commenced this action for specific performance.

The trial court found that the contract was fairly entered into and signed without any misconduct, conceal-

ment or misrepresentation or without any other inequitable contract on the part of either party; that such contract was fair and just in its terms and was made upon a valuable consideration; and that the terms of said agreement were mutual.

The district court further found that the premises intended to be covered by the terms of the contract for the lease were the first story and basement in the brick building located on lot 4, in block 26, in the original town of David City, Nebraska; that the defendant "took possession of said portion of said building pursuant to and in performance of the contract;" that prior to February, 1921, the defendant "refused to further carry out said contract;" that while a key to the building was turned over to plaintiff, when defendant removed his effects, yet the plaintiff did not accept the key with the intent of abandoning his rights or canceling the contract obligations, or releasing the defendant from such contract.

The district court finished its findings with this statement: "Upon the findings as above set forth the court concludes as a matter of law that the parties to this action never made or entered into any agreement as to the terms of the lease for said building owned by plaintiff except as to the rent to be paid per month and the term which said lease was to run; and that, said parties never having made or entered into any agreement as to the other terms to be inserted in said proposed lease, the plaintiff is not entitled to specific performance."

The first question presented for our determination is whether the district court had equitable jurisdiction to decree the specific performance of an executory contract to lease.

The rule of law seems to be well settled that courts of of equity will take cognizance of actions requiring the specific performance of agreements concerning real property, and that the rule applies as well to leases as to deeds. This power of courts of equity is regarded as discretionary, yet it is limited to fixed and established

equitable principles, and, unless exercised within these limitations, it has been adjudged to be arbitrary and capricious. It is generally held by the best judicial authorities that, under a proper state of facts, the right to the remedy of specific performance is perfect, and the court cannot, in any sense, exercise its discretion to deny relief. It has been announced that when a contract, of which equity has jurisdiction, conforms with certain equitable principles, which are quite limited in number, it is as much a matter of course for a court of equity to decree specific performance as for a court of law to give damages for a breach of the contract. The formula as to judicial discretion, therefore, is habitually used by the courts simply to indicate that the cases before the court are governed, not by legal rules, but by some well-established equitable principles.

Further, where the contracts involved concern land, or, in general, where land or any estate or interest in land is the subject-matter of the agreement, the jurisdiction to enforce specific performance is undisputed, and does not depend upon the inadequacy of the legal remedy in the particular case. To emphasize and restate the above principle, it is as much a matter of course for courts of equity to decree the specific performance of a contract for the conveyance or lease of real estate, which is in its nature unobjectionable, as it is for courts of law to give damages for its breach. Equity seems to have adopted this principle as a general governing rule. This is not because the land is fertile or rich in minerals, but because it is land, "a favorite and favored subject in England and every country of Anglo-Saxon origin." Land is assumed to have a peculiar value so as to give an equity for specific performance without reference to its quality or quantity.

The following extract from Pomeroy, Equitable Remedies (2d ed.) sec. 2184, plainly recognizes and enunciates the limitations upon the discretionary latitude applicable to suits for the specific performance of real estate contracts given to courts of equity:

"The granting the equitable remedy is, in the language ordinarily used, a matter of discretion, not arbitrary, capricious discretion, but of a sound judicial discretion, controlled by established principles of equity, and exercised upon a consideration of all the circumstances of each particular case. Where, however, the contract is in writing, is certain in its terms, is for a valuable consideration, is fair and just in all its provisions, and is capable of being enforced without hardship to either party, it is as much a matter of course for a court of equity to decree its specific performance as for a court of law to award a judgment of damages for its breach. This is the ordinary language of judges and text-writers. The term 'discretionary,' as thus used, is, in my opinion, misleading and inaccurate. The remedy of specific performance is governed by the same general rules which control the administration of all other equitable remedies. The right to it depends upon elements, conditions and incidents, which equity regards as essential to the administration of all its peculiar modes of relief. When all these elements, conditions, and incidents exist, the remedial right is perfect in equity."

These limitations upon the discretionary powers of courts of equity have been approved by this court in the following language: "Whether a decree for the specific performance of an agreement for the sale of real estate will be granted rests in the discretionary power of the trial court, sitting as a court of chancery. Such discretion, however, is not unlimited, and a decree is not to be given or withheld arbitrarily and capriciously, but it is a judicial discretion, to be controlled and governed by equitable rules and principles." *Hoctor-Johnston Co. v. Billings,* 65 Neb. 214. See, also, *Stanton v. Driffkorn,* 83 Neb. 36; *Waldo v. Lockard,* 96 Neb. 490.

The foregoing citations are sufficient to authorize us to answer in the affirmative the first question, and to show the recognized principle that equity takes cognizance of all actions requiring the specified performance of an

agreement concerning real property or any estate or interest in land, including the execution of leases.

The next question to be determined is whether the written executory agreement in respect of the particular terms of the lease agreed to be executed contains a definite and specific statement of all the material elements necessary to require the discretionary power of the court to enter a decree of specific performance.

It will be observed that the local or particular, material terms of this agreement to execute a lease are all definitely fixed and undisputed, and each of the parties has so admitted by the form of lease submitted by him. There is no disagreement whatsoever regarding the date of the commencement of the term, the duration of the lease, the rental to be paid, when payable, and the specific description of the premises demised. These are all fully understood and agreed upon by the parties. It seems to follow, then, that as to the real, necessary and material elements of the lease the agreement is clear, definite and complete, and upon these the parties seem to have been of one mind and the lower court in no doubt.

This brings us to the real or main matter of controversy in this case, which is that, where the material elements of the agreement to lease are definitely agreed upon, but the contract is silent as to the general, usual and ordinary covenants and conditions, can such a contract be enforced by specific performance? In other words, are these covenants and conditions to be implied in law, or must they be definitely set forth in the agreement in order to be inserted in the lease by decree of a court of equity? While the contract provides "that a lease shall be executed covering the agreement between the parties hereto as to said building," it is silent as to the usual conditions, covenants and other general provisions contained in an ordinary lease.

From an examination of the recognized text-books and the adjudicated cases, it appears that it has long since been the settled law that, where there is no specification

in the contract to execute a lease covering the usual and ordinary covenants and provisions, these will be implied by the courts of equity. This rule was established in England as early as the famous decision in *Dumpor's* case, and is clearly stated in *Church v. Brown,* 15 Ves. Jr. (Eng.) *258, *271, in this language: "There was no sort of difference, whether the agreement in the terms of it did or did not refer to usual or proper covenants; that in every agreement, whether as to freehold or leasehold estate, it was implied, that there were to be usual and proper covenants."

This rule of law is recognized, with some exceptions, by the courts of this country. In 36 Cyc. 792, the general principle of construction is briefly stated thus: "A contract to execute a lease calls for a lease with the usual covenants."

The annotator of the L. R. A. states the rule to be: "Specific performance of an agreement for a lease will be decreed with such covenants as are usual and incident to leases of the same kind, and such as flow from the contract and are necessary to give it effect." Note in 20 L. R. A. 36.

The same principle of law is announced in *Eaton v. Whitaker,* 18 Conn. *222, in which the court say: "Where nothing was said as to its terms, at the time when the agreement was made," the decree will require the demurring party "to execute a lease containing the usual provisions."

As has been noted, the same general established rules of law applicable to contracts for leases apply to contracts for deeds, and in general to all interests in land. The following are some of the numerous adjudicated cases so holding: *Dwight v. Cutler,* 3 Mich. *566; *Dewey v. Hines,* 87 Kan. 834; *Drake v. Barton,* 18 Minn. 462.

The author of the article entitled "Vendor and Purchaser" in Cyc., after an examination of the authorities bearing on this question, makes the following deduction as to deeds: "When the contract does not stipulate as

to the character of the deed or for covenants therein, some of the authorities hold that no covenants are necessary and that a quitclaim deed satisfies it. By the weight of authority, however, the purchaser, notwithstanding nothing is said in the contract regarding covenants, is entitled to a deed with covenants." 39 Cyc. 1555, and cases cited.

The learned counsel for the defendant, in opposition to this general rule of law, cite judicial authorities from several states, including the case of *Peterson v. Ramsey,* 78 Neb. 235. An examination of these cases is not convincing that the established rule of equity as to the usual and ordinary covenants and provisions should be done away with, and the case decided by this court referred to may be considered as but a proper modification of the rule as applicable to particular circumstances. The facts always require courts of equity to enforce, not an arbitrary rule, but to exercise sound discretion based upon established equitable principles.

The district court, in *Peterson v. Ramsey, supra,* decreed that the defendant should execute a deed of general warranty to plaintiff Peterson, but this was considered inequitable by this court, upon appeal, for the reason that Rublee had received only a quitclaim deed from Ramsey, which gave him no recourse upon Ramsey, and that therefore Rublee, who had no remedy against a prior grantor in case of failure of title, should execute simply a quitclaim deed with covenants against his own acts or omissions, and not a deed of general warranty.

The other cases cited by counsel for defendant fall far short of deciding that the rule of law established in the common law of England and generally approved in this country should not be adopted by the courts of Nebraska. Some of the cases referred to are in states where there is an express statute against "implied covenants" in real estate contracts. In others, a specific performance was refused because of a want of equity.

In *Finty v. Kinder,* 194 Ill. App. 115, especially relied upon by defendant's counsel, the court place the main

ground of refusal upon a waiver of the right, and use this language: "One who enters into an agreement to lease property for a term of years at a stipulated monthly rental waives his rights under the agreement, where the tenant refuses to sign and accept the lease proffered by the landlord and is permitted to remain in possession upon payment of the stipulated rental." It will be seen at a glance that this Illinois case does not pretend to decide that, where the agreement contains the material elements of the lease, the law will not presume the ordinary covenants and conditions and enforce the agreement.

In *Clarke v. Koenig,* 36 Neb. 572, this court properly held, in denying specific performance, that the contract was ambiguous and uncertain, and that plaintiff was in default of his part of the agreement, and also that the contract was for the sale of a homestead of a married person and had not been executed by both husband and wife, any one of which facts was fatal to the right of specific performance.

In *Krum v. Chamberlain,* 57 Neb. 220, this court held that the correspondence relied upon did not eventuate in a valid and enforceable contract, and hence the remedy should be denied.

It does not appear that any of the Nebraska cases cited by defendant's counsel hold adversely to the general rule recognized as to implied covenants and provisions in executory contracts for deeds or leases.

A careful consideration of the agreement and of the admitted facts in the instant case does not convince us that any subsequent negotiations were necessary between the parties or were contemplated by its terms. Each party had the right to assume that the stipulation for a lease, in its legal effect, was an agreement for a lease with usual and ordinary covenants and provisions, and the contract, with this legal implication, is complete. In any event, if such usual and ordinary covenants and provisions were not implied, then there would be a lease of the premises fixing the term, the beginning and ending thereof,

and the rent to be paid, and this in itself would make the lease complete and subject to the legal incidents operative in the absence of any express stipulation. The undisputed evidence proves that shortly after the agreement was complied with by the parties, with the exception of the execution of the lease, the plaintiff tendered a lease for execution by the defendant, claiming that such lease included the usual and ordinary covenants, as understood by the plaintiff; and a witness, whose testimony is undisputed, testified that the lease so tendered contained only the ordinary covenants and provisions in general use in the state of Nebraska. This lease the defendant refused to execute.

While it is held that certain covenants in a lease or deed are matters of law, such as quiet enjoyment, delivery of possession, etc., yet there are others which are properly held to be questions of fact, and that at different times and places the practice may vary and the court may look to books and precedents in determining what covenants are usual and ordinary, and that experts, such as conveyancers and others, may testify in regard thereto, and further that the question is to be considered in the light of the character of the property leased and the custom in the state or neighborhood.

The evidence shows that the defendant also tendered a lease to the plaintiff. This the plaintiff refused to execute. There is no evidence showing that the covenants contained in the defendant's proposed lease were the usual and ordinary covenants; but, on the contrary, one of the provisions therein was a clause which the defendant wanted to have inserted, but which is under no jurisdiction included among the common or usual provisions in contemplation of the law, or shown by any evidence to be in use in the state of Nebraska. The following is such objectionable provision: "And it is further agreed, that the party of the first part, should the party of the second part or his sublessee put in dry-goods stock for sale in premises, that said party of the first part shall

put in shelving of a kind and character necessary to conduct a dry-goods business, in said store, at his expense." Certainly, the plaintiff was justified in rejecting a lease including this unusual and unauthorized provision.

What both parties were entitled to under the agreement was to have a lease executed containing, not only the specific and necessary material elements agreed upon, but, in addition thereto, the common and usual covenants, conditions and provisions in use in the state of Nebraska. Either party had the right to reject a proposed lease because it included unusual and unauthorized provisions which could only be inserted therein by special stipulation and agreement. Because the defendant could not obtain, and plaintiff would not consent to, a lease which contained unauthorized and unusual provisions, the district court was not justified in finding that, "said parties never having made or entered into any agreement as to the other terms to be inserted in said proposed lease," the plaintiff was not entitled to specific performance. What the parties failed to agree upon were the unusual and unauthorized covenants and provisions.

As we have seen, the material elements were fixed and settled in the written agreement, and the usual and ordinary covenants and provisions applicable to leases in the state of Nebraska were implied, as a matter of law, and the undisputed evidence shows what these were. This agreement and the provisions which the law implies were all settled by the parties when they executed said written agreement, and it necessarily follows that the plaintiff was entitled to the specific performance of such agreement with all its specific stipulations and legal implications, and to have the lease, the terms of which had all been agreed upon and been implied by law, executed by the defendant. In accord with this view, there is nothing in the agreement from which the court can infer that other provisions and covenants are required to be specifically named and stipulated by the parties before the lease is executed. The material elements are certain and fixed,

and, as a part of such agreement, the usual and ordinary covenants and provisions in use in the state of Nebraska are made a part thereof by implication of law.

Under the established principles of equity and the facts, the plaintiff was entitled to the specific performance of the contract, and to have the defendant execute the lease tendered by the plaintiff and set forth in plaintiff's petition. The decree of the district court is reversed and the cause remanded, with instructions to require of the defendant his specific performance of the agreement as to leasing the premises in question.

REVERSED.

CITIZENS STATE BANK OF BLOOMFIELD ET AL., APPELLANTS, V. BOARD OF EQUALIZATION OF KNOX COUNTY, APPELLEE.

FILED JULY 13, 1923. No. 22471.

1. **Taxation:** BANKS: ASSESSMENT. Under section 6343, Rev. St. 1913, as amended in 1919 (Laws 1919, ch. 162), providing for the taxation of banks, it is the duty of the county board of equalization, whenever a bank shall have acquired real estate which is assessed separately, to deduct the assessed value of such real estate from the capital stock of the bank.

2. ———: ———: ———. A banking corporation is not authorized by law to deduct in its tax schedule the book value of its banking house property, but can lawfully only deduct the assessed value thereof.

APPEAL from the district court for Knox county: WILLIAM V. ALLEN, JUDGE. *Affirmed.*

W. A. Meserve, for appellants.

P. H. Peterson and *F. A. Barta, contra.*

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

COLBY, District Judge.

This is an appeal from the district court for Knox county. In the lower court it was an appeal from an order of the board of equalization of Knox county, ordering an amendment to the personal tax schedule of plaintiff bank for the year 1921.

The appellant, Citizens State Bank of Bloomfield, in making out its tax schedule to the assessor of Knox county for the year 1921, deducted from the valuation of its capital stock the value of its banking house property according to the amount as it was carried on the books of the bank in the sum of $12,375, instead of deducting the assessed valuation for which said property had been separately assessed in the sum of $8,400. The whole question is as to how section 6343, Rev. St. 1913, as amended in 1919, should be construed.

The assessor and board of equalization of said county gave notice to appellant bank of their intention to amend the tax schedule by deducting the assessed valuation of said banking house property only, or the said sum of $8,400, instead of the sum of $12,375, the book value deducted by the bank in its schedule. The bank protested against the proposed change by the board of equalization, but the change was made and the bank appealed to the district court for Knox county. A demurrer was interposed to the petition and sustained by the court, the action was dismissed, and the cause is brought here for review.

Objection is made that section 6343, Rev. St. 1913, as amended in 1919, and as interpreted by the district court, is unconstitutional. Section 1, art. IX of the Constitution of Nebraska of 1875, regarding the uniformity of taxation, has been held to apply to the class taxed. The Constitution does not prohibit double taxation, but provides that the taxation shall be uniform upon the class taxed. Authority was given in the section and article referred to to classify certain business for taxation purposes, but this court held at the time that this power did not prohibit the legislature from making such classifications as it deemed proper, and the state ever since has freely exercised such power. *State v. Lancaster County,* 4 Neb. 537; *State v. Fleming,* 70 Neb. 523, 529; *Smith v. Stephens,* 173 Ind. 564, 30 L. R. A. n. s. 704; *McCulloch v. Maryland,* 4 Wheat. (U. S.) *316, *428.

From these authorities we may properly conclude that section 6343, Rev. St. 1913, as amended in 1919, is constitutional and valid. Banking is declared to be a quasi-public business by our revised statutes and subject to the regulation and control of the state. A bank can only do what the law permits it to do. Its full and only authority comes from the legislative acts authorizing its existence. When the statutes say that a bank shall have the right to deduct the assessed value of real estate, which has been separately assessed, the state is acting within its authority, and only the assessed valuation of said real estate can be deducted. The statute is the sole authority for making any deduction. It is clear that, if the legislature had intended that a bank should be allowed to deduct the valuation of its banking house as the same was carried on its books, that is, its book value as fixed by the bank, which the appellants contend they should be allowed to do, it would have been so stated in the statutes.

The following is the wording of the clause of chapter 162, Laws 1919, under consideration: "Whenever any such bank, association or company shall have acquired real estate which is assessed separately, the assessed value of such real estate shall be deducted from the valuation of the capital stock of the association or company." It has been properly said that the power of taxation is inherent in the state and that the government could not perform its functions without this power. It may be limited by the Constitution, but exists without express authority as a necessary attribute of sovereignty. The power of taxing the people and their property is essential to the very existence of the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. *McCulloch v. Maryland,* 4 Wheat. (U. S.) *316, *428.

In *Smith v. Stephens, supra,* this question was passed upon by the supreme court of Indiana; the controversy arising over the wording of a statute substantially the

same as ours as to the manner of assessing the shares of stock in a banking business. The wording of the Indiana statute was as follows: "Whenever any such bank, banking association or trust company shall have acquired real estate, the assessed value of such real estate shall be deducted from the valuation of the capital or capital stock of such bank, banking association or trust company." The suit was brought by the stockholders of the bank enjoining the treasurer from collecting alleged unlawful taxes assessed against them on their shares of stock. It was held: "Stockholders of a bank are not denied constitutional privileges and immunities, uniformity of taxation, or the equal protection of the laws, by a statute allowing a deduction, in fixing the value of its capital stock for taxation, of only the assessed value of real estate held by it, rather than the amount invested in real estate, although it results in the taxation of the real estate to its full value, while such property is assessed to others at only a fraction of its value." *Smith v. Stephens,* 30 L. R. A. n. s. 704 (173 Ind. 564).

Another case applicable to the construction of the Nebraska statute under consideration is that of *State v. Shryack,* 179 Mo. 424, in which the same principle of construction is announced.

Under our law the shares of the bank are the unit of taxation, and each of the individual shares is taxed to the respective shareholders as personal property, and the bank as an entirety, as a corporation, is not taxed at all. By the statute provision is made to obtain a basis for taxing the shareholders and the assessor is required to determine and settle the true value of each share of stock, and such share then forms the unit or basis of taxation. It is taxed as personal property upon its true value, as determined by the assessor, and it matters not the kind of property, taxable or nontaxable, which goes to make up its value.

It is worthy of note that the shares of stock are taxable to the stockholders even though all or any part of such

bank stock may be invested in nontaxable government bonds. It is not a question of double taxation or single taxation or the nontaxation of certain property, a part of which goes to make up the value of the shares of stock. While double taxation should be avoided, yet it is a common fact that this condition, as well as the escape of certain property from taxation, results in many instances.

The language of the statute is plain and unequivocal that, whenever any bank shall have acquired real estate which is assessed separately, the "assessed value," not the "book value," shall be deducted from the valuation of the capital stock of the banking association, and then the further duty devolves upon the county assessor to determine and settle the true value of each share of stock after an examination of the statement and report of the bank.

It is admitted that it is the settled policy of our law to guard against double taxation, if possible, but such taxation is not held to be unconstitutional, as is evident from a consideration of the following cases: *Nye-Schneider-Fowler Co. v. Boone County,* 102 Neb. 742; *First Trust Co. v. Lancaster County,* 93 Neb. 792; *Bankers Life Ins. Co. v. County Board of Equalization,* 89 Neb. 469. The phrase used in the law, "the assessed value of real estate," means simply and only what the ordinary definition of the words imports, and the law under the interpretation and definition given, as we have seen, is not held unconstitutional.

Our statutes provide that property shall be assessed at its actual value, and we must presume that the assessor has done his duty. However, if the assessor did not assess the banking house property of appellant at its actual value, it is no reason for complaint against the law. Banking corporations and other organizations are given many privileges and immunities in business, taxation and in the variety of avenues in which their labors enter, not given to private individuals. A bank is an

artificial person subject to the laws applicable to the class to which it belongs. Individuals, in many things, are discriminated against in favor of banks. A bank is not obliged to pay taxes upon its borrowed money or the money of its depositors, a privilege which no individual is given. Many cases could be enumerated, showing discrimination between banks, firms and other kinds of corporations, but these do not make the laws unconstitutional.

As before stated, the law of uniformity of taxation need be uniform only as to the class taxed, but may not be uniform as to other and different classes. The constitutional requirements are complied with when the property of a banking corporation is assessed in the manner prescribed by law at its fair value, the same as an individual's property is assessed at its fair value.

In our judgment the board of equalization of Knox county had full authority to deduct the assessed valuation of the banking house property of appellant bank in the sum of $8,400 from the tax schedule of the bank, in place of the sum of $12,375 deducted by the bank, and the district court was right in sustaining the demurrer and dismissing the action, and its judgment should be, and is,

AFFIRMED.

JOHN TASICH V. STATE OF NEBRASKA.

FILED JULY 13, 1923. No. 23160.

1. **Criminal Law:** SEPARATE OFFENSES. Section 9553, Comp. St. 1922, defines several distinct independent offenses of equal rank, no one of which is embraced within the other.
2. ———: INSTRUCTIONS. Under an information charging defendant with shooting with intent to kill, it is error to instruct the jury that this offense includes the lesser offense of shooting with intent to wound or of assaulting with intent to inflict a great bodily injury.
3. ———: CONVICTION. Under an information charging defendant with shooting another person with intent to kill, such defendant cannot be convicted of an assault with intent to do a great bodily harm.

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

Jamieson, O'Sullivan & Southard, Richard J. Organ and *John T. Marcell,* for plaintiff in error.

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

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

COLBY, District Judge.

The defendant was tried and convicted in the district court for Douglas county upon an information in which he was charged with maliciously shooting with intent to kill, the charging part of the information being as follows: "That on or about the 22d day of March, in the year of our Lord one thousand nine hundred twenty-two, John Tasich and Joe Tasich, late of the county of Douglas aforesaid, in the county of Douglas and state of Nebraska aforesaid, then and there being, then and there being in said county, then and there in and upon one Stella Denie, then and there being, unlawfully, feloniously and maliciously did make an assault and then and there with a certain pistol loaded with gunpowder and leaden bullets, which said pistol they, the said John Tasich and Joe Tasich, then and there in their right hands had and held, her, the said Stella Denie, did shoot with the intent in so doing wilfully, maliciously and feloniously, her, the said Stella Denie, to kill, contrary to the form of the statute," etc.

Defendant was arraigned and plead not guilty to the offense charged in the information, was tried by a jury, and under the instructions of the court the jury found him guilty, their verdict being in the following language: "We, the jury * * * do find the said defendant guilty of assault with intent to do great bodily injury, as charged in the information." Motion for a new trial was overruled and defendant was sentenced to three years in the penitentiary. To reverse these proceedings and the

judgment, the defendant filed his petition in error in this court.

It is plain that the information was brought under section 9553, Comp. St. 1922, which is as follows: "Whoever shall maliciously shoot, stab, cut, or shoot at, any other person with intent to kill, wound, or maim, such person, shall be imprisoned in the penitentiary, not more than twenty years nor less than one year"—charging the defendant with maliciously shooting Stella Denie with intent to kill. This section of the statute clearly contains a number of distinct substantive crimes, no one of which is a part of or embraced within any of the others.

The district court in its instruction No. 5 used this language: "Embraced within the crime of shooting with intent to kill is the lesser offense of shooting with intent to wound. The statute of this state pertaining to the offense of shooting with intent to wound provides: 'Whoever assaults another with intent to inflict a great bodily injury, shall be punished, on conviction thereof,' as provided by law."

Under section 9553 of the statute the offense of shooting with intent to wound is not embraced within the crime of shooting with intent to kill, but each is an independent substantive crime of equal rank. Further, the district court seems to have transferred the offense contained in section 9556 to and made it a part of section 9553, although beyond question the two are entirely distinct and separate.

The instructions substituted the crime of assault with intent to inflict a great bodily injury, as found in section 9556, which is an entirely different and distinct, independent offense, not even embraced in the same section, for the one contained in the information, and thus enabled the jury to find defendant guilty of a crime with which he was not charged and for which he was not on trial.

The sections of the statute under consideration seem to be plain and their language incapable of two con-

structions. The law appertaining thereto is settled and unequivocal and the proceedings and judgment of the district court are clearly erroneous and should be reversed, and, as the defendant has been in jeopardy, he is entitled to be discharged.

The judgment and proceedings of the district court are reversed and the defendant will be discharged from further prosecution for the offense contained in the information.

REVERSED AND REMANDED.

FRANCIS E. NASH ET AL. V. STATE OF NEBRASKA.

FILED JULY 13, 1923. No. 23260.

1. **Indictment and Information:** DUPLICITY. An information charging defendants with unlawful possession of a still for the manufacture of intoxicating liquors and unlawful possession of other equipment for the manufacture of intoxicating liquors, and also unlawful possession of 30 gallons of mash being used in the manufacture of intoxicating liquors, sets forth only one offense, and should not be quashed for duplicity. The act made criminal by law is the unlawful possession of equipment or material for the manufacture of intoxicating liquors.
2. **Jury:** CHALLENGES: WAIVER. When the defendants, being tried together, do not demand the full number of challenges allowed under the statutes, they will be held to have waived their rights thereto.
3. **Criminal Law:** SEPARATE TRIALS. The statute only grants the right of separate trial to persons charged with a felony, not to those jointly charged with a misdemeanor, and defendants' motion for separate trials was properly overruled.
4. **Evidence:** SUFFICIENCY. The court properly submitted the case to the jury upon the evidence and instructions, and an examination of the record shows that there was sufficient evidence to justify and sustain the verdict.

ERROR to the district court for Adams county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

J. E. Willits, for plaintiffs in error.

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

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

COLBY, District Judge.

This is a criminal action brought by proceedings in error to this court by the defendants Francis E. Nash and Ernie C. Noble, who were prosecuted in the district court for Adams county for having unlawfully in their possession a still and other equipment for the manufacture of intoxicating liquors, and also for unlawfully having in their possession about 30 gallons of mash being used in the process of manufacturing intoxicating liquors.

The defendants were tried jointly, convicted by a jury, and each defendant sentenced to pay a fine of $500 and to serve 30 days in the Adams county jail, and taxed with the costs of the prosecution.

The defendants filed a motion in the district court to quash the information, in the following language: "The defendants and each of them severally move the court to quash the information filed herein, for the reason that more than one offense is sought to be charged in a single count thereof, and the same is contrary to law." This motion was overruled by the district court and is the first assignment of errors of which complaint is made.

The charging part of the information upon which the defendants were tried is as follows: "That Francis E. Nash and Ernie C. Noble, late of the county aforesaid, on the 6th day of April, A. D. 1922, in the county of Adams, and state of Nebraska aforesaid, did unlawfully have in their possession a still and other equipment for the manufacture of intoxicating liquors, and did also unlawfully have in their possession about 30 gallons of mash being used in the process of manufacturing intoxicating liquors, all contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Nebraska."

The language of the information as to the statement of the offense follows very closely that of the statute,

which, in section 3252, Comp. St. 1922, contains a statement of the offense and the definition of the possession which is made unlawful. In this section it is declared to be unlawful for any person to "maintain or have possession of any still, or equipment for the manufacture of alcohol or whiskey or of any mash or intoxicating liquor in any stage of manufacture." This section also contains the further provision that any person "who shall have possession of any still or any part thereof or of any other equipment for making intoxicating liquor or who shall have in his possession any mash or other material being used in the process of manufacturing intoxicating liquor, * * * shall, upon conviction, be fined," etc.

It is contended by counsel for defendants that the information contains more than one offense; that the unlawful possession of a still is an offense, that equipment for the manufacture of intoxicating liquor is an offense, and that the unlawful possession of the 30 gallons of mash being used in the process of manufacturing intoxicating liquors is also an offense under the statute, and that all three offenses are charged in the one count in the information, and that these three distinct offenses should each be charged in a separate count.

We are referred to section 3278, Comp. St. 1922, covering the practice under the intoxicating liquors act, which provides that "separate offenses may be set out in separate courts, and any and all offenses hereunder may be joined in the same indictment, information," etc., and that "the accused may be prosecuted and convicted upon all or any of said counts so joined, the same as upon separate indictments, information," etc.

The question is whether the information charges more than one offense, whether the unlawful possession of a still, or the unlawful possession of other equipment or the unlawful possession of the 30 gallons of mash being used in the manufacture of intoxicating liquors are to be considered as separate and distinct crimes, and are re-

quired to be stated in separate counts of the information.

We are convinced that the unlawful ownership, maintenance and possession prohibited and made criminal define and state but one criminal offense. There are two acts made unlawful by this clause. The first is that it shall be unlawful for any person to manufacture any intoxicating liquors, and this is a distinct separate offense, and the second, which is the charge set out in the information, is that it shall be unlawful to own, maintain or have possession of any still or equipment for the manufacture of intoxicating liquor or any mash or intoxicating liquor in any stage of manufacture.

The information in this case charges the defendants with the unlawful possession of a still and of other equipment for, and of 30 gallons of mash being used in, the manufacture of intoxicating liquor. This unlawful possession plainly embraces only one criminal offense and makes the unlawful possession of any still or other equipment and of any mash, etc., the criminal act for which a remedy is intended. It is the unlawful possession of certain things and material which are being used in the manufacture of intoxicating liquor that is the crime. Section 3278, Comp. St. 1922, providing that separate offenses may be set out in separate counts and joined in the same information, is applicable only to distinct, separate offenses, and cannot be considered as authority for the dividing up of one offense and placing each in a separate count. This would place an unreasonable duty upon the county attorney and might work a serious injustice to the defendant.

Plainly the intention of the statute is to make a criminal offense of the unlawful possession of certain equipment and material used for the manufacture of intoxicating liquors, and the change in the stating of the crime in the information from the use of the disjunctive "or" in the statute to the conjunctive "and" in the information is the proper way to allege the offense as to

the unlawful possession of equipment or material used or intended for the manufacture of intoxicating liquors, and it is for the state, upon the trial, to prove beyond a reasonable doubt the existence of the possession of one or more of the things charged to be in the unlawful possession of defendants; by so doing, the defendants are only obliged to meet the one crime contemplated and defined by the law, and, if convicted, can only be punished for the one offense.

The principle is recognized in 1 Bishop, Criminal Procedure (3d. ed.) sec. 436, in which the learned writer uses the following language: "It is common for a statute to declare that, if a person does this, or this, he shall be punished in a way pointed out. Now, if, in a single transaction, he does all the things, he violates the statute but once, and incurs only one penalty. Yet he violates it equally by doing one of the things. Therefore an indictment upon a statute of this kind may allege, in a single count, that the defendant did as many of the forbidden things as the pleader chooses, employing the conjunction *and* where the statute has *or,* and it will not be double, and it will be established at the trial by proof of any one of them. Thus, where the allegation was that the defendant sold spirituous liquors, to wit, rum, brandy, whisky, and gin, in less quantities than one quart, without license, the court overruled the objection that four offenses were thereby charged in one count, saying: 'The selling of any of the liquors named would be an offense; but there is no more reason why an offender should be indicted separately for each, than there would be to charge a thief, who had stolen a suit of clothes, in separate counts for the coat, waistcoat, etc.'"

The same general principal has been held by this court in *State v. Leekins,* 81 Neb. 280; *Union P. R. Co. v. State,* 88 Neb. 547; *Lawhead v. State,* 46 Neb. 607.

The action of the district court in overruling defendants' motion to quash the information on the ground

that more than one offense was charged therein was correct.

The next error urged by counsel for defendants is the overruling of the demurrer to the information interposed, the grounds of which were that an offense was not charged. This contention seems without merit, as the information sets forth all the essential elements of the crime and all the averments required by law.

The next objection urged is the overruling of the plea in abatement and bar on the ground that the act enacted as an amendment to the intoxicating liquors law of Nebraska is unlawful for infringing upon the constitutional rights of the defendants and depriving them of certain inalienable rights, among which are life, liberty and the pursuit of happiness. There is no merit in this assignment of error, as this court has held in *Badberg v. State,* 108 Neb. 816, that the law is constitutional.

The next assignment of error is in overruling defendants' motion for separate trials. Section 10130, Comp. St. 1922, grants the right to defendants of separate trials only in cases of felony. The offense charged in the information is a misdemeanor, to which the statute referred to does not apply.

The next assignment of error is in regard to the court's rulings on the admission or exclusion of evidence offered on the trial. An examination of each ruling convinces us that nearly all of them were made by the court in the interests of defendants and for their protection, and that no prejudicial errors were committed.

A further objection is made that the jury were not properly selected, and that the defendants were allowed only three peremptory challenges, and our attention is called to section 10136, Comp. St. 1922, which provides: "If two or more persons be put on trial at the same time, each must be allowed his separate peremptory challenge, and in such cases the attorney prosecuting on behalf of the state shall be allowed such peremptory challenges for each of such defendants as are allowed by

law." The record shows that the jury were duly impaneled and sworn, and, nothing appearing to the contrary, the presumption is that the jury were properly anl lawfully selected. This assignment of error is not raised specifically in the motion for new trial, and the transcript fails to disclose any objection by defendants, or either of them, arising because of the mode of selection or sufficiency of the jury. No objection was made to the allowance of peremptory challenges until after the trial and verdict and upon the hearing of the motion for new trial. In a misdemeanor case of this kind the defendants can waive a jury or any or all peremptory challenges. The jury was not waived, but the defendants requested no more than three peremptory challenges; they made no demand under the statute for the allowance to each of his three separate challenges, and this right must be considered as waived. 16 R. C. L. 219, sec. 36, 244, sec. 61, 253, sec. 71; *Gravely v. State,* 45 Neb. 878; *Morgan v. State,* 51 Neb. 672. The fact appearing in the record that no exceptions were taken to the jury by the defendants indicates that it was a fair and impartial jury, such as the Constitution guarantees to a party. The defendants were tried by a jury to which they took no exceptions, and this in itself should constitute a waiver of further peremptory challenges.

We find no error in any of the instructions given by the court. Each and all of them seem to be proper and to correctly state the law; they cover the different phases of the case and carefully preserve the rights of the defendants. There seems to be no merit in any of the objections raised by the defendants to the instructions given. There appears to be no error in the proceedings of the lower court which amounts to a deprivation of the constitutional rights of the defendants, or of rights which were not and could not be waived, and there has been no substantial miscarriage of justice. *Porter v. State,* 107 Neb. 690.

The sole remaining assignment of error is that the ver-

dict of the jury is not sustained by the evidence and is contrary to law, that such evidence merely raises a suspicion or conjecture of guilt and is not sufficient to support a conviction. Without going into the evidence fully, it appears conclusively that one of the exhibits found in the possession and on the place of the defendants constituted a still; that the equipment and material found upon the premises were sufficient to justify the jury in its belief that the still was upon the premises with the knowledge of both defendants and was there for the purpose of manufacturing intoxicating liquor. The fact that the still was concealed might be considered as evidence by the jury in reaching their conclusion as to the intent of defendants and the purpose for which the still was kept on the premises, and it hardly seems possible that the defendant Noble, without any instructions from defendant Nash, would change the feed of the hogs and upon his own initiative fix up a mixture of mash to be fed to the animals. The jug with the "hootch" smell was also a fact which the jury were entitled to consider.

It is usually quite difficult for officers to apprehend a guilty person in the actual operation of a still in the unlawful manufacture of intoxicating liquor. Such manufacture is a process which requires time. In this particular case the officers apparently arrived when the initial process of manufacture had just started, the mash had been prepared and the grain was soaking. The machinery for the distillation part of the process was at hand and was concealed. The jury might well infer from the actions of the defendants and from the entire surroundings that the still and the mash were in the possession of these defendants for the purpose of manufacturing intoxicating liquor.

Under this evidence there were proper questions of fact to be submitted to the jury and the jury passed upon such questions. There was certainly considerable evidence to go to the jury under the information, and upon such evidence the jury made its finding of the guilt of defend-

ants. It is not for this court to reconsider the evidence or its weight. The issues of fact were exclusively within the province of the jury to decide, upon a consideration of all the evidence, and we see no reason why the verdict should now be disturbed.

From an examination of the whole record, it appears that the defendants had a fair trial by an impartial and unprejudiced jury, that the propositions of law were properly submitted to the jury by the district court, and that the evidence was sufficient to warrant the verdict of guilty against each defendant. We hold that the proceedings and judgment of the lower court were without prejudicial error and should be affirmed.

AFFIRMED.

STATE, EX REL. CITY OF CHADRON, ET AL., APPELLEES, V. INTERMOUNTAIN RAILWAY, LIGHT & POWER COMPANY ET AL., APPELLANTS.

FILED JULY 13, 1923. No. 23266.

1. **Mandamus:** PUBLIC DUTY. A writ of mandamus, with an ancillary injunction to prevent actual, impending or threatened injury, is a proper remedy to compel the performance of a plain public duty, when there is no adequate remedy at law.
2. ———: ———: PUBLIC SERVICE CORPORATION. A court may compel by mandamus the performance of a public duty assumed by a public service corporation in furnishing electrical current to a municipality and its beneficiaries, when from the franchise contract it appears that such duty is plain and unequivocal.
3. **Electricity:** EXCESS RATES: PAYMENT: ESTOPPEL. The payment of a surcharge of 33 1-3 per cent. in addition to the maximum contract rate by the city of Chadron and its inhabitants under threat of shutting off the electrical current, unless the increased rate is paid, will not be construed as a consent to such increased rate or a change of the contract between said city and the public service corporation.

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

J. E. Porter, for appellants.

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

Heard before MORRISSEY, C. J., LETTON and ALDRICH, JJ., BLACKLEDGE and COLBY, District Judges.

COLBY, District Judge.

This action is an appeal by the respondents, Intermountain Railway, Light & Power Company, a corporation, and Edward N. Libby, from a judgment awarding to the relators, city of Chadron and others, a peremptory writ of mandamus and from the writ issued. In pursuance of the judgment the writ commanded respondents as follows:

"To equip the 59 ornamental light posts or standards comprising the white-way with top light and side lights and globes thereon, and furnish the same with the full amount of electricity called for in the said franchise contract, and to paint the same in substantial compliance with the franchise contract, and to monthly render bills for such fluid supplied at the rate prescribed in the said franchise ordinance without surcharge, and to furnish to Milton B. McDowell and John H. Regan for the operating of their X-ray machine, and all other purchasers of power, residents of the city of Chadron, electricity for power for any and all purposes at the rate of $1 per H. P. per month and a current rate not exceeding 6 cents, and to furnish every inhabitant now connected with the plant of said respondent or its wire transmission lines electricity for illuminating purposes, and to charge therefor a minimum charge of $1 per month when not metered, and, when metered, additional current charge up to 20 K. W. H. per month of 12 cents per K. W. H., and to furnish service connections from the feed wires of the respondent company to the owners, also to building of any customer or any resident who shall apply to become a customer, without charge or advances for the said material and without surcharge to any customer or prospective customer."

It appears from the record that on December 22, 1910, the city of Chadron, a city of the second class, made a contract by ordinance No. 229 of said city with Kass & Klingaman for the use for 20 years of the public places of the city to maintain their system of distribution of electric lights to the city and its citizens, and fixed rates for the city's street lights and for citizens at a 12 cent per kilowatt, monthly, meter rate, and this contract was made binding upon the assigns of Kass & Klingaman. Some years later Kass & Klingaman sold their plant and contract rights to the respondent Intermountain Railway, Light & Power Company, and ordinance No. 287 was passed by the city of Chadron at the request of respondent company, and its terms were accepted in writing by said company. By its terms this contract under ordinance No. 287 was for the period of 25 years from the date of its final passage on January 19, 1917.

It appears that all parties acted upon and carried out the terms of said contract until some time in November, 1918, when the respondent company notified the city of Chadron that it would, on and after said date, collect from the city and all consumers in said city the maximum rates provided for in said ordinances and contract, and in addition thereto a surcharge of 33 1-3 per cent. thereon, and that thereafter and up to the time of the commencement of this action said surcharge was collected from the city and all consumers therein, until stopped by the restraining order issued in this case at the commencement thereof.

Among the first objections made by the respondent is that the district court erred in granting an injunction or restraining order with the writ of mandamus, that the two remedies are inconsistent; and it is contended that an injunction is the proper remedy for the threatened violation of a duty entailing an injury for which the law gives no adequate remedy, while the office of mandamus is to compel the performance of a plain and positive

duty. It is strenuously urged by respondents' counsel that in this case the relators really seek the specific performance of a contract aided by injunction, and that if the relator is entitled to any relief the remedy is by specific performance and injunction, and not by mandamus.

It is unquestioned that the writ of mandamus is an extraordinary legal remedy and should not be used where there is an adequate remedy at law. Although to a certain extent proceedings by mandamus and by injunction occupy the same field and cover parts of the same ground, yet one of the distinguishing questions presented here at the outset is whether money damages are adequate to compensate the city of Chadron and the public for the failure on the part of the respondent company to carry out the terms of the contract. There is a provision for, and the ordinance requires, a continuity of service in the furnishing of electrical current, and it is very evident that a continued refusal on the part of respondent company to live up to the franchise contract could not be adequately relieved by suits for damages; there would have to be a multiplicity of suits and the public privileges of the city in the lighting of the streets and municipal buildings could not be preserved and the damages from violation adequately reached by legal actions. It appears to us that there is a plain public duty to be performed by the public service corporation arising under the terms of the ordinances and the franchise contract, and that the extraordinary legal remedy of mandamus is the only one which would furnish an adequate remedy and reach the desired object, and it seems to be clear and plain from the facts in the record just what the respondents' duties are to the city and its citizens, and that mandamus is authorized in cases of this kind.

It is also quite generally held that a temporary injunctional order, ancillary and an aid to the writ of mandamus, to prevent an actual or threatened injury, can be issued. In *North Carolina Public Service Co. v.*

Southern Power Co., 181 N. Car. 356, it is stated by Justice Stacy that the writs of mandamus and injunction may properly aid each other in actions requiring such relief. See *De Lancey v. Piepgras*, 141 N. Y. 88; *Cline v. Whitaker*, 144 Wis. 439, 140 Am. St. Rep. 1039; *Davis v. Mayor*, 1 Duer (N. Y.) 451; *Whigham v. Davis*, 92 Ga. 574.

This court in a number of cases has issued the writ of mandamus in the enforcement of contracts where the duty was plain and of a public nature. *State v. Lincoln Medical College*, 81 Neb. 533; *State v. Missouri P. R. Co.*, 100 Neb. 700; *State v. Dahlman*, 100 Neb. 416. The third paragraph of the syllabus in the latter case is as follows: "The act providing for the consolidation requires the consolidated city to perform all valid, unperformed, subsisting contracts made by the city of South Omaha, and a writ of mandamus to compel such performance was properly issued by the district court."

The general rule seems to be that, when the relator is the beneficiary of a contract, ordinance, franchise or statute, which is of a public nature, the writ should issue. The mandate issued plainly requires the performance of a legal, public duty. and not only is the city of Chadron a proper party, but any and all of the consumers of electrical current and the beneficiaries of such city are interested and may be made parties.

The pleadings upon which this case was submitted to the district court virtually admit the general liabilities, obligations, rights and duties devolving upon the relators and respondents, and the district court had but to apply the established law to the facts in order to come to the conclusions reached and to justify its judgment. It has long been settled by the better judicial authorities that, where there is a grant and acceptance of a public franchise which imposes certain obligations on the corporation to which a franchise is granted, a public duty is imposed upon it, differing from an ordinary contractual duty, and that a writ of mandamus will issue in a proper

case to compel the performance of such public duty. *Chicago v. Chicago Telephone Co.,* 230 Ill. 157, 12 Ann. Cas. 109, and note, 13 L. R. A. n. s. 1084; *City of Potwin Place v. Topeka R. Co.,* 51 Kan. 609, 37 Am. St. Rep. 312; *Township of Ross v. Michigan U. R. Co.,* 165 Mich. 28, Ann. Cas. 1912C, 885, and note; *State v. St. Paul, M. & M. R. Co.,* 98 Minn. 380, 8 Ann. Cas. 1047, 28 L. R. A. n. s. 298; *State v. St. Paul City R. Co.,* 117 Minn. 316, Ann. Cas. 1913D, 139; *State v. Bridgeton & Millville Traction Co.,* 62 N. J. Law, 592, 45 L. R. A. 837.

Because the respondent company is an assignee or transferee of the franchise, it is not relieved from any burden which inhered in the original or subsequent grants of the franchise, and the court should compel the performance of the legal obligations and duties assumed and contained in such franchise. *Walls v. Strickland,* 174 N. Car. 298; *Mahan v. Michigan Telephone Co.,* 132 Mich. 242; *Yancey v. Batesville Telephone Co.,* 81 Ark. 486, 11 Ann. Cas. 135; *Robbins v. Bangor R. & E. Co.,* 100 Me. 496, 1 L. R. A. n. s. 963; *Godwin v. Telephone Co.,* 136 N. Car. 258, 67 L. R. A. 251, 103 Am. St. Rep. 941, 1 Ann. Cas. 203; *Horner v. Oxford Water & Electric Co.,* 153 N. Car. 538, 138 Am. St. Rep. 681.

The answer and return of the respondent company states, as one of the reasons why the terms of the contract should not be performed on its part, that at the present time such performance is not remunerative or profitable and could only be performed at a loss, but this is not a valid reason under the law.

In *Columbus R. P. & L. Co. v. City of Columbus,* 63 L. ed. 669 (249 U. S. 399) it is held:

"Increased street railway operating costs and decreased net revenues due to war conditions and to an increased wage scale fixed by the national war labor board, though rendering unremunerative the street railway fares fixed by municipal franchise ordinances which, by acceptance, became valid contracts, mutually binding for the twenty-five year term named therein, do not absolve the street railway company from the obligations of its

contract, so as to justify it in surrendering its franchises and excuse it from giving service at the rates so fixed, especially where it cannot be said that, taking all the years of the term together, the contract will prove unremunerative."

"A municipality acting under state authority, may, by ordinance, make a valid binding contract obligating it to permit the operation of a street railway upon the city streets for twenty-five years, upon the terms and conditions therein set forth."

"If a party charges himself with an obligation possible to be performed, he must abide by it unless performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties will not excuse performance. Where the parties have made no provision for a dispensation, the terms of the contract must prevail."

See, also, 6 R. C. L. 997, sec. 364.

The main facts establishing the obligations and duties between the relators and respondents are not in dispute but are admitted in the pleadings, yet the respondents seek to justify their action in adding a surcharge of 33 1-3 per cent. to the maximum rates provided for in the ordinances on the ground, as stated in their answer, that the company notified the city that it was necessary to have an increase in the rates because the maximum rate had become grossly inadequate and noncompensatory, and also that the city and the public had consented to such increased rate by paying the same from the date of such notice of increase to the time of the commencement of this suit, although it was stated, and it may be reasonably inferred, that such consent or payment was induced by the admitted threat that the current would be turned off and not furnished by the company, unless the surcharge was paid in addition to the regular rates. It occurs to the writer of this opinion that a similar argument of consent might be made in defense of the highway robber who compels his victim at the point of a revolver to turn over his money in order to save his life. Such en-

forced consent certainly cannot be intelligently held to do away with the public obligations and duties contained in the ordinances and contract entered into and acted upon for years by the city and its beneficiaries, on the one hand, and the public service corporation, on the other. Municipal ordinances and contracts affecting the public are not thus lightly to be abrogated at the will and pleasure of one party without the legal consent of the other, and the writ of mandamus would seem to be the proper remedy to require such corporations to perform the plain public duties which they have assumed.

The decisions of this court and of the courts of the United States generally seem to meet and answer fully all the assignments of error made by appellants. The facts admitted in the pleadings and the best adjudicated cases all unite in authorizing and sustaining the proceedings of the district court, whose judgment should be affirmed.

AFFIRMED.

The following opinion on motion for rehearing was filed April 30, 1924. *Former judgment of affirmance vacated, and judgment of district court reversed.*

1. **Mandamus**: PEREMPTORY WRIT. To justify the issuance of a peremptory writ of mandamus, the alternative writ should state or recite facts showing that compliance with the demands of relators is a specific duty clearly enjoined by law upon respondent.

2. ———: ———. In a proceeding for a peremptory writ of mandamus, it is error to assume unproved facts denied by the answer or return.

3. ———: DENIAL OF WRIT. If a peremptory mandamus cannot be granted as prayed, the writ may properly be denied.

4. ———: ALLOWANCE OF WRIT: ERROR. On application by a city for a peremptory writ of mandamus requiring a public service corporation to furnish electric currents according to the terms of a city ordinance, a judgment requiring performance of that duty on terms at variance with the ordinance is erroneous.

5. ———: ———: ———. In mandamus to compel a public service corporation to comply with a city ordinance, a writ subjecting an individual respondent to coercive process is erroneous, if the record

fails to show that he is directed by the writ to perform a specific duty enjoined upon him by law.

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

ROSE, J.

This is an application by the city of Chadron and other relators for a peremptory writ of mandamus requiring the Intermountain Railway, Light & Power Company and Edward N. Libby, respondents, to comply with a contract and city ordinance enjoining upon them the duty to furnish electric currents to the city of Chadron and residents thereof. The writ was allowed, and respondents appealed. Upon a consideration of the appeal the judgment was affirmed. A statement of the case appears in the former opinion and need not be repeated. *State v. Intermountain R., L. & P. Co., ante*, p. 720. Subsequently a reargument was granted on motion of respondents. In the light of new arguments at the bar the case was again submitted and reconsidered.

Some features of the application and judgment, not discussed in the former opinion, seem to require consideration. The alternative writ issued by the district court does not state or recite facts showing that compliance with the demands of relators is a specific duty clearly enjoined by law upon respondents. To justify the issuance of the peremptory writ it was necessary to assume unproved facts denied in the answer. If mandamus cannot be granted as prayed, the writ may properly be denied. In these respects relators failed to comply with principles of law applicable to a proceeding of this kind.

The peremptory writ granted by the district court required respondents to furnish electric currents on terms at variance with those prescribed by the ordinance which relators pleaded as a basis for the relief demanded by them. For this reason the judgment was erroneous.

Furthermore, the record fails to show that the duty to comply with the lighting ordinance and contract was one which the law enjoins upon respondent Libby. It

follows that the judgment subjecting him to coercive process was erroneous. For the reasons stated, the former judgment on appeal in this case is vacated, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

FRANK H. BROWN, APPELLEE, V. C. R. EASTERDAY ET AL., APPELLANTS.

FILED JULY 13, 1923. No. 22481.

1. **Nuisance:** OIL STATION. An oil and gasoline filling station erected in a residence district is not a nuisance *per se*.
2. ———: ———. The storage of gasoline in tanks underground, in strict compliance with an ordinance regulating the same, is not a nuisance *per se*.
3. **Explosives:** STORAGE: PERMIT. Ordinance examined, and *held* not to require the taking out of a permit to store gasoline when done in the manner prescribed.
4. **Nuisance:** INJUNCTION. That the operation of a lawful business will depreciate the value of adjoining property furnishes of itself no ground for injunction; the legal remedy being adequate.
5. ———: ———. The right of an individual to enjoin a public nuisance depends upon his being subjected to an injury, not merely in degree, but in kind, different from that suffered by the general public.
6. **Evidence** examined and found not to show any special injury to plaintiff warranting equitable relief.

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

Burkett, Wilson, Brown & Wilson, Claude S. Wilson and *Albert S. Johnston,* for appellants.

T. S. Allen, C. Petrus Peterson and *Charles R. Wilke, contra.*

Heard before MORRISSEY, C. J., DEAN, DAY and ALDRICH, JJ., COLBY and REDICK, District Judges.

REDICK, District Judge.

The action is to enjoin appellants from erecting a fill-

ing station for the sale of oils and gasoline to motorists in the manner commonly in use. The plaintiff is the owner of an adjoining lot which he occupies as a private residence; the defendants are the owner of the corner lot and his lessees who propose to operate the station. The grounds upon which the plaintiff bases his right to an injunction are: (1) That defendants are constructing said station in violation of the city ordinance regulating storage tanks for gasoline, a permit therefor having been denied by the city council as against the public safety; and (2) that the filling station is a nuisance; that it deprives plaintiff of the comfortable enjoyment of his property; that it will cause a congestion of automobiles in that vicinity; that the glare of lights will be thrown directly on plaintiff's house; that the apparatus makes disagreeable noises; the fire hazard and rates increased, and the property lessened in value by being rendered uninhabitable for residence.

The city of Lincoln filed a petition of intervention, alleging a city ordinance providing, among other things, "that no underground gasoline tank shall be installed without obtaining a permit from the city council for the installation thereof," and that, notwithstanding a permit was denied defendants, they were proceeding to install such tank, and joins in prayer for injunction.

The answers of defendants admit that the filling station is being erected; that no permit therefor was obtained, but the same was denied; set forth the nature of the improvements contemplated; deny all other allegations of the petition; and allege that plaintiff has an adequate remedy at law.

The lower court granted a temporary injunction, which was made permanent by final decree. and defendants appeal.

It is conceded that the buildings and other improvements, if constructed as proposed, will in every respect comply with the building regulations and ordinances of the city, the objection going only to the fact that de-

fendants are proceeding without a permit to install the tanks. The building ordinance was received in evidence over the objection of irrelevancy by defendants, and considerable space in the briefs on both sides is devoted to a discussion as to its validity; but we do not find it necessary to decide this question, for the reason that the failure to take out the ordinary building permit is not within the allegations of the petitions, which refer only to the "ordinance regulating storage tanks for gasoline." Besides, no building had been started, only a pit for the tanks. Doubtless defendants will apply for and obtain a permit for the buildings before starting upon their erection. Furthermore, the city having refused a permit to install the tanks, defendants were not required to do the useless thing of applying for a permit for the building, the utility of which depended upon the other improvements.

The only questions for discussion then are (1) whether defendants were required to take out a permit to install the gasoline storage tanks; and (2) whether a filling station in the location proposed is a nuisance which an adjoining property owner may enjoin.

The material parts of the ordinance relied upon as requiring a permit to install the tanks are as follows:

"Section 1. It is hereby declared unlawful for any person or corporation to store or keep any coal oil, gasoline, naptha, benzine, or other like products of petroleum, in quantities of more than five gallons in the city of Lincoln in any other manner than provided for in this ordinance. (Provided this ordinance shall not apply to reservoirs on motor vehicles.)"

Section 2 provides with great particularity the material of which the tanks and pipes shall consist, and the manner of their connection and installation, but contains no word on the subject of a permit until the last paragraph, which is as follows:

"Provided it shall be unlawful for any person, firm or corporation to keep any quantity of such products

exceeding one gallon *in any building* within the fire limits of said city *in any other manner than as above described* without first obtaining a written permit from the chief of the fire department so to do. And provided, further, that such oils may be kept and stored in tanks *otherwise than provided in this ordinance* where such tanks are constructed of iron or steel and coated on the outside with tar or other rust resisting material and are detached and clear from buildings, at least 75 feet distant from any other building, and by obtaining permission from the mayor and council, and storing of any such oils on the *west side of Fourth street* in said city." (Italics are ours.)

We are unable to find in this ordinance any requirement that a permit be taken out when the installation is to be made in the manner described in the first part of section 2, which is the case here. The only condition requiring a permit is when it is desired to keep the oil in some other manner. This is practically conceded by plaintiff's counsel, who "confess that the ordinance could have been drawn in a more clear and satisfactory manner," but contend that the defendants and all others in the city have placed a practical construction thereon by uniformly applying for permits, and heretofore accepting a denial thereof as final. The doctrine of practical construction of statutes is well understood, but it only applies to doubtful or ambiguous statutes, and cannot be resorted to for the purpose of altering or adding to the plain meaning of the words used. *Houghton v. Payne,* 194 U. S. 88; *Studebaker v. Perry,* 184 U. S. 258; *Travelers Ins. Co. v. Fricke,* 94 Wis. 258. There is no ambiguity in the ordinance in question; it simply fails to require a permit except in certain cases, and the exception must be construed as excluding all cases not within its terms. There is no language in the ordinance upon which to found the practical construction suggested. It therefore becomes unnecessary to discuss the power of the city to

deny the permit for reasons of public safety, or the validity of the ordinance.

The other question presents greater difficulty. The decree of the lower court contains no finding on the subject of nuisance, but is based exclusively upon a finding that defendants were "about to erect and install a gasoline filling station and storage tanks * * * without a permit from the city and in violation of the ordinances." So far as the city is concerned, the decree might be justified regardless of the question of nuisance, if a permit were requisite, but the suggestion of nuisance arising from the supposed unlawful character of the act, which we find is not well-founded, is one which a private party is not entitled to make unless he suffers special injury. *Hill v. Pierson,* 45 Neb. 503; *Letherman v. Hauser,* 77 Neb. 731. The question, however, is presented by the pleadings and evidence and should be disposed of for future guidance in similar cases.

Plaintiff's proposition is: "The erection and operation of the filling station and storage tanks is a private nuisance." He cites *Whittemore v. Baxter Laundry Co.,* 181 Mich. 564. In that case defendant proposed to bury two 10,000-gallon tanks for the storage of gasoline at the extreme edge of its property, and at a point farthest away from its own buildings and within 10 feet of plaintiff's residence, and it was shown that they could have been placed at a point removed from proximity to any residence, and no good reason was suggested for not so placing them. The court held that, *under the circumstances,* it constituted a private nuisance. What the holding would have been if defendant had made a *reasonable* use of his own property may be inferred from the concession: "We may grant that the storage of gasoline on premises adjacent to or adjoining the premises of another is not a private nuisance *per se.*" We do not think it is seriously contended in the instant case that gasoline stored in the manner prescribed by the ordinance at the place in question is a menace to the safety of

plaintiff and his property; he presented no evidence on the point, while defendants showed by insurance men that the hazard of fire was not thereby increased.

McGregor v. Camden, 47 W. Va. 193, is also cited, which involved the drilling and operating of an oil well, and presents no proper analogy.

Also *O'Hara v. Nelson,* 71 N. J. Eq. 161. This case was decided in 1906, in the pioneer days of automobiles, and restrained the defendant from filling tanks of automobiles inside the building *and from storing automobiles with gasoline in their tanks inside the building.* The development of the automobile as a real necessity of modern life has rendered this decision archaic. To require a car to be drained of gasoline, and run in and out of a garage by hand power, would be an unreasonable restriction on business as now conducted. The defendant had a permit to store 55 gallons *outside* the building, which was frame, while 200 gallons would be in the tanks of the machines stored; great stress was laid upon the fact that the storage was in the building.

We are not prepared to hold as a matter of law that a filling station or the storage of gasoline in the manner proposed is a nuisance.

The plaintiff finally contends that he will be deprived of the comfortable enjoyment of his property by reason of a congestion of automobiles, the glare of lights, and the noise of the apparatus used in operating the station, and that these will constitute a private nuisance. Regarding the increase of traffic, the same reasoning would constitute a popular church a private nuisance, as it is a well known fact that, not only on Sundays, but on other days and nights, when the activities of churches are in progress, automobiles are parked for blocks in all directions and to a certain extent interfere with the quiet enjoyment and privacy of homes in the vicinity, and yet these are but the trivial inconveniences necessarily resulting from changes and improvements growing out of advancing civilization. The same may be said as to the

glare of the lights. These inconveniences are shared by the general public, and the only difference as regards the plaintiff is in the matter of degree, not of kind, and therefore does not constitute a special injury entitling him to an injunction. *Ayers v. Citizens R. Co.,* 83 Neb. 26. As to the disagreeable noises, the evidence does not convince us they are of such a character as to seriously interfere with the plaintiff's comfort and enjoyment of his home. The contention that the plaintiff's property will be reduced in value by the erection of the gasoline station, if true in point of fact, is not of itself ground for equitable interference.

The contention is made that the location in question is in a purely residence district, which should not be invaded for the purpose contemplated. A sufficient answer would seem to be that, in the absence of legislation dividing the city into zones and having a general application to all property within the respective sections, it is not within the power of the courts to interfere with the lawful use of property by the owner. It was held, however, in *Hanes v. Carolina Cadillac Co.,* 176 N. Car. 350 (citing cases), that automobiles being of general use, and public gasoline supply stations being essential, their erection in a residence district is not a nuisance *per se.* Whether or not by reason of the manner of operation of the filling station in question it may become a nuisance calling for equitable cognizance rests in the future, and we express no opinion in that matter. What we do hold is that the evidence is insufficient to sustain a finding that the proposed improvement will necessarily amount to a nuisance. It follows that the judgment of the lower court must be reversed and the case dismissed.

REVERSED AND DISMISSED.

H. J. HUGHES COMPANY, APPELLEE, V. FARMERS UNION PRODUCE COMPANY ET AL., APPELLANTS.

FILED JULY 13, 1923. No. 22485.

1. **Corporations:** CORPORATION DE FACTO. To constitute an association of persons a corporation *de facto*, there must exist some color of a corporate franchise under which they are operating.
2. ———: ———: COLOR OF FRANCHISE. To constitute such color, some *bona fide* effort, clearly intended as an attempted compliance with some provision of the statute requisite to a corporate franchise, must be shown.
3. ———: ———: ———. The adoption of articles and perfection of an organization in the usual manner, followed by the holding of meetings and transaction of business in a manner appropriate to a corporation, and the existence of a law under which one might have been formed, are insufficient to constitute a corporation *de facto*, for want of color of franchise, even though the parties intended to incorporate and believed they had done so.
4. ———: ———: ESTOPPEL. A corporation *de facto* cannot be created by estoppel, the only effect of the estoppel being to prevent the question being raised.
5. **Partnership:** PLEADING AND PROOF. Where members of an association are sought to be charged as partners, and the answer is a general denial, the defendants may show that they were a corporation, or may show any fact which tends to dispute the facts necessary for plaintiff to prove, without pleading the same specially.
6. **Estoppel in Pais:** PLEADING. In order to let in evidence of an estoppel *in pais*, the facts constituting the same must be pleaded; such an estoppel cannot be shown under a general denial.

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

Bernard McNeny, for appellants.

Stout, Rose, Wells & Martin and *Frank J. Munday, contra.*

Heard before MORRISSEY, C. J., GOOD, J., COLBY and REDICK, District Judges.

REDICK, District Judge.

Action upon certain accounts by plaintiff against defendants seeking to charge them as partners in an unincorporated association doing business as Farmers

Union Produce Company. There was judgment against defendants individually, and they appeal. There is no dispute as to the amount due plaintiff, the only contentions of defendants being (1) that they constituted a corporation *de facto,* and (2) that plaintiff is estopped to question their corporate character and claim an individual liability.

Plaintiff produced certificates from the secretary of state and county clerk to the effect that no articles of incorporation had been filed by Farmers Union Produce Company, and evidence showing certain of defendants to be members of the association, and rested.

Defendants then introduced record of a meeting held October 5, 1918, showing the adoption of "Constitution and By-Laws" of "Farmers Union Produce Company." This document contains no declaration of an intention to form a corporation—the company being called an association—the only reference to a corporation being a provision for amendment of "the articles of incorporation" in article LV, sec. 4. The original document was not produced, the evidence fails to show it was ever signed or acknowledged, and no copy was ever filed anywhere. An effort was made to identify exhibit 1 as the articles of incorporation, but the witnesses who signed it were evidently mistaken as to the document. It appears that exhibit 1 was prepared sometime in April, 1919, for a different purpose, and a comparison with the articles in the record book of the company demonstrates that the latter is not a copy of the former, the word "corporation" in the later document being substituted for the word "association" in the earlier one. Exhibit 1 was never acknowledged nor filed. An organization similar to that of a corporation was effected, however, by the election of a board of directors, and officers of the company, meetings were held and minutes kept in a crude sort of way; and, while the question is not free from doubt, it may be assumed that the parties attempted to form a corporation and believed they had done so. The

business was carried on in the name of "Farmers Union Produce Company" and all letters and statements from plaintiff were so addressed. The case of plaintiff is not grounded upon any fraud or holding out as partners; it seems to have dealt with defendants without any investigation as to their legal status as an association; and their position is that defendants are neither a corporation *de jure* nor *de facto,* and therefore they are liable as partners. That they are not a corporation *de jure* is conceded, so the question is whether under the evidence they were one *de facto.*

The answer was a general denial; and plaintiff contends that the question is not thereby presented; but the allegation of the petition is that they were an unincorporated association, and a general denial is sufficient to let in proof of no association or any other kind of an association to rebut that statement. This is not a special matter of defense that must be pleaded, but is a fact which tends to disprove the allegation of the petition by showing a situation inconsistent therewith. If the allegation was that defendant was a citizen of the United States, under a general denial defendant could show that he was born in Germany and had never been naturalized, for such facts meet directly the charge of the petition. Any evidence which tends directly to contradict the allegations of a pleading to which it is interposed is admissible under a general denial. *Wiedeman v. Hedges,* 63 Neb. 103; *Broadwater v. Jacoby,* 19 Neb. 77; *Hanson v. Diamond Iron Mining Co.,* 87 Minn. 505; *Bolton v. Missouri P. R. Co.,* 172 Mo. 92.

Were the defendants a corporation *de facto?* In *Abbott v. Omaha Smelting & Refining Co.,* 4 Neb. 416, it was shown that the organization of the company was in all respects in conformity with the requirements of the law except that it had not filed its articles with the county clerk, and that it did business as a corporation, and evidence was offered that plaintiff transacted business with and recognized defendant as a corporation.

It was said that to establish a *de facto* corporation "it is necessary to show user of a corporate franchise," and before any franchise could exist the articles must be filed. "If the mere act of organization by the individuals conferred the corporate franchise, why should the statute require the articles to be filed and recorded in the office of the county clerk as a prerequisite to corporate existence?" "Hence, if the acts and proceedings of a company or association consist only of such acts and proceedings as might be performed without an incorporating act, or corporate grant or franchise, a corporation cannot be inferred from such acts"—citing *Greene v. Dennis*, 6 Conn. 293. The syllabus of the *Abbott* case, "To establish the existence of a corporation *de facto*, a charter or some law under which the assumed powers are claimed to be conferred, and user of the franchise thereby obtained, must be shown," omits the element of an attempt, at least colorable, to comply with the statute, but the opinion and the cases cited recognize the necessity of such an attempt, as by filing the articles. The rule was more fully and accurately stated in *Lusk v. Riggs*, 70 Neb. 718: "Where the law authorizes a corporation and there has been an attempt in good faith to organize, and the requirements of the statute have been colorably complied with and corporate functions thereafter exercised, there exists a corporation *de facto*, which cannot ordinarily be called in question collaterally."

There is some apparent difference of opinion as to what facts are necessary to be shown to establish the existence of a corporation *de facto*, and it is not intended to hold that the filing of the articles is the only act which will authorize the requisite inference, but the authorities are practically unanimous upon the point that there must be some color of a corporate franchise before even an inference of such a corporation is permissible; and to acquire this requisite color, some effort, springing directly from its requirements, must have been made to comply with the statute. This does not mean a substantial

complia ce, because that is all that is requisite for a corporation *de jure,* as suggested in *Finnegan v. Noerenberg,* 52 Minn. 239, and it is there stated: "But there must be an apparent attempt to perfect an organization under the law. There being such apparent attempt to perfect an organization, the failure to comply with some substantial requirement will prevent the body being a corporation *de jure;* but if there be user pursuant to such attempted organization, it will not prevent it being a corporation *de facto*"—citing cases. This case clearly distinguishes between persons acting with and those acting without color of organization, and holds that the mere existence of a law under which a corporation *might* be formed, unaccompanied by any attempt to do anything required thereby looking toward a franchise, will not satisfy the requirement of a colorable compliance, to support a claim of a *de facto* corporation. The reasoning of this case is convincing.

In *Abbott v. Omaha Smelting & Refining Co., supra,* it was said: "'Organization' * * * means simply the process of forming and arranging into suitable disposition the parts which are to act together in, and in defining the objects of, the compound body, and that this process, even when completed in all its parts, does not confer the franchise, either valid or defective, but, on the contrary, it is only the act of the individuals, and therefore something else must be done to secure the franchise."

These acts necessarily precede the filing of the articles, which is the first step to initiate a franchise. Up to the filing of the articles the power and authority of the state is not invoked, and the body has not received the breath of life necessary to its existence as a legal entity, defective or perfect. That case has never been criticised, so far as we are advised, but has been cited with approval many times in this and other states. The cases of *Haas v. Bank of Commerce,* 41 Neb. 756, *Lusk v. Riggs,* 70 Neb. 718, and *Kleckner v. Turk,* 45 Neb. 187, were all

cases where the articles had been filed, and do not criticise the *Abbott* case, but distinguish it. *Globe Publishing Co. v. State Bank,* 41 Neb. 175, involved the liability of stockholders of a *de jure* corporation before exhausting the remedies against the corporation. In *Hogue v. Capital Nat. Bank,* 47 Neb. 929, the existence of a corporation *de facto* was assumed. In *Otoe County Fair & Driving Park Ass'n v. Doman,* 1 Neb. (Unof.) 179, the facts are not given; but it is stated that the persons acted under color of authority and were therefore a *de facto* corporation. In *Livingston Loan & Building Ass'n v. Drummond,* 49 Neb. 200, the objection was that the articles of incorporation were not signed by a sufficient number of persons, and it was held defendant was prohibited by statute from raising the question. None of these cases holds that a *bona fide* effort to comply with the statute is not necessary, but when the question is discussed that doctrine is affirmed.

In the case at bar no step was taken which gave defendants any color of right to a corporate franchise. The most that can be said is that they prepared to secure a franchise, but stopped short of any act which would secure their purpose.

The following cases cited by appellants do not apply for the reasons noted: In *Swofford Bros. D. G. Co. v. Owen,* 37 Okla. 616, *Snider's Sons' Co. v. Troy,* 91 Ala. 224, and *Slocum v. Head,* 105 Wis. 431 articles were filed; in *Jennings v. Dark,* 175 Ind. 332, a colorable attempt was made to incorporate under an act of 1850, and the company was recognized as a *de facto* corporation by act of the legislature changing its name; in *Mason v. Stevens,* 16 S. Dak. 320, there was legislative recognition as a *de facto* corporation; in *Whipple v. Tuxworth,* 81 Ark. 391, an improvement district was to be incorporated by filing a petition, which was filed, and objections were to the qualifications of the signers. Only one case has been called to our attention in anyway intimating that a corporation *de facto* may exist without color of authority,

Magnolia Shingle Co. v. Zimmern's Co., 3 Ala. App. 578, but the holding there was upon the ground of estoppel.

Our conclusion is that defendants are not entitled to claim that they are a corporation *de facto*, and we are supported by the following additional authorities: *Harrill v. Davis*, 168 Fed. 187; 1 Fletcher, Cyclopedia of Corporations, secs. 289, 290, 294, 298, 303.

It is contended, however, that, the plaintiff having dealt with defendants as a corporation, it is estopped from now questioning its corporate character. The answer was a general denial and, therefore, this defense is not available. *Burwell Irrigation Co. v. Lashmett*, 59 Neb. 605; *Henderson & Co. v. Keutzer*, 56 Neb. 460; *Scroggin v. Johnston*, 45 Neb. 714. These cases and many others in this state hold that the facts constituting an estoppel *in pais* must be specially pleaded; this is the general rule.

AFFIRMED.

ANTON LENNEMANN, APPELLANT, V. HARLAN COUNTY, APPELLEE.

FILED JULY 13, 1923. No. 22501.

Taxation: UNAUTHORIZED LEVY: REMEDY. The remedy to recover taxes paid on the ground that they were levied for an unauthorized purpose must be pursued against the political subdivision for whose benefit or at whose request the same were levied, as provided by subdivision 2, sec. 6491, Rev. St. 1913; and where such taxes were levied by the county for the benefit of a township, the county is not liable therefor.

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

B. B. Webber and *J. G. Thompson*, for appellant.

L. D. Hunt, contra.

Heard before MORRISSEY, C. J., LETTON and GOOD, JJ., COLBY and REDICK, District Judges.

REDICK, District Judge.

Plaintiff appeals from judgment of the district court

affirming an order of the county board disallowing a claim for recovery of taxes paid under protest. The tax was levied by the county board at the request of the authorities of Orleans township, Harlan county, for library purposes. Plaintiff alleges: "That the said levy of five mills for library purposes is illegal, and is not a valid levy * * * for the reason that the electors of said township of Orleans have never voted to establish or maintain a public library as provided by the statutes of Nebraska." A demurrer to the petition was sustained and the case dismissed by the lower court.

Only one question is presented: Is the action properly brought under subdivision 1, sec. 6491, Rev. St. 1913 (Comp. St. 1922, sec. 6018), against the county, or should it have been brought under subdivision 2 against the township? So far as material to our present inquiry the provisions are as follows:

"First. If such person claim a tax, or any part thereof, to be invalid for the reason that the property upon which it is levied was not liable for taxation, or that the property has been twice assessed, * * * he may pay such taxes under protest"—and recover the same from the county.

"Second. If such person claim the tax, or any part thereof, to be invalid for the reason that it was levied or assessed for an illegal or unauthorized purpose, or for any other reason except as hereinbefore set forth, when he shall have paid the same to the treasurer, or other proper authority"—he may recover the same from the county, city, village, township, district, or other subdivision, for the benefit or under the authority or by the request of which the same was levied.

In *Darr v. Dawson County,* 93 Neb. 93, we held that the remedy provided by the first subdivision is available only when the property was wrongfully assessed, either because exempt from taxation or because the tax levied had already been assessed thereon and paid. This case was followed in *Janike v. Butler County,* 103 Neb. 865.

We think, in view of the fact that all property is "liable to taxation" except that which is expressly exempted, that the construction placed upon the words quoted is correct, and that for recovery for taxes paid, illegal for any other reason, the remedy must be sought under the second subdivision. The taxes in question are claimed to be illegal for the reason that they were levied for a purpose not authorized by the township, which brings them clearly within the words of the second subdivision. In a sense property is not liable for taxation for an unauthorized purpose, but the statute clearly distinguishes between such levies and levies upon property not taxable for any purpose, and has provided distinct remedies for each situation.

We are of opinion that the action should have been brought against the township of Orleans, and that the judgment of the lower court in sustaining the demurrer was correct, and it is

AFFIRMED.

RICHARD HIBBERD ET AL., APPELLEES, V. JAMES A. HUGHEY, APPELLANT.

FILED JULY 13, 1923. No. 23412.

1. **Master and Servant:** DEPARTURE FROM EMPLOYMENT. Mere disobedience by the servant of the master's order regarding the manner in which work is to be performed will not operate to remove the servant from the sphere of his duties.
2. ———: ———. Disobedience of a positive order as to the place where work is to be performed, resulting in injury to the servant arising out of the place selected by him, constitutes a departure from his employment, and such injury cannot be said to "arise out of and in the course of" his employment within the meaning of the employers' liability law.
3. **Evidence** examined, and *held* to support the finding of the district court.

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

Drake & Drake, for appellant.

W. D. Oldham and *W. E. Balcom, contra.*

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

REDICK, District Judge.

Appellant was allowed compensation by the commissioner, but the award was set aside by the district court, and from that judgment claimant appeals.

The facts are that appellant was in the employ of Hibberd Brick Company engaged in the construction of a brick building for appellee Brigham. No insurance was procured by the contractors and so the owner is joined. Appellant was employed as a common laborer and his work just before the accident was carrying mud boards from one part of the building to another, on the second floor. A material hoist was being installed, consisting of two cages balancing each other and connected by a cable passing over a pulley or drum, and so arranged that when one cage was up the other would be down. The work had progressed to a point where it was necessary to adjust the position of the cages so that when they were at rest material could be wheeled on and off at the floor levels. The cage at the second floor had become lodged at a point several inches above the floor and it was necessary to jar it down even with, but not below, the floor. The floors had not been laid, so the spaces were open between the joists on the first and second stories. Charlie Hibberd, one of the appellees, from the first floor called to appellant to bring the elevator down level with the second floor (just what the order was is in dispute and will be discussed later). Appellant put his foot on it, but was unable to move it, and then stepped into the cage and jumped on it, with the result that the cable slipped through the clamps by which it was attached to the cage, and it was precipitated with appellant into the basement, a distance of 16 to 20 feet, and appellant was injured.

The claim of appellees is that prior to the accident all

employees were ordered to keep off the elevator, and that in giving the order to appellant he expressly told him not to get on it; and two questions are presented: (1) Did the injuries to Hughey arise out of and in the course of the employment? (2) Was Hughey guilty of wilful negligence barring compensation?

The lower court answered the first question in the negative and the second in the affirmative.

The elevator was being installed; it had not been in use prior to the accident; the floor of the cage was a short distance above the floor of the second story; it was necessary to have the floor of the cage level with the second floor of the building so that the other cage could be so adjusted that it would be on a level with the first floor; the manner of doing this is not described, but it seems clear that, as one cage balanced the other, their relative positions were governed by the length of the cable connecting them, which being determined, the cable would be attached to the top of the respective cages. When operated therefore, one cage would always be at the first floor and the other at the second. The operation appellant was required to accomplish was to lower the cage to the second floor level—not below it. To accomplish this it is evident that it would be necessary to withdraw the force applied for the purpose, as soon as the cage had descended to the proper place. There was no mechanism provided for stopping the cages; they were to be operated by electricity, which had not been attached; they were not for workmen to ride in. How appellant could have expected the cage to stop at the point desired with the moving force of his own weight still operating is difficult to understand. True, he may have thought the cage would stop when the cable became taut, but the cable was the very thing which was being adjusted, and he had no reason to suppose that the cable was just the proper length—quite the reverse.

We have, up to this point, a servant adopting a method of accomplishing the result desired by the master,

which, at most, *might* be successful, but which, owing to the nature of the case, probably would not be. The general rule is that an injury arises out of his employment when the servant is performing some service for the master, although in a *manner* contrary to his instructions; and this because he is acting within the scope of his employment and his departure from instructions were mere acts of disobedience.

There is evidence in the record, however, that appellant was directed not to get onto the elevator at the very time he was told to lower it to the floor level. If this fact is proved, then another element enters the problem, viz., that the servant was disobedient as to the place he should perform his work.

In *Gacesa v. Consumers Power Co.*, 220 Mich 338, after a discussion of cases, the rule in England was said to be: "Where the employee violates instructions as to the manner in which he is to perform his labor, he is not thereby removed from the sphere of his employment, and that if he is injured the accident arises out of and in the course of his employment, that where the employee violates his instructions as to the place in which he is to perform his labor he thereby removes himself from the sphere of his employment, and if there injured such accident does not arise out of and in the course of his employment"—and the same was adopted by the court as correct. In that case the employee had disobeyed the order of his employer to report each day for instructions as to the day's work, and went to work at a place different from the one he had worked the day before, and received injuries arising out of the place where he worked; and the rule was applied that, by his disobedience of the order, he had removed himself from the sphere of his employment.

In *Fournier's Case*, 120 Me. 236, the servant, for a purpose connected with his duties, attempted to enter the second story of a warehouse through a trap-door by means of a rope operated by a hoisting engine, and was

injured. He and other servants had received orders not to use the rope for that purpose, and the court, by Wilson, J., in holding that he did not receive his injuries "in the course of" his employment, said:

"The words 'in the course of the employment' relate to the time, place and circumstances under which the accident takes place. An accident arises in the course of the employment when it occurs within the period of the employment at a place where the employee reasonably may be in the performance of his duties and while he is fulfilling those duties or engaged in doing something incidental thereto. *Westman's Case,* 118 Me. 133; *Larke v. Hancock Mutual Life Ins. Co.,* 90 Conn. 303; *Bryant v. Fissell,* 84 N. J. Law, 72; *Dietzen Co. v. Industrial Board,* 279 Ill. 11.

"If, then, the employee is in a place where he is prohibited from being by positive orders of his employer by reason of the danger, or has taken a certain course in going from one place to another which he is prohibited from taking by his employer for the same reason, notwithstanding it is within the period of his employment and his purpose in going to the other place is to perform some of his duties he is engaged to perform, he cannot be said, while in the forbidden place or while going by the forbidden route or means, to be acting in the course of his employment within the meaning of the compensation act, because he is not in a place where he reasonably may be in the performance of any of his duties. *Nelson R. R. Construction Co. v. Industrial Commission,* 286 Ill. 632; *Powell v. Bryn du Colliery Co.,* 5 B. W. C. C. 124; *Barnes v. Nunnery Colliery Co.,* 5 B. W. C. C. 195; *Borin's Case,* 227 Mass. 452; *United Disposal Co. v. Industrial Commission,* 291 Ill. 480; *McDaid v. Steel,* 4 B. W. C. C. 412. Of course, if he went to the forbidden place for a purpose not connected with his duties, *a fortiori* would he be outside the course of his employment. If, however, he is in the place where his duties are intended to be performed and where, of course, he

reasonably may be, and is engaged in the performance of them and only violates some rule relating to his conduct while in such performance, he is still acting in the course of his employment, even though he performs them recklessly and knowingly exposes himself to danger in violation of orders, and, unless the injury can be said to have been inflicted by 'wilful intention,' may recover compensation.

"The claimant in this case was not in a place where he reasonably might be when the accident occurred. He had taken a forbidden way. He was as much in a forbidden place where he could not reasonably be, when he was dangling at the end of a swinging rope between the floors of the building where he was working, as he would have been had he, in order to save time in going to some part of the employer's premises where his next duties were to be performed, passed through a transformer chamber full of high-tension wires, which he was forbidden to enter. He took the forbidden course for his own convenience and not that of the master."

In *Borin's Case,* 227 Mass. 452, the windows of one side of the room where claimant was employed had been nailed down so that the employees would not be climbing over vats of steaming dye to open them. Claimant took a hammer and chisel to pry open one of the windows and received an injury from a splinter from the chisel, and it was held that, as the employee was upon a forbidden part of the premises, the accident did not arise out of the employment; "the fastened window spoke as plainly to him that it was to remain closed as if a printed notice had been posted, or an oral order had been given, the intentional violation of which ordinarily would have precluded compensation."

In *Haas v. Kansas City Light & Power Co.,* 109 Kan. 197, an oiler of machinery went into a room of the building in which he had no duty to perform and received an electric shock. *In re Jenczewski,* 199 App. Div. (N. Y.) 156, compensation was denied for the reason that the

employee, at the time of his injury, was violating his instructions as to the place where he was to work, and was therefore outside the sphere of his employment. In *Reimers v. Proctor Publishing Co.*, 85 N. J. Law, 441, compensation was denied because the employee whose duty was to deliver papers had taken an automobile for the purpose, contrary to express instructions.

The question as related to the place of employment, whether or not the employee's injuries arose out of and in the course of the employment, presents some difficulty in the absence of special instructions. In such cases it seems a wide discretion rests with the servant. The following cases are illustrative of the principle: *Christensen v. Hauff Bros.*, 193 Ia. 1084; *Decatur R. & L. Co. v. Industrial Board*, 276 Ill. 472; *White v. Industrial Commission*, 167 Wis. 483; *Clem v. Chalmers Motor Co.*, 178 Mich. 340; *McCrary v. Wolff*, 109 Neb. 796. In none of these cases was there any prohibition of the particular act which caused the injury. In *Bryant v. Fissell*, 84 N. J. Law, 72, it was said: "An accident arises 'in the course of the employment' if it occurs while the employee is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time." The court quotes with approval from *Fitzgerald v. Clarke & Son*, 2 K. B. (Eng.) 796: "The words 'out of' point to the origin or cause of the accident; the words 'in the course of' to the time, place, and circumstances under which the accident takes place."

It may be conceded that, if the command of the master had been without any restriction as to the place where the desired operation was to be performed, and claimant had acted as he did, his act might be considered as within the scope and course of his employment, and the only question would be whether he was guilty of wilful negligence, for in such case the servant would be invested with a reasonable discretion in the selection of the precise place at which the particular service might

best be performed but where the place is designated, or a certain place forbidden, the servant has no discretion. Suppose a wall of a building is to be pulled down, and a servant, being ordered to attach a rope thereto, for that purpose goes upon the roof of the building and is injured by the collapse thereof, it could not be claimed that he was not within the sphere of his employment; but if the order was accompanied by a prohibition against going upon the roof, there seems no doubt but that his disobedience would take him without such sphere; he was at a place where he had no right to be in the performance of the work assigned to him. The prohibition in the supposed case, as in the one under consideration, went further than as respected the *manner* of doing the work, and touched the place where the servant should be. True, the claimant's weight upon the cage would tend to send it down, and to that extent may be considered a manner of doing the work; but this loses sight of the consideration as a part of the operation that the cage must be stopped at the floor level, and, as already suggested, this essential feature could not be accomplished in the manner attempted; and so, even in the absence of the prohibition, it might be a debatable question whether the servant was in a place where he could reasonably be expected to be, and therefore within the sphere of his employment; but it seems quite inadmissible to conclude that he was in a place reasonable to be expected in the face of a positive prohibition. The fact that he was actually attempting to perform a service for the master is not conclusive; in all of the following cases that fact was present: *Plumb v. Cobden Flour Mills Co.*, 7 B. R. C. (Eng.) 128, 51 Scottish L. R. 861; *Cook v. London & S. W. R. Co.*, 14 B. W. C. C. 100; *Jackson v. Canadian P. R. Co.*, 12 Sask. L. R. 433; *Kolaszynski v. Klie*, 91 N. J. Law, 37; *Bischoff v. American Car & Foundry Co.*, 190 Mich. 229; *Reimers v. Proctor Publishing Co., supra.*

Compensation is not denied merely as a penalty for

disobedience of the order, but because the servant has put himself in a place which the master has not provided, and, therefore, an injury occurring at and growing out of defects of that place cannot be said to arise out of or in the course of the employment.

The evidence is conflicting as to whether or not claimant was ordered not to get upon the hoist at the time he was told to bring it down to the floor level; but there is not only ample evidence to support the finding of the lower court that he was so ordered, and under the rule in *Urak v. Morris & Co.*, 107 Neb. 411, and *Swift & Co. v. Prince*, 106 Neb. 358, the same will not be disturbed, but the clear weight of the evidence independently considered supports the finding. The reason the master had for ordering Hughey not to get upon the hoist, whether it would drive the hoist below the level of the second floor or because it was not to be used as a carrier of passengers, is not important. It might have some bearing upon the question of negligence of the master, but in these cases that matter is not material.

We conclude that the injury to claimant did not arise out of and in the course of the employment, and it will not be necessary to discuss the question of wilful negligence.

The judgment is

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1923

ATLAS REFINING CORPORATION, APPELLANT, V. JOSEPH H. VAUGHAN ET AL., APPELLEES.

FILED SEPTEMBER 22, 1923. No. 22400.

1. **Parol evidence** is inadmissible to vary or contradict the unambiguous terms of a valid contract in writing.
2. **Contracts:** RESCISSION. A rescission in definite terms by mutual agreement in writing may substitute a new contract for the old.
3. ———: ———. A written agreement rescinding a sale and prescribing definite terms of rescission without reserving existing obligations, rights and remedies may prevent a recovery for damages or items of indebtedness resulting from a failure to comply with the terms of the original contract.
4. **Sales:** RESCISSION: DAMAGES. In an action to recover the amount which vendors agreed to pay vendee upon a written contract rescinding sale and reconveying the property, the contract of rescission set out in the opinion, under the circumstances narrated therein, *held* to prevent vendors from recovering on a cross-petition the amount claimed to be due them from vendee for debts created before the rescission.

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

Fawcett & Mockett and *Harry A. Reese,* for appellant.

Burkett, Wilson, Brown & Wilson, contra.

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

PER CURIAM.

This is an action by the Atlas Refining Corporation, plaintiff, to recover from Joseph H. Vaughan and Jacob C. Vaughan, partners, doing business as J. H. Vaughan &

Son, defendants, $13,831.68, according to the terms of a written contract rescinding a sale of oil stations at Alliance and Antioch. Defendants had owned and operated the oil stations and plaintiff had purchased them. The parties contracted in writing September 4, 1920, to rescind the sale, defendants agreeing to take back oil stations, to pay plaintiff $8,640 for improvements made by it and $5,191.68 for merchandise on hand August 30 and 31, 1920, as shown by an inventory. The claim pleaded by plaintiff consists of these two items.

Defendants admitted the execution of the contract rescinding the sale and their liability for improvements and merchandise aggregating $13,831.68, but filed a cross-petition pleading an itemized indebtedness of $25,727.64 due from plaintiff to defendants, a credit of $17,231.68, and demanding judgment for the difference, or $8,495.96. The indebtedness pleaded by defendants consisted of charges for equipping an additional oil station at Hemingford; for trucks used in distributing oils; for debts assumed by plaintiff; for depreciation in the value of property; for salaries and expenses of defendants, while in the employ of plaintiff, and for other enumerated items.

In an answer to the cross-petition plaintiff pleaded that all matters and differences between the parties had been adjusted and settled by the contract rescinding the sale.

The trial court admitted proof tending to show that the items of indebtedness pleaded in the cross-petition were not included in the rescission or settlement and permitted the jury to find in favor of defendants on that issue. As a result the verdict contained findings that defendants were indebted to plaintiff in the sum of $13,831.68, that plaintiff owed defendants $22,327.64, and that the latter were entitled to recover the difference, or $8,495.96, which, with interest, amounted to $9,105.52. To prevent a new trial defendants remitted from the verdict $3,882.50, and from a judgment in their favor for $5,223.02, plaintiff appealed.

Did the contract rescinding the sale settle the items of indebtedness pleaded in the cross-petition of defendants? This is the question presented by the appeal. The circumstances attending the rescission are material to the inquiry and involved negotiations between defendants and three corporations. When defendants owned and operated the oil stations at Alliance and Antioch, they entered into a contract April 23, 1919, to sell them to the Reliance Refining Corporation of Delaware, the latter agreeing to issue therefor $3,000 shares of its capital stock, to pay $26,500 in cash in instalments by November 24, 1919, and $5,191.68 by January 24, 1920, for merchandise on hand, as disclosed by an inventory. The Reliance Refining Corporation did not comply with any of the terms of its purchase. In connection with the oil stations at Alliance and Antioch another one was established at Hemingford. With the consent of defendants, plaintiff purchased the assets of the Reliance Refining Corporation and assumed the obligations of the latter under its contract to purchase from defendants their oil stations at Alliance and Antioch. In this state of affairs plaintiff and defendants entered into a contract of which the following is a copy:

"At a directors' meeting of the Atlas Refining Corporation held September 4, 1920, the sale of the J. H. Vaughan & Son oil stations was considered, and, owing to a failure on the part of the Atlas Refining Corporation in obtaining a permit to sell or issue stock of said company, said company is unable to carry out its contract with J. H. Vaughan & Son; and J. H. Vaughan & Son are desirous of rescinding said contract, and have heretofore and do hereby demand a rescission of said contract of the sale of said stations at Alliance, Antioch and Hemingford; and said J. H. Vaughan & Son hereby tender back to the Atlas Refining Corporation $30,000 of the capital stock of the Atlas Refining Corporation and return to said company, $8,640 put into said stations by the Atlas Refining Corporation; and said J. H. Vaughan &

Son also agree to pay the Atlas Refining Corporation the invoice price of all merchandise on hand on the 30th and 31st days of August, 1920; and the Atlas Refining Corporation by good and sufficient bill of sale is to convey all interest of the Atlas Refining Corporation in and to said properties.

"The Reliance Refining Corporation of Delaware claimed some right in a certain contract with J. H. Vaughan & Son for the sale and purchase of the above oil stations, but said Reliance Refining Corporation have heretofore waived and disclaimed any right in any contract with said J. H. Vaughan & Son for the reason that they were unable to carry out the conditions of the same.

"With the assent of the holders of two-thirds of all the capital stock of the corporation issued and outstanding and by authority of the board of directors now in session, the said board of directors hereby consent to the rescission of the contract between J. H. Vaughan & Son and the Atlas Refining Corporation and hereby, as a board of directors, rescind said contract, on the conditions hereinbefore set forth, by putting each party in the same plight that they were formerly in, and the board of directors by this resolution hereby authorizes the officers of the Atlas Refining Corporation and instruct them by good and sufficient bill of sale or any other instrument in writing that may be necessary to convey back all title, claim or interest that the Atlas Refining Corporation may have claim in and to the oil properties of J. H. Vaughan & Son at Alliance, Antioch and Hemingford, Nebraska, so that said J. H. Vaughan & Son shall have said properties free and clear of any claim or claims of the Atlas Refining Corporation.

"September 4, 1920.

"I hereby accept the terms and conditions of the foregoing resolution and we are accepting bill of sale under said conditions and agree to carry out the terms thereof and attach this to said resolution and make it a part thereof.

"J. H. Vaughan & Son, by J. H. Vaughan.
"J. C. Vaughan."

Does this contract defeat a recovery for the items of indebtedness enumerated and described in the cross-petition of defendants? They were stockholders and officers in both the Reliance Refining Corporation and the Atlas Refining Corporation. In the negotiations resulting in the sale of the oil stations to the former, in the obligations assumed by the latter as successor and in the contract of rescission, defendants not only acted for themselves but were at the time interested financially and officially in the corporations. In addition, they were experienced in business affairs and had been conducting oil stations for several years. There is no evidence to sustain a finding that they were induced by fraud to sign the contract of rescission or that they did not understand its terms. There is no reason to construe the circumstances or the writings in their favor.

From the date of the purchase by plaintiff until the sale was rescinded defendants managed the oil stations without making substantial profits for plaintiff, their employer. They knew plaintiff could not perform its contract of purchase after investing in the enterprise $8,640, and keeping on hand merchandise inventoried at $5,191.68. They wanted the oil stations back, and before plaintiff made any reconveyance to them they had entered into an agreement to sell the properties to the Mutual Oil Company. They met September 4, 1920, with the other officers of plaintiff to make a settlement. At that meeting the claims pleaded in the cross-petition were discussed, including salaries. Any indebtedness of plaintiff to defendants was then due. Depreciation by use of the personal property to be reconveyed had already taken place. Monthly salaries claimed by defendants had not been demanded or collected when due. Defendants, now pleading that plaintiff owed them $8,495.96 September 4, 1920, then agreed to pay plaintiff $13,831.68,

without reserving in the terms of rescission the items enumerated in their counterclaim. Knowing that plaintiff could not pay for the oil stations while operating them as owner, defendants are in the attitude of having relied on plaintiff to pay its indebtedness to them after it divested itself of property regarded as security. The counterclaim of defendants is inconsistent with their written instrument. Parol evidence is inadmissible to contradict the unambiguous terms of a valid contract in writing. A new contract was substituted for the old. The rescission did not provide for payment of damages for breach of the contract of purchase. No provision was made in writing for reserving debts or damages as liabilities of plaintiff. On the contrary, defendants agreed to accept a bill of sale, or a reconveyance, under the conditions prescribed in the contract of rescission. The conditions therein did not include payment of the items pleaded in the cross-petition. The terms of rescission clearly excluded those items. To allow them is to vary an unambiguous contract and to unsettle by parol a settlement deliberately made in writing. A written agreement rescinding a sale and prescribing definite terms of rescission without reserving existing obligations, rights and remedies may prevent a recovery for damages or items of indebtedness resulting from a failure to comply with the terms of the original contract. Plaintiff reconveyed the property purchased and otherwise complied with the terms of the rescission. Defendants accepted the bill of sale and promptly transferred the property to the Mutual Oil Company, but violated its agreement to pay plaintiff $13,831.68. For this sum, with interest from September 4, 1920, there should have been a judgment in favor of plaintiff. There was no competent evidence that the claims pleaded in the cross-petition were left open for future settlement. The cross-petition should have been dismissed. The judgment is therefore reversed and the cause remanded, with directions to enter judgment in favor of plaintiff for $13,831.68, with interest

from September 4, 1920, and to dismiss the cross-petition of defendants.

REVERSED.

JOY ROBERTS V. STATE OF NERRASKA.

FILED SEPTEMBER 22, 1923. No. 23140.

1. **Criminal Law:** INSTRUCTIONS: BURDEN OF PROOF OF DEFENSE. When on the trial of one charged with the violation of section 9829, Comp. St. 1922, the state has proved beyond a reasonable doubt that at the time and place charged in the information defendant rarried a weapon aoncealed upon his person, and defendant relies upon the proviso iontained in that section for his defense, it is not error for the court to instruct the jury that as to that issue the burden of proof is on the defendant, when by other instructions the jury are correctly informed as to the burden of proof on the general issue.
2. ———: INQUIRIES BEFORE SENTENCE. Errors cannot be predicted upon inquiries made by the trial court of one convicted of a violation of section 9829, Comp. St. 1922, before imposing sentence, nor is it error to set out in the record the substanec of the inquiry.
3. ———: SENTENCE. Record examined, and *held* that the sentence imposed is not so excessive as to require a redhction by this court.

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

King & Bracken, for plaintiff in error.

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

Heard before MORRISSEY, C. J., DEAN, ALDRICH and DAY, JJ., COLBY and REDICK, District Judges.

MORRISSEY, C. J.

Defendant was convicted of carrying concealed weapons and sentenced to serve a term of not less than one nor more than two years in the penitentiary.

It may be said that it is conceded that defendant at the time charged was carrying a revolver concealed upon his person. The defense relied upon is that proviso of the statute (Comp. St. 1922, sec. 9829) which reads as follows:

"If it shall be proved from the testimony on the trial,

or at a preliminary hearing of such case that the accused was, at the time of carrying any weapon or weapons as aforesaid, engaged in any lawful business, calling or employment and the circumstances in which such person was placed at the time aforesaid was such as to justify a prudent person in carrying the weapon or weapons aforesaid, for the defense of his person, property or family, the accused shall be acquitted or discharged."

Defendant requested the court to instruct the jury that, if they found that defendant was carrying the revolver "as a matter of precaution for his own safety, or if he had reason to believe that it would be prudent to take it from the automobile to avoid the likelihood of its being stolen," he would be justified in so doing.

Defendant further requested the court to instruct the jury: "That if you find from all the evidence that the defendant had good reason to believe and did believe that some person or persons had made threats of violence against his person, and that he had good reason to believe and did believe that such threats were likely to be, or might be, carried out at the time and place that the crime was committed as charged in the information, then you are instructed to find defendant not guilty."

These instructions were refused, and the court on its own motion by instruction No. 5 set out the proviso of the statute which defendant relied upon as a defense, and told the jury that, if the state had proved its case beyond a reasonable doubt, then the burden was on defendant to show that he came within the proviso. "If he does so, then you should find the defendant not guilty. The burden of so establishing this fact is upon him."

Error is assigned because of the court's refusal to give the requested instructions, and also, and perhaps with greater emphasis, is urged the giving of instruction No. 5, and especially its concluding sentence. The general rule is that the burden is on the state to establish the guilt of the accused, that is, to prove every fact and circumstance which is essential to the guilt of the accused,

or, as frequently stated, to prove every essential element of the crime charged, and to prove each item as though the whole issue rested on it, except in so far as a statute establishes a different rule. Stated in another way, the rule is that the law does not cast on accused the burden of satisfying the jury of his innocence. But it must be borne in mind that the statute on which this prosecution rests does not take into account the intent with which the act is done. It denounces the carrying of a concealed weapon. The undisputed evidence brought the defendant within the terms of the statute, but by the proviso relied upon defendant was free to purge himself of the guilt established by the state's evidence. In such a situation the general rule does not apply.

"While there has been some little confusion in the cases as to whether the burden of proof is ever on the defendant in a criminal prosecution, it is generally true that this is not the case. Indeed, it is stated as a maxim that the burden of proof never shifts from the prosecution to the defense. This, however, means only that it never shifts in so far as it is necessary to make out the specific crime charged in the indictment, by establishing the *corpus delicti* and the constituent elements of the crime. When distinct, substantive matter is relied upon by the defendant to exempt him from punishment and absolve him from liability, which is foreign to the issue as made by the state in the charge against him, the burden of proving it properly should be upon the defendant. As to such a fact he presents a subordinate issue upon which he goes forward with his evidence and the state rebuts. Thus where, in the trial of an indictment for robbery, it is proved beyond a reasonable doubt that the defendant was present at the time and place of the crime and participated in the acts which constitute the robbery, and the defendant for his defense interposes a plea of duress, the burden is not on the state to disprove such plea, but is on the defendant to main-

tain his plea by a preponderance of the evidence." 8 R. C. L. 171, sec. 164.

By instruction No. 6 the court told the jury that, if they found that defendant was engaged in any lawful business, calling or employment, and that the circumstances in which he was placed at the time the weapon was found upon him were such as to justify a prudent person in carrying a weapon for the defense of his person, property or family, they should find the defendant not guilty. This instruction gave defendant the benefit of the proviso, and from a consideration of the entire charge it is clear that the jury were fully advised of defendant's rights under the statute. It is clear that the court was not guilty of prejudicial error either in refusing to give the instructions requested or in giving the instruction criticised.

We are urged to hold that the sentence imposed is excessive. And in connection with this assignment complaint is made because the record sets out the questions propounded by the court to defendant before imposing sentence, together with defendant's answers thereto. We fail to see how defendant can be prejudiced by a correct recital of what occurred in the court at the time sentence was pronounced. The statute (Comp. St. 1922, sec. 10173) made it the duty of the court to inquire into defendant's general conduct, and error cannot be predicated upon the inquiries made.

From a consideration of all the record, we find no prejudicial error, nor does the sentence imposed appear to be so severe as to require a reduction by this court, and the judgment is

AFFIRMED.

MISSOURI PACIFIC RAILROAD COMPANY, APPELLANT, V. DRAINAGE DISTRICT, APPELLEE.

FILED SEPTEMBER 22, 1923. No. 22517.

1 **Drains**: ASSESSMENTS. Benefits accruing to a railroad by the

drainage of a valley in which flood waters overflowed and injured the railroad tracks may be assessed by a drainage district organized under statutory authority. Comp. St. 1922, sec. 1758.

2. ———: ———. Evidence outlined in opinion *held* sufficient to sustain an assessment of benefits accruing to railroad property by drainage.

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

J. A. C. Kennedy and *Yale C. Holland,* for appellant.

Kelligar, Ferneau & Gagnon, contra.

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

ROSE, J.

This is a controversy over the assessment of benefits accruing to railroad property by drainage. Comp. St. 1922, sec. 1758. Drainage District Number 5, Richardson county, is defendant. It was organized for drainage purposes under statutory authority. Comp. St. 1922, sec. 1744. By means of a channel and a number of laterals it constructed a drainage system in Muddy creek valley, Richardson county. Muddy creek was formerly the water-course in what is now the drainage district. The general direction of drainage is southeast. The new channel is about half the length of the old. The drainage district is approximately nine miles long and varies in width from one to three miles. The Missouri Pacific Railroad Company is plaintiff. Its railroad followed the general direction of Muddy creek more than three miles in the upper part of the valley and crossed that stream several times on bridges. The drainage board, upon the estimate and recommendation of its engineer, assessed the benefits accruing to the railroad property of plaintiff at $41,386. From this assessment plaintiff appealed to the district court, where the amount was reduced to $24,600. Plaintiff has again appealed.

The question presented by the appeal is the sufficiency

of the evidence to sustain the assessment for benefits. Plaintiff argues, and there is evidence tending to prove, that its rails, ties and ballast are on a roadbed four to six feet higher than the natural surface of the ground, that its tracks are now out of danger from flood waters, that its embankments are composed of gumbo, which is practically impervious to water, and that therefore the railroad property is not benefited by defendant's drainage system. The evidence shows conclusively that Muddy creek valley is subject to overflows. In 1883, 1907, 1912 and 1915 water covered plaintiff's roadbed in places and destroyed portions of its tracks, causing heavy losses. There is evidence of a dozen floods in Muddy creek valley in a single year. It is conceded by plaintiff that its property prior to 1915 was damaged by floods at intervals of four or five years, but in this connection it is argued that the railroad tracks were subsequently elevated above the plane of flood waters and are now beyond the danger of injury therefrom. This theory of the controversy was supported by engineers who testified on behalf of plaintiff, and was ably advocated at the bar. The testimony of other engineers called by defendant as witnesses is, however, of a different import. There is evidence tending to prove that the drainage system of defendant will lower the plane of floods along the roadbed and carry the waters therefrom more rapidly. The effect of this, according to one engineer, is to protect the embankment, retard deterioration in ties and rails, preserve ballast, and decrease the number of necessary railroad bridges. Another engineer advanced the theory that drainage will make further elevation of the tracks unnecessary, there being evidence tending to show that the carrying capacity of the drainage channel will increase with floods, while the nature of the watershed and the windings of Muddy creek in its natural state would inevitably raise the surface of the valley and necessitate further elevation of railroad tracks. The estimate of

benefits under either theory of defendant's engineers exceeds the assessment from which the appeal is taken. The trial judge, in the light of all the evidence, viewed the railroad property as affected by the drainage system, and there does not seem to be a sufficient reason to disturb his finding. The judgment seems to be supported by the evidence.

AFFIRMED.

DOUGLAS MOTORS CORPORATION, APPELLANT, V. DANIEL BAUM, JR., ET AL., APPELLEES.

FILED SEPTEMBER 22, 1923. No. 22358.

Corporations: ACCOUNTING. Evidence examined, and *held* sufficient to sustain the findings and judgment of the trial court.

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

Brome & Ramsey, J. P. Uvick and *H. C. Brome,* for appellant.

Gaines, Van Orsdel & Gaines, contra.

Heard before MORRISSEY, C. J., ROSE, DEAN and DAY, JJ., BLACKLEDGE and COLBY, District Judges.

DAY, J.

This is an action in the nature of an accounting brought by the Douglas Motors Corporation against Daniel Baum, Jr., and the City Safety Deposit Company, to recover the value of 500 shares of stock in the plaintiff corporation. The action is based upon the theory that the shares of stock were issued to the City Safety Deposit Company without any consideration being paid therefor, and that the latter defendant had sold and transferred to innocent purchasers the said shares of stock so that the same could not be canceled. The plaintiff seeks to hold the defendant Baum liable upon the theory that, as president of the plaintiff corporation, and as a

member of the board of directors, he participated in the wrongful issuance of the shares of stock to the City Safety Deposit Company. The defendants denied that there was any fraud in the issuance of the shares of stock, and alleged that the plaintiff received a valid and legal consideration therefor. The trial resulted in a judgment in favor of the defendants. Plaintiff appeals.

The record shows that a corporation known as the Drummond Motor Company was organized in 1910 for the purpose of manufacturing and selling motor vehicles. The stock in this corporation was held largely by Frank W. Bacon and Walter J. Griffith. Bacon, who was a mechanical engineer of considerable genius and experience, had designed a type of motor car, known as the "Drummond," which the company proposed to manufacture and place on the market. The Drummond Motor Company did not have the necessary means to purchase materials in large quantities for the manufacture of this car, and accordingly applied to Daniel Baum, Jr., and Dan W. Gaines for a loan with which to purchase materials. After considerable negotiations, an agreement was entered into whereby Dan W. Gaines, Albert L. Schartz, David Baum, and Daniel Baum, Jr., under the name of the Drummond Sales Company, agreed to advance $15,000 to the Drummond Motor Company to purchase materials for use in the manufacture of the Drummond cars. The Drummond Sales Company advanced the $15,000, and later increased the amount, so that in December, 1916, the advancements amounted to $44,000. To secure these advances thus made, a bill of sale was executed by the Drummond Motor Company on the materials purchased. The Drummond Motor Company also entered into a contract with the Drummond Sales Company to construct out of the materials purchased 100 cars and to sell the same to the Drummond Sales Company for $700 a piece. In December, 1916, a scheme was suggested by one of the interested parties

which contemplated the organization of a new corporation with a large capital, which would succeed to the business of the Drummond Motor Company, and assume its indebtedness. Accordingly Daniel Baum, Jr., Frank W. Bacon, and Richard O. Bunn, residents of Nebraska, and George F. Sayre of South Dakota, organized a corporation under the laws of South Dakota, known as the Douglas Motors Corporation, with an authorized capital of $1,000,000, divided into shares of $100 each. Sayre was employed to participate in the organization for the purpose of complying with the laws of South Dakota. By the terms of the articles of incorporation the four incorporators constituted the board of directors until such time as a board of directors should be elected by the stockholders at their annual meeting. Following the organization a meeting was held of the board of directors, excepting Sayre, and the following officers were elected: Daniel Baum, Jr., president, Frank W. Bacon, vice-president and general manager, and Richard O. Bunn, secretary and treasurer.

At the first meeting of the board of directors it authorized the purchase from the Drummond Motor Company of the automobiles in course of manufacture, all of the materials on hand, its leasehold, and good-will, including the right to manufacture and sell the Drummond car. Arrangements were made by which stock in the new company was issued to the Drummond Motor Company of the face value of $80,000 in payment therefor The new company also guaranteed the payment of the indebtedness of the Drummond Motor Company amounting to approximately $55,000. While the record is not entirely clear as to the manner in which the City Safety Deposit Company acquired the bill of sale which had been executed to the Drummond Sales Company, and also the contract for the sale of 100 cars, it is assumed that it did so. An arrangement was made between the Douglas Motors Corporation and the City Safety Deposit

Company, by which the deposit company released the Douglas Motors Corporation from the obligation of the contract upon which 74 cars had not been delivered, and also released the bill of sale on the materials, resigned as transfer agent, and other considerations not made clear, taking in payment therefor 500 shares of stock in the new corporation, which shares of stock form the basis of the present controversy. The testimony shows that the contract for the sale of cars which the City Safety Deposit Company surrendered was a valuable one, there being a profit of $300 a car on the number of cars actually delivered. The other rights surrendered had a substantial value. Considering the fact that the value of the shares of stock in the Douglas Motors Corporation at the time the arrangement was made was more or less speculative, depending upon the success of the enterprise, it occurs to us that the value of this stock was not so disproportionate to the consideration surrendered by the City Safety Deposit Company as to be subject to criticism. Considering the whole record, we are convinced that the transaction between the plaintiff and the City Safety Deposit Company was entered into in good faith by the parties, and that the plaintiff has not shown facts sufficient to warrant the court in setting the transaction aside upon the ground of inadequacy of consideration in the issuance of the stock. If, as we hold, the City Safety Deposit Company is not liable, it follows as a matter of course that no liability could attach to Baum upon the theory that he wrongfully participated in the issuance of the stock.

The judgment of the lower court is right, and it is, therefore,

AFFIRMED.

DOUGLAS MOTORS CORPORATION, APPELLEE AND CROSS-APPELLANT, V. DANIEL BAUM, JR., APPELLANT AND CROSS-APPELLEE.

FILED SEPTEMBER 22, 1923. No. 22396.

Compromise and Settlement. Upon the state of facts set forth in the opinion, it is *held* that all matters in dispute between the parties were fully settled by the agreement of compromise, which was supported by a sufficient consideration and fully performed.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed in part, and reversed in part.*

Gaines, Van Orsdel & Gaines, for appellant.

Brome & Ramsey and *H. C. Brome, contra.*

Heard before MORRISSEY, C. J., ROSE, DEAN and DAY, JJ., BLACKLEDGE and COLBY, District Judges.

DAY, J.

This is an action in the nature of an accounting brought by the Douglas Motors Corporation against Daniel Baum, Jr. In the first cause of action the plaintiff seeks to recover from Baum the value of 675 shares of its capital stock, which it alleges was fraudulently issued to Frank W. Bacon without any consideration paid to the plaintiff therefor. Bacon was not served with process, and has since died. The plaintiff seeks to hold Baum liable upon the theory that, as president of plaintiff corporation, and as a member of its board of directors, he participated in the wrongful issuance of the shares of stock. In the second cause of action the plaintiff seeks to recover from Baum the value of 76 shares of its capital stock, which it alleges was fraudulently issued to him without any consideration being paid therefor.

The answer of Baum denied that the stock issued to Bacon or to himself was issued without any consideration, alleged that there was a valid legal consideration therefor, and denied that there was any fraud in the

issuance of the shares of stock; that all the then stockholders consented to the issuance of the said shares to Bacon as well as to himself. Baum also pleaded that there had been a full and complete settlement of the matters which form the basis of plaintiff's cause of action.

The trial court found against the plaintiff on the first cause of action, and dismissed it. Upon the second cause of action the court found in favor of the plaintiff; found the value of the 76 shares of stock to be $7,500, and rendered judgment against Baum for that sum, with interest. Baum has appealed from the judgment against him on the second cause of action. Plaintiff has filed a cross-appeal from the judgment on the first cause of action.

The facts giving rise to the controversy are as follows:

In 1910 a corporation was organized in Nebraska, known as the Drummond Motor Company, for the purpose of manufacturing and selling motor vehicles. The stock in this corporation was held largely by Frank W. Bacon and Walter J. Griffith. Bacon, who was a mechanical engineer of considerable genius and experience, had designed a type of motor car known as the "Drummond," which the company proposed to manufacture and place on the market. The Drummond company did not have sufficient means to manufacture this car on the large scale desired, and accordingly applied to Daniel Baum, Jr., and others for a loan. After some negotiations a loan was made which eventually amounted to approximately $44,000. In this way Baum, who was a successful business man, became familiar with the affairs of the Drummond company. In December, 1916, a scheme was suggested by either Baum or Bacon that a new corporation be organized with a large capital which would take over the business and assets of the Drummond company and assume its liabilities. Accordingly Daniel Baum, Jr., Frank W. Bacon, and Richard O. Bunn, residents of Nebraska, and George F. Sayre

of South Dakota, organized a corporation under the laws of South Dakota with an authorized capital of $1,000,000, divided into shares of $100 each. The purpose of the corporation was to engage in the manufacture and sale of motor vehicles. By the terms of the articles of incorporation the four incorporators constituted the board of directors until a board of directors was elected by the stockholders at their annual meeting.

Following the organization a meeting of the board, excepting Sayre, was held, and elected Daniel Baum, Jr., president, Frank W. Bacon, vice-president and general manager, and Richard O. Bunn, secretary and treasurer. At the first meeting of the board of directors, in pursuance to a prearranged plan, 675 shares of the capital stock was issued to Baum, and a like number of shares to Bacon. Other shares were issued to other parties. Shares were also issued to the Drummond Motor Company for its lease, good-will and materials, and the business of the Drummond company was taken over by the plaintiff corporation. Up to this time no money had been paid to the corporation for the shares of stock issued.

A stock-selling scheme was then inaugurated to sell the stock to the public, and over $500,000 of stock was thus sold. More than a year after the corporation had been operating, dissension arose among the directors, and the question was raised by some of the directors as to Baum's right to the stock which had been issued to him. At that time Baum still owned 599 shares of the 675 shares which had been originally issued to him, the remaining 76 shares he had sold. Following the discussion, which appears to have been conducted with considerable asperity, Baum submitted to the board a proposition in writing, as follows:

"Inasmuch as there have been complaints because of my holding stock in the Douglas Motors Corporation, and the manner of acquiring the same, in order to avoid

all controversy and for the purpose of full compromise and settlement, I make the following proposition: I am willing to assign to the Douglas Motors Corporation, for cancelation, any and all stock owned by me or in my name, namely 599 shares, on condition that the acceptance thereof shall be in full settlement of any and all matters between said corporation and myself, of every kind and character, growing out of the issuance of stock in said corporation and my connection with the corporation as an officer and director, and otherwise."

This offer was accepted by the full board of directors, each member voting to accept the proposition. Thereupon Baum surrendered the 599 shares of stock and resigned as president of the corporation, for which service he was being paid $250 a month, and thus severed his relationship to the corporation.

Two questions are argued in the briefs: First, that the corporation has no standing to now question the issuance of the shares of stock to Baum or Bacon, because at the time the shares were issued every one interested in the corporation assented thereto; second, that Baum has fully and completely settled for any liability which might have been legally charged against him. Upon the first proposition suggested, the authorities appear to be divided. In *Old Dominion Copper Mining & Smelting Co. v. Lewisohn,* 210 U. S. 206, it is held that a corporation cannot assail the issuance of its stock, when at the time of its issuance all the stockholders consented thereto. Under the same facts an opposite conclusion was reached by the supreme court of Massachusetts in *Old Dominion Copper Mining & Smelting Co. v. Bigelow,* 203 Mass. 159. We do not deem it necessary at this time to commit ourselves as to which line of authorities we prefer to follow, as the settlement appears to us to be decisive of the question of Baum's liability. The language of the proposal by Baum, which was

accepted by the corporation acting through its board of directors, is comprehensive in its scope, and includes all matters between the corporation and Baum of every kind and character growing out of the issuance of stock in the corporation, and of his connection with the corporation as an officer, director, or otherwise.

The terms of the settlement were clearly broad enough to include, not only the shares of stock issued to Baum, but also those issued to Bacon, if it could be said that Baum was liable for having participated in the issuance of the shares to Bacon. The plaintiff seeks to avoid the settlement upon the ground that there was no consideration to support it, and the argument is advanced that Baum simply surrendered a part of the stock to the whole of which he had no legal claim. While it is ordinarily true that a dispute as to the legal effect arising from undisputed facts is not sufficient to sustain a settlement, yet in this case we think there was more than the legal question involved in the transaction. Baum surrendered a valuable right, viz., that of being president of the corporation, as well as the salary which went with the office. Considering the entire record, we are quite satisfied that the settlement entered into precludes the plaintiff from recovering from Baum.

From what has been said it follows that the judgment dismissing the first cause of action was right, and should be affirmed. The judgment against Baum on the second cause of action should be reversed, and the action dismissed.

AFFIRMED IN PART, AND REVERSED IN PART.

FRED L. MILLER ET AL., APPELLEES, V. AMERICAN COOPERATIVE ASSOCIATION, APPELLANT.

FILED SEPTEMBER 22, 1923. No. 22477.

Receivers: ATTACHMENT. The appointment of a receiver of a foreign corporation by a court of the state of its domicile does not thereby bring the property of the corporation situated in this state *in custodia legis* until the receiver has reduced the property in this state to actual

possession, and does not defeat or destroy the lien of attaching creditors acquired after the appointment of such receiver.

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

E. D. Crites and *F. A. Crites,* for appellant.

J. E. Porter, contra.

Heard before MORRISSEY, C. J., DEAN, ALDRICH and DAY, JJ., COLBY and REDICK, District Judges.

DAY, J.

On February 9, 1921, the plaintiffs commenced this action against the American Cooperative Association to recover judgment for a sum of money which the plaintiffs had theretofore been required to pay as indorsers upon a promissory note executed by the defendant. The action was aided by an attachment upon defendant's property, issued upon the ground that the defendant was a foreign corporation. On March 30, 1921, defendant's motion to dissolve the attachment was overruled. The trial upon the general issues resulted in a judgment in favor of the plaintiffs for $1,616.42, and an order was made directing the sale of the attached property to satisfy the judgment. Defendant appeals.

The principal error relied upon by the defendant is the overruling of its motion to dissolve the attachment.

The defendant is a Wisconsin corporation, transacting business, as indicated by its name, upon the cooperative plan. The defendant's central supply house was located in Wisconsin. It also maintained branch mercantile establishments in other communities where there was sufficient membership to justify so doing. One of these branch establishments was located at Crawford, Nebraska, and was under the local management of the plaintiffs.

In the conduct of the local business at Chadron, the association borrowed a sum of money from a local bank,

giving its note therefor. The note was indorsed by the plaintiffs, and later paid by them.

Prior to the issuance of the attachment, a receiver had been duly appointed by a court of competent jurisdiction in the state of Wisconsin, the domicile of the defendant, with the usual powers and duties of receivers, the order reciting that the stock, property and effects of the defendant "are hereby sequestered, * * * wheresoever situated." The defendant being a foreign corporation, there is no doubt that the statutory grounds for the issuance of an attachment existed.

But it is urged by the defendant that its property was not the subject of seizure by attachment, because at the time of the levy the property was *in custodia legis*. It appears, however, that prior to the attachment no steps had been taken by the receiver to acquire possession of defendant's property situated in this state. The precise question is then presented, whether the property of the defendant in this state was *in custodia legis* so as to exempt it from the process of attachment issued by the courts of this state upon the application of a local creditor of the defendant.

It is familiar law that the powers which are exercised by the courts are limited, and cannot ordinarily be exercised beyond the territorial jurisdiction of the court issuing the order. This restriction upon judicial authority has given rise to the consideration by the courts in numerous cases involving the rights of receivers appointed in a foreign state over the property of the insolvent debtor situated in other states. The weight of authority upon the precise question before us seems to support the view that the appointment of a receiver of a foreign corporation by a court of the state of its domicile does not thereby bring the property of the corporation situated in another state *in custodia legis* until the receiver has reduced such property to actual possession, and does not defeat or destroy the lien of attaching creditors

in the other state acquired after the appointment of such receiver. This rule is founded upon the well-settled principle that a receiver possesses no power or authority beyond the jurisdiction of the court appointing him. There has been some relaxation of this rule by modern decisions, so as to permit a receiver on the principle of comity to exercise in another state the functions vested in him by his appointment but, this is permitted only where it will not violate public policy or infringe upon or defeat the rights of domestic creditors. A few of the many authorities supporting this view are: *Frowert v. Blank*, 205 Pa. St. 299; *Catlin v. Wilcox Silver Plate Co.*, 123 Ind. 477; *Lichtenstein Bros. & Co. v. Gillett Bros.*, 37 La. Ann. 522. Defendant cites *Veith v. Ress*, 60 Neb. 52. In that case, however, the receiver was in possession of the property. *Ogden v. Warren*, 36 Neb. 715, is also cited, but we do not consider it an authority sustaining the point at issue.

The plaintiffs also urge that, the defendant being in the hands of a receiver, the latter has no standing in court to urge the dissolution of the attachment. In the view we have taken of the case, however, it seems unnecessary to discuss this question.

From what has been said, it follows that the judgment of the trial court is right, and it is, therefore,

AFFIRMED.

CLARENCE E. GOVIER, APPELLANT, V. JOSEPH F. WILSON ET AL., APPELLEES.

FILED SEPTEMBER 22, 1923. No. 22489.

1. **Evidence** examined, and *held* sufficient to sustain the decree of the trial court in so far as it dismisses the plaintiff's cause of action.
2. **Evidence** examined, and *held* not sufficient on the accounting between plaintiff and defendants, W. and K., to sustain the judgment of the trial court.

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

Sullivan, Squires & Johnson, for appellant.

Prince & Prince and *Kelly & Schnell, contra.*

Heard before MORRISSEY, C. J., DEAN, ALDRICH and DAY, JJ., COLBY and REDICK, District Judges.

DAY, J.

The plaintiff, Clarence E. Govier, who was purchaser at a partition sale of a certain tract of land, and who had paid to the referee the amount of his bid, intervened in the partition action and sought to have a credit established upon his bid by reason of the facts alleged, and prayed that the referee be ordered by the court to refund to him the amount of the credit found to be due. The trial court directed the plaintiff to separately docket his action, and ordered the referee to retain $1,054 out of the money paid upon the bid until the further order of the court, and further ordered the referee to distribute the balance of the purchase price to the parties entitled thereto. As originally filed, the petition named Joseph F. Wilson and P. Jerry Kelly defendants. Later Rose E. Richardson was made an additional party defendant. Upon the trial the court found upon the issue presented by the petition in favor of the defendants, and dismissed the plaintiff's action. The court also found, upon an accounting between the plaintiff and the defendants Wilson and Kelly, in favor of the defendants, and rendered a personal judgment in their favor against plaintiff for $40.40. Plaintiff appeals.

The facts are somewhat peculiar. The property partitioned consisted of a section of land in Custer county, Nebraska, owned by the defendant Rose E. Richardson, formerly Rose Empfield, and her two minor children, Paul McKee Empfield and Lillie Ruth Empfield, each being the owner of an undivided one-third interest. Mrs. Richardson was desirous of disposing of the property, but, inasmuch as the two minors owned part of it, she could not do so without resort to a par-

tition action. The land was leased to S. S. Sallee for a term of years expiring March 1, 1922. On June 23, 1919, C. E. Bass, a brother of Mrs. Richardson, and who handled her business affairs in Custer county, entered into a written contract with P. Jerry Kelly and Joseph F. Wilson, the defendants herein, to sell the property in question to them for $16,000, subject to the Sallee lease. The contract recited that the land was owned by Mrs. Richardson and her two minor children above named, and that a partition suit was necessary to be had to acquire a good title. Kelly and Wilson paid $700 on account of the purchase price, the balance to be paid according to the terms of the contract when a title to the land could be given. The partition action was commenced by Mrs. Richardson on February 17, 1919; the two minor children, and Rose Richardson as their guardian, being named defendants. N. T. Gadd was appointed guardian *ad litem* for the two minor children. On February 5, 1919, Wilson, acting for himself and Kelly, bought Salee's rights under the lease, paying therefor $1,200; Sallee agreeing to vacate the premises on or before March 1, 1919. On March 5, 1919, Wilson and Kelly, anticipating that their contract for the purchase of the land would be carried out, entered into a contract to sell the land in question to the plaintiff, Govier, for $22,400. At the time of entering into the contract the plaintiff paid $1,500 in cash to Wilson and Kelly, the balance of the purchase price to be paid as provided in the contract. The contract contained other provisions which will be hereinafter considered.

On May 3, 1919, a judgment in partition was duly entered. Edwin F. Myers was appointed referee, and, upon his report being made, an order was entered directing the sale of the property. On June 23 the referee reported a sale of the property to P. Jerry Kelly for $16,000. This sale was objected to by the guardian *ad litem,* and the court set the sale aside. Later, on Sep-

tember 8, 1919, the referee sold the property to plaintiff, Govier, for $23,354. This sale was confirmed, and deed ordered to Govier, the purchaser, who paid the purchase price to the referee. At this time Govier was in possession of the premises and had crops ready for harvest under his contract with Kelly and Wilson.

The plaintiff's theory is founded upon the idea that he was obliged to bid $23,354 for the property at the sale in order to protect his crops which were then growing upon the land; that he is entitled to recover from Wilson and Kelly the difference between the amount of his contract with them, to wit, $22,400, and the amount of his bid; that the contract between Bass and Wilson and Kelly would be carried out to the extent at least of the interest of Mrs. Richardson, and that Wilson and Kelly would be entitled to receive a part of the proceeds of the referee's sale.

The main question upon this phase of the case, as we view it, turns upon the construction to be given to the contract between the plaintiff and Wilson and Kelly. If under the terms of that contract Wilson and Kelly were not bound to sell the property to the plaintiff, then the plaintiff's cause of action must fail. This contract contained provisions, as follows:

"It is further understood and agreed by and between the parties to this contract that the said parties of the first part (Wilson and Kelly) have purchased the real estate above described from C. E. Bass as agent for Mrs. Richardson and her minor children upon a contract signed by the said C. E. Bass as such agent, and it is further understood and agreed by and between the parties hereto that, in order for the parties of the first part to secure title to the real estate above described, said land will have to be sold by a referee appointed by the district judge of Custer county, Nebraska, and that said sale will be at public auction, and if for any reason the parties of the first part are unable to secure title

to said real estate, under the terms of their contract with the said C. E. Bass, then, and in that event, one thousand dollars ($1,000) of the fifteen hundred dollars ($1,500) paid by the parties of the second part (Govier and his wife) shall be retained by the said parties of the first part as rent for the real estate described from the fifteenth (15th) day of March, 1919, to the first (1st) day of March, 1920, and the parties of the first part agree to refund to the said parties of the second part the sum of $500 with interest thereon at the rate of 6 per cent. per annum. It is understood by and between the parties hereto that the said parties of the first part do not at this time have title to said real estate and their ownership thereof depends upon the contract heretofore mentioned between them and the said C. E. Bass, and in the event that they are for any reason unable to secure their title as provided for in said contract, then they are bound only under the leased provision heretofore mentioned in this contract. * * * It is further agreed by and between the parties hereto that, in the event the said parties of the first part do not secure a deed from the referee for any reason, then in that event they agree to lease the premises above described to the said parties of the second part for two years from March 1, 1920, to March 1, 1922, for the sum of one thousand ($1,000) per year."

It will be observed that the contract recites, in substance, that Wilson and Kelly have purchased the property from C. E. Bass as agent of Mrs. Richardson and her minor children; that in order to secure a title the land must be sold at a referee's sale under the direction of the court at public auction; that, if for any reason Wilson and Kelly are unable to secure title to the land under the terms of their contract with Bass, then $1,000 of the $1,500 paid by the plaintiff is to be retained by Wilson and Kelly as rent for the land from March 15, 1919, to March 1, 1920, the balance of $500 with 6 per cent. interest to be returned by Wilson and Kelly to

the plaintiff. The contract further recites that, if for any reason Wilson and Kelly are unable to secure title as provided in the Bass contract, they shall be bound only under the leased provision of the contract hereinafter mentioned, which is that Wilson and Kelly agree to lease the premises to the plaintiff for two years from March 1, 1920, to March 1, 1922, for $1,000 a year. There is no ambiguity in the terms of this contract. Its language is precise, and its terms are easily understood. In construing a contract it is the duty of the court to give force and effect to its several provisions. Plaintiff was bound to take notice of the terms of the contract, and, had he done so, he would have been apprized that Wilson and Kelly were purchasing the property for $16,000, subject to the Sallee lease. Wilson and Kelly at the first sale bid $16,000 for the property, but this sale was set aside. It seems clear that Wilson and Kelly, in order to put themselves in a position to carry out their contract with the plaintiff, were not bound to bid for said property above $16,000. The plaintiff contends that he was obliged to bid $23,354 in order to protect his crops, but this position is hardly sound, because the referee's sale was subject to the rights of the Sallee lease. Construing the contract as a whole in the light of subsequent events, which seem to have been contemplated and provided for in the contract, it seems quite clear to us that the only liability on the part of Wilson and Kelly under the contract is to fulfil their agreement for the leasing of the premises.

The plaintiff also objects to that part of the decree wherein the court rendered judgment in favor of Wilson and Kelly and against the plaintiff for $40.40. The objection is made that there is no issue properly raised, and no proof to sustain a judgment of this amount. It is true that there is not a cross-petition filed with the answer of Wilson and Kelly setting out the facts showing an indebtedness from the plaintiff to them. Their answer in great detail sets up all of the facts, and

refers to the several contracts, and prays for an accounting between the plaintiff and themselves. The evidence upon the status of the accounts is not very satisfactory. It does appear, however, that Wilson and Kelly have $1,500 of the plaintiff's money, and that the plaintiff has been in possession of the land since about March, 1919. Under the terms of the contract he was to pay $1,000 for the land from March 15, 1919, to March 1, 1920, and $1,000 from March 1, 1920, to March 1, 1921, and $1,000 from March 1, 1921, to March 1, 1922. The decree of court was entered on June 6, 1921, and recited that the rent for the year 1919-1920 had been paid, and that for the year 1920-1921 there was due $40.40. We are unable to reconcile the findings upon this branch of the case with the facts as disclosed by the record. In the interest of justice to all parties, it seems that the cause should be remanded upon the matter only of the accounting of the rents between plaintiff and Wilson and Kelly. The judgment of the lower court is affirmed in part and reversed in part, and the cause remanded for further proceedings in conformity with this opinion; each party to pay his own costs in this court.

AFFIRMED IN PART, AND REVERSED IN PART.

BARTLETT STATE BANK, APPELLEE, V. DANIEL L. JOHNSTON ET AL., APPELLANTS.

FILED SEPTEMBER 22, 1923. No. 22482.

1. **Appeal**: REVIEW. This court will not determine an issue of fact presented to the trial court unless the evidence is preserved in a bill of exceptions.

2. ———: ———. Affidavits, used as evidence in support of objections to confirmation of a judicial sale, will not be considered in this court unless incorporated in a bill of exceptions.

APPEAL from the district court for Wheeler county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

J. M. Shreve and *P. N. Johnston,* for appellants.

A. L. Bishop, contra.

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

GOOD, J.

This is an appeal from an order confirming a judicial sale of real estate, made pursuant to an order of sale issued after decree in an action to foreclose a real estate mortgage. The only objection made is that the land was sold for less than its fair and reasonable value. This presents only a question of fact. The evidence has not been preserved in a bill of exceptions, so that this court is not advised as to evidence which was presented to the trial court. We must therefore presume that the finding and order was based on sufficient evidence.

Appellant in his brief directs our attention to two affidavits, appearing in the transcript, which purport to give the views of affiants as to the value of the land in question. This court has repeatedly held that affidavits, used as evidence on any issue of fact tried in the district court, cannot be considered in this court unless they are incorporated in a bill of exceptions. The reason for such holding is that, in the absence of a bill of exceptions properly authenticated, the court is not advised whether such affidavits were presented or considered by the trial court, nor does it know what other evidence may have been presented on the question. Among the many decisions of this court sustaining this view are: *Morris v. Hines*, 107 Neb. 788; *Amos v. Eichenberger*, 107 Neb. 416; *Carmichael v. McKay*, 81 Neb. 725; *Duffy v. Scheerger*, 91 Neb. 511; *Schmidt v. Village of Papillion*, 92 Neb. 511; *Taylor v. American Radiator Co.*, 93 Neb. 24; *Burrowes v. Chicago, B. & Q. R. Co.*, 85 Neb. 497; *Crocker v. Steidl*, 82 Neb. 850; *Mercer v. Armstrong*, 98 Neb. 645; *Koepke v. Delfs*, 95 Neb. 619.

The judgment of the district court is

AFFIRMED.

AUGUST JOHN HEYER ET AL., APPELLEES, V. PAULINE HEYER, APPELLANT.

FILED SEPTEMBER 22, 1923. No. 22366.

1. **Wills:** CONSTRUCTION. "In the construction of a will the intention of the testator, if it can be ascertained, must govern. Such intention should be ascertained from a liberal interpretation and comprehensive view of all the provisions of the will." *Worley v. Wimberly*, 99 Neb. 20.

2. ———: DEVISE: CONSTRUCTION. Under the provisions of the testator's will set out in the opinion, *held*, that he intended to convey to his widow only a life estate, coupled with a power of sale under a certain contingency. *Held*, further, that the contingency contemplated did not arise and such power of sale became, and is, extinguished.

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

W. F. Moran, for appellant.

Pitzer, Cline & Tyler, contra.

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

BLACKLEDGE, District Judge.

This action was instituted in December, 1920, to obtain a construction of the will of Edward Heyer, which had been admitted to probate in the year 1890, in its effect upon the title to certain real estate situated in Otoe county, Nebraska, of which the testator died seised and possessed.

The will was perhaps autographic, or, in any event, was written by one wholly unacquainted with the preparation or requirements of such instruments. It was, however, the effort of an untrained layman to express the wishes of the testator in the serious business of disposal after his death of the property of which he was possessed, and it is the duty of the court, acting under established rules, to give effect as far as possible to such wishes and to authoritatively declare the intent of the testator.

The will, so far as concerns the present inquiry, is written as follows:

"After my death the farm shall go to my wife, Pauline Heyer.

"After her death the farm shall go to my son, August John Heyer. * * *

"In case my wife cannot keep up the place (farm), I give her the right to sell it, provided she is single.

"Should she marry again she shall not sell it."

The testimony covers a much broader field than the issues made by the pleadings. The petition prays for a construction of the will in respect to the rights of the son derived therefrom, and of the widow, and of her power of sale, and asks that it be held to establish a life estate in Pauline Heyer with remainder to the son; and, if it should be held that the widow has a right of sale, that the remainder will be protected by a trusteeship for the investment and conservation of the proceeds. The defendant in her answer prays that she be decreed to own the fee simple title to the premises, and that she may dispose of the same and convey absolute title. It will be seen that the sole question actually involved in the case is a determination of the title or interest devised by the will to the widow and to the son, including the effect properly to be given to the clause respecting the sale of the premises by the widow.

The daughters, of whom there are five, are not parties to this action and have not applied to be made parties. Any question as to the propriety or fairness of the terms of the will as affecting them cannot be considered in this case, in the disposition of which it must be remembered that it is not the function of the court to substitute the opinion of a judge or judges for that of the testator as to what would constitute the right disposition of his estate, but its sole function is and should be to ascertain and declare with as much certainty as possible what was the real intention of the testator. The will is an established fact and muniment of title. It

has stood admitted to probate and unchallenged in the courts for 30 years. The widow made her election to take under it. The county court in making its order of final distribution July 14, 1891, found that by the terms of the will the widow, defendant herein, took a life estate in the farm with the right to sell it unless she remarried, provided she could not pay the incumbrance.

We can determine the meaning and effect of the will upon the interests of the parties to this suit in the land involved, but we cannot in this case undertake to consider any adjustments they may have made or attempted with others, nor do we find the pleadings or evidence such that we can undertake to ascertain or adjudicate any right of contribution or reimbursement as between the life tenant and remainderman.

Considering now the will, it is held to be elementary that in its construction the court should effectuate the intention of the testator if it can be ascertained, and in order to ascertain the same should place itself as nearly as possible in the position of the testator and consider the whole of the instrument as distinguished from some particular part or clause thereof. When there are different provisions in the will as to the disposition of specified property, they must be construed together to ascertain the intention of the testator. *In re Estate of Willits,* 88 Neb. 805; *Worley v. Wimberly,* 99 Neb. 20; *Grant v. Hover,* 103 Neb. 730.

The language of the will is simple. The rules of construction to be applied are elementary. The first two sentences hereinbefore quoted are not subject to construction, when both are considered, they so clearly give a life estate to the wife and remainder to the son.

It is the clause pertaining to sale that is material here. As to this we must seek to put ourselves in the position of the testator. It contains in itself a limitation, in that the wife was prohibited thereby from selling if she should marry again. A sale was authorized only

in the event she could not keep up the farm. When we consider the situation in which the testator was then placed, in the year of the drought which many of us remember, himself about to be taken from his wife and family of five minor children, living upon the land, which was incumbered by mortgage for the entire purchase price, there is no doubt that the thing in his mind was her ability or inability to so manage as to take the farm out from under the burden then existing and accumulating burden of taxation. This, with the aid of her children, principally her son, she did accomplish, and ten years later the mortgage indebtedness was extinguished. The farm had been improved and was carried on in a successful manner for more than ten years additional. We do not think the testator reasonably could have contemplated that, long after the expiration of this time, and when his wife in the ordinary course of nature had become aged and unable to personally supervise the farming operations, the power of sale should become operative. It was intended to cover the contingency of her being able to keep up the farm as a family home under the conditions as they then existed; and when such conditions were overcome and the property released from incumbrance and placed upon a revenue producing basis which has furnished her means to the extent shown by the record that she has, from so much of the proceeds as she has received, accumulated a surplus of more than $7,000, it is clear that the purpose for which that clause was inserted has been accomplished and it is no longer in force.

We, therefore, hold that the conclusion of the district court to the effect that the plaintiffs are owners of the remainder in the land, subject only to the life estate therein of the defendant, Pauline Heyer, and that such ownership is free and clear of all present right of the defendant, Pauline Heyer, to sell or convey the land in fee simple, is right, and it is

AFFIRMED.

GRACE GOLDENSTEIN, APPELLANT, V. FRANK GOLDENSTEIN, APPELLEE.

FILED SEPTEMBER 22, 1923. No. 22502.

1. **Divorce:** JURISDICTION. Under the provisions of section 3, ch. 45, Laws 1909 (Comp. St. 1922, sec. 1555), the authority of the district court over its decrees in divorce actions was extended, as if in term time, to the period of six months after trial and decision.
2. ———: DECREE: POWER TO VACATE. An order of the trial court in reference to the vacation of a decree awarding a plaintiff wife a sum in gross as permanent alimony, which order is made after the expiration of the six months' period, must rest upon the grounds of like orders made in cases after term time.
3. ———: INTERLOCUTORY DECREE. An order of the district court in a divorce action vacating a former decree as to permanent alimony, and which expressly reserves for the future consideration and judgment of the court the amount of alimony to be granted and all allowances for the support of plaintiff and the children, and also the determination of defendant's application to set aside the decree of divorce is, for the purposes of appeal, interlocutory, and not final.

APPEAL from the district court for Gage county: LEONARD W. COLBY, JUDGE. *Judgment modified.*

Sabin & Vasey, for appellant.

Safranek, Dutton & Massey, contra.

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

BLACKLEDGE, District Judge.

The controversy submitted on this appeal arises upon the rendition and subsequent modification of a decree in the district court for Gage county awarding the plaintiff divorce and alimony.

The case was originally tried and decree entered December 1, 1920. By this decree the plaintiff was awarded an absolute divorce, custody of the two minor children of the parties, provision for an unborn child, and was given permanent alimony in the sum of $8,000, made payable in four instalments of $2,000, maturing, respectively, May 1, 1921, and January 1, 1922, 1923 and 1924, with interest at 5½ per cent. per annum from

June 1921, and, if not paid at maturity, at 7 per cent. per annum from maturity until paid. There were further provisions respecting a monthly amount that should be paid to the plaintiff until the maturity of her first alimony instalment May 1, and credited against the same, and for the support of the minor children and her approaching confinement, which items need not be further noticed here.

In January, 1921, the judge who had tried the case and rendered the decree retired from office and was succeeded by another judge before whom the later proceedings herein considered were had. The case was originally tried upon the petition, answer, and reply of the parties, both parties producing testimony and the trial lasting two days. No appeal was taken by either party.

Afterwards, on February 5, 1921, the defendant filed in the district court a petition to vacate or modify said decree. On April 13, following, he filed his amended petition, to which the plaintiff on June 20 filed answer. No reply seems to have been filed, but on June 20 a hearing was had and the court entered an order providing that the findings and decree of December 1, 1920, for alimony and other allowances, except in so far as they had been complied with by the defendant, were set aside and discharged and he and his property released therefrom, and further providing that the amount of alimony for plaintiff and of allowance for the support of plaintiff and her children were reserved by the court for its future consideration and judgment, and without prejudice to either party upon the hearing of defendant's application to vacate the decree of divorce. The parties were also given ten days in which to file affidavits and make additional showing to be used in the hearing of defendant's application to set aside the divorce decree. On September 27 at the same, or June, 1921, term, a further hearing was had and an order entered overruling the application of the defendant to open and set aside the decree of divorce, making certain

specific findings as to the property and indebtedness of the defendant, and providing that defendant pay $40 a month beginning October 1, 1921, $20 thereof to be used for the support of the plaintiff and $20 for the support of the three minor children in her custody.

The June term of said court adjourned *sine die* October 1, and thereupon plaintiff undertook to settle a bill of exceptions which was submitted to adverse counsel on December 13. It was finally settled December 24, but in so doing was divided into three parts designated as: (1) The evidence upon the application to set aside the judgment for alimony and allowance for support of children; (2) the evidence upon hearing of defendant's petition to set aside the decree of divorce; and (3) the evidence upon the hearing of plaintiff's application for allowance of alimony and support of the minor children.

The appeal was filed in this court December 19, 1921, and the brief of appellant on March 23, 1922. In this court the appeal was submitted upon the brief and argument of appellant only, but in the meantime, on June 1, 1922, motions were filed on behalf of the appellee to dismiss the appeals and suggesting diminution of the record, the defendant presenting a further order of the district court made December 1, 1921.

It is contended by the appellee that the said order of June 20 was a final order, and, no appeal having been prosecuted therefrom within the time allowed by law, the same should not be considered nor the bill of exceptions allowed. It is further contended that the order of September 27, in so far as it refused to set aside the divorce decree, was in appellant's favor and she could not complain of that, and that, in so far as it fixed an allowance in the nature of alimony for the support of plaintiff and the children, it had been vacated and superseded by the order of December 1, 1921, and hence furnished no basis for appeal.

As stated, the June term of court adjourned October 1. This order of December 1, 1921, was made at a

subsequent term, and also appears from the record to have been made without application by, or notice to, either of the parties to the case, or in their presence, and there is disclosed no basis of either pleading or evidence for the same; hence, although it purports to relieve the defendant from payment of the allowance designated by the order of September 27, until further order of the court, it is considered as of no validity and will not be given further attention in this discussion.

The real question involved in this appeal is as to the authority for, or propriety of, the modification of the original decree by which it was undertaken to eliminate the allowance of $8,000 permanent alimony; and the question whether the order of June 20, 1921, was final or interlocutory, and its status as affected by the appeal sought to be taken from the order of September 27.

With reference to the action of June 20, 1921, it was argued by the appellee that, under the authority of *Beard v. Beard,* 57 Neb. 754, *Wunrath v. Peoples Furniture & Carpet Co.,* 98 Neb. 342, and *Bannard v. Duncan,* 65 Neb. 179, the same was a final order. We think, however, that the proper practice has been fairly well defined by cases more closely applicable. In *Everson v. Everson,* 101 Neb. 705, the scope of the act of 1909 (Comp. St. 1922, sec. 1555) was considered and held to be to extend the jurisdiction of the trial court over such cases for the period of six months after decision, as it otherwise had during term time. An order made within such period was held not final or appealable. The later case of *Blakely v. Blakely,* 102 Neb. 164, seems to apply the rule in instances where the application for modification is made during the six months' period although acted upon at a later date. Without determining this question, we think that the nature of this order itself, as disclosed by its own terms, indicates that it was not, and could not be, a final order. It expressly reserves the very thing which was the point of contention for the future consideration and judgment of the

court. This court held in *Howell v. Howell,* 89 Neb. 243, that such a decree is usually within the control of the court during the term at which it is rendered, and if the court believes it necessary in the interests of justice to open it up and allow further evidence to be taken at the same term, the matter is entirely within its discretion; and in *Huffman v. Rose,* 72 Neb. 57, that an order is not final when the substantial rights of the parties involved in the action remain undetermined and when the case is retained for further action. In such case the order is interlocutory. When no further action of the court is required to dispose of the case, the order becomes final, and from which an appeal or proceedings in error will lie. Applying this rule and having regard to the provisions of the order itself, we must hold that the order in question of June 20 was, for the purpose of appeal, interlocutory, and not final. It follows that the appeal from the judgment or order of September 27 brought up the whole case, and it is now before us upon the question of the modification of the decree.

Looking, now, to the contents of this application for a modification of the decree, we find that it is based, not upon any new cause or subsequent event arising or taking place after the trial, but upon things alleged to have taken place during the trial itself and in connection therewith. The import of the allegations is to the general effect that much of the testimony on plaintiff's behalf was untrue, and that the trial court was misled thereby in making its findings and decree. The court, as constituted at the time of the hearing now under review, had not heard the testimony given at the trial nor seen the witnesses; neither was such testimony before the court in the form of a transcript thereof or otherwise. The bill of exceptions, or the part thereof which is herein designated as containing all the evidence submitted upon that phase of the case, includes only the amended petition of the defendant to vacate the decree, the answer of the plaintiff thereto with exhibits

attached, and the affidavits of three persons upon the value of defendant's land, which place the same at $200 an acre. The trial court originally found defendant's net worth to be $25,000. The evidence contained in this bill of exceptions does not disclose anything as to the value of his personal property, and was wholly insufficient to justify the modification of the alimony judgment.

So far as concerns the modification of the monthly allowance for the support of the wife and the children, that was by statute placed under control of the court, and was perhaps within the authority of the court and should not be disturbed, except in so far as is hereinbefore indicated with reference to the effect of the order of December 1, 1921.

The parties are entitled to a determination of their rights, and, in view of the circumstances of this case, a judgment will be entered in this court that the amount of the original decree for the sum of $8,000 permanent alimony in favor of the plaintiff be reinstated as of December 1, 1920, payable $2,000, May 1, 1921, and $2,000, January 1, 1922, and a like amount January 1, 1923, and January 1, 1924, the same bearing interest at 5½ per cent. per annum from June 2, 1921, to maturity, and 7 per cent. per annum thereafter; subject, however, to a deduction of $465, paid on the instalment first maturing, making the net amount of that instalment for which judgment is rendered $1,535; and also reinstating as of September 27, 1921, the award of $20 to be paid to the clerk of the district court for plaintiff monthly beginning October 1, 1921, for the support of the minor children, this monthly amount subject to future modification by the court as by law provided. Costs in the case and on this appeal are taxed to the defendant.

The several judgments and orders of the district court are modified accordingly.

JUDGMENT MODIFIED.

ADOLPH H. STEENBOCK, APPELLEE, V. OMAHA COUNTRY CLUB, APPELLANT.

FILED SEPTEMBER 22, 1923. No. 22167.

1. **Negligence:** INJURY: PROXIMATE CAUSE. "The proximate cause of an injury is that cause which, in the natural and continuous sequence, unaccompanied by any efficient intervening cause, produces the injury, and without which the result would not have occurred." *Spratlen v. Ish,* 100 Neb. 844.
2. ———: ———: ———. It is not sufficient that the negligence charged furnishes only a condition by which the injury is made possible, for if such condition causes an injury by the subsequent independent act of a third person, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury.
3. ———: ———: ———. The negligent placing of a flagpole across its driveway by the defendant Omaha Country Club, which flagpole was thereafter knocked against plaintiff's back by the careless and negligent driving of defendant Crofoot's car, thereby causing plaintiff's injury, is not the proximate cause of such injury.
4. ———: DIRECTION OF VERDICT. The pleadings and evidence do not disclose facts creating a liability in favor of plaintiff and against the defendant Omaha Country Club, and the defendant's motion for a directed verdict in its favor should have been sustained.

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

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

Jefferis, Tunison & Wilson, contra.

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

COLBY, District Judge.

This action was brought by the plaintiff, a minor about 15 years of age, by his father and next friend, against the Omaha Country Club and Ludovic C. Crofoot for injuries sustained by plaintiff while employed as a caddy at said club.

The petition alleges that the injuries complained of were the result of an automobile being driven by the chauffeur of defendant Crofoot against a flagpole owned

by the country club, which its employee, for the purpose of repair, had taken down and laid across a driveway on the grounds of said club. It is further alleged in the petition that the plaintiff was waiting for employment during his term as a caddy and sitting near the east end of the flagpole, and that the chauffeur of defendant Crofoot negligently propelled and directed an automobile along the driveway, failed to exercise ordinary care or to observe or discover such flagpole and negligently ran into the same; that such negligent act caused the car to strike the flagpole with great violence, inducing the slender part thereof to strike plaintiff in the back, thus producing the injuries complained of; that the negligent acts of the defendant Omaha Country Club in placing its flagpole across the driveway, and the negligent acts of defendant Crofoot, through his chauffeur, concurring, were the proximate cause of the plaintiff's injuries.

Before the trial of the case defendant Crofoot settled with plaintiff for the injuries complained of by the payment of the sum of $1,260.

The evidence upon the trial seemed to support the main facts alleged in the petition regarding the placing of the flagpole across the driveway by defendant Omaha Country Club and the failure of defendant Crofoot to exercise ordinary care in the driving of his machine or to observe or discover said flagpole, and that he carelessly and negligently ran into the same, and that the running into said pole by said car knocked the same against the back of plaintiff and thus produced the injuries complained of.

There were a number of defenses interposed by the defendant Omaha Country Club, but the controlling question at issue is whether the placing of the flagpole across the driveway of the country club or the knocking of the pole against plaintiff's back by the car of defendant Crofoot was the proximate cause of the injuries to plaintiff, and the decision of this question is of im-

portance and will practically make a consideration of the other matters unnecessary.

To constitute proximate cause, under authority of the adjudicated cases, the injury must be the natural and probable result of the negligence, and be of such a character as an ordinarily prudent person could have known, or would or ought to have foreseen might probably occur as the result. It is not sufficient that the negligence charged does nothing more than furnish a condition by which the injury is made possible, and if such condition causes an injury by the subsequent independent act of a third person, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury. There may have been carelessness and negligence on the part of the country club in placing the flagpole across its driveway, but this, in itself, no matter how careless and negligent it might be, would not and could not alone cause the injury.

It is alleged in the petition and supported by the evidence that the carelessness and negligence of the chauffeur of defendant Crofoot caused the striking of the automobile against the flagpole, knocking the same against the back of plaintiff, thus producing the injuries complained of, and while the country club may have been careless and negligent in the placing of the flagpole across its driveway, this, in itself, without any other cause or condition, would not produce the injury. The pole, in itself, lying across the roadway would not produce any injury, but if negligently run into, as the plaintiff alleges happened in this case, an accident would result. From this it would appear that the pole simply furnished a condition, but that the real proximate cause of the accident was the carelessness and negligence of the chauffeur of the Crofoot car in running into the pole.

The failure of the country club to put up a notice or erect a barricade cannot be considered as the proximate cause of the accident. In order for the plaintiff to recover damages for its alleged negligence, the plain-

tiff must prove both the negligence of defendant country club and that such negligence was the proximate cause of the injury complained of. In this case it does not appear that the injury to plaintiff resulted from the negligence of the country club, if it was negligent in placing the flagpole across its driveway. This alleged negligence of the defendant country club plainly might have existed for years without any injury to plaintiff, had it not been for the negligent act of defendant Crofoot's chauffeur in the operation of his car.

In *Cole v. German Savings & Loan Society,* 124 Fed. 113, Judge Sanborn, in his opinion, says on the subject of proximate cause: "It is now no longer difficult to determine whether or not the acts of the defendant were the proximate cause of the injury to the plaintiff. Wharton (Negligence, sec. 134) says: 'Supposing that, had it not been for the intervention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the interposition of responsible human action. I am negligent on a particular subject-matter as to which I am not contractually bound. Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a nonconductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured.'"

Bishop, on Non-Contract Law, sec. 42, says: "If, after the cause in question has been in operation, some independent force comes in and produces an injury not its natural or probable effect, the author of the cause is not responsible."

In the case of *Thubron v. Dravo Contracting Co.,* 86

Atl. 292 (238 Pa. St. 443), it is said in the second paragraph of the syllabus as follows: "The mere concurrence of a person's negligence with the proximate and efficient cause of an accident will not create liability."

In 29 Cyc. 496, the text is as follows: "A prior and remote cause cannot be made the basis of an action if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible, if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated, and efficient cause of the injury. If no danger existed in the condition except because of the independent cause, such condition was not the proximate cause."

In *Elliott v. Allegheny County Light Co.*, 54 Atl. 278 (204 Pa. St. 568), the syllabus is as follows: "In an action by a painter to recover for injuries received, where the evidence shows that he fell from a ladder and clutched at a live electric wire, and was shocked thereby, he is not entitled to recover from the electric light company, which left the wire uninsulated, the fall from the ladder being the proximate cause of the injury."

In *Independent Ice Cream Co. v. United Ice Cream Co.*, 125 N. Y. Supp. 1106, the second paragraph of the syllabus is as follows: "Where the negligence of one party is merely passive and potential, while that of the other is the moving and effective cause of the accident, the latter is the proximate cause."

This court has recognized and adopted the same principle on the question of proximate cause. In *Spratlen v. Ish*, 100 Neb. 844, the defendant was charged with maintaining a defective and improperly drained gas pipe in which the moisture in the gas froze and stopped the gas. The gas company's employee put alcohol in the pipe to thaw it out and at night it was thawed out, but the gas company's man left the gas jet open and plaintiff's husband was asphyxiated. The lower court

directed a verdict for the defendant company, and this court, in affirming the case, say:

"Was the alleged negligent plumbing the proximate cause of the injury? If this question is answered in the negative, it is unnecessary to determine the rights of landlord and tenant. The alleged negligence, it will be noted, consisted in permitting one of the gas pipes to sag so that it did not drain properly, and the liquid therein froze and shut off the flow of gas which was desired for illuminating purposes. Had the gas jet been left closed, this would merely have caused inconvenience in lighting the house, but would have caused no other injury. Asphyxiation does not occur from shutting off the flow of gas, but from permitting it to escape. No stretch of the imagination will permit a holding that asphyxiation of plaintiff's decedent was the natural and probable result of such plumbing. If it was not, plaintiff is not entitled to recover."

The law on this subject seems to be fairly well settled. The best considered authorities hold that an injury which could not have been foreseen or reasonably anticipated as the probable result of the negligence is not actionable, nor is an injury that is not the natural consequence of the negligence complained of, and would not have resulted from it, but for the interposition of some new, independent cause that could not have been anticipated. The concurring negligence of another cannot transform an act of negligence, which is so remote a cause of injury that it is not actionable, into a cause so proximate that an action can be maintained upon it. It cannot create a liability against one who does not legally cause it, nor make an injury the natural and probable result of a prior act of negligence which was not, or would not have been, such a result in its absence. *Chicago St. P., M. & O. R. Co. v. Elliott,* 55 Fed. 949, 20 L. R. A. 582; *Cole v. German Savings & Loan Society,* 124 Fed. 113, 63 L. R A. 416.

The defendant Omaha Country Club, in instruction

No. 1, moved the court to direct the jury to find a verdict for the defendant, and under the rules of practice this was the authorized mode of procedure to obtain the relief sought. This court held in *Benson v. Peters*, 82 Neb. 189, that this was the proper course to pursue. The syllabus is as follows: "In an action to recover damages for a personal injury, the defendant is entitled to a directed verdict when the evidence is insufficient to show that the alleged negligence was the proximate cause of the injury."

The defendant's motion for a directed verdict should have been sustained. Under the law, the pleadings, and the undisputed evidence, the plaintiff cannot recover, and this case should be reversed and remanded, with instructions to the district court to dismiss plaintiff's action.

Reversed and remanded, with instructions to dismiss.

REVERSED.

DURLAND TRUST COMPANY, APPELLEE, V. CHARLES AUGUSTYN ET AL., APPELLANTS: JONAS VAN WIE, CROSS-PETITIONER AND APPELLEE.

FILED SEPTEMBER 22, 1923. No. 22484.

1. **Vendor and Purchaser**: DEFAULT OF VENDOR: RECOVERY OF PAYMENTS. When a vendor of land under a contract of sale sells and conveys such land to another and is unable to comply with the terms of his contract, the vendee is entitled to recover back any payments made on the purchase.
2. **Forfeiture**: RECOVERY OF PAYMENTS. If the vendor conspires to hinder and delay the vendee in the performance of the terms of such contract on his part, and thus prevents the prompt payment of the remaining purchase price on the day it is payable, he is not entitled to have a forfeiture of the payments made, but the vendee may recover or have decree for cancelation of a note and mortgage given as advance payments under the contract and may be relieved from further obligation.

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

Guy Laverty and *Bert M. Hardenbrook*, for appellants.

Mapes, McFarland & Mapes, Davis & Davis, T. B. Dysart and *Price & Price, contra.*

Heard before MORRISSEY, C. J., ALDRICH, DAY and GOOD, JJ., COLBY and REDICK, District Judges.

COLBY, District Judge.

This is an action by Jonas Van Wie, cross-petitioner and appellee, to foreclose a real estate mortgage of $3,000. A decree in the suit was entered in favor of the plaintiff Durland Trust Company upon its petition, and in favor of defendant M. D. Cameron upon his cross-petition, each for the foreclosure of their separate mortgages. No objection is made nor is there any contest or issue between the several parties as to these two foreclosure decrees, the only question being as to the foreclosure of the $3,000 real estate mortgage and the issues made by the cross-petition of Jonas Van Wie, the answer and cross-petition of appellants Charles Augustyn and wife, and the reply of cross-petitioner Van Wie thereto.

The undisputed facts appearing in the record are substantially as follows: On July 27, 1920, the cross-petitioner Jonas Van Wie, and Ida Van Wie, his wife, entered into a written contract with appellant Charles Augustyn, whereby they contracted and agreed to sell to said Augustyn 356 acres of land situated in Greeley and Valley counties. Appellants Augustyn and wife executed and delivered to the cross-petitioner, Van Wie, a note for $3,000, and to secure said note executed a real estate mortgage. This note and mortgage were given as the first payment upon the land under the contract of sale and purchase and are the instruments set up in the cross-petition of Van Wie and sought to be foreclosed in this action.

According to the contract the transaction was to be finally consummated on the 1st day of March, 1921, by the delivery of abstract and deed and the payment of the remainder of the purchase price, unless an extension of time was had by reason of defects in the abstract.

The transaction, however, was never consummated, being given up by both parties, and the 356 acres of land were sold and conveyed by Van Wie to J. B. Ramel in the fore part of March, 1921. It also appears from the record that Augustyn, shortly after making his contract with Van Wie, made a contract for the sale of this same land to said J. B. Ramel, which was to be consummated on March 1, 1921.

The contract between Van Wie and Augustyn provides that Van Wie, ten days prior to March 1, 1921, is to furnish Augustyn an abstract showing good, marketable title free of all liens and incumbrances, including taxes for 1920 and all prior years, except a mortgage of $30,000, which was then on said premises and which was to be assumed as a part of the consideration; and it was further agreed that, in case any corrections should be found necessary in the abstract of title, Van Wie should be allowed a reasonable time, not exceeding 30 days, in which to make such corrections and comply with the conditions of the contract as to furnishing an abstract. The conveyance of the land from Van Wie to Augustyn was to be by warranty deed delivered at the First National Bank of Ord, Nebraska, and all remaining payments were to be made at said place.

It further appears from the record that no abstract of title was furnished by Van Wie at any time, no deed was deposited in the First National Bank of Ord, nor did Augustyn pay any part of the consideration for the lands excepting the $3,000 note and mortgage in controversy, which were delivered at the time of the execution of the contract. No special provision is made in the contract that time is to be of the essence of the contract, the only requirements being that the deed and abstract and the consideration of $24,500 remaining unpaid, after the assumption of the $30,000 mortgage already on the land and the giving of the $3,000 note and mortgage, were to be turned over on March 1, 1921. The contract also contained the following provision:

"It is further agreed that in case the said second party (Augustyn) shall fail on his part to perform the conditions of this contract by him to be done and performed, and shall fail to pay said deferred payments at the time and in the amounts herein set forth, then in such case the said first parties (Van Wie) shall retain the said $3,000 paid under the provisions of this contract as their liquidated damages for failure on the part of the second party to perform said contract; and it is further agreed that in case the said first parties shall on their part fail to perform the conditions of this contract and to convey said premises under its terms and at the time and place therein set forth, then and in such case they agree to and will repay said $3,000 to second party and will pay the said second party the further sum of $3,000 as liquidated damages by reason of the failure of the said first parties to comply with their said contract, and upon the payment of said amounts this contract shall terminate and both parties be released from all obligations thereunder. It being mutually agreed by the parties hereto that said provisions for the payments of the said sums of $3,000 by each of said parties is to be treated and considered as liquidated damages, and not as a penalty, and the agreement is made to avoid the expense and trouble in proving damages in case either of said parties fail to comply with the terms of this contract."

It further appears in evidence that the contract made by Augustyn with J. B. Ramel required the payment of $17,900 cash on March 1, 1921. Van Wie testifies that sometime in February, 1921, he had a conversation with Augustyn, and that Augustyn said, "I don't know where the money is coming from." He further testifies that later on he had another talk in which Augustyn wanted Van Wie to take some kind of security other than the payment of the $24,500 in money, but there was no agreement to modify the terms of the contract, but Augustyn denies that he had any such conversations with Van Wie.

There is testimony on one side, which is denied on the other, that Augustyn said he did not believe that Ramel would be able to make the payment of $17,900 by March 1, 1921, and he tried to arrange some way to obtain a deed from Van Wie so he could collect the forfeiture from Ramel provided for in their contract, but there was no consummation of this agreement. Van Wie testified that he was ready and able to comply with the contract and had his wife in town to sign the necessary deed, but that he did not comply with the contract because Augustyn told him that he could not make the payment. This statement Augustyn also denied, and testified that he was able to comply with the contract and make the payments on March 1, 1921; that he expected to get the $17,900 from Ramel, and that he had the other money ready.

It does not appear from the record that Augustyn demanded the deed and abstract or that Van Wie demanded the payment of the money on the 1st of March, 1921. It appears, however, that Augustyn came to town on March 1, 1921, for the purpose of closing up the contract with Van Wie, and also for the purpose of closing up his contract with Ramel, from whom he was to receive $17,900 in money; that he had only $6,000 in cash and expected to get the other from Ramel. The evidence is meager on both sides and somewhat conflicting as to what was said and done between Van Wie and Augustyn on March 1, 1921, when they were both in town. Augustyn testifies, in substance, that he had the money to pay the whole $24,500, but expected to get $17,900 from Ramel. Augustyn further testifies as follows: "Q. You say you got away? A. No; they got away. I wasn't far enough down; * * * they went up to Mr. Davis' office; I followed up there and asked Jonas Van Wie if they were ready to complete the deal. They didn't say nothing. After a while they go out and told me that I am out; they are making a deal between themselves. Q. Who told you this? A. Mr. Jonas Van Wie. Q. What

did you do? A. I just walked out. Q. Were you on the 1st of March, 1921, willing to comply with the conditions of this contract? A. Yes; yes; yes. Q. And did Jonas Van Wie or any one for him ever offer or tender to you an abstract of the land in this contract? A. No. Q. Did Jonas Van Wie or any one for him ever offer or tender to you a deed for the land described in this contract? A. No. * * * Q. Did Mr. Van Wie on the 1st day of March, 1921, demand of you at any time to close this deal? A. No. Q. Did he demand the balance of the payment under this contract? A. No, sir. Q. Did he tell you at any time on the 1st day of March that he was ready to close up the deal? A. No, sir. Q. Has he ever told you that? A. No, sir.

It is further shown in the evidence, and not contradicted, that on the afternoon of the 1st of March, 1921, at about 4 o'clock, Van Wie entered into a contract with J. B. Ramel for the sale of this land to the said Ramel; a copy of said contract being introduced in evidence and bearing the false date and false certificate of acknowledgment of March 2, 1921; but the parties on the witness-stand testified that the same was made the day before. In this contract the purchase price was fixed at $45,240, a part of which was taken in trade for other lands, while in the contract between Augustyn and J. B. Ramel for the same property the purchase price was fixed at $71,200, a part of which was taken in trade for other lands, and the purchase price in the contract between Van Wie and Augustyn, under their contract for said land, was $57,500.

The appellants present two propositions of law which they contend are applicable to this case, viz: First. Where a vendor fails to perform the conditions of his contract and sells to another, he thereby terminates his contract, and the vendee is relieved from all liability and entitled to recover back any money paid. Second. Where a vendor fails to tender an abstract and deed, the vendee is not in default until such tender; and if vendor sells to

another without tendering deed there is no default on the part of vendee, but he is relieved from liability and can recover back any money paid. In support of the first proposition the case of *Eaton v. Redick,* 1 Neb. 305, is cited, and in support of the second proposition the cases of *Adler v. Kohn,* 96 Neb. 346, *Patterson v. Murphy,* 41 Neb. 818, *Gillilan v. Rollins,* 41 Neb. 540, and other cases are cited.

Counsel for appellee Van Wie present two propositions of law in answer to those of appellants as applicable to the case from appellee's standpoint, the first of which is as follows: When a contract for the sale of real estate provides that upon nonperformance by the vendee the vendor may retain a payment made thereon as liquidated damages, the vendee cannot recover back the amount of such payment, unless he proves that he was able and ready to perform the contract on his part. Counsel for appellee cite the following cases in support of this proposition: *Patterson v. Murphy,* 41 Neb. 818; *Maloy v. Muir,* 62 Neb. 80; *Lowry v. Robinson,* 3 Neb. (Unof.) 145; 39 Cyc. 2025, 2047; *Battle v. Rochester City Bank,* 3 N. Y. 88.

The second proposition of law contended for by appellee is that where the purchaser repudiates a contract, or states that he cannot perform, the fact that the vendor has failed to tender a deed and abstract will not entitle the vendee to recover payments made by him on the contract, as the law does not require a vain act and a tender in such case is unnecessary. In support of this proposition the following cases are cited: *Johnson v. Higgins,* 77 Neb. 35; *Wasson v. Palmer,* 17 Neb. 330; 27 R. C. L. 529, sec. 259; 39 Cyc. 1377, 1541.

There is really little or no dispute about the law generally applicable to contracts for the sale of real estate, but the question is, which propositions of law advanced by the respective parties are applicable to the evidence in the case at bar? From the evidence preserved in the record it plainly appears that Charles

Augustyn did not desire nor intend to repudiate his contract with Jonas Van Wie, but that he came to town on the 1st of March, 1921, with the purpose, expectation and intention of completing such contract, and did not relinquish the idea of such completion until the afternoon of said day when he understood he was obliged to and was told by Van Wie that he was out, and that Van Wie and Ramel were making a deal between themselves for the same land.

We are further convinced from the evidence contained in the record that Van Wie did not on his part desire to complete the contract with Augustyn and did not intend to do so if he could avoid it. After making the contract with Augustyn and before the end of the time for its consummation, he entered into negotiations and signed a written agreement with J. B. Ramel for the sale of the same property to Ramel and for a less price than that for which he had sold it to Augustyn and at a much less price than that for which Augustyn had sold the same property to Ramel. This, on its face, would be an improper inducement for Ramel to go back on his contract with Augustyn.

It appears that Jonas Van Wie was an experienced and shrewd real estate dealer and that he had attorneys to advise and assist him in this transaction, while on the part of Augustyn it is just as plain that he was inexperienced in such business transactions, was not educated and understood the English language only imperfectly, and that he had no attorney or legal counsel to advise or assist him in this important business matter; and yet it appears that he had the confidence of banks and others having money to loan and who were willing to advance for him the necessary funds when required to complete the deal. Augustyn testifies, in substance, that he was to get $17,900 of the $24,500 from Mr. Ramel under his contract with him, and that he had $6,000 in cash, but that if Ramel did not pay him the amount due on the 1st of March he could and would have gotten this amount from

his friend, who was a banker and who would have let him have it.

There is nothing in the record tending to show the bad faith of Augustyn or his desire not to comply with the contract; while, on the other hand, there is convincing evidence that Van Wie, by his conversations with Augustyn, by his failure to furnish an abstract and deed, and by his entering into a contract for the sale of this same land with J. B. Ramel on the afternoon of March 1, 1921, in which he made it to the interests of Ramel not to comply with his contract with Augustyn, was desirous of and using his best endeavors not to comply on his part, and also to prevent Augustyn from complying with the contract between them. It is very evident that Van Wie was making it to the interest and advantage of Ramel not to furnish the $17,900 to Augustyn on the 1st of March, 1921, as he had agreed, so as to render Augustyn unable to make the cash payment at that time of $24,500. On the one hand, we have the honest endeavor and desire of an inexperienced and unlearned man, without legal counsel, to comply with his obligations; while, on the other hand, we have an intelligent and experienced real estate agent, acting under the advice of legal counsel, endeavoring to hinder, delay and prevent the consummation of the contract, and thereby enable him to retain and recover the forfeiture of the $3,000 note and mortgage which is sought to be foreclosed in this action. The conduct and actions of Jonas Van Wie, as they appear from the record evidence preserved in the bill of exceptions, clearly show duplicity and double dealing and savor very strongly of fraud. By his questionable conduct he was endeavoring to prevent a compliance with the contract by Augustyn for the purpose of enabling him to obtain an undue advantage and a forfeiture of the $3,000 note and mortgage received as part of the purchase price. There is nothing in the evidence to show that J. B. Ramel would not have complied with his contract of purchase with Augustyn and

paid over the $17,900 on the 1st of March, 1921, as he had agreed, had it not been for the machinations of Van Wie, who excited his cupidity by entering into a written contract with him by which he was to make several thousand dollars by such noncompliance.

In *Reiger v. Turley,* 151 Ia. 491, 501, the supreme court of Iowa say: "The law abhors forfeitures and will give them effect with reluctance and only when the right thereto has been clearly contracted for, and where the party claiming it has complied with all conditions imposed upon him by the contract or by the statute."

This court has given its sanction to the doctrine that forfeitures are looked upon with disapproval, and equity will generally relieve against them, especially where there is no evidence of loss or damage.

In *Springfield F. & M. Ins. Co. v. McLimans & Coyle,* 28 Neb. 846, this court used the following language: "Forfeitures are not favored, and should not be enforced unless the courts are compelled to do so."

In *Hanover Fire Ins. Co. v. Gustin,* 40 Neb. 828, 838, this court stated: "Forfeitures are odious in law and should never be enforced unless the court is compelled to do so." See *Adler v. Kohn,* 96 Neb. 346.

This court will not confirm a forfeiture induced by duplicity and overreaching. From the record it is plain that Augustyn honestly intended, expected and endeavored to comply with the terms of the contract on his part to be performed, but was prevented by the questionable conduct of Van Wie. The propositions of law presented by counsel for appellants Augustyn are applicable to the proofs, as we view them, contained in the record as it comes to us. With this view of the proofs and the law, we find generally for the appellants Charles Augustyn and Mary Augustyn, and against the cross-petitioner and appellee Jonas Van Wie; we find that neither party is entitled to a judgment of forfeiture; that the contract of purchase between Jonas Van Wie and Charles Augustyn should be set aside, as it has been aban-

doned and its terms not complied with by either party; and that the $3,000 note secured by mortgage given by Charles Augustyn and wife, sought to be foreclosed in this action, should be canceled and the record thereof released in the offices of the registers of deeds of Greeley and Valley counties.

The decree of the lower court is reversed and the cause remanded, with instructions to the district court for Garfield county to enter a decree in accordance with the findings of this court.

REVERSED.

ALBERT RATH ET AL., APPELLEES, V. BESSIE WILGUS ET AL., APPELLANTS.

FILED SEPTEMBER 22, 1923. No. 22498.

1. **Trial**: EQUITY CASES. In equity cases and in those involving both law and equity, the district court is authorized to submit all questions of fact to a jury, and it is not error to refuse to separate the law from the equity and try the issues of the former to a jury and of the latter to the court.
2. **Vendor and Purchaser**: TITLE: ABSTRACT. An abstract showing a mortgage barred on its face by the statute of limitations, but not released of record, does not show a perfect record title, and the purchaser may be justified in rejecting it, as the statute may have been tolled by some act of the parties not appearing of record.
3. ———: ———: ———. An abstract of title showing that a release of an old mortgage was entered in the registration and numerical index, but that such release was not of record, does not show a good title of record.
4. **Mortgages**: RELEASE: EVIDENCE. The statutes of Nebraska do not make the entries in the numerical index evidence of the facts therein noted, and a reference in such index to the filing of a release cannot be considered as proof of the release of such mortgage.
5. ———: RECORD. Section 5625, Comp. St. 1922, requires that releases of real estate mortgages shall not only be indexed but recorded at full length, and to constitute a valid record the statute must be complied with.
6. **Vendor and Purchaser**: FAILURE OF TITLE: RECOVERY OF PAY-

MENT. *Held,* that the abstract did not show a good title of record, and that, as none was furnished by the vendors within the time limited for the completion of the contract, the vendees were entitled to recover back the amount paid by them under the contract.

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

Roper & Shaw, for appellants.

Grant G. Martin and *Stewart, Perry & Stewart, contra.*

Heard before MORRISSEY, C. J., ALDRICH, DAY and GOOD, JJ., COLBY and REDICK, District Judges.

COLBY, District Judge.

This action was begun as an action at law to recover $1,200 paid by appellees to appellants upon a land contract, the terms of which were not complied with. The appellants filed their answer, in which they set up certain defenses and a cross-petition, praying for specific performance of the contract.

In the contract appearing in the record between appellants and appellees the former undertook to sell a half section of land in Hitchcock county for $22,400, payable $1,200 in cash, which was paid by appellees, $10,000 on surrender of deed and acceptance of title, and $11,200 on March 1, 1921, on presentation of good title. The contract provided that appellants were to furnish appellees a warranty deed and a good and sufficient abstract of title showing good title of record on or before March 1, 1921. The contract further contained the agreement that time was an essential element of the contract.

Appellees alleged in their petition due execution of the contract, payment of $1,200 in cash, their readiness and ability to perform on their part, tender of performance, demand for deed, failure of appellants to perform, insufficiency of title of record in appellants on March 1, 1921, and inability to deliver deed conveying good title of record, and they ask judgment for the $1,200 advance payment with 7 per cent. interest from September 4, 1920.

The district court overruled appellants' motion for a separate trial before the court without a jury on the issues presented in the cross-petition for specific performance and required appellants to proceed to trial before a jury on both issues. The jury returned a verdict for appellees for $1,291.35, for which judgment was entered by the court on October 22, 1921, from which an appeal is taken to this court.

We think there is no error in the trial of the issues involved in the whole case to the jury, as the court, in equity cases, has the right to submit questions of facts to the jury. Comp. St. 1922, sec. 8787; *Alter v. Bank of Stockham,* 53 Neb. 223; *Schumacher v. Crane-Churchill Co.,* 66 Neb. 440.

The case, as we have stated, started out as a law case for the recovery of $1,200 and interest, then by the cross-petition the specific performance of the contract was asked, but the whole matter, under our practice, could be submitted to the jury for its finding, which was done by the court without taking the trouble to separate the law from the equity matters.

The main controversy in this action seems to be in regard to the furnishing of an abstract of title showing a good title of record in the appellants. The old mortgage of $2,000, the release of which is claimed to be defective, appears on its face to be barred by the statute of limitations, yet this is such a defect in the record title that a purchaser may be justified in rejecting the title. *Justice v. Button,* 89 Neb. 367; *Adler v. Kohn,* 96 Neb. 346, 354.

It is a general rule of law that a purchaser of real estate covered by a mortgage apparently barred by the statute of limitations will not obtain a marketable title, one free from reasonable doubt, as the statute may have become tolled by some act of the parties not appearing in the record. *Austin v. Barnum,* 52 Minn. 136; *Zorn v. McParland,* 28 N. Y. Supp. 485, affirmed in 32 N. Y. Supp.

770; *Whittier v. Gormley,* 3 Cal. App. 489; *Reynolds v. Strong,* 31 N. Y. Supp. 329.

The record shows that the defendants commenced an action to quiet title and to obtain a release of the old $2,000 mortgage in question some months after the time had expired for the consummation of the contract. As time was made by such contract an essential element, it was not necessary for the appellees to make a tender of the balance of the purchase price before rescinding, they being willing and able to perform their part of the contract had the appellants been able to perform their part. Where time is an essential element of the contract, made so by an express provision therein, a court of equity will refuse to enforce specific performance, unless strict performance has been waived. *Brown v. Ulrich,* 48 Neb. 409; *Langan v. Thummel,* 24 Neb. 265; *Morgan v. Bergen,* 3 Neb. 209.

Unless the contract provides that the vendee shall have a reasonable time to perfect his title after the time limited, no time can be allowed to cure defects, where time is made of the essence of the contract, and title tendered under the contract must be a good title of record, or the vendee is not compelled to accept. *Ballou v. Sherwood,* 32 Neb. 666.

The abstract of title showed that a purported release of the old $2,000 mortgage was entered in the registration and numerical index, but that such release was not of record. We find no provision in our law making the entries in the numerical index evidence of the facts therein noted, but on the contrary section 5625, Comp. St. 1922, requires that releases of real estate mortgages shall not only be indexed, but that they shall be "recorded at full length," and that in the record of discharge the register of deeds shall make a reference to the book and page of such record. To constitute a valid record the statutes must be complied with. A reference made in the numerical index to the filing of a release cannot be considered as a record of the release of such mortgage. The

curative statutes of this state do not reach such defects. Where there is an entire failure of the recording officer to place a release of record, the curative acts do not do away with the necessary requirements of the law. The abstract did not show a release of the mortgage.

We hold that an abstract showing a good title of record was not furnished by vendors within the time required under the contract, which makes time of the essence of such contract, and hence that the appellees were entitled to recover back the amount paid under the contract.

The proceedings and judgment of the district court should be, and are hereby,

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. HOLDREGE STATE BANK ET AL., APPELLEES.

FILED OCTOBER 1, 1923. No. 23443.

1. **Appeal**: PROCEDURE. Where the district court has entered an order allowing a claim against a receiver of an insolvent state bank and directing payment of the claim from the depositors' guaranty fund, and, on application by the state for a vacation of such order and for permission to make defense to the claim, enters an order setting the hearing on the application upon a future date, also by the order suspends the first order until the further action of the court, and, on the subsequent hearing, announces that the hearing will be on the merits of the claim, and at such hearing the court and litigants treat the first order as though it had been vacated, and try the merits of the claim, this court will, on appeal, disregard any technical question of procedure and treat the appeal as on the merits of the claim presented for allowance.
2. **Subrogation**: BANKS AND BANKING: GUARANTY FUND. One who, pursuant to a contract with a failing state bank, pays the claims of its depositors is not thereby subrogated to the rights of depositors as against the depositors' guaranty fund, notwithstanding that the contract may so provide.

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

O. S. Spillman and *George W. Ayres,* for appellant.

Stout, Rose, Wells & Martin, Bernard McNeny and *G. Norberg, contra.*

Stiner & Boslaugh, amici curiæ.

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

GOOD, J.

The state of Nebraska has appealed from orders of the district court, allowing a claim for $187,815.80 against the receiver of the Holdrege State Bank and in favor of the Citizens State Bank of Holdrege, and directing the payment of the claim from the depositors' guaranty fund. For convenience, the Citizens State Bank will hereafter be referred to as the claimant and the Holdrege State Bank simply as the Holdrege bank.

At the outset it is contended by the claimant that the appeal is from a judgment denying an application to vacate an order or judgment rendered at a previous term of the district court, and that the question of the merits of claimant's right to the allowance of its claim and the payment thereof from the guaranty fund is not before the court. On December 18, 1922, the claim was presented to and allowed by the district court without objection. In February, 1923, the state filed an application to set aside the orders and for permission to make defense to the allowance and payment of the claim from the depositors' guaranty fund. On the 13th of February, 1923, the court entered an order directing that on the 5th of March, 1923, a hearing be had on this application, and directing that the orders entered on December 18, 1922, be suspended until the further action of the court. It may here be observed that the record does not disclose when the term of court, at which the claim was allowed, adjourned, and whether the subsequent proceedings were at the same or at a subsequent term of court. Issues were joined by the state, the claimant and others, as interveners, upon the merits of the claim and a hearing was begun on March 5 and concluded on March 16, 1923. On the hearing there seems to have been some doubt in the minds of the counsel

as to whether the orders entered December 18 had been vacated, and whether the hearing was upon the merits of the claim. Counsel for the state made inquiry of the court and the court made this statement:

"This proceeding will go into the merits of the proposition, just as though it was an application for the order which was first made here. This is in order that all concerned will have a full and complete investigation of the matter. * * * So far as any evidence, except on the merits of the case as to whether there was a claim or whether there was not, that is what is before the court now, and I think we will save time by so considering it in that way. We will go right to the merits of the case, as to whether the order should have been made or whether it should not."

Upon further inquiry by counsel as to whether this was a hearing upon the claim filed by the claimant, and as to whether or not it should be allowed, as if no order had been made, the court answered: "Yes; that is the position of the court." The hearing proceeded and evidence was taken upon the merits, and at the close of the hearing the court rendered a decision upon the merits of the case and entered it as of that date. The claimant now takes the position that the orders of December 18 were never vacated or set aside, and that the question as to the merits of the allowance of the claim is not before the court. It is true that the order entered suspended and did not technically vacate the orders made on December 18, 1922, but it was treated by the court and by counsel for the respective parties as though the first orders had been vacated, and the hearing was upon the merits of the claim. Under these circumstances, this court will disregard any technical question as to procedure and treat the matter as did the trial court and determine it upon its merits.

The question for determination is whether the claimant, having paid the depositors of the Holdrege bank the amount of their deposits, pursuant to an agreement between the two banks, is entitled to be subrogated to the rights of

the depositors whose claims were paid. There is practically no conflict in the evidence. The record shows that on the 23d day of May, 1921, the Holdrege bank was insolvent, and that its affairs would have been placed in the hands of a receiver unless some satisfactory arrangement had been made for the payment of its depositors. On that date the Holdrege bank entered into a written contract with the claimant, by the terms of which the latter guaranteed and agreed to pay the claims of depositors of the Holdrege bank, amounting in the aggregate to $338,695.87. The Holdrege bank, as a part of the agreement, transferred to the claimant a part of its bills payable, amounting to $137,162.40, and also executed a promissory note to the claimant for $209,150.38, and this note was secured by the pledge of all of its other assets, including the remaining bills receivable, its furniture, fixtures, banking house and other real estate, and all of its assets of every name and nature. The contract provided that the claimant should take over and guarantee the payment of the depositors of the Holdrege bank in the amount due such depositors at the close of business on May 22, 1921, in the amount above stated. The contract further provided:

"Both parties hereto, recognizing that under section 53, article 16, title V, chapter 190, of the Laws of 1919, that the depositors of the Holdrege State Bank have a lien upon all its assets for the payment of such deposits, it is the declared intention of both parties hereto that the Citizens State Bank shall become subrogated to all the rights of deposits taken over and guaranteed, and in consideration of the guaranty and payment by the Citizens State Bank of all the depositors of the Holdrege State Bank in the amount set forth above, the Holdrege State Bank hereby assigns, delivers, and sets over," etc.

The contract contained this further provision: "It is the general purpose of this contract for the Holdrege State Bank to pledge and assign all of its assets of every kind and nature to the Citizens State Bank, to protect the Citizens State Bank in the guaranty of the deposits of the Hol-

drege State Bank. * * * After the Citizens State Bank shall have collected from the total assets of the Holdrege State Bank an amount equal to the sum of $359,195.87, being the amount of the deposits and the bills payable, which are assumed by the Citizens State Bank, with interest from May 23, 1921, the excess of such collateral notes and real estate and other assets taken over is to again become the property of the Holdrege State Bank and is to be reassigned or retransferred to them. This contract is subject to the approval of the department of trade and commerce of the state of Nebraska."

Shortly after its execution, the contract was presented to and received the approval of the department of trade and commerce of the state of Nebraska. After the 22d of May, the Holdrege bank did not reopen for business. The claimant paid the depositors of the Holdrege bank, and, at the time of the filing of its claim, claimant had collected a part only of the assets of the Holdrege bank which it had taken as security. The amount so collected, together with the assets which it purchased outright, aggregated $150,880.07. The excess of the amount paid to depositors by the claimant, over the amount that it had received, was $187,815.80, and it is for this amount that it seeks to have its claim allowed and paid from the guaranty fund.

Immediately after the execution of the contract by the claimant and the Holdrege bank, it was advertised in the local papers as a merger of the two banks, and it is now urged on behalf of the state that this court should construe the contract as a merger or consolidation of the two banks. Notwithstanding the fact that the banks may have called and advertised it as a merger, the question of whether or not it was a merger must be determined by the terms of the contract. No provision was made for the retirement of the capital stock of the Holdrege bank, nor for the cancelation of its charter. The contract provided for the giving of a note by the Holdrege bank which was to run for a period of six months. It also provided that the surplus remaining after a sufficient amount had been collected to

reimburse the claimant for the amount it had paid out, pursuant to the contract, should be returned to the Holdrege bank. The contract did not contemplate the extinguishment of the Holdrege bank. It provided and recognized that it should remain as a corporate entity, with liability upon its obligations and with a right to have surrendered to it any surplus of its assets after the payment of its depositors. Under these circumstances, the contract cannot be construed as a merger or consolidation of the two banks. We think the contract should be viewed as one providing for a voluntary liquidation of certain liabilities of the Holdrege bank, including its liabilities to depositors.

If the claimant is entitled to have its claim allowed and paid from the guaranty fund, such right must arise by reason of its being subrogated to the rights of the depositors of the Holdrege bank. We do not understand that claimant contends that what is ordinarily termed legal subrogation is applicable to the situation established by the record, but rather that its contention is that by the doctrine of conventional subrogation it stands in the shoes of the depositors and can assert all the rights that they could assert if they were claimants, and that the application of this doctrine to the situation arises by virtue of the provisions of the contract between it and the Holdrege bank, together with the approval thereof by the department of trade and commerce.

Conventional subrogation arises where one pays the debt of another under an agreement, existing at the time of the payment, with either the debtor or the creditor, that the person paying shall be subrogated to the liens existing as security for the debt. It differs from legal subrogation which exists only in favor of the surety for the payment of the debt, or one who is compelled to pay the debt to protect his own rights. Conventional subrogation arises by reason of either an express or an implied agreement between the third person paying the debt and either the debtor or creditor. *Seeley v. Bacon,* 34 Atl. (N. J.

Eq.) 139; *Gore v. Brian,* 35 Atl. (N. J. Eq.) 897; *Allen v. Caylor,* 120 Ala. 251, 74 Am. St. Rep. 31; *Home Savings Bank v. Bierstadt,* 168 Ill. 618; 37 Cyc. 367-373; 25 R. C. L. 1325, sec. 11, 1326, sec. 12, 1340, sec. 24. The cases in which the doctrine of conventional subrogation has been applied are numerous, but our attention has not been directed to, nor have we been able to discover, any case where it has been applied in a situation like that existing in this case. It is applicable to cases where the debtor had made an agreement with a third person to pay his debt which was secured by a lien upon his property, or for which his property was pledged, and under such circumstances, if it was so understood or agreed, the person paying would be subrogated to all the rights of the creditor as against the property of the debtor that was in any wise pledged as security; but in the instant case it is sought to have the doctrine applied so as to give the claimant a right against the depositors' guaranty fund. It must be observed, however, that the debtor, with whom the agreement was made, did not own nor have any direct legal interest in or control over the guaranty fund. It had no right or power to pledge it as security for its obligation. The depositors' guaranty fund is created by law for the protection of depositors, and the state is the trustee for the handling and disbursing of the fund. The department of trade and commerce is the state's instrumentality for so managing and disbursing the fund, but the department of trade and commerce has no authority to create any right against that fund and can only pay out the fund upon the conditions prescribed by statute. The approval of the contract by the department of trade and commerce could add nothing to the contract of the parties, so far as creating an obligation against the guaranty fund is concerned. We do not think that the facts and circumstances, as disclosed by the record, create a situation calling for the application of the doctrine of conventional subrogation, except as to assets of the Holdrege bank on which its depositors would have a lien. The claimant was not bound, either legally or morally,

to enter into any contract for the payment of the depositors of the Holdrege bank. It did so voluntarily. For its relief it must look to the party with whom it contracted and the property pledged by the contract.

There is another reason why we think the claimant should not be allowed to recover against the guaranty fund. When the contract is closely analyzed, it does not show there was any intent by the parties to undertake to create any liability against the depositors' guaranty fund. The provision of the contract relied upon is:

"Both parties hereto, recognizing that under section 53, article 16, title V, chapter 190, of the Laws of 1919, that the depositors of the Holdrege State Bank have a lien upon all its assets for the payment of such deposits, it is the declared intention of both parties hereto that the Citizens State Bank shall become subrogated to all the rights of deposits taken over and guaranteed, and in consideration of the guaranty and payment by the Citizens State Bank of all the depositors of the Holdrege State Bank in the amount set forth above, the Holdrege State Bank hereby assigns, delivers, and sets over," etc.

By other provisions of the contract, all of the assets of the Holdrege bank were transferred or pledged for the security of the claimant. The words in the contract, "shall become subrogated to all the rights of deposits taken over and guaranteed," we think clearly contemplate that the rights to which the claimant was to be subrogated were those referred to in the first part of the paragraph, to wit, "a lien upon all its assets for the payment of such deposits," and that nothing which does not come within the description of assets of the bank is included. In no sense can the depositors' guaranty fund be considered an asset of the bank; nor can it be said that the bank holds the provisions of the guaranty fund law as security for its obligations to pay its depositors.

On no theory that we can perceive was the claimant entitled to be subrogated to rights of the depositors as

against the guaranty fund. It follows that the judgment and order of the district court was erroneous and should be reversed.

REVERSED.

JAMES B. O'CONNOR V. STATE OF NEBRASKA.

FILED OCTOBER 1, 1923. No. 23125.

1. **Criminal Law:** CIRCUMSTANTIAL EVIDENCE. When it is sought to establish the guilt of the accused in a criminal case by circumstantial evidence, it is not sufficient that the facts create a probability, though a strong one. If, therefore, assuming all the facts to be true which the evidence tends to establish, they may yet be accounted for upon any hypothesis which does not include the guilt of the accused, the proof fails. It is essential that the circumstances, taken as a whole, and giving them their reasonable and just weight, and no more, should to a moral certainty exclude every other hypothesis.

2. **Forgery:** UTTERING FALSE WILL: BURDEN OF PROOF. In a prosecution for uttering a false will as true and genuine knowing the same to be false, with intent to defraud, and the theory of the prosecution is that the will was recently drawn by the accused or some one in collusion with him and dated back, and the instrument carries upon its face evidence inconsistent with such theory, the burden is upon the state to overcome such evidence by proof beyond a reasonable doubt.

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

James M. Johnson, F. P. Olmstead, Bernard McNeny and *James & Danly,* for plaintiff in error.

O. S. Spillman, Attorney General, and *W. T. Thompson, contra.*

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

BUTTON, District Judge.

James B. O'Connor is charged in the information with the offense of uttering a false and forged will. On this charge he was convicted in the district court for Adams

county, and sentenced to the penitentiary. He prosecutes error to this court.

The theory of the state is that this alleged will of John O'Connor was forged, after the death of John O'Connor, by James B. O'Connor or some one implicated with him, and dated back to a time prior to the death, and that the motive was to obtain the fortune left by the deceased. This theory of the state permeates the whole record and constitutes the warp and woof relied upon by the state to hold together and sustain this prosecution and conviction. In the language of the state's brief this theory is expressed as follows:

"The testimony shows that the accused was the first claimant to file a claim of heirship in the county court to John O'Connor. He had taken an active part in the original attempt to probate the will, now involved, in the county court. He was present at all of the many trials involving the estate of the deceased, both in connection with questions of heirship and with those involving wills. He had observed the weak and the strong points in all the proceedings. He was familiar with the local surroundings. He knew what would appeal to the sentiments and feelings, the likes and prejudices of the people of the community respecting any will that might be brought forward, purporting to be the will and testament of John O'Connor. No one was better qualified than he to draft a will that would reflect his eccentric characteristics. Does not the instrument involved attempt to reflect these characteristics and to fit into the local surroundings? No one was more able to make it do so than the accused."

The state has consistently adhered to the above theory at all times and must now stand or fall by this theory, as it has not attempted to establish the alleged forgery of this will at any other time or in any other way.

The will in question was acknowledged before a notary public. Our statute does not require a will to be acknowledged, neither does it forbid it. Hence, a testator

would have the right to have his will acknowledged as an additional means of identification of the instrument. The statute requires but two witnesses to a will, but does not forbid a greater number. If a greater number do witness a will, all are competent to testify. In the same way, the presence of an acknowledgment to a will, the seal and the signature of the notary are all competent to identify the will and must be considered. If a will is unquestioned, the certificate of acknowledgment may be treated as surplusage. However, if genuine, it proves conclusively that the notary was alive at the time he signed the certificate and attached his seal. If he later dies and claim is made that the will was recently drawn and dated back, and the state adopts this theory in a prosecution for forgery, in order to establish the falsity of the will beyond a reasonable doubt, the prosecution must refute the evidence furnished by the work of the notary by proof beyond a reasonable doubt.

We now come to a discussion of the evidence in this case. Watkins, the notary, died August 5, 1909. In the administration of his estate Judge Amick acted as attorney. Within 30 days after the death of Watkins his library and desk and notarial seal were moved to the office of Judge Amick. The seal remained in the possession of Judge Amick until this litigation came up, when search was made for it. Judge Amick found the seal in the right-hand lower drawer of the desk he obtained from Watkins' office about 30 days after Watkins' death. The seal was closed and rusted together and bore evidence of having been in this condition for a long time. The judge was unable to open the seal and took it to a mechanic. The mechanic took out the lever pin and broke the seal apart. An impression of the seal was taken upon a piece of paper and is now in the record. It proved to be the seal of Watkins and the same as the impression upon the will. This identical seal was not used on the will in question recently, as

it was in the possession of Judge Amick and not available to the accused nor any one else. And the seal was unworkable, also, until broken apart by the mechanic at Judge Amick's request.

As to the signature of the notary, Judge Amick says he knew Watkins for 25 years before his death; says he had assisted Watkins many times in the trial of cases; says he knew the way Watkins dressed, how he walked and how he looked, and then says he knew his handwriting as well as he knew his face, and gait, and says the signature to the certificate to the will is the genuine signature of Watkins. And to make his judgment doubly sure, he says he went to the courthouse and found numerous signatures of Watkins, known to be genuine, and made a critical examination of the questioned signature in comparison with the genuine, and again pronounced the signature, to the certificate to the will, the genuine signature of Watkins. Watkins' wife says the signature to the certificate to the will is the genuine signature of her deceased husband. The two witnesses to the will say they saw Watkins sign his name to the certificate. Also Yeager and Brown pronounced the signature genuine. In addition to all this, the record contains numerous signatures of Watkins, admitted by all to be genuine, so that the court may also make a comparison with the signature of Watkins to the certificate to the will, which is also in the record.

Against this testimony we have the opinion of an expert witness. He thought the signature of Watkins to the acknowledgement not only spurious, but also thought it the handwriting of the accused. Another expert, fully as competent, came to the opposite conclusion. The record shows that the first expert testified in another case that the name John O'Connor, signed in Albany, New York, 50 years ago, was the handwriting of John O'Connor who signed certain papers admitted to be the handwriting of John O'Connor of Hastings, Nebraska. After reading his cross-examination, and con-

sidering the entire record, we are of the opinion that the testimony of this witness with the other testimony in the record still leaves more than a reasonable doubt as to the guilt of the accused.

While it was not necessary for the state to show that the accused actually wrote the signature to the will in question, because he was charged with uttering a forged instrument, still it was the theory of the state that the accused did in fact write the signature to the will as well as the signature of the notary. The state attempted to prove this fact to show guilty knowledge on the part of the accused in uttering the instrument. To do this the state called expert witnesses, not only to show that the deceased did not sign the will, but the further fact that the accused did.

The opinion of an expert that a certain signature to an instrument, claimed as spurious, was not written by the same person whose genuine signature he has examined, has probative value. But Mr. Osborn says: "When a signature is shown to be fraudulent, the question naturally arises as to who committed the forgery. This question is usually asked in every such case, but cannot often be answered with much certainty, judging from the writing alone. It is much easier to show that a fraudulent signature is not genuine than it is to show that such a writing is actually the work of a particular writer." Osborn, Questioned Documents, p. 13.

The state offered in evidence a letter of the accused to Mrs. Watkins. This letter was dated November 4, 1917. The letter shows a knowledge of the disputed will. The will was not opened and read in the county court until November 19, 1917. This was a damaging circumstance, if true, for it proved guilty knowledge. But, was it true? This letter was dictated to a stenographer. The stenographer was called as a witness. She testified the letter was written at the time of its dictation, and she produced the book containing her original notes. The letters in her note-book before and after

this letter bear consecutive dates before and after November 24, 1917, and there is no indication of tampering with the book or the dates. This book is now a part of the record in this case and bears internal evidence that it is genuine. If the stenographer is to be believed, this evidence is conclusive that this letter was actually written five days after the will was opened, instead of 15 days before.

The witnesses to the will also wrote some letters to District Judge Corcoran. We have examined them and find nothing in the letters to indicate collusion or any corrupt motive. We suppose that, while time lasts, some people will continue to talk and write foolishly. A district judge gets many letters that ought not to have been written. Judge Corcoran did not consider the letters of sufficient importance to answer any of them. No witness was produced to speak against the reputation for truth and veracity of either of these witnesses. Neither witness is an educated man and neither seems capable of carrying out any scheme to defraud.

Now, could this will have been falsely made and these witnesses and Mr. Watkins deceived? It is possible, but highly improbable. The accused could have gotten some one to simulate John O'Connor on October 10, 1908, the date the will bears. But what motive could prompt him? John O'Connor was living at that time. The will of a living man is of no value, and is not even the subject of forgery. *Huckaby v. State,* 45 Tex. Cr. Rep. 577. A later will by O'Connor would revoke such a will without the necessity of proving it spurious. But we need waste no time on conjecture. The state has a different theory, and if the above theory had been adopted the burden would have been on the state to prove it beyond a reasonable doubt, and it finds no support in the evidence.

Was it possible to have produced this will recently and dated it back in some way other than contended for? To do it one would have to take a genuine impression of

Mr. Watkin's seal and have a seal made like it. Then the signature of Mr. Watkins would have to be forged. All this would be almost impossible. But, again, we are not concerned with this theory, as the state adopted a different one. If the above theory had been adopted, again the burden would have been upon the state to establish it beyond a reasonable doubt, and the evidence does not support such a theory.

We will not examine into the state's evidence that John O'Connor was at home, in Hastings, at the time this will was drawn. Suppose this fact were established, it gets us nowhere. The burden would still be upon the state to prove beyond a reasonable doubt that the impression of the notarial seal on the will and the signature of the notary were spurious. The state has not succeeded in doing this. On the other hand, the defense has shown the seal to be genuine almost to a mathematical certainty, and the genuineness of the signature of the notary seems to be established.

It will serve no useful purpose to examine the assignment of errors of law and we shall not do so.

We wish, in passing, to call attention to the case *In re Estate of O'Connor,* 105 Neb. 88. In this case the will herein involved was offered for probate. The evidence in the probate proceedings was the same in many respects as now before the court. In the probate proceedings the state was not a party, and only one question was involved, to wit: Was the instrument offered for probate the last will and testament of John O'Connor deceased? The district court said it was, a majority of the supreme court said it was not. Being a civil case, this question turned on the preponderance of the evidence alone, and did not require proof beyond a reasonable doubt, as it required in such a prosecution as this. Neither the note-book nor the testimony of the stenographer were in evidence at the trial of the civil case, and what then seemed to be a fact—that the letter, dated November 4, was written before the contents of

the will could have been known to the writer, if it was the genuine will of John O'Connor—had great influence on the minds of some of the members of the court in deciding in that case that it was a forgery. That this was an error in the date is now established. The law of the present case is that the defendant is presumed to be innocent of crime until his guilt is established by the evidence beyond a reasonable doubt. We think that in this case this has not been done, even though a preponderance of the evidence in the former case led the majority of the court to the conclusion that the will was forged. The evidence for the state in this case is partly circumstantial in its nature and partly consists of the opinions of witnesses as to the genuineness of the signature to the will. When it is sought to establish the guilt of the accused in a criminal case by circumstantial evidence, it is not sufficient that the facts create a probability, though a strong one. If, therefore, assuming all the facts to be true which the evidence tends to establish, they may yet be accounted for upon any hypothesis which does not include the guilt of the accused, the proof fails. It is essential that the circumstances, taken as a whole, and giving them their reasonable and just weight, and no more, should to a moral certainty exclude every other hypothesis.

Under these well-settled principles, we are convinced that the evidence as produced in this, a criminal case, is not sufficient to uphold a conviction.

The judgment of the lower court is

REVERSED.

GOOD, J., dissenting.

I have no criticism to make of the principle of law announced in the syllabus of this case, but, after a careful examination of the record, I am unable to concur in the view of the majority of the court that the evidence is insufficient to establish defendant's guilt beyond a reasonable doubt.

In my opinion, the evidence establishes the fact that

the will in question was a forgery, and that the defendant in this case, with knowledge thereof, attempted to procure its probate with intent to defraud, and was therefore guilty of uttering a false will as true and genuine, knowing the same to be false. No error in any ruling of the court or in any instruction is pointed out in the opinion. The reversal is based solely upon the question of fact. The jury, as well as the trial judge, saw the witnesses and their manner of testifying, and were better able to judge of the credibility of the witnesses than is this court. At most, it is a case in which there was some conflict in the evidence. It seems to me that the holding of the court is invading the province of the jury.

NELLIE M. JOHNSON, APPELLANT, V. ALFRED MILLARD ET AL., APPELLEES.

FILED OCTOBER 20, 1923. No. 22357.

1. **Appeal.** This court will presume that the trial court, in arriving at its judgment, considered only competent testimony.
2. **Deeds**: MENTAL CAPACITY. In an action in equity to set aside conveyances of real estate because of the alleged insanity of the grantor, the question is not whether the grantor's mind was impaired, nor whether he was afflicted with some form of insanity, but whether the powers of his mind had been so affected by his disease as to have renderd him incapable of knowing and appreciating his property and what disposition he wished to make of it at the time he conveyed it.
3. ———: ———. The evidence examined, and *held* that the grantor, at the time of the conveyances in question, had sufficient mentality to know, and did know and appreciate, what disposition he wished to make of his real estate.

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

Morsman, Maxwell & Haggart, for appellant.

William F. Gurley and *Isaac E. Congdon, contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE and DAY, JJ., BUTTON and SHEPHERD, District Judges.

PER CURIAM.

This case was submitted to the court upon the printed briefs and without argument at a prior sitting of the court. It was ordered resubmitted and that an oral argument be made. The following opinion was prepared, after the former submission, by Button, district judge. The court being satisfied that it makes a proper disposition of the case adopts it. The opinion follows:

Nellie M. Johnson is the niece of Dr. George L. Miller, deceased. She brings this action to set aside certain conveyances of real estate made by Dr. Miller during his lifetime. The ground is the incompetency and insanity of Dr. Miller at the time of such conveyances.

We are confronted with a voluminous record, a mass of evidence and exhaustive written arguments and briefs, but have not been favored with oral arguments.

A number of the assignments of error have to do with the rules governing the admissibility of evidence; and much of the discussion in the briefs has to do with these rules. The presumption is that the trial court based its decision on competent testimony only. If there is sufficient competent evidence to convince this court after a trial *de novo* that the decision of the trial court is the decision that should be rendered on the facts it will be affirmed.

There is but one question before us, then, as we see it, and this is: Did Dr. Miller have sufficient mental capacity to know and appreciate what disposition he wished to make of his property at the time he conveyed it?

To answer the above question intelligently we must examine the evidence with care. We do not feel justified in quoting from this mass of evidence to any considerable extent, as this opinion will become too voluminous. When the mental capacity of Dr. Miller has been established, or the want of it has been shown, nothing will be accomplished by pursuing this mass of evidence further.

Dr. George L. Miller, an old man, conveyed the parcel of land involved in this action to one Frances M. Briggs on March 11, 1903. Shortly thereafter these parties were married. At the time of this conveyance the First National Bank of Omaha held a mortgage against this land for about all it was worth. On March 6, 1906, Mrs. Frances Briggs Miller with her husband, Dr. Miller, transferred this parcel of land to Charles T. Kountze and Luther L. Kountze, officers of the above bank, in trust. At this time the indebtedness to the bank had not been paid. Later, however, the indebtedness was paid. At the same time another parcel of ground was conveyed, but it is not involved in this action. Dr. Miller also made a will, but it was never probated. Mrs. Miller died before her husband. There seems to be no competent evidence that the doctor was over-reached or defrauded by any of the parties. It seems, therefore, that the question propounded above presents the only problem for solution.

The trust provides in substance as follows:

That the trustees should handle said land and make whatever improvements were necessary to cause it to yield an income, to collect the income and pay the mortgage, and also pay to Miller and his wife what was necessary for their support and care, and upon the death of Miller and wife to convey the property to Alfred Millard, Charles T. Kountze, and Luther L. Kountze with the income and accumulations in trust and to be conveyed by them, as soon as practicable, to some society or corporation having its principal place of business and field of operations in the city of Omaha, and having for its object the prevention of cruelty to animals or the care of and prevention of cruelties to children and animals, and if there should be no such society in existence, the said trustees should cause one to be organized for the purpose. This property was to be conveyed to such society for the purpose of pro-

ducing an income to be used as above and to be known as "The George L. Miller Memorial."

The conveyance from Miller to Miss Briggs and the conveyance to the above trustees by Mrs. Miller and husband are the conveyances claimed to have been void because Miller was insane at the time. There is no claim that Mrs. Miller was insane.

We will first examine the evidence tending to establish sanity, immediately before, at the time of the conveyance, and during the time intervening between March 11, 1903, and March 6, 1906, and afterwards.

Dr. Miller owned 480 acres of land which he platted into "Seymour Park." On this land he erected a home for himself and family. On this land was sunk an artesian well. From this well there developed Seymour Lake. This lake became valuable for harvesting ice. This situation was brought about by the industry and business sagacity of Dr. Miller, and from this time on for some time we find him making leases with reference to the sale and purchase of ice, bargaining with the Cudahy Packing Company, dealing with he banks, and others, and doing his own business in seemingly intelligent and sane manner. During th ard time of 1893, Dr. Miller, in common with man ers, suffered financial reverses and was compelled ortgage his land. In the course of time this pr , from the income from the ice and otherwise, b about its own redemption from the mortgages. T was a justification for Dr. Miller's business sagaci and foresight. From 1902 to 1909 Dr. Miller transacted a great deal of business. In 1903 he married. In 1906 he entered into the agreement heretofore mentioned. And for many years he dealt in various ways with many people. In September, 1900, Dr. Miller suffered a mental collapse. From this sickness he recovered so that during the years up to 1909 he transacted his business as above stated. It becomes material to know what some of the people with whom he dealt thought of Dr. Miller's

sanity during the years 1903 to 1906, inclusive, the period involved herein.

John H. Bexton states that from 1901 to 1908 Dr. Miller dealt with the bank of which Bexton was cashier continually. Bexton heard his conversations and knew of his business transactions, and Bexton says he was sane during this period. Charles Kountze, also of the bank, says the same thing; as does Davis, president of the bank. Mann, secretary of the Forest Lawn Cemetery Association, says Dr. Miller was sane during this period. James B. Haynes, C. C. Shriver, Richard L. Metcalf, Harry A. Tucker, Robert W. Patrick, and Abraham L. Reed, all substantial business men of Omaha, all testified to Dr. Miller's sanity during the period of concern in this action. Surely here is sufficient evidence to indicate Dr. Miller's sanity during the time involved herein.

Dr. George L. Miller was adjudged insane in 1900. All the doctors testifying seem to think Dr. Miller was insane in 1900 and that he was suffering from paranoia. There was insanity in the family. His letters indicate an abnormal mentality. Paranoia may be defined as mental unsoundness of a chronic character. It is progressive in character. In the early stages of this disease, and before it has progressed to so aggravated a form, a patient is much better at times than at other times. In other words, the patient has lucid intervals when he is capable of transacting business. We search the record in vain for any witness who had business transactions with Dr. Miller in the years 1903 to 1906 who noticed he was not competent to transact his business. If, then, we accept the conclusions of the doctors as final, still the appellees have shown that Miller was capable of transacting his business at the dates of the two conveyances in question.

Mere inbecility or weakness of mind, however great, is not insanity. There must be a total want of understanding. *Mulloy v. Ingalls,* 4 Neb. 115; *Johnson v.*

Phifer, 6 Neb. 401; *Witte v. Gilbert,* 10 Neb. 539; *Dewey v. Allgire,* 37 Neb. 6.

The question in all cases is not whether a person's mind is impaired, nor whether he is afflicted by any form of insanity, but whether the powers of his mind have been so affected by his disease as to render him incapable of transacting business like the business in question at the time of the transaction. *Martin v. Harsh,* 231 Ill. 384, 13 L. R. A. n. s. 1000; 1 Parsons, Contracts (9th ed.) p. *383, and note; *Sands v. Potter,* 165 Ill. 397; *Elwood v. O'Brien,* 105 Ia. 239; *Milks v. Milks,* 129 Mich. 164; *Whitaker v. Hamilton,* 126 N. Car. 465; *Buckey v. Buckey,* 38 W. Va. 168; *Carnagie v. Diven,* 31 Or. 366; *McIlroy v. Rivercomb,* 142 Ark. 354; *Williams v. Reese,* 177 Ky. 679.

Conceding all the doctors say, Dr. Miller was suffering from paranoia or mental unsoundness with delusions. This alone would not render his conveyance void. That paranoia is "monomania" is held in *People v. Braun,* 158 N. Y. 558, and *Flanagan v. State,* 103 Ga. 619. A conveyance is valid, then, if the delusion exists only with reference to an extraneous matter, so that it cannot be reasonably supposed to have influenced the grantor in making the conveyances. *Teegarden v. Lewis,* 145 Ind. 98; *Lewis v. Arbuckle,* 85 Ia. 335; *West v. Russell,* 48 Mich. 74.

However, conceding that Dr. Miller was suffering from paranoia, appellees contend he had a lucid interval which covered, at least, the years 1903 to 1906, inclusive. The burden was upon the appellees to prove this. *Gingrich v. Rogers,* 69 Neb. 527.

The appellees have sustained this burden. The business friends and associates of Dr. Miller, without a dissenting voice, have said that they noticed nothing wrong with his mentality during those years and that he fully understood his business transactions. There is no witness who knew him during those years, who dealt with him or associated with him, who speaks to the contrary. The

man who had acquired this property, planned to make it yield an income, and succeeded, and whom business associates, without exception, pronounced sane, had sufficient mental capacity to know and appreciate what disposition he wished to make of his property. The conveyances involved were valid.

The judgment of the lower court is right, and is

AFFIRMED.

WILLIAM H. PARSONS, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED OCTOBER 20, 1923. No. 22425.

1. **Master and Servant**: ASSUMPTION OF RISK. An employee, by entering and continuing in the employment of a railroad company, under the federal employers' liability act, assumes the ordinary risks and dangers incident to the employment, and the extraordinary risks and dangers which are obvious or of which he is aware, but he does not assume extraordinary risks which are unknown to him or which are not so obvious that a man of ordinary intelligence would have appreciated them.
2. **Trial**: INSTRUCTIONS. "Whether the instructions could have produced misconception in the minds of the jury is not to be ascertained by merely considering isolated statements, but by taking into view all the instructions given, and the tendencies of the proof in the case to which they could possibly be applied." *Seaboard Air Line Ry. v. Padgett*, 236 U. S. 668.
3. **Master and Servant**: NEGLIGENCE: ASSUMPTION OF RISK: QUESTIONS FOR JURY. Evidence examined, and *held* sufficient to submit to the jury the question of negligence on the part of the defendant in the providing of an insufficient appliance with which to move a car in a railroad switch-yard, and the issue of assumption of risk on the part of the plaintiff.

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

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

M. F. Harrington, Earl McDowell and *Gerald F. Harrington, contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE, DEAN

and GOOD, JJ., REDICK and SHEPHERD, District Judges.

PER CURIAM.

Action brought by plaintiff under the federal employers' liability act to recover damages for personal injuries alleged to have been sustained by him by reason of the defendant's negligence. The trial resulted in a verdict and judgment in favor of the plaintiff for $5,000. The defendant appeals.

The material facts relating to the accident are as follows: On January 22, 1921, the plaintiff was, and for four years prior thereto had been, in the employ of the defendant railroad company as a switchman in the defendant's yards at Casper, Wyoming. He was what is termed by railroad men an "engine foreman." Generally speaking his duties required him to follow the engines and give directions to the members of the switching crew with respect to switching cars in the yards. He described his duties as "Just picking up cars and placing them where they belonged in the yards at Casper." As between himself and the other members of the switching crew he was foreman. On the morning of January 22, 1921, the plaintiff and other members of his switching crew were engaged in switching cars. One of the movements which they desired to make was to switch a car loaded with steel from the main lead-track onto a side-track, and "spot" it at a proper place. At the time in question the engine was headed west and had attached to it on the west three cars, the car loaded with steel, before mentioned, being on the extreme west end of the string of cars. In making this switch the men in charge moved the engine and cars toward the east on the main lead-track, and while the cars were still in motion the most westerly car was cut off, the speed of the engine accelerated, and after the engine and two cars had passed the switch the rear car, while in motion, was switched onto the side-track. It was intended that the momentum of the car cut off would be sufficient to carry it onto the switch-track, and in the clear of cars moving on the

main lead-track. The speed of the car, however, did not carry it far enough to clear the main lead-track. To overcome this situation the men in charge undertook to move the car loaded with steel by a process known among switching crews as "poling" the cars. This is usually done by wedging a stout pole or heavy timber between a car on the side-track and a car or the engine on the lead-track in such a manner that by moving the engine forward the pole will push or shove the car on the side-track forward. The testimony shows that this process is not an unusual one in moving cars in railroad yards. The testimony shows that the defendant at its yards at Chadron and Fremont, Nebraska, provides a stout pole made of oak, about 12 feet long and 5 or 6 inches in diameter, which is carried on the switch engine, and which is intended to be used in "poling" cars. No such appliance was provided at the Casper yards. The testimony shows that the men at Casper usually used, in place of a regular pole, a railroad tie or heavy timber for "poling" cars. When the car failed to clear the main lead-track, the plaintiff and his helpers immediately began search for some appliance suitable to pole the car in the clear. In the search the plaintiff picked up a piece of gas-pipe, about 5 or 6 feet long and 2 inches in diameter, but discarded it because, in his judgment, it was not suitable for the purpose. It so happened that a Mr. Collier, a yard foreman, who was the superior of all the members of the switching crew, was present and joined in the search. He picked up the gas-pipe, which the plaintiff had discarded a moment before, and handing it to Mr. Carson, a member of the crew, said: "Come on, let's get this car in the clear." Collier and Carson then signaled the engineer to back the train down so as to bring the rear car of the train alongside of the car on the switch-track. Collier and Carson then proceeded to place the gas-pipe in such a position that one end would rest against the car on the switch-track and the other against the car on the main lead-track. At this

time plaintiff appeared and took a position between the two cars, about 15 or 20 feet from the gas-pipe, and joined in signaling the engineer to move the cars forward. When the signal was given Carson ran forward past the plaintiff, as he figured that the gas-pipe might rebound when the pressure was removed by the movement of the cars. When the car on the side-track moved, the gas-pipe was hurled forward through the air, end over-end, with great force, striking the plaintiff on the left foot, producing the injuries complained of.

The plaintiff's cause of action is grounded upon the theory of the defendant's negligence in failing to exercise ordinary care in providing the proper instrumentalities for moving the car, and the use by his superior of a light and insufficient gas-pipe.

It is first urged by the defendant that the court erred in refusing to direct a verdict for the defendant. In support of this contention, defendant argues, first, that the evidence is not sufficient to show any negligence on defendant's part; and, second, that the injury sustained by the plaintiff was a risk assumed by him by virtue of his employment.

It is conceded by both sides that the action is brought under the federal employers' liability act, and that the plaintiff's rights, if any, are to be determined in the light of the provisions of that act.

In so far as it is material here, that act provides, in substance, that common carriers engaged in interstate commerce shall be liable for the injury to an employee resulting in whole or in part from the negligence of any officer, agent, or employee of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, or other equipment.

As before pointed out, the testimony is clear that the gas-pipe used in poling the car was selected by Collier, the yard foreman, and it would seem that it was in-

sufficient, unfit, and improper for the purpose for which it was used.

Defendant argues upon this point that, inasmuch as the plaintiff was the switch foreman, the selection and use of the gas-pipe must be regarded as his act. In this contention we think the defendant has overlooked one very important item of evidence, which is undisputed. While it is true the plaintiff was the foreman of the switching crew, it is also true that at the time of the accident Collier, the yard foreman, was present. He was the superior of all the switching crew, including the plaintiff. In the situation thus presented, Collier assumed to take charge of the work. He gave the command to the men to come and get the car in the clear. He selected the gas-pipe as an instrument to be used in poling the car, helped to put it in position, and, but for the sudden appearance of the plaintiff, would have had the work completed without plaintiff's knowledge or participation. As we view the record, it seems clear that the action of Collier must be regarded as the act of the defendant.

Under the facts and circumstances disclosed by the record, we are of the view that the question of whether ordinary care was used by the defendant in selecting an instrument reasonably safe for the work then being done was a question of fact for the jury.

It is next urged that the doctrine of assumption of risk precludes the plaintiff's right to recover. The rule is well-settled, not only in this state, but elsewhere. An employee, by entering and continuing in the employment of a railroad company, under the federal employers' liability act assumes the ordinary risks and dangers incident to the employment, and the extraordinary risks and dangers which are obvious of which he is aware, but he does not assume extraordinary risks which are unknown to him or which are not so obvious that a man of ordinary intelligence would have appreciated them. Numerous cases are readily to be found supporting this doctrine. A few

are here noted: *Fitzpatrick v. Hines,* 105 Neb. 134; *Bower v. Chicago & N. W. R. Co.,* 96 Neb. 419, subsequently affirmed in *Chicago & N. W. R. Co. v. Bower,* 241 U. S. 470; *Chicago, B. & Q. R. Co. v. Shalstrom,* 195 Fed. 725, and cases cited, with note in 45 L. R. A. n. s. 387; *Chicago, R. I. & P. R. Co. v. Ward,* 252 U. S. 18; *Chesapeake & O. R. Co. v. De Atley,* 241 U. S. 310; *Seaboard Air Line Ry. v. Horton,* 233 U. S. 492.

Under the facts disclosed by the record, we think the trial court was right in submitting to the jury the question of assumption of risk.

Complaint is made of a number of instructions given by the court, among them instruction No. 8. The only complaint made of this instruction is that it erroneously states that the law required defendant to furnish the employees a reasonably safe place to work, because negligence in this respect is not shown by the evidence, and that it erred in submitting a question as to the strength of the gas-pipe. There is some merit in the criticism directed to the first point. The master had used due care to provide a safe place in so far as the condition of the surface of the ground between the tracks was concerned, at least as safe a place as could be furnished in such a yard where tracks interlaced and engines and trains were apt to be running at any time. The place might in one sense be said to be unsafe at the time the plaintiff was injured, on account of the flying missile, but in a proper sense the place was safe. We must presume that the jury took all the evidence into consideration, that they were possessed of ordinary perception and apprehension, and that their verdict was not based upon a theory that the railroad yard was any less safe than such yards usually are. The fact that this isolated expression was used, not applicable to the evidence, should not operate to set aside the verdict, unless we are satisfied that it was prejudicial to defendant.

Another point may be mentioned, although not called

to the attention of this court or apparently to the attention of the trial court. The supreme court of the United States has said that under the federal employers' liability act it is the duty of an interstate carrier to exercise "reasonable care" (*Seaboard Air Line Ry. v. Horton,* 233 U. S. 492), "due diligence" "due care" (*Choctaw, O. & G. R. Co. v. McDade,* 191 U. S. 64), "reasonable diligence" (*Myers v. Pittsburgh Coal Co.,* 233 U. S. 184), to see that the appliances furnished its employees are not defective or insufficient to perform the work required of them, and that it is only for negligence in that regard that such a carrier is liable.

The instruction is inaccurate in the expression used as to this duty. Separated from its context, the portion of instruction No. 8 referred to is inaccurate, but when it is considered that the real complaint of plaintiff is that defendant was negligent in failing to use reasonable care in the selection of the appliance with which to move the car, and that it did in fact negligently supply an insufficient and defective instrumentality, and that this was the real issue on which the case turned, it seems to us that the instruction, taken as a whole and in connection with the entire charge of the court and the evidence in the case, could not have misled the jury. Its main purpose was to submit to the jury the question "whether the use of this gas-pipe was a negligent and wrongful act on the part of the defendant company. On that you will consider all the evidence, the strength of the gas-pipe, the custom of this and other roads as to what should be used in poling or frogging a car, and every fact which shows what would be reasonably necessary to be used as a pole under such circumstances, and every fact and circumstance in evidence, and from all this evidence decide for yourselves whether the defendant was negligent in the use of this gas-pipe, and whether this negligence caused the injury to the plaintiff. If you shall find that it did so cause the injury to him, then your verdict should be for the plaintiff, unless the de-

fense of assumed risk is made out here, and on that question the burden of proof is upon the defendant."

It was said in *Seaboard Air Line Ry. v. Padgett,* 236 U. S. 668: "Whether the instructions could have produced misconception in the minds of the jury is not to be ascertained by merely considering isolated statements, but by taking into view all the instructions given, and the tendencies of the proof in the case to which they could possibly be applied." To the same effect is *Southern R. Co. v. Bennett,* 233 U. S. 80, in which case, as here, this defect was not called to the attention of the court.

In *Parker v. Omaha Packing Co.,* 85 Neb. 515, in which a like statement as to the duty of a master was made, it was said: "A case will not be reversed on account of the use of this expression unless, under the peculiar circumstances of the case, a jury would be apt to be misled thereby as to the amount of care demanded on the part of the master in supplying tools." This court has departed from the view that trifling errors, such as may occur in any human undertaking or investigation, and which clearly do not impede or interfere with the due administration of justice, must necessarily result in a new trial.

It is complained that the verdict is excessive. There is a conflict in the testimony of several medical witnesses who were called. If the evidence of plaintiff and his doctor was believed by the jury, the pain was excessive and the injury permanent. If such is the fact, the amount of the verdict is ample, but not excessive. If the other witnesses as to the extent of his injuries are credited, the recovery, which was for $5,000, should be reduced. In any event the excess would not justify the court in setting the verdict aside, on account of it being the result of passion and prejudice. We do not feel justified in disturbing the finding of the jury in this regard. We have considered the other errors as-

signed, but deem none of them justifies a reversal.

AFFIRMED.

FRED E. BODIE, RECEIVER, APPELLANT, V. T. H. POLLOCK, APPELLEE.

FILED OCTOBER 20, 1923. No. 23299.

1. **Banks and Banking**: LIABILITY OF STOCKHOLDERS: CONSTITUTIONAL PROVISION. Sections 4 and 7, art. XII of the Constitution, are self-executing when considered together, as they have been and should be; and, so considered, they form a complete constitutional rule to the effect that, while stockholders in banks are subject to the double liability set out in said sections, such liability cannot be enforced until the property of the bank has been exhausted, and the amount justly due judicially determined.

2. ———: ———: ———: POWER OF LEGISLATURE. Since the time when the liability of a bank stockholder can be enforced is definitely fixed by the Constitution, no other time for the enforcement of that liability can be prescribed by the legislature so long as the Constitution stands unchanged.

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

Gaines, Van Orsdel & Gaines, for appellant.

Crossman, Munger & Barton, contra.

Heard before MORRISSEY, C. J., LETTON, DEAN, DAY and GOOD, JJ., REDICK and SHEPHERD, District Judges.

PER CURIAM.

Plaintiff was receiver of the Bank of Cass County, which was insolvent. Before the assets of the bank were exhausted and without any judicial determination that said assets were insufficient to pay the creditors, he brought an action against the defendant Pollock, a stockholder, for a sum equal to the face value of the latter's stock, alleging in his petition that it was necessary to enforce the double liability of the stockholders in order to pay out. The defendant demurred to the petition upon the ground that it did not state facts sufficient to constitute a cause of action, and because it showed on

its face that the action was prematurely brought. The demurrer was sustained and plaintiff brings the case here for review.

It is conceded in the briefs and upon argument that the petition was sufficient except that it was not alleged therein that the bank assets had been exhausted and that the proper judicial determination as to the amount due had been made. The question is, therefore, may a receiver bring his action against the stockholders when the bank is adjudged insolvent, as the appellant receiver contends, or must he wait until the assets are exhausted and a judicial determination has been made of the exact amount justly due, as the trial court found?

The law of double liability is found in section 7, art. XII of the Constitution, and is as follows:

"Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder."

It is the contention of the appellant that this provision is not self-executing and must be construed in connection with the legislative enactment of 1919 to give it effect. The following is the legislative enactment in question, found in section 8015, Comp. St. 1922:

"Every stockholder in a banking corporation shall be individually liable to its creditors, over and above the amount of stock by him held, to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder. In case any stockholder shall sell, transfer or dispose of such stock, knowing that such bank is insolvent, he shall be deemed the owner of such stock, and liable thereon the same as if such stock had not been sold, transferred or disposed of; and such liability may be enforced whenever such banking corporation shall be adjudged insolvent without regard to the probability of the assets of such

insolvent bank being sufficient to pay all of its liabilities."

But, though the doctrine so contended for—that the constitutional provision is not self-executing—is supported in a way by much respectable authority, this court has held to the contrary. In a case involving the liability of a stockholder in a banking corporation, it was expressly declared that the provisions of said section 7 of the Constitution are enforceable without supplementary statutory enactments. *Farmers Loan & Trust Co. v. Funk,* 49 Neb. 353. It is true that the provision standing alone may lack the completeness necessary to make it self-operating. This is the point upon which a number of courts have held somewhat similar constitutional provisions inoperative of themselves. But construing the section with another section of the Constitution, section 4 of the same article, any lack of this kind is supplied and the section becomes of itself fully operative in so far as to provide for the enforcement of the double liability referred to therein. The language of said section 4 is:

"In all cases of claims against corporations and joint stock associations, the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted the original subscribers thereof shall be individually liable to the extent of their unpaid subscription, and the liability for the unpaid subscription shall follow the stock."

By this it will be seen that the time and conditions of the enforcement of the liability are made sufficiently definite.

Prior to 1897 the legislature passed a law (Laws 1895, ch. 8, sec. 35) expressly providing that, whenever any bank receiver should report to the court that in his opinion the assets of the bank would not be sufficient to pay out within a reasonable time, the court might direct him to at once collect from the stockholders. Proceeding under this statute, the receiver of the German

Savings Bank made such a report to the court and prayed the court for an order permitting and directing him to sue the stockholders on their double liability. The stockholders, or one of them, intervened and opposed the application. Their objections were overruled, and the order made. This order was reviewed upon the merits in this court in the case of *State v. German Savings Bank*, 50 Neb. 734, and the doctrine announced by the court in that case has become the settled law of the state through a long course of years and by a line of cases in which said doctrine has been consistently upheld. The case referred to was considered with unusual care because of the legislative enactment referred to, which, it will be observed, is similar in language and purpose to the enactment of 1919 hereinbefore quoted. In other words, the legislature in that case, as in this, had attempted to supplement the Constitution by providing that the stockholders might be sued before the assets were exhausted. The opinion in that case completely answers the contention of the appellant receiver in this. And the reasons for sustaining the objections of the stockholders in that case apply with equal force to sustaining the decision of the district court in this. It was there again announced that the two constitutional provisions, sections 4 and 7, art. XII, were to be construed together, and that, so construed, they were completely self-operating and self-executing, to the effect that the double liability existed, but that it could not be enforced until the assets were exhausted and until the court judicially determined the exact amount to be recovered. It was there declared that no matter of expediency or of policy ought to be permitted to avoid or to change the express provision and direction of the fundamental law, and that the legislature could not be permitted to provide by legislative enactment a different or a better rule for enforcing the liability against the stockholder, even if experience seemed to show that it would be beneficial. To be sure, the Constitution

could be changed, but in this connection what the recent constitutional convention did affords only an additional reason why the rule so long ago announced and so uniformly adhered to should now stand. Not only did the late constitutional convention not change the constitutional provisions in question, but it reenacted them. These constitutional provisions had received a construction which had become the settled law of the state and that construction had been read into and become a part of the said provisions. It is well settled in many, if not most, of the jurisdictions of the country that, where a construction of constitutional provisions has been adopted and a constitutional convention thereafter reenacts such provisions, it reenacts not only the language of the provisions but the construction which has attached to the same.

Probably no better exposition and declaration of the law with respect to the question now before the court can be found than appears in the opinion written in the case of the *State v. German Savings Bank, supra.* In the interest of clear and comprehensive statement excerpts from that opinion are here quoted:

"It will be observed at once that the general effect of these two provisions is to establish a liability, free from interference by the legislature, on stockholders of all corporations, subject to certain conditions, for their unpaid subscriptions; and in the case of banking corporations, an additional liability for a further amount equal to the amount of stock held by any person for the purpose of paying debts incurred while such person is a stockholder. The conditions attached to the enforcement of the first liability are that its enforcement must be in cases of claims against corporations; that the amount of such claims shall be first ascertained, and that the corporate property shall have been exhausted.

"Does the banking act, in so far as it attempts to confer authority upon the court to authorize the receiver of a bank, merely upon a report that in his opinion

the assets of the bank are insufficient to pay its liabilities within a reasonable time, to collect this unpaid subscription, conflict with section 4 as we have quoted it? * * * A large portion of the argument in support of the statute has been addressed to three points: In the first place, a consideration of the policy of the statute, which is manifestly to afford a speedy and somewhat summary remedy for creditors of insolvent banks, and to enable the receiver, for their benefit, to promptly enforce all liabilities of stockholders. Secondly, the justness of this policy, the danger attending upon any process requiring securities to be immediately sold, often on a falling market and at a sacrifice, or, if that danger be avoided, the still greater danger of delaying resort to proceedings against stockholders until such a time that by their death or insolvency the remedies become ineffectual. Thirdly, an appeal to the general principle that the corporation, while it was a going concern, had the right to make calls for unpaid subscriptions regardless of the sufficiency of its assets to pay existing liabilities, and that this right passed to the receiver, so that the receiver, in collecting unpaid subscriptions, is acting merely as he does in collecting other assets, We freely grant the correctness of the last statement as the statement of a general principle of law, and we further concede the correctness of the contention of the appellee as to the policy of the statute. We may further, for the purposes of this case, acquiesce in the position of counsel that for the effective winding up of insolvent banks and the protection of depositors a remedy against stockholders should be permitted in some cases, before, by a slow process of liquidation, other assets shall have been exhausted. But all these are matters not particularly pertinent to the question under consideration. We are not free to declare the law as we believe it ought to be. In a doubtful case of construction it may be proper to throw the balance in favor of that side where we conceive the natural justice and policy to

lie; but this only for the reason that in such doubtful cases it is rather to be presumed that the intention of the lawmakers was on the side of manifest justice and policy. Where, after resort to established canons of construction, no doubt is left, we must construe the law as written, and not in accordance merely with our own notions of abstract or substantial justice. Furthermore, in interpreting the written law the prevailing doctrine of other jurisdictions is of assistance only for the purpose of ascertaining upon what information the lawmakers acted in adopting their language, and such general doctrine cannot be permitted to prevail as against a written Constitution or statute plainly implying an intention to change the rule. * * * The Constitution must be interpreted according to the facts which its framers and the people in adopting it had then in mind. * * * We are entirely clear that the general purpose of the constitutional provision was as already indicated, and that it was the deliberate intention of the framers of the Constitution to render the liability for unpaid stock subscriptions, in one sense at least, secondary, to be enforced only after a consummation of the conditions precedent mentioned, and it is no answer to this conclusion to assert that the corporation itself, while it was a going concern, might by call, if necessary, followed by suit, have enforced that liability as primary. The conditions are different. The corporation in making calls acts for the stockholders. Directors or other officers authorized to make the call are representatives of the stockholders, by them selected for that and other purposes, and the object in making the call is to provide the corporation with means of proceeding with the business for which it was created. When, however, the corporation suspends its functions as a going concern, the only purpose of resorting to the capital is to discharge debts. It was perfectly competent for the Constitution to provide that upon this contingency a liability which might theretofore have been enforced

unconditionally by the representatives of the corporation should thereafter be enforced only as a secondary liability and so far as necessary to accomplish its purpose. This the Constitution did, and in such clear terms as to be almost unmistakable. * * * The new feature was affixing terms and conditions upon which, and upon which only, the liability could be enforced, and it was beyond the power of the legislature to provide a remedy whereby such liability could be enforced in violation of the terms impressed by the Constitution.

"We conclude that the portion of the banking act under which the order complained of was made is in conflict with section 4 of article XII of the Constitution relating to miscellaneous corporations, and is void. The report of the receiver showing affirmatively that the corporate property had not been exhausted, but only that it was in his opinion probably insufficient within a reasonable time to pay the liabilities of the bank, the court had no authority at that time to direct actions to be brought for the unpaid subscriptions."

Following this decision are *Hastings v. Barnd,* 55 Neb. 93; *State v. German Savings Bank,* 65 Neb. 416; *Hamilton Nat. Bank v. American Loan & Trust Co.,* 66 Neb. 67; *Holcomb v. Tierney,* 79 Neb. 660. Nor does the holding so announced lack approval in federal jurisdictions. In *Goss v. Carter,* 156 Fed. 746, the circuit court of appeals for the fifth district declare that the provisions in question are self-executing, and state in substance that by the mandate of the Nebraska Constitution the liability of bank stockholders cannot be imposed till the indebtedness of the corporation is judicially ascertained and the assets of the corporation exhausted.

The law being as it is, the ruling of the district judge was right, and should stand. For, "while a practical interpretation of the Constitution by the legislature will not be lightly disregarded in doubtful cases, yet, when the language of the Constitution is free from ambiguity, an interpretation thereof by the legislative department

cannot be invoked to nullify the fundamental law." *State v. Cornell,* 60 Neb. 276.

AFFIRMED.

QUEEN INCUBATOR COMPANY, APPELLEE, V. CHARLES E. BYERS ET AL., APPELLANTS.

FILED OCTOBER 20, 1923. No. 22512.

Appeal: REQUESTED INSTRUCTION. When a defendant submits an instruction covering his theory of the case to the trial court, which is adopted by the court and given to the jury, and the jury returns a verdict for the plaintiff, the verdict will be upheld if there is sufficient competent evidence in the record to sustain it. *Held,* that the evidence sustains the verdict.

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

James & Danly, for appellants.

Bruckman & Paulson, contra.

Heard before MORRISSEY, C. J., LETTON, DEAN, DAY and GOOD, JJ., REDICK and SHEPHERD, District Judges.

MORRISSEY, C. J.

This is an action brought by plaintiff against defendants to collect a balance due for merchandise sold and delivered by plaintiff to defendant; the amount originally due was $2,197.52. Of this sum defendants have paid $1,867.90. Plaintiff was the manufacturer of incubators and accessories, and defendants were dealers in lumber and commodities generally carried in that line of trade. The receipt of the merchandise is not denied, nor is any complaint made of the amount at which it was billed by plaintiff, but the answer alleges that, under the agreement between plaintiff and defendants, plaintiff obligated itself not to sell at retail incubators in the territory adjacent to defendants' lumber yards, and that plaintiff violated this agreement. And because of this alleged violation of the agreement, defendants refused to pay the full amount demanded by plaintiff, but did send to plaintiff a check in the sum of $1,867.90, to-

gether with a statement that said sum must be accepted as full payment of the amout due or the check returned. It is also alleged that plaintiff accepted the check, collected in cash the face thereof, and that by reason thereof plaintiff is estopped from demanding any additional sum. The cause was tried to a jury and at the conclusion of the evidence defendants requested, and the court gave, the following instruction:

"Under the pleadings and the evidence in this case there is but one issue to determine, and that is in regard to the tender and acceptance of the check in dispute.

"Hence, you are instructed, gentlemen of the jury, that under the laws of the state of Nebraska, where there is a *bona fide* dispute between the parties, plaintiff and defendant, as to the amount due on an account, and the debtor tenders to the creditor a less amount than due, in full settlement of the debt, and the creditor, knowing that the same is tendered in full settlement, accepts the same, the same is a settlement in full of said debt. If you find from the evidence that the defendants in this action tendered to the plaintiff a sum less than claimed by plaintiff, and tendered the same in full settlement of the account, and that the plaintiff knew that the same was tendered in full settlement of the account, and accepted the same, then and in that case it would be your duty to find in favor of the defendants and against the plaintiff; provided, however, that you find that there was a *bona fide* controversy existing between the parties as to the amount due at the time said check was accepted. On the other hand, if you find that no *bona fide* controversy between the parties existed at the time said check was accepted by plaintiff, then you should find for the plaintiff."

The jury returned a verdict for plaintiff, on which the court entered judgment, and defendants appeal.

It is alleged that the verdict is not sustained by the evidence, and is contrary to law and to the instruction given. Defendants having requested the instruction,

it will be assumed that it properly submits their theory of the case. There is a suggestion in the brief of appellee that the request for the instruction given constitutes an admission, in the absence of a request for a peremptory instruction, that there was sufficient evidence in the record to warrant the submission of the case to the jury. However, we think this point may be passed without discussion, for when we turn to the evidence furnished by the defendants we fail to find anything to support the contention that there was a *bona fide* dispute between the parties as to the amount due. One of the defendants admitted, upon the witness-stand, that the amount covered by the invoice was never in dispute, and that when the collector for a bank presented the bill he declined to pay, but said that defendants would pay "when they got ready," and in response to the direct question as to whether plaintiff had agreed to accept less than the full amount said, "I don't know that they ever did." It also appears that on receipt of the check plaintiff wired defendants that the check was received and would be applied on the account, and that defendants should pay the balance due within 48 hours. This gave defendants ample notice of the conditions on which the check was accepted and they might have stopped payment on the check had they so desired. On consideration of all the evidence, the jury might have found that there never was a *bona fide* dispute as to the amount due, or that there had never been an accord and satisfaction.

As the cause was submitted to the jury on defendants' theory of the law, and the evidence is amply sufficient to sustain the verdict, the judgment is

AFFIRMED.

CHARLES D. TRAPHAGEN, APPELLEE, V. LINCOLN TRACTION COMPANY, APPELLANT.

FILED OCTOBER 20, 1923. No. 22516.

1. **Negligence.** Under the circumstances of this case as shown by the evidence, whether the failure of plaintiff to look and listen before undertaking to pass in front of the street car constituted such negligence as would defeat plaintiff's recovery was a question of fact.
2. **Appeal**: DIRECTED VERDICT. "In determining whether a peremptory instruction was justified, the party against whom the verdict is directed is entitled to have every controverted question of fact resolved in his favor, and to have the benefit of every inference that reasonably can be deduced from the facts in evidence." *Schmelzel v. Leecy*, 104 Neb. 672.
3. **Negligence**: CONTRIBUTORY NEGLIGENCE: QUESTION FOR JURY. Where it is established, in an action to recover damages suffered by plaintiff as a result of a collision between his automobile and one of defendant's street cars, that plaintiff, having his attention attracted by the violent sounding of the gong on a street car approaching a street intersection from the east, without looking to the west to observe if a car might be approaching from that direction, drove his car upon defendant's tracks, where it was struck by an east-bound street car which was then operated at the rate of 20 to 22 miles an hour without sounding a gong or giving any warning of its approach, it is proper for the court to submit the questions of negligence and of contributory negligence to the jury under our comparative negligence statute (Comp. St. 1922, sec. 8834).

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

Field, Ricketts & Ricketts, for appellant.

Peterson & Devoe, contra.

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

MORRISSEY, C. J.

This action was brought by plaintiff to recover for damages sustained in a collision between his automobile and one of defendant's street cars at the intersection of O street and Seventeenth street in the city of Lincoln, about 7:30 p. m., November 22, 1920. Plaintiff was driving north on Seventeenth street. When he arrived

at the intersection two of defendant's cars were approaching, one from the east, the other from the west. Plaintiff's car was struck and damaged by the east-bound car. As a basis for recovery plaintiff contends that the motorman on the east-bound car failed to sound the gong or give any warning of its approach; that he knew plaintiff was approaching the track and was in a dangerous situation, but negligently failed to stop his car, and that the street car was driven at an excessive rate of speed. There are other allegations of negligence in the petition, but they are not material to the issue here presented. The answer contains a general denial coupled with an allegation of negligence on the part of plaintiff. The case was submitted to a jury, and from a verdict and judgment in favor of plaintiff defendant appeals.

The controlling assignment of error is that the court erred in failing to instruct a verdict in favor of defendant. The evidence discloses that plaintiff drove upon the track without looking to the west from whence the street car causing the damage came, and it is the contention of defendant that the failure of plaintiff to take proper precautions for his own safety and the protection of his property constituted such negligence upon his part as to defeat a recovery. The facts disclosed by witnesses for the plaintiff show that at the time the accident occurred the streets were wet and the rails and pavements slippery, the sun had set and a light mist had fallen. The pavement on Seventeenth street immediately south of its intersection with O street was rough, except a strip lying slightly to the west of the center which had been resurfaced. Plaintiff drove his car along the resurfaced strip of pavement until he reached the intersection of O street, where he claims to have veered his car to the right so that he might cross the intersection on the proper side of the street. He claims to have come to a full stop before entering the intersection, but says that, as he did so, his attention was attracted by the sounding of a gong on a west-bound street car

which was approaching from the east. He claims to have driven into the intersection at a low rate of speed, and that his attention was directed exclusively to the west-bound car, the gong of which car was being rung with unusual violence, and that he, for the instant, failed to look to the west and therefore did not see the car approaching from that direction until the forward part of his automobile had crossed the south rail of the east-bound track, and at that instant he saw the east-bound street car, heard the motorman call out to him, and the collision instantly occurred. He testified that the gong on the east-bound street car was not sounded nor any warning given of its approach, and that it was running at from 20 to 22 miles an hour. There is other testimony which corroborates plaintiff in his claim that the gong was not sounded nor any other warning given, and also as to the rate of speed. This testimony is directly contradicted by the motorman and other witnesses who testified for defendant. These witnesses testified that the gong was sounded before the car entered the intersection, sounded again before the collision occurred, and that the rate of speed was at from 12 to 15 miles an hour.

It is conceded that immediately before the collision the motorman threw on the emergency brake, and, according to some of the witnesses, the car came to a full stop almost immediately after the collision, while according to other testimony the car traveled 25 feet after the collision. It does not appear that the distance traveled after the collision can be material, except only as it may indicate the rate of speed at which the street car was progressing. On this point it is of doubtful weight. Plaintiff's automobile weighed in the neighborhood of two tons; the weight of the street car is not pointed out in the briefs, but it is shown to be a light-weight car operated by one man who performs the dual functions of motorman and conductor. The car was derailed as a result of the collision.

The court instructed the jury on the doctrine of comparative negligence under the provisions of section 8834, Comp. St. 1922. Laying aside all the minor issues, this appeal presents the question as to whether the trial court should have instructed a verdict for defendant, or submitted the cause, as it did, to the jury to determine from all the evidence whether either of the parties were guilty of negligence, and, if so, was the negligence of plaintiff slight and the negligence of defendant gross in comparison. The act of plaintiff which defendant relies upon as showing contributory negligence of sufficient degree to defeat a recovery is his driving upon the track without looking to the west at a time when he might have seen the east-bound car and avoided the collision.

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

Under this rule, before the court could instruct a verdict in favor of defendant, it would have to give full faith and credence to the testimony of plaintiff and his witnesses and concede that the street car was being driven across the street intersection at from 20 to 22 miles an hour; that no gong was sounded nor any warning given; that plaintiff was traveling on the proper side of the street at 6 or 8 miles an hour, and that his eyes were upon the street car approaching from the east with the gong sounding with unusual violence. With these facts conceded, the court would have had to find that reasonable minds could not differ on the question as to whether the negligence of plaintiff in failing to look to the west was more than slight and that of defendant in the operation of its car gross in comparison and resolve that question in favor of defendant. May reasonable minds differ on the question? It requires no discussion to show that plaintiff ought to have

looked to the west as well as to the east before driving upon the track, and that his failure so to do was negligence. *Haffke v. Missouri P. R. Corporation, ante,* p. 125, and cases therein cited. On the other hand, the rate of speed at which it is said the car was operated and the failure to sound the gong or give notice of its approach are facts which, if accepted as established, would constitute negligence on the part of defendant. The rule to be followed under such circumstances is announced in *Francis v. Lincoln Traction Co.,* 106 Neb. 243, as follows:

"Where there is evidence tending to prove both negligence and contributory negligence in an action to recover damages for the causing of death by a wrongful act, the duty of making the comparison under the comparative negligence law is imposed upon the jury, unless the evidence of negligence is legally insufficient to sustain a verdict in favor of plaintiff, or the evidence shows the contributory negligence of the plaintiff is more than slight, or where the defendant's negligence is not gross in comparison with that of plaintiff."

Under all the circumstances, we are constrained to hold that the court did not err in submitting the cause for the determination of the jury.

AFFIRMED.

JOHN K. RICHMOND, APPELLEE, V. ULYSSES C. BREITHAUPT, APPELLANT.

FILED OCTOBER 20, 1923. No. 23424.

1. **Elections**: EVIDENCE: BURDEN OF PROOF. The ballots are the original evidence of the votes cast at an election, and upon a contest the burden is upon the contestant to establish that the ballots are those that were cast at the election and that they are in the same condition as when cast.

2. ———: ———: BALLOTS. If when the ballots are produced in court they are properly and sufficiently identified, have substantially been kept as required by law, and the court is satisfied from the evidence that they have not been tampered with but are in the

same condition as to markings as when cast, they should be admitted in evidence, but unless such facts are made manifest with reasonable certainty, the ballots should be rejected.

3. ———: CONTEST: PROOF. Unless the parties stipulate otherwise, all the evidence must be produced upon which the contestant relies. The stipulation set forth in the opinion in this case is not sufficient to relieve the contestant from this duty.

APPEAL from the district court for Harlan county: LEWIS H. BLACKLEDGE, JUDGE. *Reversed.*

Bernard McNeny and *J. G. Thompson,* for appellant.

O. E. Shelburn, contra.

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

LETTON, J.

This is an appeal from a judgment of the district court, on appeal from the county court, in a contested election proceeding. Contestee, Breithaupt, upon the official returns, appeared to be elected county clerk of Harlan county. The returns showed that he had received 1,524 votes, and that Richmond, the contestant, received 1,518. A certificate of election was duly issued to the contestee. It was alleged by the contestant that illegal votes were received in each of 16 townships of the county sufficient to change the result; that legal votes cast for him were rejected; that votes were erroneously counted for the contestee, and that a proper canvass would change the result and show the election of the contestant. The answer was practically a general denial, with an affirmative plea that none of the ballots except in two precincts had been sealed and preserved as required by law, and that they had been tampered with and changed. The contestant was declared elected in the district court, and contestee appeals.

At the beginning of the trial in the district court, the parties entered into a stipulation of which the following is the material portion:

"It is hereby stipulated * * * that, after the

filing of the contest herein and the filing of the answer of the contestee, the following stipulation was filed by the parties hereto in the county court of Harlan county, Nebraska (omitting caption):

"The parties in the above entitled case agree that the hearing in said case commence on November 29, 1922, and that in the recount either party may take exceptions to the counting of any ballot counted or to the rejection of any ballot rejected, and when any such exception is taken that a record be made sufficient to show the facts with reference to the ballot in question and the objections thereto and said ballots be laid aside until final count is completed. It is further agreed that upon the completion of the recount in the county court of Harlan County, Nebraska, a record be made of the number of unquestioned ballots for each of the parties and of the decision as to the questioned ballots, and if the defeated party desires to appeal from the decision of the county court, said record, together with the ballots in question, the facts with relation thereto and the objections of the parties with reference to such ballots may be used as evidence on appeal. Said questioned ballots to be properly returned to the county clerk with all ballots but to be inclosed in separate marked envelopes. (Signatures.)

"That pursuant to the above stipulation the ballots of all the precincts of Harlan county, Nebraska, were counted by the county judge with the assistance of tellers agreed upon by the parties."

Contestant then offered testimony of the county judge as to the result of the recount of the ballots of Sappa township. Objection was made to this testimony as incompetent, but the witness was permitted to testify. One of the men who had acted as teller in the county court was handed a tally sheet of the recount which he had kept and had delivered to the county judge. When asked whether it was a correct statement of the result of the recount, the contestee made the objection

that the evidence was incompetent and no foundation laid, and renewed this objection to every question as to the result of the recount, and to the offer of the tally sheet. These objections were all overruled. The envelope containing 25 rejected and questioned ballots was then offered in evidence with the ballots it contained, to which offer the same objection was made. The county judge also testified, over objection, as to which of these ballots were accepted and counted, and for whom, and which were rejected, stating also from which township the ballots came.

The evidence in the county court was not preserved as a part of the record by a bill of exceptions. The ballots, except the 25 mentioned, were not produced at the trial; the contestant insisting that by the terms of the foregoing stipulation he was relieved from the necessity of adducing them as evidence.

In a contest of an election, in which a recount of the ballots is necessary, the original ballots should be brought into court and should be produced in the same condition and in the same receptacles as returned by the election officials, unless otherwise agreed to by the parties. "As between the ballots cast at an election, and a canvass thereof by the election officers, the former are the primary and controlling evidence; but in order that they may continue controlling evidence it must appear that they have been preserved in the manner and by the officers prescribed by the statute." *Albert v. Twohig,* 35 Neb. 563. See, also, *Martin v. Miles,* 40 Neb. 135. The strictness of this rule as to sealing and preservation has been somewhat relaxed in *State v. Barr,* 90 Neb. 766.

The statutory provisions relating to elections are not mandatory, but directory. *State v. Russell,* 34 Neb. 116. With the change in the methods of voting and the additional protection against fraud furnished by the Australian ballot law, there seems to be sound reason for holding that, if the ballots are clearly identified, which

they may be by an inspection of the signatures of the election officials on the back, and the trial court is fully satisfied that they have not been tampered with or altered in any way, the voter ought not to be deprived of his vote on account of the neglect of those officials whose duty it was to properly preserve the ballots. While this is so, election officials should follow the statute strictly, and perform their duty as prescribed therein. Negligence in this respect almost invariably gives rise to controversies such as have arisen in this case. Such controversies are detrimental to public interest, and tend to create discord, bitter feeling and public dissatisfaction. Upon a retrial of the case, if the ballots are properly and sufficiently identified, and the court is satisfied from the evidence that they are in the same condition as to markings as when cast, they should be counted; but, if this is not made manifest with reasonable certainty, they should be rejected. *Strubinger v. Ownby,* 290 Ill. 380; *Thomas v. Marshall,* 160 Ky. 168; *Newhouse v. Alexander,* 27 Okla. 46, and note 30 L. R. A. n. s. 602; *Averyt v. Williams,* 8 Ariz. 355.

Does the stipulation entered into relieve the contestant from the production of the ballots? We think not. The stipulation does not bind the contestee to accept as final the recount of the ballots in the county court, nor does it require the appeal to be tried solely upon an inspection of the questioned ballots, nor solely upon the record of the county court, nor that objections may not be made to the counting of any ballots produced. There is not a word in it which provides that the ballots are not to be produced. An appeal in such a proceeding, under such issues as presented here, brings up the whole case for trial *de novo* in the district court. Unless the parties stipulate otherwise, all the evidence must be produced upon which the contestant relies. *Griffith v. Bonawitz,* 73 Neb. 622. The contestant must establish that he has been elected, and the ballots are the primary evidence upon which he must rely. The burden

is upon him to show that the ballots produced are the identical ballots cast and that they are in the same condition as when cast. The official returns must be taken as true in this proceeding until a recount in the district court establishes otherwise. The contestee in any such case is entitled to raise objections to the recount based upon the manner in which the ballots have been preserved, and, unless they are admissible under well-settled rules, they are not entitled to be counted.

The ballots not having been produced in evidence, and there being no agreement that the result of the recount should be taken as true and correct, there is not sufficient evidence to overcome the official returns, and the judgment must be reversed.

Evidence was produced as to the manner in which the ballots of Alma and other townships had been kept, but since the evidence upon a retrial may not be identical, and the issue is not really presented in this appeal, the ballots not having been offered, we can only state the legal principles which govern, leaving them to be applied if a question as to the admissibility of such ballots arises upon a retrial of the issues.

In order to avoid contention at another trial as to the ballots examined and passed upon by the district court, it may be added that, if it is established by the testimony that the statement on the back of exhibits 7 and 8, that the voter was incompetent to mark his ballot and was assisted, is proved to have been placed there by the proper election officials, these ballots should not be rejected on account of such marking, if otherwise properly identified. As to the other ballots upon which the district court passed, we have reached the same conclusion as did that court.

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4. Procuring a written option to cancel a purchase of stock if the corporation fails to resell one-half for the price of the whole is not necessarily a fraud on the corporation. *Dinsdale v. Sprague Tire & Rubber Co.* 290
5. A subscription for corporation stock and a contemporaneous option to cancel the purchase unless one-half the stock is resold for the price of the whole constitute a single contract. *Dinsdale v. Sprague Tire & Rubber Co.* 290
6. Color of corporate franchise is requisite to corporation *de facto*. *Hughes Co. v. Farmers Union Produce Co.* 736
7. To constitute color of corporate franchise, a *bona fide* effort to comply with statutory requirement must be shown. *Hughes Co. v. Farmers Union Produce Co.* 736
8. Adoption of articles, perfection of organization, and transaction of business are insufficient to constitute a corporation *de facto*. *Hughes Co. v. Farmers Union Produce Co.* 736
9. A corporation *de facto* cannot be created by estoppel. *Hughes Co. v. Farmers Union Produce Co.* 736
10. Evidence *held* to sustain judgment for defendants in an action by a corporation to recover stock alleged to have been wrongfully issued. *Douglas Motors Corporation v. Baum* 765

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1. To justify conviction on circumstantial evidence, facts essential to the conclusion sought must be proved beyond a reasonable doubt, and must be inconsistent with any reasonable hypothesis of innocence.. *Lowe v. State* 325
2. Articles or information will not be excluded because obtained illegally. *Georgis v. State* 352
3. In a prosecution for conspiracy, it is no defense that the person to be defrauded intended to participate in an unlawful transaction. *Georgis v. State* 352
4. Error cannot be predicated on failure to instruct without a request therefor, unless a statute or rule of law requires an instruction. *Georgis v. State* 352
5. Amendment to motion for new trial made after three-day period and after the term disallowed. *McCoy v. State* 360
6. Where two jointly convicted filed separate motions for a new trial, and one was sustained and the other overruled, the defendant whose motion was overruled cannot predicate error on the ruling. *Cura v. State* 476
7. A conviction on conflicting evidence will not be set aside where the state's evidence sustains the verdict. *Ingoldsby v. State* 495
8. Sentence should be under law in force at time crime was committed. *Ingoldsby v. State* 495
9. A delay of 36 hours after arrest without warrant, and incarceration, *held* unreasonable and unlawful. *Hayes v. Pilger* 609
10. A verdict will be set aside where the evidence is clearly insufficient to sustain it. *Larson v. State* 620
11. A motion for a new trial for newly discovered evidence, merely cumulative and corroborative, *held* properly overruled. *Hopperton v. State* 660
12. The page of the record at which an oral request for an instruction is shown should be pointed out in the brief. *Hopperton v. State* 660
13. Unless the refusal of an oral request for an instruction constitutes prejudicial error, the better practice is to submit a suitable instruction as a foundation for review. *Hopperton v. State* 660
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18. Separate trials are not allowed in misdemeanor cases. *Nash v. State* 712
19. It is not error to instruct that the burden of proof is on defendant as to a special issue, when the jury are correctly instructed as to the burden of proof on the general issue. *Roberts v. State* 759
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21. Sentence for carrying concealed weapons *held* not excessive. *Roberts v. State* 759
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3. Damages are not recoverable for other than financial loss. *Ensor v. Compton* 522
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5. Equity may cancel a deed procured by fraud and also a mortgage by a subsequent grantee, if the mortgagee is chargeable with notice of the fraud. *Engdahl v. Laverty* 672
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1. In 1870 an equitable interest in government land prior to patent was not an estate to which dower attached. *Perry v. Ritze*.... 286
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5. Refusal to require incompetent or irrelevant matter in a deposition to be read is not error. *Security State Bank v. Brown*.. 237
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7. Where a party refuses to produce a document, the court should instruct that the contents are presumed to be as alleged in the affidavit for its production. *Sallander v. Prairie Life Ins. Co.*.. 332
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9. An executor's sale of land under a will, directly or indirectly to himself, is voidable, though he paid full value and there was no actual fraud. *Johnson v. Erickson* 511

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2. Jurisdiction where a party is confined under United States authority is in the federal courts. *Hayes v. Pilger* 609

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1. A railroad company placing an obstruction in a highway must maintain warning signals *Sharp v. Chicago, B. & Q. R. Co.*.. 34

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3. A county cannot evade statutory liability for obstruction in a highway by delegating its duty to maintain it to another. *Sharp v. Chicago, B. & Q. R. Co.* 34

4. A county and a corporation erecting an obstruction in a highway are jointly liable for injuries resulting therefrom. *Sharp, v. Chicago, B. & Q. R. Co.* 34

5. A county board *held* not to have authorized that an obstruction in a highway should not be provided with warning signals. *Sharp v. Chicago, B. & Q. R. Co.* 34

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8. An order of a county board vacating a road *held* erroneous, where the record failed to show consent of a majority of the electors residing within two miles thereof. *Feuerstein v. Saunders County* 121
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1. In 1870 a husband could transfer a homestead independently of his wife. *Perry v. Ritze* 286
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2. Clerk of local camp of fraternal beneficiary association *held* to be its agent to make and report reinstatements. *Kunes v. Sovereign Camp, W. O. W.* 338
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3. Only three peremptory challenges are allowable to each side in civil cases. *Petsch & McDonald v. Hines* 1
4. A party and an intervener whose interests are not adverse constitute a single party within the rule governing peremptory challenges. *Petsch & McDonald v. Hines* 1
5. Where parties have conflicting rights, the court may allow each party three peremptory challenges. *Petsch & McDonald v. Hines* 1
6. Refusal to allow each defendant peremptory challenges *held* not error. *Petsch & McDonald v. Hines* 1
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1. A contract for a 99-year lease is not unenforceable because the owner of the fee reserves the right to approve form of terms of lease. *Mercer v. Payne & Carnaby Co.* 28
2. A lease is personal property. *Nelson v. Radcliffe* 54
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2. Mandamus is a proper remedy to compel performance of public duty, when there is no adequate remedy at law. *State v. Intermountain R., L. & P. Co.* 720

3. Mandamus will lie to compel a public service corporation to furnish electric current under a franchise. *State v. Intermountain R., L. & P. Co.* 720

4. A peremptory writ of mandamus is justified only where the alternative writ shows a specific duty enjoined by law upon respondent. *State v. Intermountain R., L. & P. Co.* 727

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7. Judgment requiring a public service corporation to furnish electric current on terms at variance with a city ordinance *held* erroneous. *State v. Intermountain R., L. & P. Co.* 727

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2. An agreement for attorney's fees in a workmen's compensation case must be approved by the district judge. *Dysart v. Yeiser*. 65
3. Statute limiting attorney's fees in workmen's compensation cases *held* constitutional. *Dysart v. Yeiser* 65
4. An employer who does not insure or prove his ability to pay compensation is liable in damages at common law or to statutory compensation. *Nedela v. Mares Auto Co.* 108
5. Sec. 3069, Comp. St. 1922, providing that employer shall furnish bond or show ability to pay compensation *held* valid. *Nedela v. Mares Auto Co.* 108
6. Employer and employee are presumed to contract with reference to the compensation act. *Avre v. Sexton* 149
7. Either party may relieve himself of the operation of the compensation act by contract or by notice. *Avre v. Sexton*..... 149
8. An employer who does not insure or furnish proof of ability to pay compensation is liable either at common law or under the compensation act, under part II, at the election of an injured employee. *Avre v. Sexton* 149
9. A non-insuring employer cannot take advantage of his own default, to the detriment of an employee. *Dietz Club v. Niehaus*. 154
10. Employment of caretaker of club-house *held* not casual. *Dietz Club v. Niehaus* 154
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12. The burden is on the owner of a vehicle causing injury to show that the driver was not his agent. *Finegold v. Union Outfitting Co.* 202
13. Findings in compensation case *held* conclusive. *Tragas v. Cudahy Packing Co.* 329
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15. An employee is bound to use safe methods. *Preble v. Union Stock Yards Co.* 383
16. Doctrine of "the last clear chance" *held* not applicable. *Preble v. Union Stock Yards Co.* 383
17. Assumption of risk is a bar to an action under the federal employers' liability act. *Preble v. Union Stock Yards Co.* 383
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9. A public improvement assessment is not "taxation" within a statute exempting cemetery property from taxation. *Greenwood Cemetery v. City of Wayne* 300

10. A statute exempting property from execution sale *held* not to apply to a sale for special improvement assessments. *Greenwood Cemetery v. City of Wayne* 300

11. Unsold cemetery lots are not exempt from special assessments for paving. *Greenwood Cemetery v. City of Wayne* 300

12. The right of a pedestrian to use of crosswalks is coequal to that of a driver of a motor-propelled vehicle. *Christoffersen v. Weir* 390

13. It is the duty of an automobile driver where pedestrians are

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numerous and traffic is congested to use a degree of care commensurate with reasonably anticipated danger. *Christoffersen v. Weir* 390

14. Warning devices on motor-propelled vehicles must be used opportunely to apprise pedestrians of their approach. *Christoffersen v. Weir* 390

15. Municipal authorities authorized to issue bonds for public improvements may deliver bonds to a contractor in payment of improvements. *Ledwith v. City of Lincoln* 425

16. Where a notice to contractors provided that a city reserved the option to pay for an improvement with bonds, the city should be enjoined from making a contract if such provision prevented competition. *Ledwith v. City of Lincoln* 425

17. A city of the second class must follow methods of action prescribed by statute. *Weilage v. City of Crete* 544

18. A city may act by resolution, if the action taken is merely declaratory of the will of the corporation and is a ministerial act. *Weilage v. City of Crete* 544

19. Assessments for local improvements cannot be attacked collaterally, in absence of jurisdictional defect in the proceedings. *Weilage v. City of Crete* 544

20. The words, "arising from defective streets," in the act providing for notice of claims for damages from defective streets, *held* not applicable to damages to abutting property. *Muffley v. Village of St. Edward* 572

Negligence. See DEATH. RAILROADS, 1, 2.

1. An employee drowned while swimming in a pond on the master's premises *held* a licensee. *Spence v. Polenski Bros., Schellak & Co.* 56

2. Petition in an action for negligently causing death of employee *held* insufficient. *Spence v. Polenski Bros., Schellak & Co...* 56

3. Plaintiff's negligence *held* to justify direction of verdict for defendant. *Haffke v. Missouri P. R. Corporation* 125

4. Where contributory negligence is shown, an instruction on comparative negligence is required. *Mares v. Chaloupka....* 199

5. Rule as to comparative negligence. *Baker v. Omaha & C. B. Street R. Co.* 246

6. The maintenance of an uninclosed elevator shaft built before passage of ordinance *held* not negligence. *Kerwin v. Thomp-*

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son, Belden & Co. 251

7. A person who knowingly exposes himself to danger cannot recover for resulting injury. *Kerwin v. Thompson, Belden & Co.* 251

8. The rule of *res ipsa loquitur held* inapplicable to an automobile propelled by gravity. *Buzzello v. Sramek* 262

9. The proximate cause of injury must be proved by a preponderance of evidence. *Katskee v. City of Omaha* 380

10. Degree of care required by a minor stated. *Collins v. Weise*.. 552

11. "Proximate cause" of injury defined. *Steenbock v. Omaha Country Club* 794

12. A condition causing an injury by the act of a third person *held* not the proximate cause. *Steenbock v. Omaha Country Club* 794

13. The placing of a flagpole, knocked against plaintiff by a third person, *held* not the proximate cause of an injury. *Steenbock v. Omaha Country Club* 794

14. Motion for directed verdict *held* proper. *Steenbock v. Omaha Country Club* 794

15. In an action for negligence against a street car company, *held* proper to submit the question of comparative negligence to the jury. *Traphagen v. Lincoln Traction Co.* 855

16. Whether failure of an automobile driver to look and listen before passing in front of a street car constituted negligence *held* a question for the jury. *Traphagen v. Lincoln Traction Co.* 855

New Trial.

1. The trial court may pass on motion for new trial at a subsequent term. *Petsch & McDonald v. Hines* 1

2. An assignment of error in a joint motion for a new trial not good as to all will not be considered. *Davey v. Aevermann*.. 62

3. To obtain a new trial for newly discovered evidence, the evidence must have been such that it could not have been obtained by reasonable diligence. *Buzzello v. Sramek* 262

4. Denial of motion for new trial for newly discovered evidence which is merely cumulative, *held* not error. *Christoffersen v. Weir* 390

Nuisance.

1. Depreciation of value of property by operation of a lawful business is not ground for injunction. *Brown v. Easterday*.. 729
2. Right of an individual to enjoin a public nuisance stated. *Brown v. Easterday* 729
3. A gasoline station in a residence district is not a nuisance *per se*. *Brown v. Easterday*. 729
4. Storage of gasoline in compliance with ordinance is not a nuisance *per se*. *Brown v. Easterday* 729

Parent and Child.

A court will make such order for the custody of a child as will be sufficient for its welfare. *West v. Ofe* 443

Parties.

1. A person with whom a contract is made for the benefit of another may sue on it without joining such other person. *Coe v. Nebraska Building & Investment Co.* 322
2. A court of equity may allow intervention after trial begun. *Engdahl v. Laverty* 672
3. A court of equity may permit the owner to intervene after decree of foreclosure, where fraudulently deprived of his title. *Engdahl v. Laverty* 672

Partnership.

Members of an association sued as partners may show under a general denial that they were a corporation, or any fact to dispute facts plaintiff must prove, without pleading the same specially. *Hughes Co. v. Farmers Union Produce Co.* 736

Physicians and Surgeons.

1. Whether infrequency of examinations of fracture constituted negligence *held* a question for the jury. *Doty v. Lutheran Hospital Ass'n* 467
2. Whether a surgeon was negligent for failure to caution a patient afflicted with smallpox as to contact with others *held* a question for the jury. *Doty v. Lutheran Hospital Ass'n*... 467
3. Whether failure of a surgeon to give instructions as to future care of a fracture constituted negligence *held* a question for the jury. *Doty v. Lutheran Hospital Ass'n* 467
4. Whether the leaving of an ajustment on a broken femur to the patient constituted negligence *held* a question for the jury.

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Doty v. Lutheran Hospital Ass'n 467

Pleading.

A party alleging a material fact cannot afterward deny it. *Finegold v. Union Outfitting Co.* 202

Poisons.

1. The sale of poisons other than medicine without being labeled as poisons is not unlawful. *Levin v. Muser* 515
2. The sale by a wholesale drug company of poisonous oil, correctly labeled, but not marked "poison," *held* not the proximate cause of death. *Levin v. Muser* 515

Principal and Agent.

1. Evidence *held* to establish authority of agent to indorse note. *Security State Bank v. Brown* 237
2. A principal who retains benefits derived from fraud of his agent after notice of the fraud is chargeable with the fraud. *Moller v. Mallory* 269
3. A principal cannot knowingly retain the benefits of a sale and escape obligations assumed by the agent in his name. *Dinsdale v. Sprague Tire & Rubber Co.* 290
4. Ostensible authority as agent is conferred where the principal allows third persons to act on an apparent agency. *Peterson v. Kuhn* 372
5. Measure of damages for merchandise converted by agent is the fair market value at time and place of conversion. *Weidman v. Barnes* 377
6. An agent cannot profit out of the subject of the agency at the expense of his principal. *Gesselman v. Phillips* 416

Property.

1. The presumption of the continuance of facts shown to exist may be applicable to the ownership or possession of property. *Finegold v. Union Outfitting Co.* 202
2. Possession of a vehicle causing injury warrants an inference of ownership, which is presumed to continue until a change is shown. *Finegold v. Union Outfitting Co.* 202

Prostitution.

1. Evidence *held* to sustain conviction for causing a female to become an inmate of a house of prostitution. *Yerkes v. State* 498
2. Particular acts of lewdness or prostitution need not be proved to establish the character of a house of prostitution. *Yerkes v. State* 498

Quieting Title.

1. In a suit to quiet title, equity will require the purchaser at an administrator's sale to reimburse heirs for moneys paid to a mortgagee by the administrator out of proceeds of the sale. *Mangold v. Grace* 216
2. Sale of right of possession of land dependent upon a contingency upheld. *Wilson v. City of Neligh* 266

Railroads. See CARRIERS.

1. A traveler on a highway approaching a railroad crossing must look and listen, and his failure to do so without reasonable excuse is negligence. *Haffke v. Missouri P. R. Corporation*.. 125
2. An automobile truck driver *held* guilty of negligence precluding recovery. *Haffke v. Missouri P. R. Corporation* 125
3. In a suit to enjoin construction of a passageway for live stock as inadequate, evidence based on general knowledge will not overcome evidence based on actual use. *Kropp v. Missouri P. R. Co.* 257

Rape.

1. Where the evidence of the prosecuting witness and the defendant is conflicting, the testimony of prosecutrix must be corroborated. *Larson v. State* 620
2. Opportunity alone to commit rape is not corroboration of evidence of complainant. *Larson v. State* 620
3. Evidence *held* insufficient. *Larson v. State* 620

Receivers.

Appointment of a receiver of a foreign corporation by a court of its domicile does not place its property in Nebraska *in custodia legis* until reduced to actual possession. *Miller v. American Cooperative Ass'n* 773

Replevin.

1. Defendant may recover value of use of property unlawfully

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withheld. *State Bank v. Murphy* 526

2. Plaintiff wrongfully seizing property is liable for interest on its adjudicated value from time of seizure, where the net usable value is not shown. *State Bank v. Murphy* 526

Robbery.

1. Evidence *held* sufficient to require submission to jury. *Gardiner v. State* 11
2. Instruction as to commission of a crime, where defendants are charged jointly, approved. *Gardiner v. State* 11

Sales.

1. Sale of a farm tractor induced by false representations may be rescinded. *Murray v. Bailey* 114
2. Delay in returning a farm tractor will not necessarily defeat rescission of sale induced by fraud. *Murray v. Bailey* 114
3. Return of personalty is not necessary to rescission where the seller refused to receive it. *Murray v. Bailey* 114
4. A sale by sample implies a warranty that the bulk corresponds to the sample in kind and quality. *Crawford v. Weeks Seed Co.* 196
5. Where a sale by sample was admitted, it was error to instruct that the fact that a sample was produced at the sale does not mean a warranty that the bulk equals the sample in kind and quality. *Crawford v. Weeks Seed Co.* 196
6. A consignor cannot ordinarily be charged with negligence in the resale of goods which the consignee unreasonably refuses to accept. *Goldmark & Sons v. Simon Bros. Co.* 614
7. Instructions defining "merchantability" approved. *Goldmark & Sons v. Simon Bros. Co.* 614
8. Sales of grain on the floor of a grain exchange are governed by rules of the exchange. *Holmquist Elevator Co. v. Omaha Elevator Co.* 655
9. Contract of rescission *held* to prevent vendors from recovering the amount claimed to be due for debts created before rescission. *Atlas Refining Corporation v. Vaughan* 753

Schools and School Districts.

1. The taxing power of a school district is statutory and must be exercised within the terms of the legislative grant. *Chi-*

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cago, B. & Q. R. Co. v. School District 459

2. A school district organized with a board of six trustees did not have power in 1920 to impose school taxes in excess of a 35-mill levy without an election. *Chicago, B. & Q. R. Co. v. School District* 459

Specific Performance.

1. A petition for specific performance of a contract for a 99-year lease is not demurrable because it contains a provision that the lease shall contain "usual conditions." *Mercer v. Payne & Carnaby Co.* 28
2. Equity may decree specific performance providing that, on vendee's default the premises be sold and judgment for deficiency be entered. *Bockelman v. Spires* 234
3. Want of mutuality as to the remedy of specific performance is not a defense, where vendors performed or tendered performance. *Perry v. Ritze* 286
4. Evidence *held* to sustain decree of specific performance. *Watkins v. Harrison* 439
5. Time *held* to be an essential element of contract for conveyance, and that purchaser was not required to accept a conveyance after time fixed. *Wilson v. Perry* 535
6. A conveyance by executors, with no showing as to whether the decedent was a married man or had left a widow, *held* insufficient to require acceptance as passing a merchantable title. *Wilson v. Perry* 535
7. Inadequacy of consideration is no defense to specific performance, unless so great as to furnish an irresistible inference of fraud. *Moore v. McKillip* 575
8. Inadequacy of consideration, suggesting fraud, is an important factor in a suit for specific performance. *Moore v. McKillip* .. 575
9. Specific performance denied, where purchaser signed contract under mistake, though vendor was not responsible therefor. *Moore v. McKillip* 575
10. Usual and ordinary covenants of a lease will be implied in specific performance. *Bennett v. Moon* 692
11. Equity will take cognizance of suits for specific performance of leases as well as deeds. *Bennett v. Moon* 692
12. Specific performance of a legal contract capable of being enforced without hardship should be granted as a matter of course. *Bennett v. Moon* 692

Statute of Frauds.

1. The defense of the statute is personal to the parties. *Happ v. Ducey* 429
2. Evidence *held* not to take an alleged oral agreement for future tenancy out of the statute. *Lindley v. Wright* 530

Statutes.

1. The word "shall" will be construed as "may" to sustain the constitutionality of a statute. *Reed v. Wellman* 166
2. In construing a statute, effect must be given to all its provisions. *Chicago, B. & Q. R. Co. v, School District* 459

Street Railways.

Right to use of street intersections by street cars and pedestrians is mutual. *Baker v. Omaha & C. B. Street R. Co.* ... 248

Subrogation.

A party paying the depositors of a failing state bank is not thereby subrogated to the rights of depositors against the depositors' guaranty fund. *State v. Holdrege State Bank* .. 814

Taxation.

1. Collection of void taxes may be enjoined. *Chicago, B. & Q. R. Co. v. School District* 459
2. In assessment of banks, the assessed value of real estate should be deducted from capital stock. *Citizens State Bank v. Board of Equalization* 704
3. A bank in its tax schedule should deduct only the assessed value of its banking house property. *Citizens State Bank v. Board of Equalization* 704
4. The remedy to recover taxes levied for an unauthorized purpose is against the political subdivision for whose benefit they were levied. *Lennemann v. Harlan County* 742

Trial. See APPEAL AND ERROR. CRIMINAL LAW.

1. Instructions as to relocating lost surveys construed together and approved. *Reed v. Wellman* 166
2. A jury cannot apportion damages among joint tort-feasors. *Forslund v. Swenson* 188
3. Instructing the jury as to correction of verdict *held* proper practice. *Forslund v. Swenson* 188

Trial—*Concluded.*

4. Statute relating to polling of jury *held* not to deprive the court of any former powers. *Forslund v. Swenson* 188
5. A correct instruction at variance with one misstating the law does not cure the error. *Schramm v. Casey* 194
6. It is error to submit to the jury the existence of a material fact pleaded by both parties. *Crawford v. Weeks Seed Co.* .. 196
7. An instruction that, if there is an obstruction of a street car track which interferes with a pedestrian's view, "he should use additional care," *held* not erroneous. *Baker v. Omaha & C. B. Street R. Co.* 246
8. Evidence as to whether defendant carried indemnity insurance is admissible. *Miller v. Central Taxi Co.* 306
9. The jury, and not the court, are triers of questions of fact. *Miller v Central Taxi Co.* 306
10. Where a special finding is inconsistent with a general verdict, it is the duty of the court to render judgment on the special finding. *Walker v. McCabe* 398
11. When case should be submitted to jury stated. *Glarizio v. Davis* 679
12. It is not error to refuse to separate law issues from equity issues and try the former to a jury and the latter to the court. *Rath v. Wilgus* 810
13. Whether instructions produced misconception in minds of jury is ascertained by considering all the instructions and the tendencies of the proof to which they applied. *Parsons v. Chicago & N. W. R. Co.* 836

Trover.

Failure to instruct as to measure of damages *held* error. *Weidman v. Barnes* 377

Trusts.

1. A person gratuitously or officiously assuming to act as agent or trustee is bound by the implied terms of his confidential relation. *Simpson v. Harley* 454
2. The burden is on one claiming land under a constructive trust to establish the trust by clear and satisfactory evidence. *Bruce v. Cadman* 500
3. Evidence *held* not sufficient to establish a constructive trust. *Bruce v. Cadman* 500

Vendor and Purchaser.

1. Evidence *held* not to establish contract of sale of land. *Olmstead v. Caldwell* 18
2. A purchaser is bound by terms publicly announced at opening of an auction sale, though not present when they were made. *Bockelman v. Spires* 234
3. Where the purchaser refuses to exercise the right of election of methods of settlement provided in a contract, the right shifts to the seller. *Bockelman v. Spires* 234
4. Where a city files a disclaimer, a decree quieting title against the city should contain no limitation or qualification. *Wilson v. City of Neligh* 266
5. Where land is conveyed by a lessor, a grain buyer who knowingly receives from a tenant the landlord's share of crop rent must at his peril pay the proceeds to the person entitled thereto. *National Bank of Commerce v. Lefferdink* 275
6. Insertion of "trustee" after the name of a patentee does not prevent him from transferring the land to another, where a trust is not disclosed. *Perry v. Ritze* 286
7. Variances in spelling of names may be cured by affidavit. *Perry v. Ritze* 286
8. A vendee who makes it impossible to place the vendor *in statu quo* cannot claim rescission. *Perry v. Meyer* 347
9. A party giving an option for the purchase of land parts with the right, for a limited time, to sell to any one other than the party to whom the option is given. *Gesselman v. Phillips* 416
10. A vendee is not entitled to rescind unless he places the vendor *in statu quo*. *Watkins v. Harrison* 439
11. Where a vendee, before acquiring title, contracts to resell, his failure to disclose the terms of his purchase is not a fraud on his vendee. *Tierney v. Dietsch* 462
12. A vendee may waive furnishing of abstracts at stipulated time. *Tierney v. Dietsch* 462
13. A vendee may enter into a valid agreement to sell land before acquiring title under an enforceable contract to purchase. *Tierney v. Dietsch* 462
14. A contract describing a portion of a lot will be reformed, when entered into by the purchaser under the mistaken belief, induced by fraud, that it conveyed the entire lot. *Hugo v. Erickson* 602
15. Possession of land is notice of the possessor's interests. *Engdahl v. Laverty* 672

Vendor and Purchaser—*Concluded.*

16. Possession of land by a tenant is not only notice of his rights as lessee, but of other interests of which inquiry would elicit knowledge. *Engdahl v. Laverty* 672
17. Vendor *held* not liable to purchaser acquiring title from third party. *Govier v. Wilson* 776
18. The vendee may recover payments when vendor is unable to perform. *Durland Trust Co. v. Augustyn* 800
19. A vendor conspiring to hinder the vendee in performance of a contract is not entitled to forfeiture of the payments made, but the vendee may rescind. *Durland Trust Co. v. Augustyn* 800
20. A purchaser is justified in rejecting an abstract showing an unreleased mortgage, though barred on its face. *Rath v. Wilgus* 810
21. An abstract showing release of a mortgage in the numerical index, but not of record, does not show good title of record. *Rath v. Wilgus* 810
22. Where an abstract showing a good title was not furnished in time, the vendees *held* entitled to recover back the amount paid on a land contract. *Rath v. Wilgus* 810

Waters.

1. A purchaser of land burdened with a visible easement of an irrigation canal may not restrain its use. *De Conly v. Winter Creek Canal Co.* 102
2. The owner of a mill-dam wilfully diverting water of a natural stream onto the land of another is liable for resulting damages. *McKee v. Nebraska Gas & Electric Co.* 137
3. A riparian owner wilfully diverting water of a natural stream is liable for resulting damages, irrespective of negligence or malice. *McKee v. Nebraska Gas & Electric Co.* 137
4. Good faith is no defense to an action for damages for wrongful diversion of waters. *McKee v. Nebraska Gas & Electric Co.* 137
5. Diversion of water for irrigation through lands of others without compliance with the statute may be enjoined, though permission has been granted by the board of public works. *Harris v. Steele* 213

Wills.

1. In construing a will, intent of testator governs. *In re Estate of Vandeveer* 651

Wills—*Concluded.*

2. In construing a will, the testator's intention, as ascertained from all the provisions of the will, governs. *Heyer v. Heyer* 784
3. Will *held* to convey a life estate, with power of sale under a certain contingency, and that, the contingency not arising, the power was extinguished. *Heyer v. Heyer* 784

Witnesses.

1. Witness *held* incompetent to testify to value of growing wheat. *Beck v. Spring* 160
2. A witness is incompetent to testify as to value of land with wheat growing thereon, where his only source of information is from inquiries made in the neighborhood. *Beck v. Spring*.. 160
3. Where the legitimacy of a child born during wedlock is an issue, neither declaration nor testimony of either spouse is competent on the question of access; but this rule does not obtain in actions for adultery, incest, divorce, or like cases. *Schmidt v. State* 504
4. An attorney employed to draw a note, but not consulted as to its legal effect, may testify as to its terms and conditions. *Novak v. Reeson* 229