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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA

JANUARY AND SEPTEMBER TERMS, 1922,
AND JANUARY TERM, 1923.

VOLUME CIX

HENRY P. STODDART,
OFFICIAL REPORTER

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

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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Ahmanson, Hayden W.
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Allsman, John F.
Anderson, Ralph M.
Atkins, Auburn H.
Beber, Sam
Beck, Clarence S.
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REVISED STATUTES

Sec. 5219 753

STATUTES AT LARGE

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1922

HENRY FURRER ET AL., PLAINTIFFS, V. NEBRASKA BUILDING & INVESTMENT COMPANY ET AL., DEFENDANTS.
FRANK E. SCHAAF V. STATE OF NEBRASKA.

FILED JULY 19, 1922. No. 21975.

1. **Contempt:** PROCEEDINGS CRIMINAL IN NATURE. "Proceedings for contempt of court are, in this state, in their nature criminal, and governed by the strict rules applicable to prosecutions by indictment; hence, presumptions and intendments will not in such cases be indulged in order to sustain judgment of conviction." *Beckett v. State*, 49 Neb. 210.

2. ———: ———: ADVICE OF COUNSEL. Advice of counsel will not serve generally as a shield to protect from punishment one who has violated the order of a court, but where the order said to have been violated does not in express terms forbid the action taken, and where the advice of counsel was honestly sought and in good faith given, and an examination of the record fails to disclose any substantial or wilful disobedience of the court's order, a conviction for contempt will not be sustained.

ERROR to the district court for Lancaster county: WILLIAM M. MORNING, JUDGE. *Reversed and dismissed.*

Burkett, Wilson, Brown & Wilson, for plaintiff in error.

Clarence A. Davis, Attorney General, Boehmer & Boehmer, Good & Good and *Fred C. Foster, contra.*

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

MORRISSEY, C. J.

Frank E. Schaaf, defendant, prosecutes error from a conviction of contempt of court. At the suit of certain stockholders a receiver was appointed for the two corpora-

tions, the Nebraska Building & Investment Company and the Nebraska Hotel Company, and it was ordered that defendant corporations and their officers should immediately upon the qualification of the receiver turn over and surrender to him "all of the assets and business, documents, securities, contracts and papers of all kinds belonging to the several corporations, so that the receiver may without hindrance or obstruction go into the complete possession of the same; that each and all of the defendants are enjoined and restrained from in any way interfering with the receiver in taking possession of the property and assets of the corporations, and from interfering in any way with the control and management of the matters over which his receivership extends by the terms of this order."

Defendant was president of each corporation and a member of its board of directors. It is charged that, notwithstanding this order, defendant, together with the other officers of each corporation, met together and, assuming to act as a board of directors for the Nebraska Hotel Company, authorized its president to vote on behalf of the company any stock owned or held by it in any other corporation in any meeting of the stockholders thereof for the election of directors or for the transaction of any other business, and adopted a resolution whereby the corporation admitted its inability to pay its debts and declared its willingness to be adjudged a bankrupt because of such inability, and that they adopted a similar resolution with reference to the Nebraska Building & Investment Company. The information alleges that at the time these resolutions were adopted defendant and the other persons assuming to act as the board of directors of the several corporations "were not in charge of, and did not have in their care and custody any of the assets or property belonging to said corporation, nor were they in charge or control or management of any of the business affairs thereof;" and alleges that at that time all of the assets, property and business affairs of the corpora-

tions had been delivered to and were under the control of the receiver theretofore appointed by the court. It is next alleged that thereafter certain persons claiming to be creditors of the companies, with these resolutions as a basis, made application to the United States bankruptcy court to have the corporations adjudged bankrupts. The information charges that the effect of the passage of these resolutions and the actions taken upon them was to hinder and delay the receiver in the management of the affairs of the corporations; that such conduct on the part of the several defendants was in disobedience of the order of the court and was a wilful attempt to interrupt the administration of justice and impede the proceedings of the court.

Defendants demurred to the information; the demurrer was overruled; whereupon an answer was filed, which admitted the adoption of the resolutions set out in the information and that petitions in bankruptcy were filed in the United States court for the district of Nebraska against the Nebraska Building & Investment Company and the Nebraska Hotel Company; explicitly denied that in passing the resolutions or in taking any other step any defendant had any intention of violating the order of the court; and alleged that each defendant acted in good faith and did what he believed he had a right to do and under the belief that the court by its order did not restrain, nor intend to restrain, them from passing the resolutions: "that before passing the said resolutions they were advised by their counsel, who had examined the decree of the court referred to, and said counsel advised them and each of them that they had a perfect right to pass said resolutions if they desired to do so, and that the passing of such resolutions would in no way be a violation of the order of the court."

Trial was had to the court, resulting in a judgment against each defendant. As to defendant Schaaf the court imposed a fine of $1,000, taxed him with one-third of the costs of the prosecution, and committed him to im-

prisonment in the county jail for 30 days.

Numerous errors are assigned, but because of the view we take of the record a review of the several assignments will not be made. It will be noted that the order which defendant is charged with violating does not on its face enjoin defendants from functioning as officers of the respective corporations, nor forbid their having recourse to the federal court. They are enjoined from interfering with the receiver in taking posession of the property or from interfering with his control and management of the matters over which his receivership extended. Had the court intended to restrain defendants from meeting as a board of directors of either corporation or from having recourse to any other tribunal, the intention might have been expressed in a few words; but such intention does not appear on the face of the order. Defendant expressly denied any intention to violate or evade the order of the court. And, indeed, the receiver's possession of the property and his control and management of the business were not disturbed.

"Proceedings for contempt of court are, in this state, in their nature criminal, and governed by the strict rules applicable to prosecutions by indictment; hence, presumptions and intendments will not in such cases be indulged in order to sustain judgment of conviction." *Beckett v. State,* 49 Neb. 210. Applying this rule to the instant case, we find an order which does not on its face forbid the commission of the acts charged. Out of an abundance of caution defendant and his associates submitted a copy of the court's order to men learned in the law and inquired if they might proceed to act as it has been shown they did subsequently act without violating the order of the court. This conduct does not indicate a wilful disregard of the court's order, but rather betokens a desire to obey the court and respect its decrees. Having been assured by their attorneys that the order did not, either in express or implied terms, forbid their meeting as a board of directors and adopting resolutions which might become the

foundation for a proceeding in the federal courts, defendants took the action on which this prosecution rests.

Advice of counsel will not serve generally as a shield to protect from punishment one who has violated the order of a court, but where the order said to have been violated does not in express terms forbid the action taken, and where the advice of counsel was honestly sought and in good faith given, and an examination of the record fails to disclose any substantial or wilful disobedience of the court's order, a conviction for contempt will not be sustained. See 13 C. J. 43, sec. 57, and cases cited in note.

The judgment of the district court, in so far as it affects defendant Schaaf, is reversed and the proceeding dismissed.

REVERSED AND DISMISSED.

JAMES B. ELLIOTT, APPELLEE, V. NELLIE M. QUINN ET AL., APPELLANTS.

FILED JULY 19, 1922. No. 22069.

1. **Charities:** DEVISE: VALIDITY. A devise to promote the public good is valid and enforceable.
2. **Wills:** DEVISE: VALIDITY. Unless the object of a devise is contrary to the settled principles of law, or to a statute, it must be sustained.
3. ———: CONSTRUCTION. Under familiar rules of construction, the court is required to consider all of the relevant circumstances which surround the testator at the time his will was made and to give effect to his meaning.
4. **Charities:** GIFTS: EQUITY. A gift for charitable uses will not be permitted to fail, even though a trustee be not named in the will, because a court of equity will name a trustee to execute the trust.
5. ———: ADMINISTRATION. "In the exercise of equity jurisdiction, the district courts may supervise the administration of charitable trusts." *Matteson v. Creighton University*, 105 Neb. 219.

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

Ambrose C. Epperson and *John E. Ray,* for appellants.

C. L. Stewart, contra.

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

DEAN, J.

John W. McMillan died testate, in Clay county, in September, 1892. By his will James B. Elliott was appointed a trustee to hold an 80-acre tract of land for the use of the testator's sister, Sarah E. McMillan, to whom was given the income from the land during her lifetime, "except such amount as shall be required to keep the place in repair and pay the taxes thereon." The testator by his will then provided that, at the death of his sister, "the property—real estate—shall become a part of the school fund of Clay county to be invested in good securities the interest whereof shall alone be used for school purposes." The testator's sister died February 11, 1920.

The court found that the will conveyed the land "to the school fund of Clay county, Nebraska; and that it was his intention that said property should be sold and the proceeds thereof invested in good securities, the income therefrom to be used for the benefit of said fund." Certain defendants who are collateral relatives demurred to plaintiff's petition. The demurrer was overruled, and defendants have prosecuted an appeal to this court.

Defendants argue that there is no fund in which the proceeds of the sale of the land may be placed, and that the devise is vague, uncertain and impossible of performance. It is further argued that the paragraph of the will in question "lacks a fixed beneficiary and the use is indefinite."

We do not think defendants' argument is sound. The object of the devise is charitable, and the property devised is certain and definite and the beneficiary is certain and definite as to the class. Sections 6906, 6930, 6931, Rev. St. 1913, upon which plaintiff relies, and which have to do with school funds, were in force when the will was

written. Whether there is such a fund, however, is not of controlling importance.

The testator was evidently interested in the welfare of the schools of his home county, where he had lived for many years, and he was desirous of promoting their interests. Neither ambiguity nor uncertainty appear and the trust created by the will cannot be avoided on those grounds. The purpose of the testator is clear. He had a right to bestow his own property where and as he chose, and it is equally clear that he was under no legal obligation to devise the land to his collateral kindred. It is well settled that a devise to promote the public good is valid. Unless, therefore, the object of a devise is contrary to the settled principles of law, or to a statute, it must be sustained and effect must be given to the provisions of the will. *In re Estate of Nilson,* 81 Neb. 809; *Chapman v. Newell,* 146 Ia. 415.

In the *Chapman* case the same question was under consideration, and it was held that a bequest to the permanent school fund of the county was not void for uncertainty, even though there was no such fund specially designated by the statute, or because the gift was not devised to a person, corporation, individual or thing capable of accepting it, under the well-established rule that a charitable gift will not be permitted to fail because of any mistake or ambiguity in describing the intended beneficiaries or expressing its purpose, if from the language of the bequest, when construed in the light of all the facts, the intent of the donor is reasonably apparent. Nor will a gift for charitable uses be permitted to fail, even though a trustee be not named, because a court of equity will name a trustee to execute the trust. In that case it is further pointed out that the gift would not fail in this class of cases, even though the testator devoted his estate to the reduction of the public tax burden.

"A bequest to aid free public schools is valid, being as definite as to beneficiaries as the rules governing the subject require; and the validity of such a bounty is not af-

fected by the fact that the state has provided for the maintenance of such schools for all children of school age within the territory intended to be benefited." 6 Cyc. 943. "The validity of a gift for educational purposes is not affected by the fact that the state has provided for the maintenance of schools for all children of school age within the territory intended to be benefited." 11 C. J. 316, sec. 20. Also, 3 Pomeroy, Equity Jurisprudence (3d ed.) sec. 1018; *Gould v. Board of Home Missions,* 102 Neb. 526.

"A bequest in trust to create a fund to be used to establish and maintain a school 'for the purpose of educating boys who reside in the state of Illinois between the ages of 12 to 18 years, and who are unable to educate themselves,' is not void for want of a class of boys to which the charity may apply, because of the existence in the state of a system of public free schools open to all boys of such age without charge, nor because of uncertainty as to the individual beneficiaries; such uncertainty being in fact an essential element of a valid charity." *Tincher v. Arnold,* 147 Fed. 665. See, also, *Vidal v. Girard's Exrs.,* 2 How. (U. S.) 127, 182; *Russell v. Allen,* 107 U. S. 163; *Wilson v. First Nat. Bank,* 164 Ia. 402; *Matteson v. Creighton University,* 105 Neb. 219.

There is no room for counsel's suggestion that it will be necessary for the court to put its own belief or wish into the will in order to make of it an enforceable instrument. Under familiar rules of construction, the court is required to consider all of the relevant circumstances which surrounded the testator at the time the will was made and to give effect to his meaning. The testator wisely couched the devise in broad terms, in that it merely provides for a fund which "shall become a part of the school fund of Clay county to be invested in good securities the interest whereof shall alone be used for school purposes."

Skinner v. Harrison Township, 116 Ind. 139, is a case where the testator devised a fund to "Harrison township," with a provision that the interest from the fund should

be used for the support of its common schools. At that time there were 22 townships of that name in Indiana, and each of them was capable of holding property for appropriate public purposes. Without extrinsic evidence the intended beneficiary could not be identified. But the court decreed that the devise was intended for the township named Harrison in which the testator resided. It was held that the will was neither ambiguous nor uncertain.

The conclusion is that the trust is valid and enforceable. The judgment of the district court is therefore affirmed, with directions that such orders be made in the premises as may be necessary to give effect to the substantial intent of the testator.

The judgment of the district court is

AFFIRMED.

WILLIAM MITCHELL, APPELLEE, V. WILLIAM L. HAWKINS ET AL., APPELLANTS.

FILED JULY 19, 1922. No. 21992.

Boundaries. Original monuments established during a government survey, when properly identified, control courses and distances.

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

Burton & Reddish, for appellants.

Mitchell & Gantz, contra.

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

DAY, J.

This is a suit to quiet in plaintiff his title to the east one-half of the southwest one-fourth of section 30 and the east one-half of the northwest one-fourth and the northeast one-fourth of section 31, township 26 north, range 48 west of the sixth P. M., Box Butte county, Nebraska.

Plaintiff owns the land described and has title thereto through mesne conveyances from the patentees. The plea of defendants is that they pre-empted and now own and occupy a tier of lots in and along the west side of the sections described and that plaintiff is asserting title thereto. The sections are practically three-fourths of a mile wide, east and west, and there is therefore a shortage in area of one-fourth the usual width. The title of plaintiff covers land extending west to the section line. The title of defendants purports to cover a tier of lots along the west side of the sections. In other words, the titles of both parties presuppose sections a mile wide, while in fact the width is only three-fourths of a mile. Plaintiff's patents were issued long before the patent of defendants, and he contends that his land, according to the original government surveys, as shown by proved government monuments at section corners and at quarter-section corners, extends to the western boundaries of the sections, and that therefore there was no land therein for defendants to acquire by pre-emption. The issues between the parties were raised by formal pleas, each side praying for affirmative relief. Testimony was taken at great length, and the findings of the trial court were in favor of plaintiff. The decree contains a plat minutely describing the boundaries of plaintiff's land according to the original government survey, and quieting his title and decreeing that defendants have no land in the sections described. Defendants have appealed.

The question presented by the appeal is one of fact only. A careful review of the record shows a clear preponderance of the evidence in favor of plaintiff. The evidence shows that witnesses for plaintiff identified government section corners and government quarter-section corners on his boundary lines with such particularity and accuracy as to convince us that his patents included the land as far west as the west line of the sections, and that consequently there was no land left in them for defendants to acquire by pre-emption when they procured their patent

from the government. The judgment of the district court is therefore

AFFIRMED.

GEORGE B. WILLIAMS, ADMINISTRATOR, APPELLEE, V. WALKER D. HINES, APPELLANT.

FILED JULY 19, 1922. No. 21991.

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, followed.
2. **Death:** PROXIMATE CAUSE. Where an employee suffered an injury of a broken collar bone caused by the negligence of his employer, and eight months thereafter died from bronchial pneumonia, *held*, in an action for damages for wrongfully causing the death, that the evidence fails to show that the injury sustained was the proximate cause of the death.

APPEAL from the district court for Phelps county: HARRY S. DUNGAN, JUDGE. *Reversed and dismissed.*

E. E. Whitted, P. E. Boslaugh and *J. L. Rice*, for appellant.

W. D. Oldham and *S. A. Dravo, contra.*

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

DAY, J.

This action was brought by the administrator of the estate of Charlie Morton Veal against the director general of railroads to recover damages sustained by the widow of said Veal, whose death it is alleged was caused by the negligent act of the defendant. The trial resulted in a verdict and judgment for the plaintiff for $7,000. Defendant appeals.

It appears that, while Mr. Veal was employed as a brakeman upon one of the interstate passenger trains of the

Chicago, Burlington & Quincy Railroad Company, he sustained a fracture of his collar bone and several minor bruises upon his head and body by the derailment of the train, the accident occurring on February 19, 1918, during the period the railroads were being operated under federal control. He died October 13, 1918, of what was diagnosed at the time as bronchial pneumonia.

It was the plaintiff's theory that the derailment of the train was caused by the negligence of the defendant, and that the proximate cause of deceased's death was the injuries he received by the derailment of the train. The answer denied the negligence, and specially denied that the death of deceased was in any wise attributable to the injuries he received in the accident.

A number of errors are assigned by the defendant, and argued in the brief, for a reversal of the judgment, but in the view we have taken of the evidence it seems unnecessary to consider but one of them. In passing, we may observe, however, that we think it extremely doubtful whether the negligence charged in the petition was proved to be the cause of the derailment of the train. Assuming, however, that the defendant's negligence has been established, and that in consequence thereof plaintiff's decedent suffered a fracture of his collar bone, we come to a consideration of the question whether the negligence of the defendant was the proximate cause of deceased's death.

It is fundamental that a person is liable only for the proximate results of his negligent act. The rule of law is not difficult of statement, but in the affairs of life the relation of causes to their effects differ so widely that oft-times great difficulty arises in the application of the rule to specific cases. The term "proximate cause" has been defined by this court in *Spratlen v. Ish,* 100 Neb. 844, as follows: "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." In that case the court quoted from *Chicago,*

St. P., M. & O. R. Co., v. Elliott, 55 Fed. 949, as follows: "An injury that 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."

With this definition in mind, we proceed to examine the facts as disclosed by the record. As before stated, by the derailment of the train the plaintiff's decedent suffered a fracture of his left clavicle. For this injury he was taken to the hospital and treated in the usual and approved method for the treatment of such an injury. The treatment required him to lie on his back, with his left arm at a right angle to his body, and bound in a rigid position to prevent movement. The injury responded to the treatment, and no unusual complications developed. His vital organs were normal; no fever developed; and the action of his lungs and heart were regular. On April 5 he was discharged from the hospital, but was required to keep his arm bandaged and report to the physicians from time to time. After leaving the hospital and during the period of his convalescence, he visited his friends and relatives in Kansas and Colorado. On August 31 he was examined by the company's physician, and pronounced fit to resume his duties as a brakeman. On September 2 he resumed his former employment, and continued to work every day, except Sundays and September 18 and 19, until October 4, when he was suddenly taken ill while on duty, and died October 13, of what was diagnosed at the time as bronchial pneumonia. During the period he worked he performed his duties as a brakeman as usual, the only difference observed being that he seemed to favor his left arm in handling baggage and milk cans, it being a part of his work to assist in such matters. On behalf of the plaintiff it was shown that during the time he was unable to work, and also after he resumed his employment, his appetite

was not as good as before the accident; he had lost considerable flesh, and was not as lively as before.

The great weight of the testimony is to the effect that there was no connection whatever in point of causation between the broken collar bone and the pneumonia which caused the death of the deceased some eight months after the accident. All of the physicians agree that the kind of pneumonia of which deceased died was a germ disease, and they also agree that it was not traumatic pneumonia, which sometimes develops within a few hours from the effects of a blow or injury. The testimony of the expert witnesses on behalf of the plaintiff upon the question of the connection between the broken collar bone and the pneumonia, viewed in the light of the direct and cross-examination, is so vague and conjectural as to amount to but little more than a mere guess. It fails to show that degree of certainty required in judicial proceedings that the pneumonia was the proximate result of the injury sustained by the deceased. An injury, in order to be the proximate cause, must be the thing that directly causes the subsequent disease, and not merely a condition which enables it to independently operate. Cases are readily to be found, some of which are cited by the plaintiff's counsel, where a physical injury has been held to be the proximate cause of a disease which later resulted in death; but an examination of the facts in the cited cases readily distinguishes them from the case at bar.

The principle here involved is discussed in *Long v. Omaha & C. B. Street R. Co.*, 108 Neb. 342, and *Cincinnati, N. O. & T. R. Co. v. Perkins' Admr.*, 177 Ky. 88.

As the evidence fails to show that the death was due to the injury, the judgment is reversed and the cause dismissed.

REVERSED AND DISMISSED.

JEREMIAH L. HEILMAN V. STATE OF NEBRASKA.

FILED JULY 19, 1922. No. 22137.

1. **Embezzlement:** DEFENSES: RESTORATION OF FUND. In a prosecution against a county treasurer for the embezzlement of county funds, proof that money feloniously converted by him was returned to the county treasury after the shortage had been discovered and exposed is no defense under the Nebraska statute (Rev. St. 1913, sec. 8654).

2. ———: PROOF. In a prosecution against a county treasurer for the embezzlement of county funds between two dates during his incumbency, the amount embezzled may be determined by adding feloious conversions at different times in different amounts between the specific dates charged.

3. **Criminal Law:** EVIDENCE: PUBLIC RECORDS. Public records kept by a county treasurer are admissible as evidence of the officer's acts when in issue.

4. **Witnesses:** EVIDENCE: EXPERT ACCOUNTANT. An expert accountant who has examined books of a public officer to ascertain an issuable fact and compiled a statement therefrom may refresh his memory from the compilation and testify to the result of his examination, where the books used by him in making his compilation are in court and available to both parties.

5. **Criminal Law:** HARMLESS ERROR. Immaterial and harmless errors in a criminal prosecution, where the evidence of defendant's guilt is conclusively shown beyond a reasonable doubt, are not grounds for reversing a conviction.

ERROR to the district court for Thomas county: BAYARD H. PAINE, JUDGE. *Affirmed.*

Lincoln Frost, N. T. Gadd, J. H. Evans and *J. W. Kinsinger,* for plaintiff in error.

Clarence A. Davis, Attorney General, and *W. A. Prince, contra.*

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

DAY, J.

In the district court for Thomas county Jeremiah L. Heilman, defendant, was convicted of embezzling, as

county treasurer, $9,000 of county funds. For that offense he was sentenced to pay a fine in double the amount of the embezzlement and to serve in the penitentiary a term not less than 1 year nor more than 21 years—statutory penalties. Rev. St. 1913, sec. 8654. As plaintiff in error defendant has brought the record of his conviction here for review.

The principal grounds urged for a reversal are insufficiency of the evidence to sustain the verdict of guilty to the extent of $9,000 and errors in rulings on evidence. The evidence is conclusive that defendant converted to his own use at various times county funds in different amounts. He used some of the county money in his hands as if it belonged to himself individually. Proof of these facts is not only undisputed, but items temporarily converted by defendant to his own use, aggregating $5,800, are conceded by him in his own testimony. Notwithstanding conclusive evidence of embezzlement to the extent of $5,800, defendant insists that he restored this money to the treasury and that the jury would not have found him guilty except for inadmissible evidence of an expert accountant who was erroneously permitted to testify, without a proper foundation, to a shortage of $11,372.59. In making allowances for errors and doubtful items in the computation of the expert, the jury seem to have deducted $2,372.59 from his estimated net shortage and found the amount of the embezzlement to be $9,000.

Under the statute defining embezzlement by a public officer, the return of the $5,800 feloniously converted by defendant to his own use is no defense. Rev. St. 1913, sec. 8654. The permanent return of the entire sum is doubtful, but in any event the felony was complete to that extent before there was any attempt on the part of defendant to put back what had been unlawfully taken. The restoration was undertaken after an examiner from the department of trade and commerce had discovered and exposed a shortage. There is no presumption that the jury would not have found defendant guilty to the ex-

tent of $5,800 on proved and conceded facts, except for proofs of a greater shortage.

To sustain a conviction the state was not required to prove the embezzlement of the exact amount charged. The amount embezzled may be determined by adding felonious conversions at different times in different amounts between specific dates given in the information.

The evidence of the expert who testified to the net shortage is assailed in a series of technical objections and rules of law which may be summarized thus: Book entries examined by the expert were inadmissible because not shown to have been made by defendant or with his assent; computations made from inadmissible books are not admissible; production of books is necessary to the introduction of a summary thereof; a summary is admissible only when the books used in making it are too complicated or voluminous for submission to the jury; an expert accountant should not be permitted to state conclusions not solely the result of computations based on the books or records used in making them.

An understanding of the situation that confronted the trial court in ruling on evidence is necessary to a consideration of the objections enumerated. It was the duty of defendant to keep an accurate record and account of his doings as county treasurer during his incumbency. For that period he was the custodian of the public records belonging to the county treasurer's office. He did not at all times keep proper records or make proper entries of his public acts. On the contrary, there were false records to some extent at least. Some of the books were injured or destroyed by fire in the courthouse while there was a shortage in his accounts. The transactions involved the collection of taxes and the disbursements of public funds for a considerable period of time. In addition to complicated transactions and voluminous accounts, the work of estimating the amount of the embezzlements was made more difficult by defective and inaccurate accounts and books. The fire made matters worse. In this situation

the expert was compelled to resort to what the public records disclosed, using the best competent sources of information for that purpose. He pursued that course, and his testimony, for what it was worth, was properly received in evidence for the consideration of the jury. Public records kept by a county treasurer are admissible as evidence of his official acts, when in issue.

An expert accountant who has examined the books of a public officer to ascertain an issuable fact and compiled a statement may refresh his memory from the compilation and testify to the result. The books, records, vouchers and documents used by the expert in making his computation were in court available to defendant, and the evidence was not objectionable on that ground. In admitting the testimony and conclusion of the expert, the rules of evidence were substantially followed. In this view of the record, the guilt of defendant to the extent of $9,000 is shown beyond a reasonable doubt, and such minor errors as may incidentally have crept into a long and complicated record in no wise prejudiced defendant.

A material error has not been pointed out or found.

AFFIRMED.

CHARLES H. HENTHORN, APPELLEE, V. ROYAL HIGHLANDERS ET AL., APPELLANTS.

FILED JULY 19, 1922. No. 22060.

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

Hainer, Craft & Lane, Miles M. Dawson and *O. B. Clark,* for appellants.

Thomas, Vail & Stoner, contra.

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

FLANSBURG, J.

This was an action brought by plaintiff, Henthorn,

against the Royal Highlanders, a fraternal beneficiary association, to recover an instalment upon a "pioneer certificate," under a provision providing for the payment of endowments. The trial court entered judgment in favor of the plaintiff. The defendant and interveners appeal.

The questions are the same as have been covered in the case of *Kennedy v. Royal Highlanders*, p. 24, *post*, and the decision there is controlling in this case.

The judgment of the lower court is therefore

AFFIRMED.

FARMERS INVESTMENT COMPANY, APPELLEE, V. ALMEDA Z. O'BRIEN, APPELLANT.

FILED JULY 19, 1922. No. 22092.

1. **Vendor and Purchaser:** DISCHARGE OF INCUMBRANCE: WAIVER. The right of a purchaser of land under a written contract to have an existing mortgage or other incumbrance discharged before accepting title may be waived by parol.

2. **Homestead:** CONVEYANCE. A contract for the sale of homestead property signed by both husband and wife, though not acknowledged, when made at the same time with a warranty deed to the property, which deed they both execute, and duly acknowledge, and which is delivered in escrow, *held* to be a valid contract.

3. **Vendor and Purchaser:** CONTRACT: WAIVER OF CONDITIONS. When a contract provides for the furnishing of an abstract by the vendors, and the vendee, after the execution of the contract, consents to procure the abstract and have it brought down to date, and from the purchase moneys in its hands, due on the contract, to pay off certain charges against the land, *held*, that there is a waiver of the strict terms of the contract which require the vendor to do those things.

4. ———: ———: BREACH. And where the vendee has so undertaken to have the abstract brought down to date, and an attachment is levied against the land on a claim for $125, the vendor in the meantime having moved out of the state, *held*, that the vendee cannot declare the vendor guilty of a breach of contract in not having the lien satisfied and the abstract extended, until the vendor has been informed of the attachment and has been given reasonable opportunity to satisfy it.

APPEAL from the district court for Harlan county: LEWIS H. BLACKLEDGE, JUDGE. *Reversed.*

Bernard McNeny and *J. G. Thompson,* for appellant.

Burkett, Wilson, Brown & Wilson, Clark Jeary, Clarence G. Miles and *O. E. Shelburn, contra.*

Heard before MORRISSEY, C. J. ROSE, DEAN, ALDRICH and FLANSBURG, JJ.

FLANSBURG, J.

This was an action by the plaintiff, Farmers Investment Company, to recover from the defendant, Almeda Z. O'Brien, $1,000 and other moneys paid under a contract whereby the plaintiff company had agreed to purchase from defendant a certain farm. The trial court found in favor of the plaintiff and entered a judgment for a return to plaintiff of the moneys so paid by it. From that judgment, the defendant appeals.

The contract provided that plaintiff should pay $13,250 for the farm; $1,000 of this consideration was to be paid immediately, and defendant was to furnish to the plaintiff an abstract of title and deliver warranty deed on or before January 1, 1919; plaintiff was to assume a mortgage of $4,000 upon the land and was to pay the remainder of the purchase money to the defendant on March 1, 1919.

The land in controversy was the homestead of the defendant. The contract was in writing and signed by the defendant and her husband, but not acknowledged. However, at the same time with the execution of the contract, and as a part of the same transaction, a warranty deed covering the property was duly executed and acknowledged by both the defendant and her husband and the deed, together with the written contract, placed in escrow in a bank.

The principal ground upon which the plaintiff bases its claim for recovery is that this contract, not having been acknowledged by both husband and wife, was utterly void, and that the payments made by the plaintiff to the de-

fendant under it could be recovered as upon an action for money had and received.

It is true that this court has many times held that a contract for the sale of a homestead, not duly executed and acknowledged by both husband and wife, is utterly void, but those cases are where there was one instrument only evidencing the agreement, and that instrument was either not signed, or not signed and acknowledged, by both parties. In this case an instrument, in effect a part of the contract between the parties, and that part a warranty deed, which has to do with the conveyance of the property, was duly executed and acknowledged by both husband and wife in strict accord with the requirements of the statute. Surely the purchaser cannot be allowed to escape upon the alleged ground that both husband and wife have not consented to a conveyance of the homestead and have not executed a proper instrument as required by the statute. To allow that to be done would, indeed, be to lose sight of the object of the statute. The statute was not intended to protect nor to furnish technical defenses to purchasers of homestead property, but its object was one in the interest of society generally, to protect the home and to prevent its conveyance except by the joint consent of both husband and wife expressed in writing and duly acknowledged. Is anything more needed to express such joint consent to the conveyance of the homestead than a warranty deed duly executed and acknowledged by both such parties at the same time and as a part of the same transaction where both husband and wife sign a written contract agreeing to make that very conveyance? Such instruments, when so made, are to be construed together and held to constitute an entire agreement. Were we to hold that agreement void, it would be to lose sight entirely of the object and purpose of the law, and to furnish the purchaser of the property a means of escape without any sound reason and justification and certainly when no such release of obligation was intended by the statute. *Lennartz v. Montgomery*, 138 Minn. 170; *Epperly v. Ferguson*,

118 Ia. 47; *Smith v. Kibbe,* 104 Kan. 159.

Plaintiff, as a further contention, argues that the defendant has defaulted in the performance of his contract, in that he did not furnish, within the time agreed, an abstract of title; that interest had become due and delinquent upon the $4,000 mortgage; and that commission notes also, really constituting a part of the interest charge on this mortgage, had not been paid, all of which constituted a lien upon the land; furthermore, that on March 5, 1919, an attachment had been issued against the land on a claim of $125, and that this lien stood unsatisfied.

The testimony of the defendant, which stands uncontradicted in the record, and therefore that issue should not have been submitted to the jury, is to the effect that an understanding was had with the plaintiff subsequently to the making of the written contract, whereby the plaintiff consented to procure the abstract from the person who held the $4,000 mortgage and have it extended, and that plaintiff would pay out of the purchase moneys to be paid by plaintiff on the contract the delinquent interest and taxes in amounts due up to March 1, 1919.

The attachment above mentioned was not levied upon the land until March 5, 1919, at a time when the performance of contract should have been fully consummated. Had the plaintiff procured the abstract to be extended, as it had undertaken to do, and paid off interest and taxes out of the moneys held in its hands, and which moneys were due from it upon the contract, it could have received delivery of the deed before the attachment lien attached, and its title would have been free from that lien. But this the plaintiff did not do. The defendant had in the meantime moved to New Mexico, and it does not appear that plaintiff made any *bona fide* effort to notify or reach an understanding with the defendant with respect to the attachment lien.

In fact, the plaintiff had never made objection on the ground that the abstract was not furnished within the time required, nor that the interest and commission notes on

the mortgage were not taken care of, nor that an attachment had been levied upon the property until it filed its reply in this case.

The plaintiff, having undertaken to have the abstract extended to date, so as to show the condition of the title, and having agreed to retain from the purchase money sufficient to cover the interest and charges incidental to the $4,000 mortgage, must, to that extent, be held to have waived strict performance of those particular requirements on the part of the defendant that his written contract otherwise called for. The plaintiff, in the position in which it found itself on March 1, 1919, with some $8,000 in its hands still due to the defendant upon the contract, was fully in position to protect itself and gain a good title as against any lien charge growing out of the attachment filed five days later, and no doubt could easily have arranged, had it desired to do so, for a retention from the purchase price of funds sufficient to satisfy the attachment lien after it had attached, or could have had a direct and immediate payment of that lien by the defendant had she been notified. That having been its position and having to such extent relieved the defendant from strict performance of the contract, the plaintiff cannot in justice now be allowed to declare the contract forfeited by reason of an alleged technical default on the part of the defendant, and which default has in fact been to some extent contributed to by the plaintiff itself.

On August 27, 1919, defendant satisfied the attachment lien, and there is evidence, to some extent indefinite, to show she has paid the past due interest and commission notes. As the record stands, the defendant was entitled to have had the case against her dismissed and should have been allowed to pursue her remedy upon the contract. The case is therefore reversed and remanded for further proceedings.

REVERSED.

EARL E. KENNEDY ET AL., APPELLANTS, V. ROYAL HIGHLANDERS ET AL., APPELLANTS: ANDREW GROSSHANS ET AL., APPELLEES.

FILED JULY 19, 1922. No. 22346.

1. **Insurance:** MUTUAL BENEFIT ASSOCIATIONS: AMENDMENTS OF BY-LAWS. A mutual benefit association may amend its by-laws to increase the amount of assessments or make reasonable amendments, affecting the organization, government and internal workings of the order, but it has no power to cancel the obligations of its contract, or to reduce the benefits payable thereunder, though the member has agreed to be bound by the laws of the society as they stood when he entered, or as they might thereafter be amended.

2. ———: ———: POWERS. Where a statute provides for the organization of mutual benefit associations under it, a recognition by the legislature of particular powers as existing in such association may be construed as a grant of those powers to the association which organized under the act.

3. ———: STATUTES: CONSTRUCTION. Section 1 of the laws of 1895 relating to mutual benefit associations (Laws 1895, ch. 42) mentions as among the powers of such associations the power to write endowments, but by section 16 following it is provided that no association, operating upon the assessment plan, shall be permitted to do business in this state which promises any indemnity upon any other event than that of the death or disability of the member. The two provisions being directly contradictory to each other, as applied to companies operating upon the assessment plan, *held* to raise such confusion and ambiguity that the contemporaneous construction, given to the statute by the officers charged with the authority to enforce it, and by the society, for a long number of years, would be looked to as bearing great weight upon the question as to what interpretation should be given by the court.

4. **Statutes:** CONSTRUCTION. The construction placed upon a statute by the officers charged with the enforcement thereof in the discharge of their duties at or near the time of its enactment, and which construction has been acquiesced in and recognized by those governed by the statute for a long period of years, will be followed by the courts, unless such construction can be said, from the terms of the statute, to be erroneous and a construction which could not have been reasonably given to it.

5. **Insurance: "ASSESSMENT PLAN."** An association, organized under the act, which issued benefit certificates and provided for payment by its members of a *per capita* tax of not over $1 a year and for regular monthly payments of a given amount, determined by the age of the member at the time of his making application for insurance, such rates being fixed by the by-laws and subject to change by the society at any time it found necessary in order to meet the needs of the society, and which association had no plan to create a legal reserve, but only to collect such amounts as to provide an emergency fund to meet current losses, *held* to be a society operating upon the "assessment plan," within the meaning of the term as used in the statute.

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

E. J. Hainer, Miles M. Dawson and *O. B. Clark,* for appellants.

Thomas, Vail & Stoner, contra.

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

FLANSBURG, J.

This was a proceeding brought by certain members of the Royal Highlanders, a fraternal beneficiary association, against the association and other members who were holders of what were called "pioneer certificates." These certificates contained a provision for the payment of endowments. The object of the suit was to enjoin the society from paying such endowments on the ground that the provisions were unenforceable. The trial court denied the relief, held the endowment provision good and dismissed the proceeding. An appeal is taken from that order.

Prior to the year 1887 there were no laws particularly applying to mutual benefit associations, such associations being incorporated under the general insurance statutes. In 1887 a statute was enacted (Laws 1887, ch. 18) providing that secret societies and associations, where the management and control was confined to the membership of the society, and which, in addition to benevolent and fraternal features, issued certificates of indemnity, calling

for payment of certain sums in case of death, disability or sickness of its members, should be exempt from the general insurance laws, but should be subject to other specific regulation. In 1895 a further statute of like import was enacted. Laws 1895, ch. 42. It provided for the organization of such societies not incorporated, and required all mutual benefit associations to submit their articles to the auditor of state and attorney general for their approval. Each corporation organized under the act, it was provided, must, before commencing business, have applications for insurance upon at least 250 lives for $1,000 each, and, where any such association did not have membership sufficient to pay the full amount of the certificate on an assessment, the association was required to signify in red ink on the application that the benefit was payable only in event that sufficient be collected upon an assessment to meet it. In 1896 the Royal Highlanders organized under this latter statute. For a period of two years, up to January 1, 1898, the association issued what was called its "pioneer certificates." These contained provisions providing for the payment of the face of the policy as an endowment, in instalments of 10 per cent. a year, to members who reached the age of 50 years and had been a member in good standing for 20 years or more.

In 1919 the association amended its by-laws, the object and purpose of which amendment was to cancel the endowment provisions and hold them nugatory. It is argued that this was authorized under the reserve power of the society to amend its by-laws. The reserve power is based upon the provision in the by-laws and in the application for insurance, by which the member agreed to be bound by any future changes in the edicts of the society. Though such an agreement with the parties, reserving power to the society to amend its by-laws, would authorize it to raise its rates and adopt reasonable amendments affecting the relationship between the members as insurers, so far as such regulations might affect the organization, government

or internal workings of the order, such a provision does not authorize the society to cancel its contractual obligations. As pointed out in *Case v. Supreme Tribe of Ben Hur,* 106 Neb. 220 an increase in assessments is quite a different matter from a reduction of benefits specified in the policy. The reserve power, based upon an agreement of such a kind, does not authorize the society to reduce or change benefits which it has contracted to pay, where the contract to pay the benefit is one which the law recognizes as valid in its inception. *Newhall v. Supreme Council, A. L. H.,* 181 Mass. 111; *Gaut v. Supreme Council, A. L. H.,* 107 Tenn, 603, 55 L. R. A. 465; *Russ v. Supreme Council, A. L. H.,* 110 La. 588; *Knights Templars' & Masons' Life Indemnity Co. v. Jarman,* 104 Fed. 638; *Langan v. Supreme Council, A. L. H.,* 174 N. Y. 266; *Supreme Lodge, Knights of Honor v. Bieler,* 58 Ind. App. 550; *Richey v. Sovereign Camp, W. O. W.,* 184 Ia. 10; *Shepperd v. Bankers Union of the World,* 77 Neb. 85.

It is further contended, however, that by reason of the provisions of the 1895 statute the endowment feature in these pioneer certificates was unenforceable, either as being an illegal contract or as being *ultra vires* of the powers of the association.

The 1895 law was entitled: "An act to regulate the organization and operation of mutual benefit associations, life insurance and life insurance companies."

Section 1 of the act is as follows: "Every corporation or association organized under the laws of this state upon the mutual assessment, cooperative or natural premium plan, for the purpose of insuring the lives of individuals, or of furnishing benefits to the widows, heirs, orphans or legatees of deceased members, *or of paying endowments* or accident indemnity, shall, before commencing business, comply with the provisions of this act."

Those representing the holders of the pioneer certificates argue that this provision of the statute recognizes the right of the associations named in the section to provide for the payment of endowments to the members. The petitioners

and the association, on the other hand, point out that the writing of endowments is expressly prohibited by section 16 of the same chapter, being a part of the act and enacted at the same time as section 1. Section 16 is as follows:

"Any corporation or association doing business in this state, which provides, in the main, for the payment of death losses or accident indemnity by any assessment upon its members or upon the natural premium plan, shall, for the purpose of this act, be deemed a mutual benefit association, and shall not be subject to the general insurance laws of this state, regulating life insurance. *No corporation or association, operating upon the assessment plan, promising benefits upon any other event than that of the death or disability resulting from accident to the member shall be permitted to do business in this state.* This act shall not relieve any corporation or assessment association, now doing business in this state, from the fulfilment of any contract heretofore entered into with its members under its policies or certificates of membership, nor shall any member be released hereby from his or her part of said contract."

It is to be noted that the prohibition found in section 16 literally applies only to those companies operating upon the "assessment plan." It is the argument of the representatives of the holders of the pioneer certificates that the term "assessment plan," as used in this section, was intended to designate those mutual benefit associations which made their assessments upon the members after a loss had occurred, and when the amount, necessary to pay the loss, had become determined. It is argued that such associations, operating under what counsel denominates as the "pass the hat" plan, are the only associations which are purely assessment associations, and that the association which collects regular payments from its members, with the idea of thus accumulating from the parties in advance only sufficient to pay the current losses as they occur, and with power to change the rate of assessment from

time to time as necessary, is not an association operating upon the "assessment plan."

It may be that the legislature intended to make a distinction between associations which operated upon the assessment plan and those operating upon the "natural premium" plan. The two terms are used in seeming contradistinction to each other in the first sentence of section 16. The natural premium plan, as we understand it, was based upon such a schedule of rates that each member was required to pay, during each year, the cost of insurance for him at his attained age for that year. Each member as he went along, in theory, paid the full cost of carrying his individual certificate, thus supposedly obviating the necessity of making assessments. The testimony shows, however, that some companies, operating upon the natural premium plan, were, in a broad sense, assessment companies.

The legislature may have considered that some of the associations, described in section 1, which were brought within the act were associations which did not operate upon what was generally known to be the assessment plan, and, if so, the prohibition found in section 16 was not intended to apply to them. If, on the other hand, section 1 refers to companies only which operated under what was known to be the assessment plan, then the prohibition found in section 16, if section 1 should be construed to authorize the writing of endowments, would be directly contradictory of that authorization found in section 1.

The chapter, considered in its entirety, seems to us to contemplate that those companies covered by it were all companies which operated upon some plan of assessment basis. The regulations throughout have largely to do with assessments. In section 4 *"each association organized under this act"* is required to indicate on its policy that benefits are contingent on the amount of an assessment to meet them, wherever the membership in any such association is not sufficient to pay the full amount of a certificate *on an assessment.* It would appear that the legislature

throughout the act was speaking of assessment companies only.

The by-laws of the Royal Highlanders association contained a provision setting forth a schedule of rates, and it was provided that the member, upon his entrance into the society, and where he procured a benefit certificate to be issued to him, should agree to pay a certain amount according to his attained age at the time of entrance. The schedule is as follows:

Age at Nearest Birthday	$500	$1,000	$2,000	$3,000
From 18 to 27 years	.20	.40	.80	1.20
From 28 to 32 years	.30	.50	1.00	1.50
From 33 to 37 years	.30	.60	1.20	1.80
From 38 to 43 years	.40	.80	1.60	2.40
From 44 to 47 years	.50	.90	1.80	
From 48 to 49 years	.60	1.20	2.40	
From 49 to 50 years	.70	1.40	2.80	

The certificate provided that these assessments should be paid monthly. By another provision of the by-laws, the executive castle, being the representative body of the association, composed of the general officers and the delegates from the tributary bodies, was given the right to fix the rates of assessment. As these rates were fixed by the by-laws, it was necessary for the executive castle to change the rates, according to the rules of the order for amending by-laws, at a special or general session. Each member in addition to these assessments was also charged dues which were in the nature of a *per capita* tax of not more than $1 a year.

It is argued by the representatives of the holders of the pioneer certificates that this plan of operation was a stipulated premium plan, and not an assessment plan of insurance, as the rates were due at regular intervals and were fixed by the contract with the member. It cannot be said, however, that the assessments were unalterably fixed by the contract, for the contract itself contained the usual provision that the member agreed that "The edicts of the executive castle of the Royal Highlanders, now in force, or

that may hereafter be adopted, shall form the basis of this contract for beneficial membership;" and "This application and the laws of the executive castle now in force, or that may hereafter be adopted, are made a part of the contract between myself and the executive castle, and I for myself and my beneficiary or beneficiaries, agree to conform to and be governed thereby." Unquestionably, the society had the right to amend its by-laws and change its rates in such a manner as was found necessary from time to time to carry out and perform the obligations which it had undertaken by its insurance contract, so far as that contract was valid and legal. *Funk v. Stevens,* 102 Neb. 681; *Fowler v. Sovereign Camp, W. O. W.,* 106 Neb. 192; *Case v. Supreme Tribe of Ben Hur, supra.*

We think the Royal Highlanders association, under its plan, as above set out, comes clearly within what was generally known to be an association operating upon the assessment plan. *State v. Root,* 83 Wis. 667, 19 L. R. A. 271; *Mutual Reserve Life Ins. Co. v. Roth,* 122 Fed. 853; *Hayden v. Franklin Life Ins. Co.,* 136 Fed. 285; *Haydel v. Mutual Reserve Fund Life Ass'n,* 98 Fed. 200; *Moran v. Franklin Life Ins. Co.,* 160 Mo. App. 407; *Westerman v. Supreme Lodge, K. of P.,* 196 Mo. 670.

It is true that in Missouri the legislature has defined the term "assessment plan," but the reasoning in the Missouri cases, in the discussion of that definition, brings out what we believe to be the general acceptation of the term.

Our conclusion, then, being that the Royal Highlanders was an association operating upon the assessment plan, as that term is used in the statute, the question remains as to how far the provisions of the statute may be held to be effective in preventing such association from writing endowment insurance, and how far those provisions of the statute can be held to render the contracts to pay endowments void and unenforceable, as being beyond the extent of the powers of the association, or as being prohibited as in violation of the declared public policy of the state.

The provisions of the act are not clear statements of the

exact intention of the legislature. Section 1 does not purport to be an express grant of the powers specified to those associations which should be organized under the act, though it seems to be an indefinite recognition that such companies should have those powers. Such a recognition of powers in associations to be organized under the act may be logically construed as an intention to grant to them the powers so enumerated. 14A C. J. 259, sec. 2097.

Section 1, standing alone then, had it not been for the prohibition contained in section 16, might well have been construed as a grant of power to the associations to write endowment insurance.

But by section 16 we find a prohibition, declaring that any association, operating upon the assessment plan, if it promises benefits upon any other event than that of the death or disability of its members, shall not be permitted to do business in this state. The two sections of the statute, taken together, and each of them given the interpretation of which they are individually capable, lead to the result that section 1 purports to be a grant of authority to write endowment insurance, while section 16 declares that if any company, so authorized to write endowment insurance, should do so, it should not be permitted to do business in the state. The two provisions, thus construed, lead to an absurdity. The prohibition in section 16 is, furthermore, not a clear and definite statement that such associations shall not have the power to write endowment insurance, but purports to be simply a limitation upon their right to do business. The fact, standing alone, that they were unlawfully permitted to do business in the state would be no defense to their contracts.

The intent of the legislature, as gathered from the entire statute, cannot be said to be clear beyond doubt or ambiguity. It is open to construction. The officers, to whom the enforcement of the provisions of the statute has been delegated, as well as the society itself, have construed the uncertain and ambiguous provisions of the statute as an authorization to this company to write endowment insur-

ance. In 1896, when the Royal Highlanders association was organized, its articles and by-laws were submitted to the auditor and to the attorney general, as provided by the statute, and the plan of operation of the society was approved and permission granted to operate upon the plan presented. The by-laws submitted to these officers set forth the form of benefit certificate which the association proposed to use. This form contained the endowment provision which is now found embodied in the pioneer certificates in controversy. For 23 years the society has not questioned the validity of those endowment provisions. It furthermore appears that counsel for the association, in his report to the society in 1919, recommending that a by-law be enacted to cancel the endowment provisions, premised his remarks with a statement that the laws of Nebraska, existing at the time of the organization of the society and the issuance of the certificates, authorized the writing of such provisions.

The contemporaneous construction placed upon a statute by those charged with its execution, where such construction has long prevailed and been recognized by the parties who are concerned and who are ruled by the statute, will not be disregarded, unless it is clear that such construction was erroneous. The statute is not so clear that it is free from doubt as to what the legislature intended, and we find no cogent reason for disturbing contractual obligations which have grown up based upon that construction, and which have existed and been recognized by the society for so many years. *Clark's Run & S. R. Turnpike Road Co. v. Commonwealth*, 96 Ky. 525; *City of Louisville v. Louisville Water Co.*, 105 Ky. 754; *Van Veen v. Graham County*, 13 Ariz. 167; *The Allan Wilde*, 264 Fed. 291; *Moriarty v. City of New York*, 110 N. Y. Supp. 842; *Montgomery Light & Traction Co. v. Avant*, 202 Ala. 404, 3 A. L. R. 384; *Laub v. Furnas County*, 104 Neb. 402; *State v. Holcomb*, 46 Neb. 88; 25 R. C. L. 1043, sec. 274; 26 Cyc. 1139.

It is beyond question that the society has failed to re-

quire of these members in the past payments sufficient in amount to cover the cost of carrying the endowment provisions. Moreover, the payments have been insufficient even to cover the cost of meeting the other benefit provisions, exclusive of endowments. The society had the power, however, and should have exercised it, to raise rates to such an extent as to make them adequate. It cannot defend upon the ground that it has not done so.

The endowment provisions of these certificates are of added value, and an additional assessment, to cover the difference between the cost of carrying the policy with the endowment and the cost of carrying it without that provision, would have been justified.

In all other respects, aside from the endowment provision, the certificate provisions of the entire membership are the same, and, as to those provisions, held in common by all members in the society, the society was, of course, compelled to preserve absolute mutuality; but it was not compelled, nor was it even proper, as we view it, to require the members at large, who had no endowment provision in their policies, to pay the same rates as those members who were to receive endowments. The members at large could not justly be called upon to contribute to the payment of benefits in which they did not share. It seems to us that the society should, from the time it ceased writing endowment provisions, January, 1898, have charged an additional assessment to the holders of those certificates, according to the added value or cost of carrying the endowment provision. As the situation now stands, the pioneer certificate holders have a vested interest in their contracts and in the funds which the society has accumulated. Of these rights they cannot justly be deprived. We see no reason why the society should not now amend its by-laws so as to require the holders of pioneer certificates to elect between surrendering the endowment provision or paying from this time forward an additional amount sufficient to cover the cost of carrying it, provided no discrimination is

made against them as to the assessments to cover the other provisions of their certificates.

The judgment of the district court is therefore

AFFIRMED.

STATE, EX REL. CITY OF OMAHA, APPELLEE, V. BOARD OF COUNTY COMMISSIONERS OF DOUGLAS COUNTY ET AL., APPELLANTS.

FILED JULY 19, 1922. No. 22521.

1. **Counties.** A county does not possess the double governmental and private character that cities do. It is governmental in character only, and in that capacity acts purely as an agent of the state.

2. —: USE OF PROPERTY. Property of the county, acquired by funds raised through taxation, is property of which the state can direct the use, management and disposition, so long at least as this is done for the benefit of the public in the taxing district.

3. **Courts:** MUNICIPAL COURTS. The municipal courts of the city of Omaha are a branch of the judicial system of the state. They are instrumental in law enforcement throughout the county; tend to lighten the burden of the county and district courts in civil cases; their function is governmental, and they render a public service of general benefit throughout the county, though their jurisdiction is limited to the boundaries of the city.

4. **Counties:** USE OF PROPERTY. Though the legislature cannot order that money or property be furnished by one taxing district for the sole use and benefit of another district, a requirement that the county commissioners furnish offices in the county courthouse for the municipal courts does not appropriate the property of one district for the use of another, but is simply an apportionment of the use of the property for the interests and general public benefit of taxpayers in that particular taxing district; the city, as well as the remainder of the county, having contributed to the funds for the erection of the building.

5. **Constitutional Law:** COUNTIES: USE OF PROPERTY. The statute (Laws 1921, ch. 120), providing for the housing of municipal courts in the county courthouse, does not interfere with vested rights of the county in such property, and is not unconstitutional as a deprivation of the use of property without due process of law; nor does it deny the equal protection of the law.

6. **Courts:** STATUTES: CONSTRUCTION. Chapter 144, Laws 1921, regarding duties of county commissioners and providing that they should furnish suitable rooms for the accommodation of the "several courts of record," and chapter 120, Laws 1921, relating to municipal courts and providing that county commissioners should house municipal courts in the courthouse and charge a rental therefor, construed, and *held* not to be inconsistent with each other,

7. ———: MUNICIPAL COURTS. The term "courts of record," as used in chapter 144, Laws 1921, as is shown by the history of the act, *held* not to have been intended to cover municipal courts.

8. **Statutes:** INCONSISTENCY: TIME OF ENACTMENT. Where two statutes are enacted at the same session of the legislature without reference to one another, but as amendments of the identical section of a preexisting statute, if the provisions of the two enactments are irreconcilable with one another, the one which is the later expression of the legislative will must prevail.

9. ———: AMENDMENT. Where the legislature amends a statute, its error in ignoring an amendment of the act referred to will not invalidate the enactment, where the intention of the legislature is clear as to what preexisting law was intended to be amended.

10. ———: TITLE. *Held*, that the provision in chapter 120, Laws 1921, providing for the housing of municipal courts, is not beyond the scope of the title of the original act, chapter 182, Laws 1915, of which chapter 120, Laws 1921, is an amendment.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

A. V. Shotwell and *W. W. Slabaugh*, for appellants.

Dana B. VanDusen and *John F. Moriarty*, *contra*.

Heard before MORRISSEY, C. J., DEAN, ALDRICH, DAY and FLANSBURG, JJ.

FLANSBURG, J.

This is an action in mandamus, brought on the relation of the city of Omaha, to command the county commissioners of Douglas county to furnish office rooms for the use of the municipal courts of the city of Omaha in the county courthouse. The action is based upon certain acts of the legislature of 1921, which provide that the county commis-

sioners of any county shall furnish rooms in the courthouse for the municipal courts of any city which is the county seat of that particular county. The district court allowed the writ of mandamus to issue, and from this order the respondents, county commissioners, appeal.

There are two acts of the legislature, passed at the session of 1921, pertaining to the duty of the county commissioners as to the furnishing of rooms in the courthouse for courts in the county. A controversy has arisen as to which law governs, since one provides for the payment of rental by the city and the other does not.

The history of one act is as follows: In 1879 the legislature, defining the duties of the county commissioners with respect to the housing of courts, declared that the commissioners should erect or otherwise provide county buildings and should furnish suitable rooms and offices for the accommodation of the "several courts of record." Laws 1879, p. 361, sec. 25. The courts of record referred to by this act were the county courts and district courts, there being then no other courts of record in the county. This provision, respecting the housing of courts, was carried throughout the statutes until in 1919, when, by chapter 66, Laws 1919, approved April 8, 1919, the same provision of that statute was reenacted.

Subsequent to the approval of that act, but at the same session of the legislature, the original law was again, by an entirely different and independent bill, amended, and without any reference whatsoever to chapter 66, just mentioned. The later statute was approved April 15, and appears as chapter 67, Laws 1919. It provided that the county commissioners should furnish suitable rooms for the accommodation of the several courts of record, and added the following provision: "Including suitable rooms and clerks' offices for the accommodation of any municipal court of record whenever the city having such court is the county seat of the county." Under our decisions, chapter 67, being the later enactment amending an identical section of the previous statutes, would be held to have re-

pealed, by implication, chapter 66. *Futscher v. City of Rulo,* 107 Neb. 521; *Morgan v. City of Falls City,* 103 Neb. 795.

In 1921 the legislature again passed a law having to do with the identical section of the statute treated by these two laws of 1919. This statute (Laws 1921, ch. 144), however, purported to amend chapter 66, Laws 1919, instead of chapter 67, Laws 1919, ignoring that amendatory act, and again reenacted the provision which was originally found in the statute of 1879, providing that the county commissioners should furnish suitable rooms for the accommodation of the "several courts of record." It omitted entirely the provision of chapter 67, Laws 1919, expressly providing for the furnishing of rooms for *municipal courts.*

Though the 1921 act purports to amend chapter 66, Laws 1919, and ignores the amendatory act, chapter 67, Laws 1919, such mistaken reference to the former statute, without express mention of the subsequent amendatory act, does not invalidate the act, for there is sufficient identification of the previous existing law sought to be amended to make certain the legislative intention. *State v. Babcock,* 23 Neb. 128; *Fenton v. Yule,* 27 Neb. 758; *Richards v. State,* 65 Neb. 808; notes, 5 A. L. R. 996, 1009.

The history of this 1921 enactment, then, shows that the original law of 1879 provided for the housing of the "courts of record" of the county; that in 1919 the legislature added a provision for the housing of "municipal courts," and, by a still later enactment, 1921, struck out the provision for the housing of the municipal courts. The legislature of 1879, in referring to "courts of record," had in mind those courts of record which were then known to the law, and those did not include municipal courts. The legislature evidently deemed it necessary in 1919, in order that municipal courts be brought within the law, that they be specifically mentioned. The legislature, when it again reenacted the law in 1921, striking out the specific mention, would seem to have intended to again eliminate from

the law any provision with regard to housing the municipal courts.

This interpretation is further strengthened and confirmed when we consider the other enactment of the 1921 legislature, which it is claimed governs in this case. It is independent of the act which we have been discussing, and appears as chapter 120, Laws 1921. This act is more specific, in its mention that municipal courts shall be housed in the court house, than chapter 144, Laws 1921, and was approved and became a law at the same session and seven days later. The provisions of chapter 120 are as follows: Where a city having a municipal court is the county seat of the county, "it shall be the duty of the county board to provide suitable rooms and clerk's office for the accommodation of such court in the county courthouse, and in such case the city shall pay to the county a reasonable yearly rental for such rooms." This, being the clearer and more pronounced enunciation, as well as being the later expression of the legislative will, would govern as against the general provision found in chapter 144, which simply provided that county commissioners shall furnish rooms for the accommodation of the "several courts of record," even were we to believe that the legislature intended to include municipal courts within the term "courts of record." 36 Cyc. 1130; *Omaha Real Estate & Trust Co. v. Kragscow*, 47 Neb. 592.

But we believe the two acts can be harmonized by the interpretation which we have placed upon chapter 144, that the legislature, in speaking of courts of record, intended to refer to those courts of record in the county, other than municipal courts, the municipal courts having been only recently created by the law, and that chapter 120 was intended particularly to cover the matter of housing municipal courts. It is therefore our opinion that chapter 120, Laws 1921, is the statute applicable here.

In further defense the respondents contend that the statute (Laws 1921, ch. 120) is in violation of section 14, art. III of the Constitution. It is claimed that the pro-

vision, providing for the housing of municipal courts in the county courthouse, is not germane to the original act, of which the 1921 statute is an amendment, and that such provision is not within the scope of the title of that act. The title of the original act (Laws 1915, ch. 182), of which act the 1921 statute is an amendment, is as follows: "An act to create a municipal court in cities of certain classes, to fix and define the organization, powers, and jurisdiction of the same, and to repeal all acts and parts of acts in conflict herewith." The constitutional limitation, that no bill shall contain more than one subject, which shall be clearly expressed in the title, does not require an enumeration in the title of all the different matters which may properly be covered in the body of the act, all having to do with one general subject. The title of the act is not intended to serve as an index. It is manifest that, if a municipal court is to be organized and to operate, those things which are incidental to the carrying into effect of those ultimate objects may properly be provided in the law. The index indicates the general object sought to be attained, and the housing of the court is a provision plainly incidental to that general object. *State v. Cox*, 105 Neb. 75, and cases therein cited.

It is further contended that the statute takes the property of Douglas county and appropriates it to the use of the city of Omaha without due process of law, and that the statute denies the citizens of Douglas county the equal protection of the law, and for these reasons is violative both of the state and federal Constitutions.

It must be remembered that a county does not possess the double governmental and private character that cities do. It is governmental only, and in that capacity acts purely as an agent of the state. The funds raised by taxation in the county are subject to the direction and control of the legislature for public use in that county, and the property of the county, acquired by funds raised through taxation, is property of which the state can direct the management and disposition, so long at least as

it acts for the benefit of the public in the taxing district. *City of Edwardsville v. Madison County,* 251 Ill. 265; *Reclamation District v. Superior Court,* 171 Cal. 672; *Board of Commissioners v. Lucas,* 93 U. S. 108; *State v. County Court of St. Louis County,* 34 Mo. 546; *Dunne v. Rock Island County,* 283 Ill. 628; *Harris v. Board of Supervisors,* 105 Ill. 445; *Heffner v. Cass and Morgan Counties,* 193 Ill. 439; *Erskine v. Steele County,* 87 Fed. 630; 15 C. J. 536, sec. 220.

The court in *Erskine v. Steele County, supra,* in summarizing, say: A county, "being a mere instrumentality of the state for the convenient administration of government, is at all times, both as to its powers and its rights, subject to legislative control. While it is no doubt true that the legislature has not such transcendent and absolute power over these bodies that it can apply property held by them to private purposes or to public purposes wholly disconnected with the community embraced within their limits, still it is likewise true that a purely public corporation, like a county, cannot acquire any vested interest which will preclude the legislature from directing the application of all its property and rights to the performance of those governmental functions which pertain to the community embraced within the corporation, and for the performance of which the corporation was created. If it were otherwise, counties, instead of being agencies of the state for administering the government, would be petty sovereignties, to impede and defeat the state with claims of local interest and authority."

The revenues of the county do not become the property of the county in the sense of private ownership, and the legislature has authority to prescribe the division and apportionment of money, raised by county taxation, between the county and a city within its limits. 37 Cyc. 1589. It is true that the legislature could not divert funds raised by one district to the use of another district (*Board of Commissioners v. Lucas, supra*), since a tax levied for a public purpose must also be levied for the use of the

district which is taxed. Should the legislature order that money be raised by one district and paid to another district, to be used for the sole benefit of that other district, that would be an exaction of money for the benefit of others than those who are taxed and clearly beyond what could be justified as taxation. 26 R. C. L. 72, sec. 51.

The municipal courts of the city of Omaha are a branch of the judicial system of the state. *People v. Cobb,* 133 Cal. 74; *Barton County v. Walser,* 47 Mo. 189; *State v. Wofford,* 121 Mo. 61. Their function is governmental, and the service they render is a public service. It cannot be said that they serve alone the citizens of Omaha. Though their jurisdiction of the person is limited to the boundaries of Omaha, many persons throughout the county have opportunity to use these courts. They are courts which are instrumental in the enforcement of the criminal laws throughout the county, and have jurisdiction in amounts, in civil cases, up to $1,000. No doubt the legislature considered that the service rendered by the municipal courts, in civil cases lightened the work of the district and county courts; also that it would be of benefit to have the several courts accessible in one building.

The legislature, we believe, had the power, in the first instance, had it desired to exercise it, to require the county to raise funds and contribute to the support and maintenance and housing of municipal courts, for these courts render a service and are of benefit to the entire county, being a branch of the general judicial system and a part of the law-enforcing machinery of the state. *State v. County Court of St. Louis County, supra; Young v. Kansas City,* 152 Mo. 661; *State v. City of Lawrence,* 79 Kan. 234; *Clark v. Eve,* 134 Ga. 788; *Ashwell v. Bullock,* 122 Mich. 620.

The legislature would also have had the right to describe, as a condition to the right of the county to levy a tax, how and in what manner the courthouse should be used for the benefit of the citizens in the county. Surely, if that is true, the legislature still has the power and the

authority to direct and control the use and management of this property, to the end of gaining what, in its judgment, will best serve the public needs and be of most general benefit to the public in the district.

We see no reason why it cannot now direct, as it has done by the statute in question, that the municipal courts shall be housed in that building. This is not a diversion of funds or property of the county to the use of persons who have not contributed by taxation to those funds. A large part of the contributions from which the courthouse was built was furnished by the city of Omaha. It is simply an apportionment of the use for general benefits and a direction as to how the property, procured by those funds, shall be used to the interest and benefit of the taxpayers in that particular taxing district.

The state has invested the legislature with complete sovereign power, except so far as restricted by constitutional limitations. The question of the extent of legislative power is determined alone by these limitations. We do not see that the enactment in question is in violation of any of the constitutional provisions invoked.

The amount of the rental is not fixed; that must be either agreed upon by the parties or fixed by the county commissioners, subject to the review of the courts.

For the reasons given, the judgment of the lower court is

AFFIRMED.

WILLIAM WATSON V. STATE OF NEBRASKA.

FILED JULY 19, 1922. No. 21914.

1. **Information:** OATH: SUFFICIENCY. The sufficiency of an oath to a complaint or information is not fixed by our state Constitution, but is a matter of legislative and judicial determination.

2. **Constitutional Law:** CONSTRUCTION. A contemporaneous legislative construction of a constitutional provision, which has, for many years, been adhered to, by the legislative and executive

departments of the government, will not be disregarded by the courts, and in doubtful cases will generally be held conclusive.

3. **Intoxicating Liquors:** SEARCH WARRANT: DESCRIPTION. A search warrant provided for by section 1, ch. 109, Laws 1919, being primarily for the search of particular premises for intoxicating liquors and the bringing of the person found in charge thereof before the magistrate for examination, the same particularity in describing the owner or occupant of the premises, thought to be in possession of the liquor, is not required as is necessary in warrants solely for the apprehension of persons.

4. **Criminal Law:** ADMISSION OF EVIDENCE. The admission of incompetent testimony to prove a fact may be a harmless error, where such fact is established by other sufficient uncontradicted evidence.

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

Jamieson, O'Sullivan & Southard, for plaintiff in error.

Clarence A. Davis, Attorney General, and *Charles S. Reed, contra.*

Heard before DEAN and DAY, JJ., DILWORTH and CLEMENTS (E. P.), District Judges.

CLEMENTS, District Judge.

Defendant was convicted of unlawfully having in his possession, for unlawful sale and disposition, certain intoxicating liquors. The evidence upon which the conviction rests was obtained principally by search of his premises under a warrant issued by virtue of section 1, ch. 109, Laws 1919. Defendant contends that section 1 is in violation of both state and federal constitutions, because it permits a complaint for a search warrant to be made upon information and belief; that the warrant was void; and the evidence obtained thereby was inadmissible to prove his guilt. Because his motion for a return of the liquor taken was overruled and the liquor was permitted to be used in evidence, and for other reasons, which will be noted later, he asks a reversal of the conviction.

The facts are as follows: The defendant's premises were searched by the sheriff. In an addition to the house,

at the end of a stairway leading down cellar, a hole was found in the floor, and in the hole were 4½ gallons of alcohol and 94 quarts of gin. The hole at the time of the search was covered with linoleum, on which stood an ice-box. The defendant made no defense and was not present at the trial, his request to have the trial proceed, in his absence, having been granted. His attorney was present at the trial, moved for a return of the liquor, cross-examined witnesses, made objection to evidence, and preserved the defendant's right to appeal. He here presents the constitutional question, and urges that errors were made in the conduct of the trial.

Defendant's contention that section 1, ch. 109, Laws 1919, is in violation of the fourth amendment of the Constitution of the United States is answered by calling attention to the fact that this amendment is not a limitation of the powers of the state, but operates solely on the federal government. 35 Cyc. 1269; *National Safe Deposit Co. v. Stead, Attorney General,* 232 U. S. 58; *Ohio v. Dollison,* 194 U. S. 445.

The question of whether our law violates section 7, art. I of the state Constitution, is much more serious and deserves careful consideration. At the outset it should be noted that section 7, art. I, is identical in language with the fourth amendment of the federal Constitution, and that the federal courts have generally construed the fourth amendment as prohibiting the issuance of search warrants on complaints made on information and belief. *United States v. Kelih,* 272 Fed. 484; *United States v. Borhowski,* 268 Fed. 408; *United States v. Rykowski,* 267 Fed. 866. The doctrine announced in these cases, so far as we have been able to determine, has never been confirmed by the United States supreme court. This court has in many decisions upheld the fourth amendment as a prohibition against search without a warrant or the issuance of general warrants, but, in no case that we have been able to find, has it interfered with the preliminary steps provided by law for obtaining a warrant, or promul-

gated a rule that can rightfully be claimed as a basis for the holdings of the federal cases cited. Notwithstanding this fact and that no federal question is here involved, the defendant insists that these cases are binding on this court and decisive of this question. This, of course, is not so. It has long been recognized that the highest court of the state has the right to determine whether an act of the state legislature is in violation of the state Constitution. 6 R. C. L. 84, sec. 83. Even if these decisions are of persuasive value, they are not binding on this court relative to this question. *Rothschild & Co. v. Steger & Sons Piano Mfg. Co.,* 256 Ill. 196, Ann. Cas. 1913E 276; *City of Sioux Falls v. Walser,* 187 N. W. (S. Dak.) 821.

The defendant says that the provision, "No search warrants shall issue but upon probable cause, supported by oath or affirmation," is an express and positive prohibition against search warrants issued upon complaints verified by information and belief. The argument is, an oath upon information and belief is not an oath at all, and therefore does not meet the constitutional requirement. It will be noted, however, that the Constitution does not define an oath, and when the defendant says an oath upon information and belief is not an oath he is resorting to construction, which is not necessary where provisions are express and positive. The sufficiency of an oath to complaints and informations is not fixed by the Constitution, but is a matter of legislative and judicial determination. In some jurisdictions, notably the federal districts represented by the courts cited, *supra,* it has been held that an oath upon information and belief is not an oath, and that a complaint or information verified upon information and belief is void. This court is committed to a different rule. Section 489 of the Criminal Code (Rev. St. 1913, sec. 9064) provides: "All informations shall be verified by the oath of the county attorney, complainant, or some other person." In *Richards v. State,* 22 Neb. 145, and *Sharp v. State,* 61 Neb. 187, this court has said: "It is sufficient

if an information is verified by the county attorney on information and belief."

An examination of the holdings of the state courts on this question discloses the impossibility of harmonizing them. Some have followed the federal courts, while others have refused to be influenced by them and have steadfastly upheld the constitutionality of statutes similar to ours. The leading case upholding the contention of defendant is *State v. Peterson,* 27 Wyo. 185, where all the cases, both state and federal, which in any manner support this contention are collected and commented upon. The states having the same constitutional guaranty against unreasonable search and seizure as this state and which have sustained a law similar to ours are: Connecticut—*Lowrey v. Gridley,* 30 Conn. 450; Vermont—*Lincoln v. Smith,* 27 Vt. 328; Main—*State v. Welch,* 79 Me. 99; Rhode Island—*State v. Fitzpatrick,* 16 R. I. 54; Massachusetts—*Jones v. Root,* 72 Mass. 435; Indiana—*Rose v. State,* 171 Ind. 662; Iowa—*Santo v. State,* 2 Ia. 165; Washington—*State v. Gordon,* 95 Wash. 289; Alabama—*Salley v. State,* 9 Ala. App. 82.

The irreconcilable conflict in the decisions of the various courts of this country can be explained in only one way. The prohibition of the Constitution sought to be invoked is not express and positive, but, if it exists at all, it is by implication and must be found by construction, and that two constructions are possible, one upholding, the other invalidating the law. This being so, then, in view of the holding of this court in *State v. Jones-Hansen Cadillac Co.,* 103 Neb. 353, that this law being for the preservation of the public peace, health and safety, must be liberally construed in furtherance of the high moral purpose aimed at, and in view of other well-established rules of constitutional and statutory construction (*Cass County v. Sarpy County,* 66 Neb. 473; *State v. Standard Oil Co.,* 61 Neb. 28), we feel bound to choose that construction which upholds the validity of the law.

One further compelling reason for this conclusion should

be noted. Section 7, art. I, appears in our first Constitution drafted and submitted to the people by the territorial legislature of 1866. The provision for the issuance of a search warrant upon a complaint that the person swearing or affirming does verily believe that the stolen goods or other property are or is concealed, etc., was enacted by the same legislature, Rev. St. 1866, Cr. Code, sec. 225. In this legislature were a number of eminent lawyers, three of whom afterwards became members of this court. It will not willingly be presumed that the framers of the Constitution immediately enacted a law in violation of its terms. The reasonable conclusion is that these men construed the Constitution as permitting the law in the form in which it was enacted.

This law was reenacted in 1873. Gen. St. 1873, Cr. Code, sec. 336. Ever since its inception it has been enforced without question as to its constitutionality. In 1889 a law containing practically the same provisions as to the issuance of search warrants in liquor cases as does section 1, ch. 109, Laws 1919, was enacted as an amendment to chapter 61, Laws 1881, the "Slocumb Law." This law was reenacted in 1913. Rev. St. 1913, sec. 8993. In 1917 it was amended and reenacted as chapter 187 of the Laws of that year. In 1919 it was again reenacted as section 1, ch. 109. It will be seen that four different legislatures have passed upon this law, with apparently no thought that it was in conflict with the Constitution. In 1919 a constitutional convention revised and proposed amendments to the Constitution. The members of this convention presumably became familiar with the provisions of the Constitution, including section 7, art. I. The legislature of that year which enacted section 1, ch. 109, included in its membership many members of the constitutional convention, a number of these being lawyers of ability. This law in practically its present form has been consistently enforced since 1889. It has withstood attacks of almost every nature, and never before has its constitutionality been questioned upon the grounds raised

in this case. These facts constitute a contemporaneous legislative and practical construction which, if not conclusive, is entitled to great weight. 6 R. C. L. p. 63, sec. 60, p. 64, sec. 61, p. 66, sec. 63.

In view of all the foregoing considerations, we hold that section 1, ch. 109, Laws 1919, does not conflict with section 7, art. I of the state Constitution.

The defendant complains that his true name was not given in the search warrant. He was designated therein as John Doe, whose first and real name is unknown, but who uses and occupies the one and one-half story frame house at 1134 Edwards street in Sarpy county, Nebraska. Defendant says that this was not a sufficient designation or description, and the warrant for that reason was void. He cites some authorities to the effect that a John Doe warrant is defective and void upon its face. These cases all refer to ordinary warrants for the apprehension of persons.

The search warrant provided for by section 1, ch. 109, Laws 1919, is of a different nature. Its primary object is a search for intoxicating liquors kept in violation of law. The person who unlawfully owns or keeps liquor is to be named or described in the warrant, and if he is found in possession of the liquors or in charge thereof he is to be arrested and brought before the magistrate for examination. If no one is found in possession of the liquors they may still be seized. This is a different proceeding from the issuance of a warrant by which an officer must at his peril select and identify the person to be arrested from the body of the community. The defendant was not arrested under the search warrant. He was apprehended under a complaint filed later, upon which a warrant was issued in which his name was correctly given. He pleaded to the complaint and information without raising any question as to their sufficiency. There is no claim that the place to be searched and the liquor to be seized were not sufficiently described. We think that the description of the defendant in the warrant was sufficient to justify his being brought before the magistrate for examination if he had been found

in possession or in charge of the liquor. If he had been arrested under the search warrant when not in possession or in charge of the liquor, a question might arise as to the sufficiency of the warrant to identify him, but it is unnecessary to decide this, as he was not arrested under the search warrant.

Defendant complains that the search warrant and the return of the officer thereon was admitted in evidence over his objection. This was no doubt error, but the defendant was not injured thereby. The complaint upon which the search warrant was issued, containing all the evidential facts found in the warrant, was admitted in evidence without objection, and the sheriff was a witness and testified without objection to every fact contained in the return. It is a familiar principle that incompetent evidence is deemed harmless, so far as a motion for a new trial is concerned, where other evidence to the same effect is properly admitted and is sufficient to prove the matter in question. *Lamb v. State,* 40 Neb. 312.

The defendant also complains that the sheriff was permitted to testify over his objection as to the facts and circumstances which occurred at a further search of his premises made after the finding of the liquor taken under a later warrant. This evidence was probably irrelevant and inadmissible; but, if not prejudicial, the defendant has no reason to complain. It will be recalled that 4½ gallons of alcohol and 94 quarts of gin were found in defendant's possession under circumstances that raised the strongest possible presumption that it was kept unlawfully and for unlawful disposition. This liquor and the circumstances of its discovery was properly in evidence. The defendant did not appear at the trial or make any attempt to explain or justify his possession of this liquor. The law provides: "The possession by any person of any intoxicating liquors except under permit as in this act authorized shall be presumptive evidence of the keeping for sale, selling, use or disposal of such liquors in violation of this act, unless after examination he shall satis-

factorily account for and explain the possession thereof, and that it was not kept for an unlawful purpose." Laws 1919, ch. 109, sec. 1. Under these facts and this law there could have rightfully been no other verdict, even though this incompetent evidence had been eliminated. "The admission of incompetent testimony to prove a fact is harmless error, where such fact is established by other sufficient uncontradicted evidence." *Lamb v. State*, 40 Neb. 312. In this case the defendant's guilt was clearly established by competent uncontradicted evidence. The evidence objected to was merely cumulative upon a charge requiring no additional proof, and the admission thereof is not ground for a reversal.

AFFIRMED.

CONSUMERS COAL COMPANY ET AL., APPELLANTS, V. CITY OF LINCOLN ET AL., APPELLEES.

FILED JULY 19, 1922. No. 22549.

1. **Municipal Corporations:** CHARTERS. By section 2, art. XIa of the Constitution, power is conferred upon the electorate of a city to frame a charter for its own government as fully and completely as the electorate of the state may form a state Constitution, subject only to the limitations contained in said section that said charter shall be "consistent with and subject to the Constitution and laws of this state."

2. ———: ———. The purpose of the constitutional provision is to render cities independent of state legislation as to all subjects which are of strictly municipal concern; therefore, as to such matters general laws applicable to cities yield to the charter.

3. ———: ———: POWERS. It is within the competency of the electorate of a city to adopt a charter in any form it may deem proper within the limits specified in the Constitution; it may take the form of a grant or a limitation of powers; in the former case all powers not expressly or impliedly granted to the city government are reserved to the people; in the latter all powers are granted to the city government except those expressly or impliedly withheld.

4. ———: ———: ———. The home rule charter adopted by the

city of Lincoln is a grant as distinguished from a limitation of power.

5. ——: ——: CONSTRUCTION. The rules of construction of a charter adopted under the constitutional provision are determined by the form of its enactment, and those rules applied which are suited to the particular instrument.

6. ——: ——: ——. Being a grant of power, the Lincoln charter is to be construed according to the same rules as a legislative act containing the same provisions, in determining what authority is thereby granted the city government.

7. ——: ——: ——. The provision of the Lincoln charter that "the council shall have, possess and exercise * * * all the * * * legislative * * * powers and duties" does not confer legislative authority beyond that necessary to the exercise of the powers specially enumerated in the charter. Its meaning is merely that such powers as are granted shall be exercised by the council.

8. ——: ——: POWERS. Where a certain power is conferred upon a municipality and the method of its exercise is prescribed, such method constitutes the measure of the power.

9. ——: ——: ——. The power conferred by the Lincoln charter "to purchase, construct and otherwise acquire, own and operate gas and electric plants and properties for the manufacture and distribution of gas, heat and electricity for the purpose of supplying the city and the inhabitants thereof with such service and utilities," does not include by implication authority to the council to establish and maintain a fuel yard, for the purchase and sale of fuel at retail to such inhabitants, in competition with private enterprises. Ordinance to that end declared invalid.

10. ——: TAXATION: MUNICIPAL FUEL YARD. The maintenance of a municipal fuel yard for the purpose of selling fuel to the inhabitants of the city is a "public purpose" for which money raised by taxation may be used.

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

Field, Ricketts & Ricketts, for appellants.

C. Petrus Peterson and *Charles R. Wilke, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH and FLANSBURG, JJ., REDICK, District Judge.

REDICK, District Judge.

This action is brought to enjoin the city of Lincoln from maintaining and operating a public market for the purchase and sale of coal and wood, and the allegations of the petition are substantially as follows: After stating the municipal character of the defendant as a city of the first class, and the official character of the other defendants as mayor and council thereof, it is alleged that on the 15th day of August, 1921, the mayor and council of said city duly passed an ordinance providing for the organization and operation of a fuel yard consisting of wood and coal, to be conducted under the management and control of the city for the purpose of purchasing coal and wood at remote points of supply, having it shipped to the city of Lincoln and sold at retail to the inhabitants thereof; that there was no actual or threatened shortage in the supply of fuel, nor was there any necessity or emergency which demanded that the city of Lincoln should engage in the retail fuel business; that said business is being conducted by the use of public moneys raised by taxation, and that the defendant city threatens to continue said business permanently. The plaintiffs are engaged in the retail fuel business and other merchandising in the city of Lincoln, and on that account and as taxpayers bring this action.

The claim of the plaintiffs is that there is no authority of law permitting the city of Lincoln as a municipal corporation to establish a coal and wood-yard, and that the ordinance purporting to do so is *ultra vires*. The defendants separately demurred to the petition, which demurrers were sustained, and the plaintiffs refusing to amend, but electing to stand on the petition, the case was dismissed and is now here on appeal by the plaintiffs alleging error in sustaining the demurrers.

Two questions are submitted for decision: First. Is the establishment and operation of a municipal coal and wood yard for the sale of those commodities at retail to the inhabitants of the city a public use for which tax money may be employed? Second. Has the city council

of the city of Lincoln power to establish a municipal coal and wood-yard under a legislative act or under its charter as adopted under section 2, art. XIa of the Constitution?

The first question has been answered both ways: In the affirmative are the cases of *Laughlin v. City of Portland,* 111 Me. 486, and *Jones v. City of Portland,* 113 Me. 123, affirmed on appeal, 245 U. S. 217. These cases all involve the validity of the same statute expressly granting to the city of Portland the power to establish a permanent wood, coal and fuel-yard. *Holton v. City of Camilla,* 134 Ga. 560. See, also, *Central Lumber Co. v. City of Waseca,* 188 N. W. (Minn.) 275, following the Maine cases. In the negative are: *Opinion of Justices,* 150 Mass. 592, and *Opinions of Justices,* 155 Mass. 598, and *Baker v. City of Grand Rapids,* 142 Mich. 687, in which the Massachusetts cases were followed. In these cases, however, it was held that for the relief of the poor and in cases of emergency, while it lasted, the city could purchase and sell to its citizens who could not otherwise procure the same. Upon the same principles it is held that the manufacture and sale of ice is not a public purpose. *Union Ice & Coal Co. v. Town of Ruston,* 135 La. 898; *State v. Orear,* 277 Mo. 303; *State v. Port of Seattle,* 104 Wash. 634.

Metropolitan cities in this state have been granted the power to maintain municipal coal yards (Laws 1917, ch. 87, sec. 4½), thus establishing the legislative view that it is for a public purpose, and while the final determination of that question is for the courts, the legislative expression upon the subject is of great weight. This principle and a consideration of the cases above cited lead us to adopt the reasoning in those cases which hold that a tax imposed to support a municipal fuel-yard is for a public purpose, and not contrary to any limitation on the taxing power.

The determination of the second question requires the construction of the constitutional provision permitting cities to form their own charters, the charter so formed

by the city of Lincoln, and the legislation upon the particular subject under discussion.

We are requested by appellees in their brief "to state clearly and definitely the effect of the home rule charter provisions of our own Constitution," and "the effect of the action of the electorate of the city of Lincoln in using in its charter the provision for vesting all legislative power in the council." We shall attempt to do this in so far as it is found necessary for the disposition of this case; to exceed that limit, though the temptation is most alluring, would unduly extend this opinion.

Let us first set out the provisions and enactments to be construed: Section 2, art. XIa of the Constitution is as follows: "Any city having a population of more than five thousand (5,000) inhabitants may frame a charter for its own government, consistent with and subject to the Constitution and Laws of this state." Then follow provisions for ratification by the electors, and that 60 days thereafter it shall "become the charter of said city, and supersede any existing charter and all amendments thereof."

We have recently held in *Schroeder v. Zehrung,* 108 Neb. 573, that "a city may enact and put into such charter any provisions for its government that it deems proper, so long as they do not run contrary to the Constitution or any general statute."

The charter ordained by the city of Lincoln under the above authority consists of an adoption of the legislative charter then existing, with a few merely verbal changes, and contains the following:

"Art. II, sec. 1. Without denial or disparagement of other powers, held under the Constitution and Laws of the state, the city of Lincoln shall have the right and power:"

"13. Inspection of Weights, Hay, etc. To provide for the inspection and weighing of hay and grain, and coal, the measuring of wood and fuel to be used in the city, and to determine the place or places of the same, and to regu-

late and prescribe the place or places of exposing for sale hay, coal and wood."

"50. General Welfare. To make all such ordinances, by-laws, rules and regulations not inconsistent with the laws of the state as may be expedient, in addition to the special powers in this article enumerated, maintain the peace, good government, and welfare of the city, its trade, commerce and manufactures."

"Art. IV, sec. 8. The council shall have, possess and exercise, by itself or through such methods as it may provide, all the executive, legislative and judicial powers and duties."

"Art. VIII, sec. 11. The city shall have power to purchase, construct and otherwise acquire, own and operate gas and electric plants and properties for the manufacture and distribution of gas, heat and electricity for the purpose of supplying the city and the inhabitants thereof with such service and utilities; and to purchase, lease, construct or otherwise acquire, own and operate street railways and telephone plants, lines and systems, and any and *all other public service plants and properties,* for the purpose of supplying the city and the inhabitants thereof with *such service and public utilities.*"

Section 5195, Rev. St. 1913, provides: "Any city of the first * * * class * * * shall have the power and is hereby authorized to establish and maintain a heating or lighting system for such city."

What then is the nature and extent of the power granted by the Constitution? Without doubt it invested the electorate of the city within the corporate limits with all the powers possessed by the electorate of the state consistent with and subject always to the Constitution and Laws of the state; but necessarily with the restriction that such powers might be exercised only "for its own government," *i. e.,* in matters appertaining to municipal affairs. Within the limitations and restrictions stated, the city has been well said by Justice Brewer to be "an *imperium in imperio.* Its powers are self-appointed and the reserved

control existing in the general assembly does not take away this peculiar feature of its charter." *St. Louis v. Western Union Telegraph Co.*, 149 U. S. 465. It must be borne in mind, however, that what *may* be done does not foreclose the question of what *has* been done.

Appellant cites *State v. Missouri & Kansas Telephone Co.*, 189 Mo. 83. The Constitution of the state of Missouri permits a city to "form a charter for its own government, consistent with and subject to the Constitution and Laws of this state"—language identical with our own—and in discussing the nature of the power so granted, Valliant, J., said (p. 99):

"A charter framed under that clause of the Constitution within the limits therein contemplated has the force and effect equal to one granted by an act of the legislature. But it is not every power that may be essayed to be conferred on the city by such a charter that is of the same force and effect as if it were conferred by an act of the general assembly, because the Constitution does not confer on the city the right, in framing its charter, to assume all the powers that the state may exercise within the city limits, but only powers incident to its municipality; yet the legislature may, if it should see fit, confer on the city powers not necessary or incident to the city government. There are governmental powers the just exercise of which is essential to the happiness and well being of the people of a particular city, yet which are not of a character essentially appertaining to the city government. Such powers the state may reserve to be exercised by itself, or it may delegate them to the city, but until so delegated they are reserved. The words in the Constitution, 'may frame a charter for its own government,' mean may frame a charter for the government of itself as a city, including all that is necessary or incident to the government of the municipality, but not all the power that the state has for the protection of the rights and regulation of the duties of the inhabitants in the city, as between themselves."

We approve this concept of the nature of the charter.

While the power to form a charter may be likened to the power of the people to form a Constitution, the subjects over which it may be exercised are confined to those matters appertaining to city government. In the just cited the charter attempted to authorize the city to "regulate prices to be charged by telephone * * * companies," which was held to be not within the power of the city electorate to do. In a concurring opinion Marshall, J., remarked:

"I am thoroughly persuaded that it never was within the contemplation of the framers of our system of government, or of our Constitution, that any city, whether organized under the general laws of this state, or under the provisions of the Constitution which allow cities to frame their own charter, to confer upon cities anything more than a *police power, and a strictly municipal power.* And that the power to enact all laws of civil conduct, and to prescribe all civil remedies among citizens, in short, to enact laws as distinguished from municipal regulations, is expressly reserved to the legislature of this state, and cannot be delegated by it."

It is not easy in all cases to distinguish between municipal powers and state powers, and when they come within the classification of police powers, they are as impossible of accurate definition as the police power itself, which Judge Cooley, in his work on Constitutional Limitations, characterized as (I quote from memory) "That bastard power to which is referred for justification every infraction of the liberties of the people." We must therefore content ourselves with the consideration of each case as it arises, applying those principles which precedent and logic approve.

Let us not be misunderstood. We hold that the city may by its charter under the Constitution provide for the exercise by the council of every power connected with the proper and efficient government of the municipality, including those powers so connected, which might lawfully be delegated to it by the legislature, without waiting for

such delegation. It may provide for the exercise of power on subjects, connected with municipal concerns, which are also proper for state legislation, but upon which the state has not spoken, *until* it speaks. *City of Spokane v. Spokane & I. E. R. Co.*, 75 Wash. 651. Its position in this regard being analogous to that of the state with reference to matters of national cognizance, *e. g.*, regulation of commerce.

Interesting in this connection is the case of *Grant v. Berrisford*, 94 Minn. 45, where it was held that a provision of a charter framed by the people omitting the statutory requirement of 90 days' notice to the owner before suit might be brought by a materialman upon the contractor's bond for the performance of a contract with the municipality was valid, the court saying:

"The sole reason urged by defendants in support of their demurrer is that the provision of the general law requiring notice of the nature and amount of the claims of the beneficiaries of the bond to be given within ninety days after the last item of labor or material is applicable to the city of St. Paul, notwithstanding its charter provisions. This presents the question whether the charter provisions relating to contractors' bonds are in harmony with and subject to the Constitution and Laws of the state, as required by constitutional amendment. If this limitation on the power of cities in framing their charters is to be construed as prohibiting the adoption of any charter provisions relating to proper subjects of municipal legislation and matters germane thereto, unless they are similar to and contain all the provisions of the general laws on the subject, then, as said by the learned trial judge: 'All that the framers of a charter can do, where there is a law in existence at the time the charter is adopted, is to add such provisions as are not already contained in the law, and are not repugnant to it. If this is the extent of the power conferred upon cities to make their own charters, then the constitutional grant is a mere form of words, of no practical value.' It is clear that

such is not a proper construction of the limitation. This limitation forbids the adoption of any charter provisions contrary to the public policy of the state, as declared by general laws, or to its penal code—for example, provisions providing for the licensing of prize fighting or gambling or prostitution, or those which are subversive of the declared policy of the state as to the sale of intoxicating liquor. But it does not forbid the adoption of charter provisions as to any subject appropriate to the orderly conduct of municipal affairs, although they may differ in details from those of existing general laws. This is necessarily so, for otherwise effect could not be given to the constitutional amendment which fairly implied that the charter adopted by the citizens of a city may embrace all appropriate subjects of municipal legislation, and constitute an effective municipal code, of equal force as a charter granted by a direct act of the legislature."

It will be noticed that both the statute and the charter dealt with bonds given by the contractor to the municipality, and the holding was that, the matter being a proper subject of municipal legislation, the charter superseded the statute. Had the charter assumed to cover bonds other than those given to the city, it must have been declared invalid.

Counsel on both sides of this case cite 1 Dillon, Municipal Corporations (5th ed.) sec. 63, as follows:

"The act of the city in formulating the charter and determining the provisions to be included therein has the same force and authority as a charter with the same provisions enacted by the legislature that is not restrained by any constitutional limitations. * * * The power and authority conferred by the Constitution upon cities to frame their own charters extend to all subjects and matters properly belonging to the government of municipalities, and this necessarily includes any subject appropriate to the orderly conduct of municipal affairs."

Appellees therefrom argue: "Assuming that the electorate of the city had expressly authorized the city council

to establish a municipal coal-yard, such action would clearly be the equivalent to a legislative act. This definitely establishes that the power is vested in the city of Lincoln to establish a municipal coal-yard without state legislation. To hold otherwise would be to destroy the basic purpose of the home rule charter provision of the Constitution."

Assuming the public purpose and with the interpellation for clarity of the words "electorate of the" just before "city of Lincoln," we agree. And just at this point of the discussion we wish to observe that it appears to us that appellees' counsel fails to differentiate between the powers conferred upon the electorate of the city in the formation of a charter, and powers of the city council under that charter. He quotes section 1, art. III of the Constitution, "The legislative authority of the state shall be vested in a legislature," and section 8, art. IV of the city charter, "The council shall have, possess and exercise, by itself or through such methods as it may provide, *all the executive,* legislative and judicial powers and duties," and argues that because the state Constitution is a limitation of power, and that, subject only to those limitations, the power of the legislature is supreme, so under a city charter adopted by the same sovereign people, reposing all legislative power in the council, such power is unlimited except where controlled by the Constitution and Laws of the state. The argument assumes that the charter so formed is a limitation, as distinguished from a grant of power. In this appellees are in error, not perhaps on general principles, but upon the proper construction of the two instruments under comparison.

Counsel concedes that a legislative charter is a grant, but contends that, by the adoption of a charter in substantially the same form and words of a legislative charter, the people have, by some process of electoral legerdemain, transformed it into a limitation. He says: "There is a fundamental difference between a city charter resting on constitutional authority directly, on one hand, and

legislative authority on the other." Of what this fundamental difference consists is not divulged. He cites *State v. Otis,* 98 Ohio St. 83. In that case the city of Cleveland had adopted its own charter under constitutional authority. Section 1, among other powers enumerated, expressly reserved to the city of Cleveland "all powers that now are, or hereafter may be, granted to municipalities by the Constitution or Laws of Ohio," and section 2 declared: "The enumeration of particular powers by this charter shall not be held or deemed to be exclusive." Later the legislature passed an act conferring power upon municipalities to provide for appointment of a board of rapid transit commissioners, and the question was whether the city of Cleveland had such power as it was not expressly conferred by the charter, and it was held: "Under the provisions of sections 1 and 2 of the charter of the city of Cleveland, authority is reserved to that city to exercise any power now or that may hereafter be conferred upon the municipalities of this state by the laws of Ohio."

In the opinion the court used this language: "In other words, these declarations at the very threshold of the charter provisions clearly indicate that it was not the intention of the people of the city of Cleveland when they adopted this charter to deprive that city of any power conferred upon municipalities by the statutes of this state, *or that might under the Constitution and laws of the state of Ohio have been written into the charter itself.*"

The italics are counsel's, and great stress is laid upon the words italicized, from which he concludes that "the enumeration is not requisite as a condition precedent to its exercise" (the power). But is the converse of the proposition laid down by the court true, that it was the intention of the people to *confer upon the city* government all the power of the electorate, notwithstanding the enumeration? We think not: but it is not necessary to decide the point first, because the court is speaking of the powers of the city in forming a charter (moreover, the alternative in italics is *obiter dictum,* the only question being whether

the city could exercise a power expressly granted by law under the explicit reservation of the charter); and, second, by reason of the difference of charter provisions from those under discussion.

Park v. City of Duluth, 134 Minn. 296, is cited also. There the charter framed by the electorate did not confer power upon the city to impose a wheelage tax, but under prior legislative act it had such right. The charter provided that the city should "have and exercise all powers, functions, rights and privileges possessed by the city of Duluth prior to the adoption of this charter, * * * and * * * it shall have all the powers, and be subject to the restrictions contained in this charter," and it was held: "This continues all power not inconsistent with the terms of the new charter, and continued the power to impose a vehicle tax." Attention is called to the following excerpt from the opinion:

"The people of a city in adopting a charter have not power to legislate upon all subjects, but as to matters of municipal concern they have all the legislative power possessed by the legislature of the state, save as such power is expressly or impliedly withheld."

We do not doubt the correctness of this statement of the law, but it will be noted that the court speaks of "the people of a city in adopting a charter." It does not deal with the powers of the city council under that charter, which, we conceive, is an entirely different matter.

Neither of these cases support the contention that a charter adopted by the electors of a city is a limitation rather than a grant of power. In *Baggage and Omnibus Transfer Co. v. City of Portland,* 84 Or. 343, it was expressly held: "A state constitution is a limitation and not a grant of power," and "a municipal charter is a grant and not a limitation of power, hence authority to enact an ordinance must be found in the charter expressly or by necessary implication." Appellee suggests that the charter in question was not a home rule charter for the reason that the city "was operating under a legislative char-

ter" which had never been superseded by a home rule charter. The facts are: It was provided by the Constitution: "The legislative assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the state of Oregon." The city did not formally "enact" its charter, but amended it a number of times. The precise status of the charter in question, in view of the prohibition to the assembly and the grant to the city, is a puzzling problem; a reasonable view would seem to be, perhaps, that the constitutional provisions, *ex proprio vigore,* changed the existing legislative to a home rule charter, or, at least, that by amending the legislative charter the city had recognized and enacted it as the latter. But in the view we take of the charter under review, we may leave the riddle unguessed. See, however, on this point: *Portland v. Parker,* 69 Or. 271; *City of Covington v. District of Highlands,* 113 Ky. 612.

Such a charter has been aptly termed the Constitution of the city (dissenting opinion of Wanamaker, J., in *State v. Otis, supra*); and Constitutions may be either grants or limitations. It is familiar law that the Constitution of the United States is a grant of power, while that of Nebraska and most or all of the states are limitations of power, the distinction being clearly stated in Cooley, Constitutional Limitations (4th ed.) p. 210, quoted in *State v. Moore,* 40 Neb. 854, as follows:

"When a law of congress is assailed as void, we look into the national Constitution to see if the grant of specific powers is broad enough to embrace it; but when a state law is attacked on the same ground, it is presumably valid in any case, and this presumption is a conclusive one, unless in the Constitution of the United States, or of the state, we are unable to discover that it is prohibited. We look in the Constitution of the United States for *grants* of legislative power, but in the Constitution of the state

to ascertain if any *limitations* have been imposed upon the complete powers with which the legislative department of the state is vested in its creation. Congress can pass no laws but such as the Constitution authorizes either expressly or by clear implication, while the state legislature has jurisdiction of all subjects on which its legislation is not prohibited. The law-making power of the state recognizes no restraints, and is bound by none, except such as are imposed by the Constitution. That instrument has been aptly termed a legislative act by the people themselves in their sovereign capacity, and is, therefore, the paramount law. Its object is not to grant legislative power, but to confine and restrain it. Without the constitutional limitations, the power to make laws would be absolute."

The distinction is founded on the different forms of the respective instruments. At the time of the adoption of the federal Constitution the people of the states were jealous of surrendering any portion of their sovereign power to a new government, and so the powers were specifically granted. But in adopting constitutions for their own government, where the powers were to be exercised by their own people, they pursued a more liberal policy; and all power except that which was expressly withheld was conferred upon the state government.

Constitutions and statutes are but different forms of legislation, the one being enacted by the people themselves, the other by their representatives, the former differing from the latter only in its paramount force in cases of conflict. *Dailey v. Swope,* 47 Miss. 367; *Willis v. Mabon,* 48 Minn. 140.

That a charter framed by the people of a city has the force and effect of one granted by an act of the legislature is held in *State v. Missouri & Kansas Telephone Co.,* 189 Mo. 83.

"A charter framed by a city for itself under the constitutional provision has, within the limits therein contemplated, the force and effect of one granted by an act of the

legislature, when unrestrained by constitutional provision, and by express provision it supersedes the old charter and all amendments thereto. Provisions of the freeholders charter which are purely municipal in their character supersede provisions of the general laws which are inconsistent therewith." 1 Dillon, Municipal Corporations (5th ed.) sec. 63.

We are unable to perceive any logical ground for distinguishing between a charter of a city adopted by the people and one enacted by the legislature based merely upon the origin of the legislation. That they had the power to adopt either kind of a charter is conceded. The legislative act is universally held to be a grant of power, and, if the charter adopted is also a grant of power, then the same principles of construction must be applicable in determining what powers are thereby granted to the city.

No doubt it was within the competency of the electorate of the city of Lincoln to adopt a charter which under settled principles of construction would be a limitation as distinguished from a grant of power; but, as appellee contends: "The vital question here is: What did the people of the city of Lincoln do with the sovereignty acquired by the adoption of a home rule charter?" or, rather, what did they do with the sovereignty conferred by the Constitution by the adoption of a home rule charter? Did they grant to the city council unlimited power to legislate upon municipal affairs in the same sense that the Constitution granted them to the legislature, or did they limit such power to the subjects enumerated in the charter? Counsel argue: "If when the electorate of the state by the fundamental law of the state say, 'The legislative authority of the state shall be vested in a legislature consisting of a senate and house of representatives,' it follows that the legislature possesses the full legislative power subject to the limitations of the Constitution, why does not the same logic apply where the electorate of the city of Lincoln establish a representative body called the city council and say that the council 'shall have, possess and exercise * * *

all the * * * legislative * * * powers and duties?' If this language does not vest all the legislative power of the city in the council, what language can be used to effect that purpose?" This argument assumes that the Constitution and the charter are both limitations of power; that the Constitution is of that character is conceded; whether the charter is or not, as counsel concedes, "reference must of necessity be had to the particular home rule charter to determine its effect."

The two provisions of the charter relied upon to sustain appellees construction are:

"Art. II, sec. 1. Without denial or disparagement of other powers held under the Constitution and laws of the state, the city of Lincoln shall have the right and power."

"Art. IV, sec. 8. The council shall have, possess and exercise, by itself or through such methods as it may provide, all the executive, legislative and judicial powers and duties."

The charter must be construed, however, as a whole, and effect given to all its provisions, in determining its character. Let us then take a general survey of its structure.

The prefatory synopsis which is required to be submitted with the charter commences:

"All that the charter convention has attempted to do, in drafting the city charter proposed herewith, is to submit to the voters the existing city charter without any substantial departure from its provisions. * * * It has been the endeavor * * * to draft a charter that will present to the voters solely the issue whether or not they desire a 'home rule' charter for the city. To that end it has seemed desirable that no change be proposed at this time that could be used legitimately to confuse the issue sought to be presented."

Article I provides that the city shall be a body political and corporate—the city limits, etc. Following article II, sec. 1, quoted above, are enumerated the general powers of the city in seven subsections.

"Section 2. In addition to the powers hereinbefore enumerated, the city shall have power by ordinance:" (Then follow 15 pages containing 49 specifications of subjects of municipal legislation and regulation, and section 50 is the general welfare clause already quoted; numerous other powers are specified in detail by later sections.) Articles III and IV have to do with elections and officers; article V, enactment of ordinances; article VI, water-works; article VII, contracts; article VIII, public improvements and utilities, containing section 11, above quoted; article IX, finance and taxation. Compare this document with the state Constitution, and we think it will be evident that they are no more alike in their basic characteristics than a liquor license is like a marriage license. The Constitution does not attempt to define the powers of the legislature, otherwise than by negativing its powers to enact local or special laws as to certain subjects; in other words, it does not *define,* but *limits;* and therefore it is held that the legislature possesses all power except as limited. How different the charter, which lays down with meticulous particularity what powers the council shall have; and when it granted to the council "all the legislative powers and duties," it merely designated what officers of the city should perform those legislative functions which the charter had granted to the city. To impart to this language any wider significance would render supererogatory fully three-fourths of the provisions of the charter, or require us to ignore them in determining its character and effect. The word "all" adds nothing to the extent of power granted, especially when taken in connection with the definite article "the." There would be more reason for a larger signification if it had read "all legislative power." What need of specifying the subjects upon which the council might legislate, if all subjects were to be within their cognizance? Why not incorporate the city and insert the provision under review and let it go at that? We agree with appellees "that the electorate may, in their discretion, grant full power to the

city council without enumeration," but have they done so? The logical inference from the plain reading of this charter is that the electorate were unwilling to grant unlimited power to the council, but intended it to exercise only the powers granted and such powers as are therefrom necessarily implied. Again, compare if you will this charter with the federal Constitution and the analogy is striking. By section 9, art. I of the latter, certain powers are conferred upon congress, and it is conceded by all that they are exclusive; that every federal enactment must find its justification in some express power contained in the Constitution, or implied as necessary to carry out the express power granted.

We conclude that the charter of the city of Lincoln falls within that class of "Constitutions" which are to be construed as grants rather than limitations of power; that the principles of construction applicable thereto are the same as to a grant by the legislature; and that the principles stated in 7 McQuillin, Municipal Corporations (Supp.) sec. 352, quoted in appellants' brief are as applicable to a charter adopted by the people in the form of the Lincoln charter as one granted by legislative act, to wit:

"A municipal corporation, therefore, possesses no powers or faculties not conferred upon it, either expressly or by fair implication, by the law which created it, or by other laws, constitutional or statutory, applicable to it. It is a creature of the law established for special purposes and its corporate acts must be authorized by its charter, or other laws applicable thereto. Every investigation, therefore, relating to its powers must be conducted from the standpoint of such laws. Wherefore the usual formula, invariably supported by judicial utterances and judgments, in substance, is: That a municipal corporation possesses and can exercise these powers only: (1) Those granted in express terms; (2) those necessarily or fairly implied in, or incident to, the powers expressly granted; and (3) those essential to the declared objects and pur-

poses of the municipality, not merely convenient, but indispensable."

The following cases support the view that we have adopted, that the home rule charter in the form of the one under review is a grant of power rather than a limitation: *St. Louis v. Western Union Telegraph Co.*, 149 U. S. 465; *State v. Otis*, 98 Ohio St. 83; *Park v. City of Duluth*, 134 Minn. 296.

It remains to be determined whether authority to establish and maintain a coal and wood-yard, as proposed by the ordinance of the defendant city, is conferred by the charter, either expressly or by necessary implication. Here again appellees confuse the powers of the city of Lincoln with the powers of the council. They say: "On the question, therefore, of the power in the city of Lincoln, under its home rule charter, there would seem to be no doubt that the power exists, and the question resolves itself into one of the methods of exercising the power." We have shown that the power does exist in the city (assuming the public purpose) as a segregated portion of the electorate, but has the city assumed that power, and conferred upon its agent, the city council, authority to exercise it? The only sections of the charter to which our attention has been called as justification for the ordinance in question are those quoted in the early part of this opinion. Section 1, art. II, in addition to the powers granted, reserves to the city "other powers held under the Constitution and Laws of the state." Therefore, if the power in question existed outside the charter, it is preserved. *State v. Otis*, and *Park v. City of Duluth, supra.* The only preexisting legislative expression upon this subject is found in section 5195, Rev. St. 1913, above quoted, and as it confers no further or additional power than section 11, art. VIII of the charter, it need not be further considered.

For convenience section 11 will be repeated: "Art. VIII, sec. 11. The city shall have power to purchase, construct and otherwise acquire, own and operate gas and electric

plants and properties for the manufacture and distribution of gas, heat and electricity for the purpose of supplying the city and the inhabitants thereof with such service and utilities; and to purchase, lease, construct or otherwise acquire, own and operate street railways and telephone plants, lines and systems, and any and all other public service plants and properties, for the purpose of supplying the city and the inhabitants thereof with such service and public utilities."

It is argued that, inasmuch as the power is granted to furnish heat, the determination of the method or means of supplying it is delegated to the council by the general grant of legislative power, and the cases of *Jones v. City of Portland,* and *Laughlin v. City of Portland, supra,* are relied upon. As before stated, they both involve the same statute, and a consideration of the *Laughlin* case will suffice for our purpose.

"The legislature of Maine enacted the following law: 'Any city or town is hereby authorized and empowered to establish and maintain within its limits a permanent wood, coal and fuel-yard, for the purpose of selling, at cost, wood, coal and fuel to its inhabitants. The term "at cost" as used herein shall be construed as meaning without financial profit.' "

The question to be decided was stated to be: "The important question is therefore sharply raised, whether this court must declare unconstitutional this act of the legislature of 1903. It is not a question whether under the general statutory powers a municipality has the right to take this step, a question that has arisen in many cases, but whether such municipality can exercise the right when conferred upon it by the legislature in clear and unambiguous terms."

Having arrived at the conclusion that the furnishing of *heat* was a public purpose analogous to those of furnishing light and water, the court holds that the legislature "can do this by any appropriate means which it may think expedient," in the exercise of its absolute power,

except as limited by the Constitution. And the opinion proceeds:

"The vital and essential element is the character of the service rendered and not the means by which it is rendered. It seems illogical to hold that a municipality may relieve its citizens from the rigor of cold if it can reach them by pipes or wires placed under or above the highways but not if it can reach them by teams traveling along the identically same highway. It will be something of a task to convince the ordinarily intelligent citizen that an act of the legislature authorizing the former is constitutional but one authorizing the latter is unconstitutional beyond all rational doubt. For we must remember that we are considering the existence of the power in the legislature which is the only question before the court and not the wisdom of its exercise which is for the legislature alone."

This language was quoted with approval by the supreme court of the United States on appeal in *Jones v. City of Portland*, 245 U. S. 217, and the case affirmed, great emphasis being laid upon the view that the judgment of the highest court of the state upon what should be deemed a public use in a particular state is entitled to the highest respect, and would be accepted unless clearly not well founded, citing cases. In the Maine case we have established the power of the city to furnish heat as a public use, and a legislative prescription of the mode of doing it. Could it be logically claimed that under such authority the city might erect and maintain a central heating plant for distribution of heat through pipes? The argument is persuasive as applied to the situation there presented, which started with the power expressly granted. In this case we have to go back a step and determine whether it has been granted. Conceding the power granted to supply heat, the precise question is, may it be done in the manner proposed?

It is a well-established proposition in municipal law that, where a power is granted and the manner of its exer

cise prescribed, the method is the measure of the power. *Page v. Belvin,* 88 Va. 985.

In *City of Ft. Scott v. Eads Brokerage Co.,* 117 Fed. 51, it was held: "The prescription, by the statutes, under which a municipality is organized or acting, of the manner in which it shall exercise one of its powers, limits the right to exercise it to that method, and its use in any other way is *ultra vires* of the corporation, and void." And in *Putney Bros. Co. v. Milwaukee County,* 108 Wis. 554, it was held that a contract by the county for the private treatment of an inebriate at a Keeley Institute was not authorized as implied from its general power to provide for paupers and inebriates, the court saying: "Thus it appears that the legislature has provided certain methods by which inebriety or habitual drunkenness may be dealt with, and we think it plain that by prescribing certain methods it has excluded other methods, and that the general provisions requiring the county or town to care for and relieve paupers refer to the necessary food, clothing, ordinary medical treatment, and the like, and not to medical treatment looking toward the cure of inebriety as a disease."

In *Varney v. Justice,* 86 Ky. 596, it was held: "The words of the Constitution are never to be regarded as directory merely. If directions are given as to the manner of exercising a power, it was intended that the power should be exercised in the manner directed and in no other manner, as no unessential matters were intended to be embraced in the Constitution." This language is as applicable to a city constitution as to that of the state.

Further citation on this point is unnecessary, as the rule is well established. So we have to inquire whether or not the provisions of the charter prescribed the mode in which the power to furnish heat to the inhabitants of the city shall be exercised; and it seems to us clearly that the method is provided for by section 11, art. VIII of the charter, in the words "construct and otherwise acquire, own and operate gas and electric plants and properties

for the manufacture and distribution of gas, heat and electricity for the purpose of supplying the city and the inhabitants thereof with such service and utilities;" and this provision is followed by authority to purchase "appliances, equipment and machinery necessary or incident to the proper operation and maintenance of such public service plants and properties," and a large number of similar provisions all referring to "such public service plants or properties." The central thought conveyed by this language is the establishment of a plant for the distribution of heat in the same manner or by the same method as had been in use for many years in the furnishing of water and light to the inhabitants of the city, namely, by the establishment of a central plant from which public service was distributed. The language used contains no hint of any purpose of the people to grant to the city, to be exercised by its legislative body, the authority to enter into fields of private enterprise and into a business which had always theretofore been carried on by private individuals to the greater or less satisfaction of the public. To imply such a power from the language used would be to attribute to it a significance away beyond the general acceptation of the import of the terms. Implied powers, as the words themselves indicate, must find their justification and foundation in express power granted; that is, they are only implied *ex necessitate* that the express powers may be fully and completely exercised. The argument being that such powers must have been within the contemplation of the granting authority, as otherwise those expressly granted could not be carried out. No doubt the power is implied to establish a municipal coal and wood-yard for the purpose of supplying the *plant* for the distribution of heat; but this power differs essentially from a power to buy fuel and sell it to the inhabitants of the city in the ordinary course of trade.

Moreover, if the argument with reference to implied powers does not satisfy, it appears that the authority of the city over the particular subject in question has been

stated in section 13, art. II of the charter: "To provide for the inspection and weighing of hay and grain, and coal, the measuring of wood and fuel to be used in the city, and to determine the place or places of the same, and to regulate and prescribe the place or places of exposing for sale hay, coal and wood." While it is true that in the construction of municipal charters the rule *expressio unius est exclusio alterius* must be applied with caution (*State v. Bryan,* 50 Fla. 293, 297, 377); yet "the expression of one thing in the Constitution is the exclusion of things not expressed" (*Page v. Allen,* 58 Pa. St. 338); the above quoted provision of the charter strongly induces the thought, in view of that other canon of construction that different sections *in pari materia* are to be construed together, that it was not the intention of the electorate to grant to the city authorities the power contended for.

In *State v. Port of Seattle,* 104 Wash. 634, where authority was granted the Port to build cold storage plants and terminal icing plants, it was held that this did not "grant power to build a plant and engage in manufacture largely in excess of its needs and to sell to others engaged in retailing ice."

In *Keen v. Mayor and Council of Waycross,* 101 Ga. 588, it was held that a general power to erect and maintain a system of water-works did not entitle the city to enter the general plumbing business.

While it is true that the constitutional provision granting all cities the right to form their charters for their own government should be liberally construed in order that the beneficent intention thereof may be fully carried out (*Hockett v. State Liquor Licensing Board,* 91 Ohio St. 176), when it comes to a construction of the powers delegated by that charter to the city government, the rule of strict construction still obtains. As was said in *City of St. Paul v. Briggs,* 85 Minn. 290:

"It is a rule of general application that the authority

given municipal corporations to enact ordinances must be construed strictly (Dillon Mun. Corp. 91, note 2), and this rule should apply with special force to cities authorized to form and adopt their own charters."

"The power conferred upon municipal corporations by their charters to enact ordinances on specified subjects is to be construed strictly, and the exercise of the power must be confined within the general principles of the law applicable to such subjects."

We do not understand it to be claimed that the ordinance in question is referable to the general welfare section of the charter. To bring it within the police power to which this section refers, some public emergency would have to be shown, such as a coal famine, or monopoly, whereby the "government might be able to obtain fuel, when citizens generally could not. Under such circumstances we are of opinion that the government might constitute itself an agent for the relief of the community, and that money expended for the purpose would be expended for a public use." *Opinion of the Justices*, 182 Mass. 605. No such emergency is suggested.

We conclude that the establishment of a municipal fuel-yard for the purchase and sale of fuel at retail to the inhabitants of the city of Lincoln is not within the powers granted to the city council, and that the ordinance in question is invalid. The case is reversed and remanded to the district court for Lancaster county, with instructions to enter a decree perpetually enjoining the defendants from conducting a fuel business under the said ordinance.

REVERSED.

SHAWNEE STATE BANK, APPELLEE, V. ALVIN LYDICK, APPELLANT.

FILED JULY 19, 1922. No. 22051.

1. **Bills and Notes:** ACTION BY INDORSEE: INNOCENT PURCHASER: PROOF. "In an action by an indorsee against the maker upon a

promissory note, when it is shown that it was obtained by fraud practiced upon the maker, the plaintiff, in order to recover, must allege and prove that he took the note in good faith in the ordinary course of business and paid value, without notice of any defense thereto or infirmity in the note." *Auld v. Walker*, 107 Neb. 676.

2. ———: ———: ———: QUESTION FOR JURY. "Whether plaintiff has sufficiently satisfied the burden resting upon him and made good his claim to be an innocent purchaser of a note is a question of fact for the jury, save in those instances where the testimony is not only consistent with the good faith of such purchase, but is such that no fair-minded person can draw any other inference therefrom." *Auld v. Walker*, 107 Neb. 676.

3. ———: INDORSEMENT: PROOF. Where the indorsement by the payee of a note is denied, the introduction in evidence of the note having thereon an indorsement purporting to be that of the payee, without proof that the indorsement is that of the payee, or without offering the indorsement independently of the note, does not carry with the note as evidence such indorsement, unless the offer is sufficiently broad to, and did, include such indorsement, and proof is made that the indorsement was made by the payee or some person authorized to make the indorsement.

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

North & Donovan, for appellant.

Stout, Rose, Wells & Martin, contra.

Heard before LETTON, DEAN and DAY, JJ., CLEMENTS (E. J.) and WELCH, District Judges.

WELCH, District Judge.

This is an action brought by appellee on a promissory note for the sum of $2,500, dated August 14, 1919, due one year from date, with interest at 8 per cent. from its date, executed by the appellant, Alvin Lydick, in favor of the Missouri Valley Cattle Loan Company. The plaintiff alleged that before said note became due the Missouri Valley Cattle Loan Company, for a valuable consideration paid by plaintiff in the regular course of business, sold, indorsed, transferred and delivered said note to plaintiff.

The defendant, Lydick, denied that the Missouri Valley Cattle Loan Company sold, indorsed, transferred and delivered said note to plaintiff; denied that the plaintiff was the owner and holder of said note for value, and alleged that there was no consideration for said note. He also alleged facts constituting fraud in the inception of said note. Plaintiff replied by general denial. The plaintiff at the commencement of the trial proceeded to introduce evidence to show that it purchased said note in good faith, for a valuable consideration, before maturity, without notice of any infirmity in the note. After plaintiff had introduced the evidence relied upon by it to establish the foregoing facts and rested, the defendant, Lydick, proceeded to introduce and offer evidence in support of his answer. Upon objection by plaintiff that the same was irrelevant and immaterial, all evidence offered by said defendant to prove his allegations of want of consideration and fraud in the inception of the note was excluded by the court. The court also, on plaintiff's objection, denied the said defendant the right to prove the specific facts offered by him to establish want of consideration of the note and fraud in its inception. Upon the close of the trial the court, on motion therefor, discharged the jury and found for the plaintiff and against the defendant, Lydick, and also against his codefendant, Missouri Valley Cattle Loan Company, for the full amount of the note with interest. From the judgment rendered on this finding the defendant, Lydick, has appealed.

The question now to be determined is whether or not the purchase of said note, in good faith, for a valuable consideration, by plaintiff, and its indorsement and delivery before it became due by the payee thereof to plaintiff, was established by the evidence to such an extent that there was nothing for the jury to pass upon. If each and all of said facts were not so established, then such of them as were not so established by the evidence were for the jury to determine, and not the court, and there was error in not submitting the same to the jury, and also error

in excluding the evidence offered by the defendant, Lydick, to prove want of consideration and fraud in the inception of the note.

The evidence introduced by plaintiff to prove that it was an innocent holder of the note for value, in good faith, before the same became due, tended to show that before maturity of the note the plaintiff, by its cashier, who conducted all the negotiations therefor, purchased said note and paid therefor its face value with accrued interest. The cashier of plaintiff testified that he had no knowledge of the consideration for the note or of any defense thereto. He testified that he purchased said note through one Huttig, a note broker residing at Muscatine, Iowa, who was also engaged in the manufacturing business at that point: that before the purchase thereof he had a conversation with said Huttig at Topeka and in reference thereto testifies as follows: "He was there; it was either the last part of July or in August; I do not remember the date; and he said he would have a lot of this cattle loan paper. He thought some good farmers' paper. He did not say good cattle loan notes; he said good farmers' and bankers' paper, and wanted to know if we had funds, if we were in financial condition to handle them, and I told him I would take it up with the board and he might submit us a list." On cross-examination said witness produced two letters received by him from said Huttig in reference to the transaction, and testifies that he did not have there all of the correspondence he had with Huttig. He also testifies that Huttig furnished him with a financial statement made by the Missouri Valley Cattle Loan Company. This statement was introduced in evidence and showed among its resources the following items: "Commission, $117,525;" "paper on hand, $508,591.22;" "paper past due, $62,251.57;" "paper redeemed awaiting maturity, $17,055.61;" "loans sold on approval, $52,656.45;" "notes receivable, $269,387.48;" "rediscounts pending, $89,145.24;" "suspense, $8,554.16." Said statement showed among its liabilities items, "paper paid not redeemed, $43,593.68;" "es-

crow, $276,780.94." The court in the trial, on objection by plaintiff, would not permit plaintiff's cashier to testify what his understanding was as to said items, "commission, $117,525" and "suspense, $8,554.16." To the ordinary layman these items without explanation are unintelligible. He would also think that the item, "paper on hand, $508,591.22," would include the items "paper past due," "paper redeemed awaiting maturity," "loans sold on approval," "notes receivable," and "rediscounts pending," above set forth. Without any explanation as to those items, it would appear as if there was a duplication of the assets in said statement. It is also unintelligible how property in "escrow" can become a liability, unless it be by a conversion of the property in escrow. And such would be the interpretation naturally to be placed upon such a statement. Here was in the hands of the plaintiff before it purchased the note in suit notice that the payee of the note had property in escrow which was a liability against the payee. Such property, on account of the nature of the business of the payee, one would naturally infer would be notes in escrow. Plaintiff's cashier also testified that he was informed by said Huttig that he (Huttig) was to receive 5 per cent. commission for selling the note, and that plaintiff should apply this commission on an indebtedness then owing to plaintiff by said Huttig. Plaintiff purchased said note September 12, 1919, paying therefor its face value with accrued interest, and crediting the said note broker on his indebtedness to plaintiff 5 per cent. of the face of the note on account of said broker's commission for selling the same. And at the same time it purchased a number of other notes in favor of the Missouri Valley Cattle Loan Company, and prior thereto in the month of August had also purchased through said Huttig other notes in favor of Missouri Valley Cattle Loan Company. The aggregate amount of notes so purchased by plaintiff was $68,000, all of which were purchased on the same terms and said commission of 5 per cent. credited on said note broker's indebtedness to plaintiff. The cashier of plaintiff also testi-

fied that he purchased said notes from a list of notes in favor of Missouri Valley Cattle Loan Company submitted to him by said Huttig; that he had never before heard of the Missouri Valley Cattle Loan Company, but that, in addition to examining said financial statement of said company, and reports submitted to him by said note broker covering the makers and indorsers of the notes, he made an independent investigation through the bank at Mr. Lydick's home and selected this note with others for purchase. Said cashier also testified that he did not think that note brokers usually received 5 per cent. commission for selling notes.

It would seem that the paying of a commission of 5 per cent. by the payee of said note for selling the same would not be in the ordinary course of business unless some reason therefor is shown. The name of payee, Missouri Valley Cattle Loan Company, would imply that it was engaged in loaning money on cattle security or to farmers. The note bore interest at 8 per cent. and was due in one year. It was sold within about one month after its date and 5 per cent. of the face value paid as a commission for making the sale. This would make the cost to the Missouri Valley Cattle Loan Company for the money it received for the note such that, had it been paid as interest on that amount of money to the maturity of the note it sold, the interest would be usurious.

Negotiable notes bought by a bank cashier cannot as a matter of law be said to have been purchased in good faith in the usual course of business, so as to cut off the defense of fraudulent inception on the part of the maker, a farmer, known to the cashier, who had never engaged in any business requiring the discounting of paper to the extent represented by the notes which were executed, 200 miles from home, if they were purchased at a usurious rate of interest from the payee, a stranger, without any inquiry on the part of the cashier as to their origin or the existence of equities in favor of the maker; the question of good faith is for the jury. *Canajoharie Nat. Bank v. Diefendorf*, 123

N. Y. 191. The cashier of a bank, who is also an owner of its capital stock, is not a disinterested witness when testifying as to the good faith of his purchase of negotiable paper, so his testimony must be regarded as controlling if not contradicted; the question of his credibility is for the jury. *Canajoharie Nat. Bank v. Diefendorf, supra.*

"In an action against the maker upon promissory notes, when it is shown that they were obtained by fraud practiced upon the maker and were without consideration, the plaintiff in order to recover must allege and prove that he took the notes in good faith in the usual course of business and paid value, without notice of any defense thereto." *Ostenberg v. Kavka,* 95 Neb. 314. "In such case the question of the good faith of the plaintiff is for the jury, and their verdict cannot be controlled and directed by the court, if one might reasonably derive inferences from the character and circumstances of the transaction which would lead ordinary minds to a different conclusion." *Ostenberg v. Kavka, supra.*

No attempt was made to show why the Missouri Valley Cattle Loan Company, after loaning its money at 8 per cent. interest, should pay 5 per cent. for selling one of its notes due within less than one year from the time of its sale. It could not be for the purpose of raising money to again loan out at 8 per cent. The transaction is not shown by the evidence of plaintiff to be in the ordinary course of business on the part of the payee of a note who is engaged in the business of loaning money and taking notes therefor. The appellee in its argument says that it assumed the burden of proving that it was the *bona fide* purchaser of the note before maturity. By making this argument in this court it concedes that there was fraud in the inception of the note, but appellee made no such concession in the record on the trial of the case in the court below. The exclusion by the court of evidence offered by the maker of the note to prove fraud in its inception was error, therefore, unless the plaintiff had sustained the burden of proof cast upon it by fraud in the inception of the note to such

an extent that there was no question in reference thereto for consideration by the jury. No attempt is made to show that plaintiff sought any explanation as to why the Missouri Valley Cattle Loan Company was selling its paper out of the ordinary course of business of legitimate concerns of its character. The ambiguous financial statement of the Missouri Valley Cattle Loan Company was before plaintiff before it purchased the note in question. This statement showed thereon as liability, "paper paid and not redeemed" and "escrow." These items unexplained would suggest improper practices by the payee of the note. Plaintiff sought no explanation thereof. This court in the recent case of *Auld v. Walker,* 107 Neb. 676, holds: "Whether plaintiff has sufficiently satisfied the burden resting upon him and made good his claim to be an innocent purchaser of a note is a question of fact for the jury, save in those instances where the testimony is not only consistent with the good faith of such purchase, but is such that no fair-minded person can draw any other inference therefrom." In the opinion in said case it is said: "Although lack of knowledge, suspicious circumstances, failure to make inquiry, and negligence will not in themselves establish bad faith in the plaintiff, such facts, where the burden is upon him to establish the innocent character of his purchase, and the only evidence offered was his own testimony, constitute evidence of bad faith sufficient to take the question to the jury. *Ostenberg v. Kavka,* 95 Neb. 314."

This court in *Central Nat. Bank v. Ericson,* 92 Neb. 396, said: "Reasons for this conclusion were recently stated by the supreme court of Iowa as follows: 'It is ordinarily to be expected, in these cases, that the purchaser will testify to his good faith and want of notice, and that defendant is compelled to rely upon circumstantial evidence to rebut such showing. Whether plaintiff has sufficiently satisfied the burden resting upon him and made good his claim to be an innocent purchaser is therefore a question for the jury, save in those instances where the testimony is not only consistent with the good faith of such

purchase, but is such that no fair-minded person can draw any other inference therefrom. A categorical denial of notice or knowledge is something which in many, if not in most, instances cannot be opposed by direct proof; and the credibility of the witnesses, their interest in the case, the reasonableness or unreasonableness of their statements, the time, place and manner of the transaction, its conformity to or its departure from the ordinary methods of business, and all the other facts and circumstances which, though of slight moment in themselves, yet, when taken together, give character and color to the purchase under inquiry, constitute a showing which the court cannot properly pass upon as a matter of law.' *Arnd v. Aylesworth*, 145 Ia. 185, 29 L. R. A. n. s. 638."

A purchaser in good faith should be one who has purchased with due regard for the rights of the maker, and not one, who, relying wholly upon paying value for the note and purchasing before maturity without knowledge of any defense, is indifferent as to whether or not the same was honestly obtained from the maker. Where the evidence tends to show such indifference the question of good faith is for the jury. We think from the foregoing facts and circumstances in evidence the question of the good faith of plaintiff in purchasing said note should have been submitted to the jury, for in determining that question it is necessary to assume the existence of every material fact which the evidence received and offered in behalf of the defendant, Lydick, tended to prove. By so doing the fact of want of consideration and fraud in the inception of the note must be assumed and the burden of proof was thereby cast upon plaintiff to prove its good faith in the purchase of the note.

In addition to the foregoing reasons for finding error in taking the case from the jury, we find in the record no evidence nor offer of evidence to prove that said note was indorsed by the payee at any time. The note was introduced in evidence, but the indorsement on the back thereof purporting to be that of Missouri Valley Cattle Loan Com-

pany was not offered in evidence, nor was there any attempt to prove that the indorsement was made by the Missouri Valley Cattle Loan Company or by any officer thereof, or to show authority of any person to make such indorsement. The offer and reception in evidence of the note with the indorsement thereon does not introduce and carry with it as evidence such indorsement, unless the offer and reception were sufficiently broad to and did include the indorsement. To effect this it was necessary that the indorsement be identified, offered and received in and of itself independently. *Schroeder v. Nielson,* 39 Neb. 335; *Johnson v. English,* 53 Neb. 530; *Capitol Hill State Bank v. Rawlins Nat. Bank,* 24 Wyo. 423; note, 11 A. L. R. 957.

The appellee quotes from *First Nat. Bank v. McKibben,* 50 Neb. 513: "In an action by an indorsee of a negotiable promissory note against the maker, its mere production by the plaintiff, duly indorsed, raises a presumption of law that it was transferred before maturity and for value, and the burden is on the defendant to show that plaintiff is not an innocent holder." The foregoing does not say that the mere production of a note raises a presumption of law that the note was duly indorsed. Before the presumption of law therein set forth arises, the indorsement of the note, if denied, must be proved. The provision of the statute that every holder is deemed *prima facie* a holder in due course is held to refer to a holder by genuine indorsement. *Vickery v. Burton,* 6 N. Dak. 245. It cannot be said that the indorsement by payee was admitted by the defendant, Lydick, by his offer to prove fraud in the inception of the note, nor by any other act during the trial. While possession by plaintiff was *prima facie* evidence of ownership of the note, indorsement of such note before the same is due by the payee must be proved, where the same is denied in the answer, to constitute one a holder in due course, so as to cut off all defenses thereto. *Britton v. Berry,* 20 Neb. 325.

The possession of the note by plaintiff, being *prima facie*

evidence of ownership thereof, if the maker had offered no proof of a defense thereto, plaintiff would have been entitled to recover without proof of indorsement by the payee. But upon proof or offer of proof of fraud in the inception of the note, the burden of proof was cast upon plaintiff to prove that it was a holder in due course and would require proof of the indorsement. The evidence shows that the cashier of plaintiff was the only person connected with plaintiff's bank participating in the purchase of said note. It was unnecessary, therefore, for plaintiff to prove that no other officer of plaintiff had notice of defenses to the note.

The court therefore erred in excluding from the jury evidence offered by the defendant, Lydick, to prove want of consideration for and fraud in the inception of the note sued on. The court also erred in not submitting to the jury the question of good faith in plaintiff in purchasing said note. The judgment is therefore reversed as to the defendant, Alvin Lydick, and remanded for a new trial as to him.

REVERSED.

SHAWNEE STATE BANK, APPELLEE, V. H. E. VANSYCKLE, APPELLANT.

FILED JULY 19, 1922. No. 22052.

1. **Bills and Notes:** ACTION BY INDORSEE: INNOCENT PURCHASER: PROOF. "In an action by an indorsee against the maker, upon a promissory note, when it is shown that it was obtained by fraud practiced upon the maker, the plaintiff, in order to recover, must allege and prove that he took the note in good faith in the ordinary course of business and paid value, without notice of any defense thereto or infirmity in the note." *Auld v. Walker*, 107 Neb. 676.

2. ———: ———: ———: QUESTION FOR JURY. "Whether plaintiff has sufficiently satisfied the burden resting upon him and made good his claim to be an innocent purchaser of a note is a question of fact for the jury, save in those instances where the testimony is not only consistent with the good faith of such purchase, but

is such that no fair-minded person can draw any other inference therefrom." *Auld v. Walker*, 107 Neb. 676.

3. **Witnesses:** CREDIBILITY: QUESTION FOR JURY. However improbable facts testified to by a witness may be, such improbability, and their denial by other witnesses, will not take from the jury the determination of what credit should be given to the witness testifying to such improbable fact or facts, unless such facts are contrary to the undisputed physical facts or are impossible.

4. **Bills and Notes:** INDORSEMENT: PROOF. "Where the indorsement by the payee of a note is denied, the introduction in evidence of the note having thereon an indorsement purporting to be that of the payee, without proof that the indorsement is that of the payee, or without offering the indorsement independently of the note, does not carry with the note as evidence such indorsement, unless the offer is sufficiently broad to, and did, include such indorsement, and proof is made that the indorsement was made by the payee or some person authorized to make the indorsement." *Shawnee State Bank v. Lydick, ante*, p. 76.

APPEAL from the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Reversed.*

North & Donovan, for appellant.

Stout, Rose, Wells & Martin, contra.

Heard before LETTON, DEAN and DAY, JJ., CLEMENTS (E. J.), and WELCH, District Judges.

WELCH, District Judge.

This is an action brought by appellee on a promissory note for the sum of $12,500, dated May 19, 1919, due one year from date, with interest at 8 per cent. from its date, executed by the appellant, H. E. Vansyckle, in favor of the Missouri Valley Cattle Loan Company. The plaintiff alleged that before maturity of said note the Missouri Valley Cattle Loan Company, for a valuable consideration paid by plaintiff in the regular course of business, sold, indorsed, transferred and delivered it to plaintiff. The defendant, Vansyckle, denied that the Missouri Valley Cattle Loan Company sold, indorsed, transferred and delivered said note to plaintiff; denied that plaintiff was the owner and holder for value of said note; and alleged that

there was no consideration for said note. He also alleged facts constituting fraud in the inception of said note. Plaintiff replied by general denial. The plaintiff at the commencement of the trial admitted to the jury that the defendant, Vansyckle, has a good defense to said note, on the grounds of fraud and lack of consideration, against the payee of the note. Plaintiff then proceeded to introduce evidence to show that it purchased said note in good faith, for a valuable consideration, before maturity, without notice of any infirmity in the note. Upon the close of the trial the court, on motion therefor by plaintiff, instructed the jury to find for the plaintiff and against the defendant, Vansyckle, and also his codefendant, Missouri Valley Cattle Loan Company, for the full amount of the note with interest; whereupon the jury returned such a verdict. From the judgment rendered on this verdict the defendant, Vansyckle, has appealed.

The question now to be determined is whether or not the purchase of said note, in good faith, for a valuable consideration, by plaintiff, and its indorsement and delivery before it became due by the payee thereof to plaintiff, was established by the evidence to such an extent that there was nothing for the jury to pass upon. If each and all of said facts were not so established, then such of them as were not so established were for the jury to determine, and not the court, and there was error in not submitting the same to the jury.

To prove that it was an innocent holder of the note for value, in good faith, before the same became due, plaintiff called as a witness F. P. Elmore, its cashier. He testified that he had general conduct of the affairs of plaintiff, and had been making the loans of the bank and purchasing notes for the bank since June 1, 1919; that nobody else during that time made loans for or purchased notes for the plaintiff. He testified that during the fall and summer of 1919 he purchased for plaintiff promissory notes given to the Missouri Valley Cattle Loan Company to the amount of about $68,000, and that included therein

was the note in suit; that he purchased these notes, not direct, but from one H. W. Huttig, Muscatine, Iowa; that said Huttig was a note broker, who was also engaged in the sash and door business, and that he had known Huttig for 10 or 15 years. Said Elmore also testified that in the last of July or first of August, in plaintiff's office in Topeka, he first had a conference with said Huttig about the purchase of these Missouri Valley Cattle Loan Company notes; that he did not purchase any notes from him at that time, but made the first purchase in August. He does not testify as to what took place at that conference. Said Elmore further testified that he purchased the note in suit August 26, 1919, for Shawnee State Bank, through said H. W. Huttig, the note being sent direct from Missouri Valley Cattle Loan Company, and that, when he received it, it had that company's indorsement on the back; that the bank paid for the note $12,500 and accrued interest figured at the rate called for in the note. Elmore further testified that at the time he purchased the note he did not know the defendant, Vansyckle, had never heard of him, nor had had any dealings with the Missouri Valley Cattle Loan Company; that before he purchased he wrote a bank as to the responsibility of Vansyckle, and that he had no information about the details of the organization of the Missouri Valley Cattle Loan Company, did not know the consideration for the note, and did not have notice or knowledge when he purchased it that Vansyckle claimed a defense to it. On cross-examination said Elmore testified that in August or September, 1919, he did not know any of the officers of Missouri Valley Cattle Loan Company; that before he bought the note he had never seen the signature of V. W. Gittings (the indorsement of said note set forth in the petition of plaintiff purports to have been made by V. W. Gittings, secretary, for Missouri Valley Cattle Loan Company). He also testified that he did not know the signature of the defendant, Vansyckle, at the time he purchased the note, made no inquiry as to what the note was given for, that Huttig told

him he was getting 5 per cent. commission for the sale of these notes, and that he received a letter from Huttig with reference to the Vansyckle and other notes. This letter was introduced in evidence, and is dated August 16, and contains the following:

"You understand the Mo. Valley Cattle Loan Co. indorses all this paper & you will see by the statement I sent you their assets are liquid. Unless you write me to the contrary Monday, I will write the Cattle Loan Co. to send notes to you with S. D. attached for par & accrued interest less 5% which you apply on my note for following: Vansyckle note $12,500; you have reports." And after listing several other notes, amounting in the aggregate, with said Vansyckle note, to $31,592.75, said letter proceeds: "& accrued interest less 5% of face to apply on my indebtedness. * * * Your friend Shaffer has taken another $10,000 this week."

Previous to this time said Elmore had received a letter from said Huttig, which is in evidence, bearing date July 3, but which he testifies as July 30. This letter is as follows:

"Dear Mr. Elmore: I am inclosing you a list of notes I have for sale. The first list from same parties Shaffer Bros. bought entire, viz., $70,000 of them. This list shows maker, net worth, rate (8%), maturity & amount. All notes are indorsed with full recourse by the Missouri Valley Cattle Loan Co. whose statement I inclose. The sale of these notes will wipe out their notes & accts. payable. Will sell you the notes at face & accrued interest & my 5% commission off the face will go to you to apply on my interest note. I have until Aug. 10th to sell these, and I hope you can handle from $30,000 to $50,000 of them. Will be here until Saturday, so write me here fully. Shaffer Bros. will take $50,000 of this lot also. These men are all well-to-do farmers & bankers. Yours truly, H. W. Huttig."

Elmore also testified that before the purchase of the Vansyckle note plaintiff had been furnished with a finan-

cial statement of Missouri Valley Cattle Loan Company. This statement was introduced in evidence. The witness Elmore testified that he thought 5 per cent. a very good commission, not too large on unknown paper; that what he would call known paper was such as Swift's and Armour's and standard paper like that; that he did not think on unknown paper this was an extra large commission. The statement of the Missouri Valley Cattle Loan Company introduced in evidence showed among its resources the following items: "Commission, $117,525;" "paper on hand, $508,591.22;" "paper past due, $62,251.57;" "paper redeemed awaiting maturity, $17,055.61;" "loans sold on approval, $52,656.45;" "notes receivable, $269,387.48;" "rediscounts pending, $89,145.24;" "suspense, $8,554.16." Said statement showed among its liabilities the items, "paper paid and not redeemed, $43,593.68;" "escrow, $276,780.94." The court in the trial, on objection by plaintiff, would not permit plaintiff's cashier to testify what his understanding was as to said items, "commission, $117,525," and "suspense, "$8,554.16." To the ordinary layman these items without explanation are unintelligible. He would also think that the item, "paper on hand, $508,591.22," would include the items, "paper past due," "paper redeemed awaiting maturity," "loans sold on approval," "notes receivable," and "rediscounts pending," above set forth. Without any explanation as to those items, it would appear as if there was a duplication of the assets in said statement. It is also unintelligible how property in "escrow" can become a liability, unless it be by a conversion of the property in escrow. And such would be the interpretation naturally to be placed upon such statement. Here was in the hands of the plaintiff before it purchased the note in suit notice that the payee of the note had property in escrow which was a liability against payee. Such property, on account of the nature of the business of the payee, one would naturally infer would be notes in escrow. Plaintiff purchased said note August 26, 1919, paying therefor its face value with accrued interest, and credit-

ing the said note broker on his indebtedness to plaintiff 5 per cent. of the face of the note on account of said broker's commission for selling the same. And at the same time it purchased a number of other notes in favor of the Missouri Valley Cattle Loan Company. The aggregate amount of notes so purchased by plaintiff was $68,000, all of which were purchased on the same terms, and said commission of 5 per cent. thereon was credited on said note broker's indebtedness to plaintiff.

It would seem that the paying of a commission of 5 per cent. by the payee of said note for selling the same would not be in the ordinary course of business unless some reason therefor is shown. The name of payee, Missouri Valley Cattle Loan Company, would imply that it was engaged in loaning money on cattle security or to farmers. The note bore interest at 8 per cent. and was due in one year. It was sold within about three months after its date, and 5 per cent. of the face value paid as a commission for making the sale. This would make the cost to the Missouri Valley Cattle Loan Company for the money it received for the note such that, had it been paid as interest on that amount of money to the maturity of the note it sold, the interest would be usurious.

Negotiable notes bought by a bank cashier cannot as a matter of law be said to have been purchased in good faith in the usual course of business, so as to cut off the defense of fraudulent inception on the part of the maker, a farmer, known to the cashier, who had never engaged in any business requiring the discounting of paper to the extent represented by the notes which were executed, 200 miles from home, if they were purchased at a usurious rate of interest from the payee, a stranger, without inquiry on the part of the cashier as to their origin or the existence of equities in favor of the maker; the question of good faith is for the jury. *Canajoharie Nat. Bank v. Diefendorf,* 123 N. Y. 191. The cashier of a bank, who is also an owner of its capital stock, is not a disinterested witness when testifying as to the good faith of his purchase of

negotiable paper, so that his testimony must be regarded as controlling if not contradicted; the question of his credibility is for the jury. *Canajoharie Nat. Bank v. Diefendorf, supra.*

We do not think all of the facts set up in the rule above announced are necessary to make the question of good faith in the purchase of a note a question for the jury.

"In an action against the maker upon promissory notes, when it is shown that they were obtained by fraud practiced upon the maker and were without consideration, the plaintiff in order to recover must allege and prove that he took the notes in good faith in the usual course of business and paid value, without notice of any defense thereto." *Ostenberg v. Kavka,* 95 Neb. 314. "In such case the question of the good faith of the plaintiff is for the jury, and their verdict cannot be controlled and directed by the court, if one might reasonably derive inferences from the character and circumstances of the transaction which would lead ordinary minds to a different conclusion." *Ostenberg v. Kavka, supra.*

The plaintiff had notice before it purchased the note in suit that the payee of the note was paying a commission of 5 per cent. for selling notes amounting to at least $80,000. This with the notes then offered plaintiff would make $111,592.75. It would seem strange that the Missouri Valley Cattle Loan Company, after loaning its money at 8 per cent. interest, should pay 5 per cent. for selling its notes due within nine months from the time of their sale. It could not be for the purpose of raising money to again loan out at 8 per cent. The transaction is not shown by the evidence of plaintiff to be in the ordinary course of business on the part of the payee of a note which is engaged in the business of loaning money and taking notes therefor. No attempt is made to show that plaintiff sought any explanation as to why the Missouri Valley Cattle Loan Company was selling its paper out of the ordinary course of business of legitimate concerns of its character. The ambiguous financial statement of Missouri Valley

Cattle Loan Company was before plaintiff before it purchased the note in question. This statement showed thereon as liability, "paper paid and not redeemed" and "escrow." These items unexplained would suggest improper practices by the payee of the note. Plaintiff sought no explanation thereof. This court in the recent case of *Auld v. Walker,* 107 Neb. 676, holds:

"Whether plaintiff has sufficiently satisfied the burden resting upon him and made good his claim to be an innocent purchaser of a note is a question of fact for the jury, save in those instances where the testimony is not only consistent with the good faith of such purchase, but is such that no fair-minded person can draw any other inference therefrom." In the opinion in said case it is said: "Although lack of knowledge, suspicious circumstances, failure to make inquiry, and negligence will not in themselves establish bad faith in the plaintiff, such facts, where the burden is upon him to establish the innocent character of his purchase, and the only evidence offered was his own testimony, constitute evidence of bad faith sufficient to take the question to the jury. *Ostenberg v. Kavka,* 95 Neb. 314."

This court in *Central Nat. Bank v. Ericson,* 92 Neb. 396, said: "Reasons for this conclusion were recently stated by the supreme court of Iowa as follows: 'It is ordinarily to be expected, in these cases, that the purchaser will testify to his good faith and want of notice, and that defendant is compelled to rely upon circumstantial evidence to rebut such showing. Whether plaintiff has sufficiently satisfied the burden resting upon him and made good his claim to be an innocent purchaser is therefore a question for the jury, save in those instances where the testimony is not only consistent with the good faith of such purchase, but is such that no fair-minded person can draw any other inference therefrom. A categorical denial of notice or knowledge is something which in many, if not in most, instances cannot be opposed by direct proof; and the credibility of the witnesses, their interest in the case,

the reasonableness or unreasonableness of their statements, the time, place and manner of the transaction, its conformity to or its departure from the ordinary methods of business, and all the other facts and circumstances which, though of slight moment in themselves, yet, when taken together, give character and color to the purchase under inquiry, constitute a showing which the court cannot properly pass upon as a matter of law.' *Arnd v. Aylesworth,* 145 Ia. 185, 29 L. R. A. n. s. 638."

The plaintiff herein had notice of all these facts hereinbefore stated, and without knowing the signature of the maker of said note, nor that of the person by whom the alleged indorsement of said note purports to have been made, not even knowing that such person was an officer of the payee nor that he had authority as such officer to make such indorsement, purchased the same. Reasonable minds might say that a note purchased with such knowledge and under such circumstances was not purchased in the ordinary course of business. Whether the purchase with such knowledge and under such circumstances was a purchase in the ordinary course of business was therefore a question for the jury. A purchase in the ordinary course of business is not proved by proof that the purchase was made in the manner that the purchaser usually transacts such business. It must be shown to have been purchased in the manner that such business is generally transacted by persons engaged in that business who have due regard for the interests of all persons affected by the transaction.

A purchaser in good faith should be one who has purchased with due regard for the rights of the maker, and not one who, relying wholly upon paying value for the note and purchasing before maturity without knowledge of any defense, is indifferent as to whether or not the same was honestly obtained from the maker. Where the evidence tends to show such indifference the question of good faith is for the jury. We think from the foregoing facts and circumstances in evidence the question of the good faith of plaintiff in purchasing said note, and whether it

was purchased in the ordinary course of business, should have been submitted to the jury. Fraud in the inception of the note was admitted by plaintiff. The burden of proof was thereby cast upon plaintiff to prove its good faith in the purchase of the note and purchase in the ordinary course of business.

The defendant, Vansyckle, testified that Elmore, the cashier of plaintiff, called at his home in 1920, and told him he was out trying to make settlement for the notes that they had purchased from the Missouri Valley Cattle Loan Company, and told him that Huttig had owed him a large amount of money and he was getting his money from this man Huttig in the sale and purchase of these notes; that this man Huttig was getting 10 per cent. commission. He further said he knew there was something wrong with the notes; that he knew they were obtained through fraud, and that they were discounting the notes 25 per cent. to him. The witness, Elmore, on rebuttal, denied making the foregoing statements to the defendant, Vansyckle, and denied making each of them. However improbable, the previous facts testified to by the defendant, Vansyckle, the weight and credit to be given to him as a witness, and to his said testimony, was for the jury. The court could not take it from the jury. If true, they should be considered by the jury in determining the good faith of plaintiff and whether its purchase of said note was in the ordinary course of business.

In addition to the foregoing reasons for finding error in taking the case from the jury, we find in the record no evidence nor offer of evidence to prove that said note was indorsed by the payee at any time. The note was introduced in evidence, but the indorsement on the back thereof purporting to be that of Missouri Valley Cattle Loan Company was not offered in evidence, nor was there any attempt to prove that the indorsement was made by the Missouri Valley Cattle Loan Company or by any officer thereof, or to prove the authority of any person to make such indorsement. The offer and reception in evidence of

the note with the indorsement thereon does not introduce and carry with it as evidence such indorsement, unless the offer and reception were sufficiently broad to and did include the indorsement. To effect this it was necessary that the indorsement be identified, offered and received in and of itself independently. *Schroeder v. Nielson,* 39 Neb. 335; *Johnson v. English,* 53 Neb. 530; *Capitol Hill State Bank v. Rawlins Nat. Bank,* 24 Wyo. 423, note, 11 A. L. R. 957.

The appellee quotes from *First Nat. Bank v. McKibben,* 50 Neb. 513: "In an action by an indorsee of a negotiable promissory note against the maker, its mere production by the plaintiff, duly indorsed, raises a presumption of law that it was transferred before maturity and for value, and the burden is on the defendant to show that plaintiff is not an innocent holder." The foregoing does not say that the mere production of a note raises a presumption of law that the note was duly indorsed. Before the presumption of law therein set forth arises, the indorsement of the note, if denied, must be proved. The provision of the statute that every holder is deemed *prima facie* a holder in due course is held to refer to a holder by genuine indorsement. *Vickery v. Burton,* 6 N. Dak. 245. It cannot be said that the indorsement by payee was admitted by the defendant, Vansyckle, by his plea of fraud in the inception of the note, nor by any other act during the trial. While possession by plaintiff was *prima facie* evidence of ownership of the note, indorsement of such note before the same is due by the payee must be proved, where the same is denied in the answer, to constitute one a holder in due course, so as to cut off all defenses thereto. *Britton v. Berry,* 20 Neb. 325.

The possession of the note by plaintiff, being *prima facie* evidence of the ownership thereof, if there had been no fraud in its inception, plaintiff would have been entitled to recover without proof of indorsement by the payee. But upon the admission by plaintiff of fraud in the inception of the note, the burden of proof was cast upon plaintiff

to prove that it was a holder in due course, and that would require proof of the indorsement. The testimony of Elmore, cashier of plaintiff, that when he received the note it had thereon the indorsement of the Missouri Valley Cattle Loan Company was not proof that such indorsement was genuine. The witness so testifying did not know the signature of the party signing said instrument, nor that he had authority to make it. Such testimony was only to the effect that when he received the note it had indorsed thereon the words alleged in the petition to be the indorsement of Missouri Valley Cattle Loan Company. Even that indorsement was not offered in evidence.

The evidence shows that the cashier of plaintiff was the only person connected with plaintiff bank participating in the purchase of said note. It was unnecessary, therefore, for plaintiff to prove that no other officer of plaintiff had notice of defenses to the note.

The court erred in not submitting to the jury the question of good faith of plaintiff in purchasing said note and its purchase in the ordinary course of business. The judgment is therefore reversed as to the defendant, H. E. Vansyckle, and remanded for new trial as to him.

REVERSED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1922.

FLOYD SEYBOLT, APPELLANT, v. WILLIAM S. WATERS, APPELLEE.

FILED OCTOBER 4, 1922. No. 21818.

1. **Sales:** PRICE: PROOF. In the absence of any agreement as to the price of goods sold and delivered, there is an implied agreement that the price shall be reasonable, and, in an action to recover the price of goods sold under such circumstances, proof of the reasonable value of the goods is essential to recovery.
2. ———: ———: EVIDENCE. Testimony that the items in an account for goods sold and delivered are "correct" is insufficient to establish that a price was agreed upon, or the reasonable value of the goods sold.

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

Hainer, Craft & Lane, for appellant.

R. J. Greene and *H. C. Wilson, contra.*

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

PER CURIAM.

This was an action on an account for goods sold and delivered by the Union Lumber Company to the defendant. The petition alleges the sale and delivery of building material and coal to the defendant during a period beginning January 2, 1911, and ending March 2, 1914; that certain

payments were made on account of the same; and that the debt had been assigned to plaintiff, who sues as assignee of the creditor. The answer denies the assignment of the account, and alleges that plaintiff had no right to maintain this suit in his own name. It also contains a general denial and a defective plea of the statute of limitations. A jury was waived. The trial court found for the defendants and dismissed the action.

We are not informed upon what ground the trial court found for the defendant. Under the provisions of section 8528, Comp. St. 1922, and the decisions in *Meeker v. Waldron,* 62 Neb. 689, and *Huddleson v. Polk,* 70 Neb. 483, the action was properly brought by the assignee in his own name, and, since a number of the items sold and delivered were furnished within four years, plaintiff, if the proof had been sufficient as to the price or value of the goods sold, would have been entitled at least to a judgment for the reasonable value of the items sold within that time. Whether for a longer period is open to question.

The president of the lumber company testified that the goods were furnished and delivered upon the order of the defendant, and that the items in the account were correct, but neither he nor any other witnesses testified that there was any price agreed upon, or that the prices charged were the reasonable value of the goods furnished. The "items" in the account might have been "correct," but that does not establish or prove that the charges made were reasonable and just. Before book accounts can be introduced in evidence under the statute, they must be shown to be "just and true." Much more should proof be required of this nature in an action when the books are not in evidence. In the absence of any agreement as to the price of goods sold and delivered, there is an implied agreement that the prices shall be reasonable. Proof that they are reasonable is an indispensable requisite to recovery upon such an implied promise. There is no proof of any agreement as to price,

or as to the reasonable value of the goods sold. We regret that we are not authorized by statute, as some courts now are, to remand the case for further proof, but, as it is, we can only hold that there is a failure to prove an essential requisite to recovery, and that the district court was right in its judgment.

AFFIRMED.

MARTHA LAND, APPELLANT, V. OLA CHRISTENSON, APPELLEE.

FILED OCTOBER 4, 1922. No. 22099.

1. **Process:** SUMMONS: AMENDMENT. Irregularities in a summons or the service thereof may be corrected by amendment, but, if the summons is void, it is incapable of amendment.
2. ———: ———: JURISDICTION. Defendant was summoned to appear in the county court of Hamilton county in which no action was pending against him. A petition had been filed in the district court for that county in which he was named as defendant. He made a special appearance in the district court objecting to its jurisdiction for want of service of summons. *Held*, that the service of summons upon him to answer in the county court did not confer jurisdiction upon the district court.

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

Hainer, Craft, Edgerton & Fraizer, for appellant.

Halligan, Beatty & Halligan, contra.

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

PER CURIAM.

This action for specific performance of a contract for the sale of land was brought in the district court for Hamilton county. The defendant, who is a resident of Deuel county,

was served in Hamilton county. He appeared specially and objected to the jurisdiction of the court for the reason that the only service of summons upon him was made by serving the copy of summons hereinafter set forth. The plaintiff then made application for permission to amend the copy of summons to conform to the original. The court denied the application for permission to amend, and sustained the special appearance. Plaintiff elected to stand upon the service as made, and the court dismissed the action without prejudice.

The copy served on defendant is as follows:

"State of Nebraska, }
Hamilton County. } ss.

"To the Sheriff or any Constable of said County:

"You are hereby commanded to notify Ola Christenson, defendant, that he has been sued by Martha Land, plaintiff in the county court in and for said county of Hamilton, and that unless he answer by the 10th day of January, 1921, the petition of said plaintiff filed against him in the office of said court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this summons on or before Monday, the 20th day of December, 1920.

"Witness my official signature and the seal of the county court of our said county of Hamilton, this 8th day of December, 1920.

"(L. S.) J. W. Weedin, Clerk of District Court.

"I do hereby certify that this is a true copy of the original summons now in my hands for service.

"J. E. Howard, Sheriff of said County,
"By Chas. Weaver.

"Specific performance demanded.

"If defendant fail to appear and answer the plaintiff will take judgment for $5,000.00 together with interest thereon at the rate of 7% from the 8th day of December.

"J. W. Weedin, Clerk of District Court.

"Returnable Dec. 20, 1920."

Neither the original summons nor a copy of it other than the above is in the transcript.

The general rule is that if the process is sufficient to inform the defendant in what court he must appear, and the time and place of his appearance, it is sufficiently definite to give the court jurisdiction, even though the time stated is incorrect, but, in this instance, defendant was notified that the suit was in the county court, and the only connection with the district court shown in the copy is that the summons appears to have been signed by the clerk of that court. A man ignorant of court procedure would be apt to pay little attention to this. Defendant was summoned to appear in a court in which no action was pending against him, and it was sought to amend the summons in a court in which he had not been notified to appear. If the defendant had not called the attention of the court to the nature of the service upon him, and a judgment against him had been rendered by default upon such a summons, the judgment would be absolutely void for want of notice. This is the test of jurisdiction. The defect in this case is not one of form, but one of substance.

As a general rule, a person summoned is not bound to look further than the summons for information as to the court in which the action is pending, or the time and place of his appearance. If neither the original summons nor the copy served upon the defendant designates the proper court in which defendant is to appear, and there is no other paper served to apprise him of the forum, that court will not acquire jurisdiction. *Eggleston v. Wattawa,* 117 Ia. 676. This court has been exceedingly liberal in permitting the amendment of pleadings or process. Mistakes in the date of the return day, or of the answer day, may be amended, and almost any other irregularity or defect merely in form. *Barker Co. v. Central West Investment Co.,* 75 Neb. 43. But if the summons is void, it is incapable of amendment. *Elmen v. Chicago, B. & Q. R. Co.,*

75 Neb. 37; *Duluth Brewing & Malting Co. v. Allen*, 51 Mont. 89; 32 Cyc. 531.

The briefs state that the copy served on defendant is not a true copy of the original summons. We have no evidence as to what the original summons contains other than the certificate of the sheriff, and must presume that the certificate that the paper served is a true copy, is true until the fact appears otherwise. The allowance of amendments to process is a matter of discretion, and no abuse of discretion is shown.

AFFIRMED.

ST. ELIZABETH HOSPITAL, APPELLEE, V. LANCASTER COUNTY ET AL., APPELLANTS.

FILED OCTOBER 4, 1922. No. 21283.

1. **Taxation**: EXEMPTIONS: USE OF PROPERTY. Under the constitutional and statutory provisions relating to exemptions from taxation, the use of the property is the test of that right. Const. 1875, art. IX, sec. 2; Rev. St. 1913, sec. 6301.
2. ———: ———: HOSPITALS. The property of St. Elizabeth Hospital in the city of Lincoln, Nebraska, *held* exempt from taxation on the ground that it is used exclusively for religious and charitable purposes.

APPEAL from the district court for Lancaster county: LEONARD A. FLANSBURG, JUDGE. *Affirmed.*

Charles E. Matson, Harry R. Ankeny and *Max G. Towle*, for appellants.

John J. Ledwith, contra.

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

ROSE, J.

Is the property of St. Elizabeth Hospital in Lincoln,

Lancaster county, Nebraska, exempt from taxation? This is the question presented by the record.

The county board of equalization levied taxes on the hospital property. Upon appeal to the district court the levy was set aside on the ground of exemption. The county has appealed.

The constitutional provisions relating to exemptions from taxation when the levy was made were as follows:

"The property of the state, counties, and municipal corporations, both real and personal, shall be exempt from taxation, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery, and charitable purposes, may be exempted from taxation, but such exemptions shall be only by general law." Const. 1875, art. IX, sec. 2.

Property used exclusively for religious and charitable purposes was also exempted by statute. Rev. St. 1913, sec. 6301. Under these provisions of the law the use of the property is the test of the right to exemption.

St. Elizabeth Hospital is situated on South street between Eleventh and Thirteenth streets in the city of Lincoln. Its property consists principally of four acres of land, a four-story brick building equipped for a hospital, all valued at approximately $500,000, and a surplus of $40,000 invested in securities. This property represents the growth of an institution established 30 years ago with small donations aggregating $20,000.

The Franciscan Sisters, a religious society, founded the hospital and hold title to its property. The Sisters of St. Francis of the Perpetual Adoration have charge of the institution. The general purpose of the sacred order to which these Sisters belong is to nurse the sick and take care of orphans. Twenty-six Sisters engaged in their life work are caring for the sick at St. Elizabeth Hospital. In devoting themselves to it they are prompted by the love of God. They are bound by a vow of poverty. Property

owned by them is used for the purposes to which they have dedicated their lives. Beyond food, clothing and shelter they receive nothing for their services. No individual, society or corporation receives any pecuniary profit from hospital property, funds or earnings. Surplus and donations are used to enlarge buildings and to improve hospital facilities, equipment and service. The institution is open alike to charity patients and others without regard to race or religious beliefs. Reasonable compensation is required from those who are able to pay it. Only a small percentage of those who seek rooms, food and hospital care, however, can be considered charity patients, but this does not change the charitable purpose for which the property as a whole is used, where no one receives any pecuniary profit from any source. Part of the burdens of government in caring for the poor is borne by the hospital. Charitable gifts and gratuitous services are contributed to the welfare of society. There are therefore reasons for immunity from taxation. The better rule, one sanctioned by precedent, is that the property in controversy is used exclusively for religious and charitable purposes within the meaning of the constitutional and statutory provisions relating to exemptions. This is the view taken by the trial court.

AFFIRMED.

CENTRAL UNION CONFERENCE ASSOCIATION OF COLLEGE VIEW, APPELLEE, V. LANCASTER COUNTY ET AL., APPELLANTS.

FILED OCTOBER 4, 1922. No. 21284.

Taxation: EXEMPTIONS: COLLEGES. Farm and dairy property used by Union College for school purposes *held* not subject to taxation within the meaning of the constitutional and statutory provisions re-

lating to exemptions. Const. 1875, art. IX, sec. 2; Rev. St. 1913, sec. 6301.

APPEAL from the district court for Lancaster county: LEONARD A. FLANSBURG, JUDGE. *Affirmed.*

Charles E. Matson, Harry R. Ankeny and *Max G. Towle,* for appellants.

John J. Ledwith, contra.

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

ROSE, J.

The right of plaintiff to exemption from taxation is the question presented by the record in this case.

Plaintiff, the Central Union Conference Association, is an organization of Seventh Day Adventists and is engaged in religious and school work. Union College, situated in the village of College View, Lancaster county, Nebraska, is part of the association and is a corporation holding title to the college grounds, buildings, equipment, farm lands and dairy property used in connection with the educational institution. The county board of equalization subjected the farm lands and dairy property to taxation. Upon appeal to the district court the levy was set aside on the ground that the assessed property was used exclusively for school and educational purposes. The county has appealed.

The constitutional provisions relating to exemptions from taxation when the levy was made are as follows:

"The property of the state, counties, and municipal corporations, both real and personal, shall be exempt from taxation, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery, and charitable purposes, may be exempted from taxation, but such exemptions shall be only by general law." Const. 1875, art. IX, sec. 2.

Property used exclusively for schools was exempted by statute. Rev. St. 1913, sec. 6301. Under these provisions

of the law the use of the property is the test of exemption.

It is argued that the farm and the dairy are not used exclusively for school or educational purposes and that therefore the property assessed is not exempt from taxation. Agriculture and dairying are subjects of instruction at Union College. The milch cows are fed on products of the farm. The dairy, if considered by itself, seems to be a source of profit. On this premise the argument against exemption is principally based. The farm and the dairy are forms of property used in carrying out a purpose of the school and are as useful for educational purposes as the equipment in class rooms. Some of the products from the dairy are used in other departments. The proceeds from the sale of milk and cream go into the general treasury of Union College from which all disbursements are made. Products of the dairy, therefore, inure to the benefit of the school as a whole and any profit therefrom is a mere incident of the general purpose for which school property is used. Outside of school purposes no one receives any pecuniary profit from the use to which the farm and dairy property is put. The better rule, one sanctioned by precedent, is that the property in controversy is used exclusively for school purposes within the meaning of the constitutional and statutory provisions relating to exemptions. This is the view taken by the trial court.

AFFIRMED.

GEORGE O. MEYER, APPELLEE, V. SUPREME LODGE, KNIGHTS OF PYTHIAS, APPELLANT.

FILED OCTOBER 4, 1922. No. 22706.

Affirmance. The record examined, and held the questions involved here are the same as those which were presented at the former hearing in the same case. *Meyer v. Supreme Lodge, K. of P.*, 104 Neb. 505; on rehearing, p. 511. We adhere to our former decision.

APPEAL from the district court for Otoe county: JAMES

T. BEGLEY, JUDGE. *Affirmed.*

W. J. Connell and *S. H. Esarey,* for appellant.

D. W. Livingston, contra.

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

DEAN, J.

This case has been twice tried in the district court and twice appealed. In the first trial a jury was waived and the defendant society obtained a judgment. On appeal by plaintiff the judgment was reversed. *Meyer v. Supreme Lodge, K. of P.,* 104 Neb. 505. Subsequently the defendant society filed a motion for rehearing. An argument on the motion was allowed, the rehearing was denied and the former decision adhered to. *Meyer v. Supreme Lodge, K. of P.,* 104 Neb. 511. Plaintiff prevailed at the second trial, and defendant appealed.

To retain the exercise of governmental authority in the hands of the people is the modern trend. Extended argument is not needed to establish this fact. Witness the election of United States senators by direct vote; the direct primary; and the initiative and referendum. Fraternal societies are no exception to the rule.

As noted in the former opinion, the defendant society was reincorporated under an act of congress which provides: "That said corporation shall have a constitution, and shall have power to amend the same at pleasure: Provided, that such constitution or amendments thereof do not conflict with the laws of the United States or of any state." 28 U. S. St. at Large, ch. 119, sec. 4, p. 96.

In view of the language of the act in question, it follows that a fraternal society doing business in this state must conform to the law of this state on that subject. In the opinion on the motion for rehearing in the present case we said: "Will it be contended that a society so chartered may with impunity violate the settled policy of a state as declared by its court in the construction of its laws?"

The questions involved here are the same as those which were presented at the former hearing in the same case. *Meyer v. Supreme Lodge, K. of P.*, 104 Neb. 505; on rehearing, p. 511. We adhere to our former decision. The judgment is

AFFIRMED.

LETTON, J., dissenting.

Being satisfied that the former decision was wrong, that defendant had a representative form of government and had power to change its rates; that the changes made were reasonable, and that this court should have given full faith and credit to the decisions of the federal courts applying to this federal corporation, I adhere to the views expressed in my dissenting opinion when the case was here before, reported in 104 Neb. 515, and must again dissent from the opinion of the majority.

FLANSBURG, J., also dissents.

LINA EISER, APPELLEE, V. SUPREME LODGE, KNIGHTS OF PYTHIAS, APPELLANT.

FILED OCTOBER 4, 1922. No. 22707.

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

W. J. Connell and *S. H. Esarey*, for appellant.

D. W. Livingston, *contra*.

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

DEAN, J.

This suit was brought in the district court for Otoe county to recover $2,000 as beneficiary of a fraternal insurance policy issued to her father by the defendant society. Plaintiff obtained judgment, and defendant has brought the case here for review.

It was agreed by the parties that the questions here are

the same as those presented in *Meyer v. Supreme Lodge, K. of P., ante*, p. 108. Both cases are controlled by our decision in the case of *Meyer v. Supreme Lodge, K. of P.*, 104 Neb. 505; on rehearing, p. 511. The judgment of the trial court is therefore

AFFIRMED.

LETTON, J., dissenting.

I dissent for the same reasons expressed in dissenting opinion in the case of *Meyer v. Supreme Lodge, K. of P., ante*, p. 108.

FLANSBURG, J., also dissents.

STATE, EX REL. CITY OF O'NEILL, APPELLEE, V. ROBERT E. GALLAGHER, TREASURER, APPELLANT.

FILED OCTOBER 4, 1922. No. 22670.

Highways: ROAD FUND: DISTRIBUTION. The rule announced in *City of Falls City v. Richardson County*, 99 Neb. 663, and cases cited therein, *held* to control the question presented by respondent's appeal, and to sustain the judgment of the district court in this case.

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

Chapman & Gallagher, for appellant.

W. J. Hammond, contra.

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

DAY, J.

By this action, the relator, the city of O'Neill, prays for a writ of mandamus against Robert E. Gallagher, county treasurer of the county of Holt, the respondent, to compel him to turn over to the relator one-half of all moneys in his hands collected under the levy for the road tax for the years 1920 and 1921, on property within the corporate limits of relator city, and also to require him in the future to turn over to relator one-half of all moneys which may

hereafter be collected from said source. A demurrer to the petition was filed by the respondent, which was overruled, and respondent electing to stand on his demurrer, the court entered judgment in favor of the relator granting the relief prayed. From this judgment respondent appeals.

The allegations of the petition are in substance as follows: That relator is a city of the second class situate within the county of Holt; that said county is under township organization; that respondent is the duly elected, qualified, and acting county treasurer of said county, and as such collected all taxes levied by the county upon all property within the corporate limits of relator city; that in the years 1920 and 1921 the said county, through its proper officers, levied a road tax on all property situate within the corporate limits of relator city subject to said tax; that the respondent as such treasurer has collected a large sum of money, the exact amount being unknown to relator, under such road tax upon property within the corporate limits of relator city, and now has the same in his possession; that relator has made demand for same, which has been refused; that the relator is entitled to have turned over to it one-half of said money so collected by the respondent, and also to have turned over to it one-half of such sums as may in the future be collected by the respondent under such tax levy for said years upon the property within the corporate limits of relator city.

A disposition of the question here involved does not require an extended discussion. The case of *City of Falls City v. Richardson County,* 99 Neb. 663, in its essential features, involved the same question now before us, and it was determined that the plaintiff was entitled to recover.

We are mindful of the fact that the case cited was dealing with a situation which arose prior to the amendment of section 2920, Rev. St. 1913, by chapter 53, Laws 1915, now section 2630, Comp. St. 1922, which is relied upon by the relator, but the amendment does not militate against

the effect of the decision as an authority in this case.

We think it sufficient to say that our holdings in *City of Albion v. Boone County*, 94 Neb. 494, and *City of Falls City v. Richardson County*, 99 Neb. 663, are decisive of the case at bar, and fully sustain the judgment of the district court.

AFFIRMED.

STATE, EX REL. CITY OF O'NEILL, APPELLEE, V. JAMES J. KELLY ET AL., APPELLANTS.

FILED OCTOBER 4, 1922. No. 22679.

Highways: ROAD FUND: DISTRIBUTION. Cities of the second class are road districts within the meaning of section 2795, Comp. St. 1922, and as such are entitled to have expended within their corporate limits for the purposes prescribed in the statute one-half of all moneys arising from township road taxes upon property situate within their corporate limits.

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

J. A. Donohoe, for appellants.

W. J. Hammond, contra.

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

DAY, J.

This is a mandamus action brought by the city of O'Neill, relator, against James J. Kelly *et al.*, constituting the members of the town board of the town of Grattan, respondents, to require them to expend for the purposes provided by statute within the corporate limits of relator city one-half of all moneys collected for road purposes for the year 1920 on property situate within the corporate limits of said city. The trial resulted in a judgment in favor of the relator, from which respondents appeal.

The record shows that the county of Holt is under town-

ship organization; that the town of Grattan is one of the duly organized towns within said county; that the respondents constitute the town board of the town of Grattan; that the city of O'Neill is a duly incorporated city of the second class, and lies wholly within the corporate limits of the town of Grattan. It further appears that in the year 1920 the electors of the town of Grattan at an annual meeting voted to levy a tax for road purposes upon all taxable property situate within the limits of said town; that the action of the electors was certified to the board of supervisors of the county, and a levy was made by said board in accordance with the resolution adopted by the electors at their annual town meeting; that the taxes were duly levied and collected on property situate within the corporate limits of relator city; that the relator has demanded of the respondents that they expend for the purposes prescribed by statute within the corporate limits of relator city one-half of all taxes collected under such levy on property within the corporate limits of said city, but respondents have refused to do so. It further appears that the taxes paid for said purpose on property within the corporate limits of relator city constitute four-fifths of all the moneys received under such levy; and that no part of said moneys has been expended by respondents within the corporate limits of relator city.

By way of defense the respondents claim that the relator city is not a road district within the meaning of the law, and is, therefore, not entitled to have expended within its corporate limits any part of the taxes collected; and that they have no jurisdiction or authority to enter upon the streets, alleys or public grounds to make repairs or improvements thereon.

The question here presented calls for a construction of section 2795, Comp. St. 1922. Without setting out at length this section of the statute, the parts thereof applicable to the present case provide in substance that in counties under township organization the township road tax shall be paid in cash; that all moneys paid into the

town treasury from the several road districts in discharge of the road tax, and all moneys paid into the treasury in discharge of labor tax, shall constitute a town road fund which shall be at the disposal of the town board, and shall be used by the road overseers under the general direction of the township board for the benefit of the road districts of the town; "provided one-half of all moneys paid into the town treasury from the several road districts in discharge of road and labor taxes shall constitute a district road fund and shall be expended by the town board in the road district from which it was collected, for the following purposes: First. For the construction and repair of bridges and culverts. * * * Second. For payment of wages of overseers, and for such tools for the use of the overseers as the township board may deem necessary. Third. For work and repair on roads."

The first question presented is whether the relator city is a road district within the meaning of section 2795, Comp. St. 1922. We think this question must be answered in the affirmative upon the authority of our prior decisions. In *Libby v. State,* 59 Neb. 264, the court had before it for construction section 76 of the road law (Comp. St. 1899, ch. 78). That section provided in substance that one-half of all of the moneys paid into the county treasury from the several road districts in discharge of the road tax constituted a county road fund which was at the disposal of the county commissioners; the other half of the moneys paid from the several road districts was to be expended by the county commissioners in the road district from which it was collected for purposes prescribed in the statute. It was held that incorporated municipalities are road districts, and as such, except as otherwise provided, are entitled to one-half of the moneys arising from the road tax levied by the county commissioners upon the property situate within their limits. A similar question was again before the court in *City of Chadron v. Dawes County,* 82 Neb. 614, and it was held that cities of the second class are road districts. The language with re-

spect to the division of the taxes collected among the road districts in the section of the statute the court was considering in the two cases above cited, and the section now under consideration, is substantially the same. We therefore hold that cities of the second class are road districts within the meaning of section 2795, Comp. St. 1922, and as such are entitled to have expended within their corporate limits for the purposes prescribed in the statute one-half of all moneys arising from township road taxes upon property situate within their corporate limits.

The objection by the respondents that they have no jurisdiction or right to enter upon the streets of the relator and do work thereon is, as applied to the present case, more theoretical than real. Here the relator is not only making no objection, but on the contrary is in court to compel the respondents to enter upon their streets and expend its proportion of the fund in the manner provided by the statute.

No substantial reason appearing in the record why the respondents should not comply with the language of the statute, the judgment of the district court is

AFFIRMED.

IN RE ESTATE OF SAMUEL S. GRIFFIN.
S. HENRY GRIFFIN, APPELLEE, V. ESTATE OF SAMUEL S. GRIFFIN ET AL., APPELLANTS.

FILED OCTOBER 20, 1922. No. 22048.

1. **Evidence:** ADMISSIONS OF DECEDENT. **Admissions of a decedent may be received against his personal representatives to show the contractual liabilities of decedent, and, in a proper case, may be sufficient to establish a contractual liability on the part of the decedent.**

2. **Statute of Frauds:** ORAL CONTRACT. **An oral contract is not void under the statute of frauds merely because it does not specifically provide that it is to be performed within a year; the statute applies only where by the terms of the contract it is not to be performed within the year.**

3. ———. "An agreement which has been performed is not within the statute of frauds." *Milner v. Harris*, 1 Neb. (Unof.) 584.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

McCarty & Hager, for appellants.

Charles E. Matson and *G. H. Risser, contra.*

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

MORRISSEY, C. J.

This suit involves a claim filed by S. Henry Griffin against the estate of his father, Samuel S. Griffin. For many years prior to the decease of the father, plaintiff occupied, as a tenant, a farm owned by the father. It is alleged that during the tenancy plaintiff constructed buildings and made general improvements, which are specified in the petition, upon the land under an oral agreement with the deceased that whenever plaintiff vacated the premises he should be paid the value of the improvements. From a verdict and judgment in favor of plaintiff the objectors have appealed.

Taking up the assignments in the order of their importance, we will first consider whether the evidence adduced was sufficient to warrant the trial court in submitting to the jury the question whether the contract pleaded had been made. To support plaintiff's claim as to the making of the contract, plaintiff offered his brother as a witness, who testified to a number of conversations had with the deceased in which the deceased told the witness that he had told plaintiff to erect the buildings, make the improvements, and that he (deceased) would pay "what they would be worth whenever he (plaintiff) moved off." It is claimed by appellants that these admissions are insufficient to show any agreement was entered into between decedent and plaintiff; that they were admissible only as declarations against interest, or as corroborative of other evidence of the contract.

The general rule seems to be otherwise. "Admissions of a decedent may also be received against his personal representatives to show the contractual or other surviving liabilities of the decedent to others, or to affect his representatives in suits on claims due to the estate, unless they are too remote to possess any probative value." 22 C. J. 363, sec. 430.

In *Jamison v. Jamison,* 113 Ia. 720, the supreme court of Iowa said: "In an action on contract by a father to convey or devise land to a son, an instruction that the jury might consider any admissions of the father in his lifetime as to any contract with the son, in deciding whether there was any such contract, was proper."

Hialey v. Hialey's Estate, 157 Mich. 45, was a suit wherein plaintiff sought to recover from the estate of his father for services rendered after the son had reached his majority. The court said: "No witness testified to any interview between claimant and his father which could be called an agreement in relation to the subject, and claimant's counsel rely upon certain evidence, which they say justifies an inference that there was a mutual understanding that claimant was to receive pay for his work at going wages. An express contract is essential to overcome the presumption that a son who continues to live with his parent is not entitled to compensation for his services: *i. e.,* the law will not imply a contract from the mere rendition of services in such a case, it being presumed that they are members of one family contributing to the common support. Such a contract may be proved, however, by the admission of the party to be charged."

In principle the holding applies to the instant case. It is true that such admissions are not always conclusive, but the weight to be given to them is for the jury. When considered with all the other facts and circumstances in evidence, we cannot say that there is not sufficient evidence to support the verdict.

It is urged that the contract, if made, was void under the statute of frauds; because it was not to be performed

within a year from the making thereof; because not evidenced by any writing; and because no part of the purchase money was paid. As to the first objection, it is sufficient to say that there was nothing in the contract to prevent its performance within the year. The rule seems to be:

"In order to bring a contract within the *infra annum* clause, it must appear affirmatively that it is not to be performed within the year, and it has been said that the purpose of the statute is to provide only for a case in which there cannot be an actionable breach within the specified time. So it is the generally accepted rule that to bring a contract within its operation there must be an express and specific agreement not to be performed within the space of a year; if the thing may be performed within the year, it is not within the statute, a restricted construction being given to the statute on account of the negative form of the provision. A contract is not brought within the statute by the fact that the full performance within a year is highly improbable, nor by the fact that the parties may not have expected that the contract would be performed within the year. This is said to be true if there is a possibility of its being performed within a year, and there is no stipulation that it shall not be so performed. If an agreement is capable of being performed within a year, it is not within the statute, although it be not actually performed till after that period, and after the expiration of the year it still remains binding." 25 R. C. L. 454, sec. 29.

As to the remaining assignments based upon the statute, it is sufficient to say that the contract was fully performed, and, as said by this court in *Milner v. Harris,* 1 (Neb.) (Unof.) 584: "An agreement which has been performed is not within the statute of frauds."

There is a further claim as to the statute of limitations, but the evidence does not support appellants as to this. There is also objection made to the proof as to values. An examination of the entire record, however, discloses that

the witnesses who testified were sufficiently qualified. The jury were correctly instructed by the trial judge, the record is free from error, and the judgment is

AFFIRMED.

GERTRUDE PENHANSKY, APPELLEE, V. DRAKE REALTY CONSTRUCTION COMPANY, APPELLANT.

FILED OCTOBER 20, 1922. No. 22116.

1. **Witnesses:** IMPEACHMENT. Where one has been misled or entrapped into calling a witness by reason of such witness, previous to the trial, having made statements to the party, or his counsel, favorable to the party's contention, and at variance with the testimony given at the trial, and the party believed and relied upon such statements in calling the witness, and is surprised by the testimony on a material point, he may, in the discretion of the court, be permitted to show the contradictory statements made before the trial.

2. **Trial:** INSTRUCTIONS: HARMLESS ERROR. A statement of the issues in an instruction, which is not precisely correct, may not always be prejudicial and require a reversal of the judgment.

3. ———: ———: CONSISTENCY. A cautionary and informative instruction with respect to expert witnesses and a general instruction that the jury are sole judges of the credibility of witnesses and may consider their relationship to the parties, their bias, or prejudice, if any has been shown, etc., are not inconsistent with each other.

4. ———: ———. The instruction set forth in the opinion *held* not to disparage the testimony of expert witnesses.

5. **Jury:** EXAMINATION. It is not improper to ascertain at the beginning of the trial and while the jury are being impaneled whether an insurance company is interested in the defense of an action for personal injuries, and whether any agent or officer of such corporation is upon the panel, so that the right of challenge may be understandingly exercised.

6. The rule as to contradiction of one's own witness announced in *Blackwell v. Wright*, 27 Neb. 269, *Masourides v. State*, 86 Neb. 105, and *Merkouras v. Chicago, B. & Q. R. Co.*, 101 Neb. 717, is set aside.

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

Kelso A. Morgan and *Livingston & Whitmore,* for appellant.

McKenzie, Cox, Burton & Harris, contra.

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

LETTON, J.

As plaintiff, accompanied by another woman, was endeavoring to cross Twenty-fourth avenue near the intersection of Harney street in Omaha, a heavy motor truck belonging to defendant, and driven by one of its employees, came rapidly eastward on Harney street and turned south into Twenty-fourth avenue. According to the testimony on behalf of plaintiff, they were about to cross the street to the Wise Memorial Hospital, which stood almost directly to the westward on the opposite corner; they stepped to the pavement and proceeded about four or five feet, when, becoming alarmed at the rapid approach of the truck, the two women turned, attempted to reach the sidewalk again, and were struck by the truck, at or about the curb line, and both were knocked down and injured. Three wheels of the truck mounted the curb before it stopped, and the left rear fender struck and knocked part of the bark off a tree which stood in the parking space between the sidewalk and the curb, about 36 feet to the south of the intersection.

The testimony on behalf of defendant is practically to the same effect, except that the witnesses say that the two women had nearly reached the center of the street going west, and that the driver of the truck was endeavoring to pass behind them, when they ran back to the east curb, fell, and were struck. This conflict in the evidence really furnishes the only material issue of fact in the case, and having been resolved by the jury, upon conflicting evidence, in favor of the contention of plaintiff, we must accept her version of the facts.

A number of assignments of error are made, some of

them very general in their nature. Those which we deem necessary to the proper disposition of the case may be summarized as follows: That the verdict is excessive; that the court erred in permitting a witness to testify that the driver of the truck, who had been called as a witness for plaintiff, had made contradictory statements to those to which he testified at the trial; error in instructions; and error in this, that plaintiff's attorney during the trial, in the presence of the jury, stated that the defendant's liability was carried by an insurance company, and questioned defendant's attorney as to whether such was not the fact, much to the prejudice of the defendant.

The first proposition of law relied upon by defendant is that a party may not contradict the testimony of his own witness by showing that the witness has, at another time and place, made statements contrary to the testimony given. Plaintiff was surprised and misled by the testimony of the driver of the truck, who was called by her, as to a very material fact. She was permitted to show by another witness that the driver had made directly contradictory statements to plaintiff's counsel, as to this, shortly before the trial. If we adhere to our former decisions on this point this would constitute error, though, considering all the evidence in the case, we think it would not have been prejudicial. But we are now convinced that the reasons for the rule are not sound. Where one has been misled or entrapped into calling a witness by reason of such witness, previous to the trial, having made statements to the party, or his counsel, favorable to the party's contention, and at variance with the testimony given at the trial, and the party believed and relied upon such statements in calling the witness, and is surprised by the testimony on a material point, he may, in the discretion of the court, be permitted to show the contradictory statements made before the trial. The proper limits of this opinion will not permit a statement of the arguments *pro* and *con*. They have often been stated since the opinion of Lord Denman in *Wright v. Beckett*, 1 Moody & Rob.

(Eng.) 414. In the last edition (1914) of Jones, Commentaries on Evidence, vol. 5, p. 241, it is said that the statement in 1 Greenleaf, Evidence, sec. 444, of the view now expressed, "is in accord with the weight of authority today founded both on statutes and the later decisions." Cases from 24 states are cited in support of this text. This more modern view is becoming increasingly adopted. The rule has been statutory in England since 1854, and has been changed in a few of the states in this country by statute. In an exhaustive examination of this rule, both historically and according to the reasons given for it in the cases made by Mr. Wigmore (2 Wigmore, Evidence, sec. 896 *et seq.*), it is very clearly demonstrated that the rule has no sound foundation in reason. Other cases are cited in the same sections of 5 Wigmore on Evidence. There is an interesting article on the topic in 11 Am. Law Rev. 261, where it is clearly shown that the reasons usually given are unsound, and that the rule is a mischievous one and cannot promote justice, while in many cases it might promote injustice. It is said in this connection that, if a witness "betrays the party who calls him, and falsifies in every statement which he makes, the opposite party will, of course, accept the treason, say nothing of impeachment, and leave the jury no alternative but to find an unjust verdict, upon evidence which both the parties know to be the rankest perjury. * * * Nobody can profit by the rule but the witness and the antagonist of the party who calls him, and they only by the defeat of the ends of justice. They may combine and defraud. In truth, the rule is a standing temptation to an unscrupulous party to tamper with his adversary's witness."

The new constitutional provisions (Const. art. V, sec. 25) expressly conferring upon the court the power to change rules of practice "not in conflict with laws governing such matters" (which we construe in this connection to mean "statutes governing such matters"), the rule as to the contradiction of witnesses stated in *Blackwell v. Wright,* 27 Neb. 269, *Masourides v. State,* 86 Neb. 105,

and *Merkouras v. Chicago, B. & Q. R. Co.*, 101 Neb. 717, is set aside and the foregoing adopted. There is practically unanimity of opinion that one may not impeach his own witness by character evidence, and we still adhere to this rule.

Complaint is made that the court, in an instruction, submitted to the jury an issue not warranted by the pleadings or the evidence. This complaint is based upon the fact that, while the petition alleged plaintiff had sustained a severe nervous shock, and that the shock had caused a severe and permanent injury to her eyesight, instruction No. 1, stating the issues, told the jury that "plaintiff complains particularly of injury to her head, ribs and other injuries, together with a severe nervous shock, and alleged these injuries are permanent." It will be seen that the allegation of the petition in this respect was not stated with precision, but a consideration of the whole record discloses that the jury could not have possibly been misled. The real issues were whether the defendant was liable for the accident, and the extent of plaintiff's injuries, and this the jury had to determine from the evidence. We think this slight error was not prejudicial.

Several medical men were examined as expert witnesses. The jury were instructed as follows:

"Certain witnesses have been called who testified as expert witnesses. You are not bound to take the statements of experts as binding upon you, but only to aid you in coming to a proper conclusion. Their testimony being received as that of persons who are learned by reason of extra investigation and study along lines not of general knowledge, and the conclusion of such persons being of value. You may adopt, or not, their conclusions according to your own best judgment, giving in each instance such weight as you think should be given under all the facts and circumstances of the case."

They were also given the usual instruction to the effect that the jury are the sole judges of the credibility of the witnesses and may consider their relationship to the

parties, bias or prejudice, *et cetera*. It is now urged that these instructions were ambiguous and in total conflict with one another. We are not of this opinion. It was entirely proper that the jury should consider the interest of the expert witnesses in the result of the suit, their relationship to the parties, their apparent fairness, or bias, if any of these conditions had been shown, and all the other evidence, facts and circumstances proved tending to corroborate or contradict such witnesses. Experts are as much subject to these human imperfections as other witnesses.

It is also complained that the instruction as to experts improperly singled out the testimony of these particular witnesses; that their testimony was disparaged by this instruction; and several cases are cited in which judgments were reversed because the juries were instructed that "expert evidence is of the very lowest order, and of the most unsatisfactory character," or other like disparaging remarks. This instruction given is merely informative and cautionary. It explains to the jury for what reason the conclusions or opinions of experts are received, and points out the distinction between the testimony of such witnesses and other witnesses whose testimony is received only as to facts, and not as to opinions or conclusions. 2 Jones, Commentaries on Evidence, secs. 391, 392; *Olson v. Manistique*, 110 Mich. 656; *Commonwealth v. Shults*, 221 Pa. St. 466.

The next complaint is that the verdict, which was for $5,000, is excessive. Plaintiff was in bed at the hospital continuously for 18 days. She had severe bruises upon her head; one rib was fractured; she suffered a severe nervous shock and was afflicted with dizziness and pains in her head continuously until the time of the trial. She complained of chilly sensations, and light seemed to affect her. The accident happened in August. She was compelled to return to the hospital in October. At that time she was very nervous, partly hysterical, suffered from severe headaches and chilly spells. A specialist in nervous

and mental diseases, who testified on behalf of the defendant, examined her about two weeks before the trial, and found pain in the region of the ribs on the left side; that there had been an injury to the front of her head above the eye; and he found her suffering from traumatic neurasthenia, which resulted from the accident. He testified that she should have suitable treatment in a hospital with proper baths, massage, nourishing diet, nerve tonics, and the removal of all worry and distress, and should have absolute rest, and estimated the cost of this and medical attendance at from $50 to $100 a week.

Another witness, who testified that he qualified as a physician and then developed into an eye specialist, testified that he examined the plaintiff's eyes, and the only trouble he found was that she was far-sighted; that this would have a tendency to cause head-aches; that another disturbance or shock might aggravate the condition already there; and that, if she had recovered from the shock incident to the accident, proper glasses would correct the condition, but he did not testify that she had so recovered.

The conclusion we draw from all the testimony with regard to the plaintiff's condition is that at the time of the trial she was still suffering from traumatic neurasthenia, and that the shock still affected her vision. She had recovered almost entirely from the bruises, contusions and fractured rib. In all probability by the aid of properly adjusted glasses her sight will become normal, and this will no doubt operate to relieve some of the headaches from which she suffers. It is impossible to tell from the evidence how long the dizziness will persist, or the other subjective symptoms, or when the neurasthenia will cease.

It is complained that the verdict is excessive. While we deem the verdict somewhat liberal, considering the pain and shock, the suffering in plaintiff's head, the care and expense of further treatment in a hospital which will be required for a complete recovery, according to defendant's own witnesses, the verdict is not so excessive as to justify the court in reducing it or setting it aside. The

trial judge deemed it not out of proportion to the injuries sustained, and he had the advantage of seeing the plaintiff and observing her condition.

As to the complaint that plaintiff's counsel was guilty of prejudicial misconduct in trying to ascertain whether an insurance company was interested in the case, human nature is such that, if an agent or representative of a liability insurance company were a member of the jury, and such a corporation were interested in the case, he might have such a bias that it would influence his verdict. It is not erroneous to permit an inquiry of this character to be made. *Egner v. Curtis, Towle & Paine Co.*, 96 Neb. 18. The affidavit used upon the motion for a new trial does not clearly and definitely show that the incident complained of did not occur during the impaneling of the jury. Also, it may be doubted whether the knowledge or suspicion that in many cases of this nature the defense is conducted by an insurance company is so foreign to the mind of jurors as appears to be thought.

To sum up, while we doubt the permanency of plaintiff's injuries, we think the verdict not unreasonable or excessive under all the facts.

AFFIRMED.

W. R. PAGE, APPELLEE, V. NATIONAL AUTOMOBILE INSURANCE COMPANY OF LINCOLN, APPELLANT.

FILED OCTOBER 20, 1922. No. 22103.

Insurance: LIABILITY. Evidence *held* insufficient to sustain a judgment in favor of plaintiff in an action to recover from a fire insurance company damages for failure to act within a reasonable time on an application for insurance.

APPEAL from the district court for Stanton county: ANSON A. WELCH, JUDGE. *Reversed and dismissed.*

Richard F. Stout, for appellant.

George A. Eberly, contra.

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

ROSE, J.

This is an action to recover $1,500 in damages for negligence. The wrongs charged are failure of defendant to exercise proper care in preparing an application for fire insurance in the sum of $1,500 on a Republic automobile truck valued at $1,625 and negligence in failing to act on the application within a reasonable time. Plaintiff bought the truck August 14, 1919, and kept it at Stanton, Nebraska, where he resided. Defendant is a corporation engaged in writing automobile insurance at Lincoln, Nebraska, with a soliciting agent named W. J. Fechner at Stanton. On a form furnished by defendant with blanks partially filled by Fechner, plaintiff signed the application for a year's insurance November 11, 1919, Fechner reading questions and inserting plaintiff's answers. Plaintiff had forgotten the motor number and promised to furnish it, but did nothing further until November 18, 1919, when he gave Fechner the omitted number and a check for $13.50 to pay the premium. The motor number was then inserted in the application. Fechner cashed the check, retained a commission of $3.50 and mailed the application with a draft for $10 to defendant at Lincoln November 18, 1919. Both were received November 19, 1919, and the same day the draft was deposited in a bank to the credit of defendant. No policy was ever issued. Under date of November 28, 1919, defendant wrote its agent, Fechner, as follows:

"In reviewing the above application we note that you failed to advise us the date the Republic truck was purchased. Kindly let us have this information by return mail and we will issue the policy immediately."

The information thus requested was never furnished. The letter was received by Fechner November 29, 1919, but the truck had been destroyed by fire earlier in the day.

The facts narrated appear in the record without contradiction.

In the petition it is pleaded in substance, among other things, in connection with the facts charged, that the policy would have been issued and delivered before the fire except for the negligence of defendant.

In an answer to the petition defendant denied negligence on its part; set out the application; pleaded the failure of plaintiff to furnish information necessary to the writing of the fire insurance for which he applied; alleged defendant acted within a reasonable time in the regular course of business; denied liability for plaintiff's loss and offered to return the premium.

At the close of the testimony each party requested a peremptory instruction. In this situation the trial court excused the jury, found the issues in favor of plaintiff and rendered judgment in his favor for his loss, amounting with interest to $1,638.87. Defendant has appealed.

For the purposes of review plaintiff's case may be stated briefly as follows: The fire insurance business is affected with a public interest. The insurer was charged with the duty of exercising proper care in preparing the application and of acting thereon within a reasonable time. Plaintiff's truck was insurable and the risk was desirable from the standpoint of an underwriter. The application contained all the data necessary to the issuance of a policy. The omitting of the date when the truck was purchased was attributable to defendant's agent who asked questions and wrote the answers. Plaintiff paid and defendant accepted the premium. There are three daily mails between Stanton and Lincoln. In the exercise of proper diligence in discharging its duty to plaintiff, defendant could have received and examined the application and delivered the policy in three days. The failure to take any action from November 19, 1919, when the application was received in Lincoln, until November 28, 1919, when demand was made for the date of purchase, was evidence of negligence. Except for the failure of defendant to discharge its duties to

plaintiff the policy would have been issued before the truck was destroyed by fire. The question of negligence was one of fact, under the principle announced in *Wilken v. Capital Fire Ins. Co.*, 99 Neb. 828. The foregoing is a mere outline of plaintiff's view of the law and the facts.

Assuming that the law is as stated by plaintiff and that the facts pleaded in his petition are sufficient to constitute a cause of action, but not now passing on either of those questions, the review of the record may be narrowed to a single assignment of error—the insufficiency of the evidence to sustain the judgment. Was defendant guilty of actionable negligence?

If the fire insurance business is affected with a public interest to the extent argued by plaintiff, a reasonable opportunity to negotiate for such business on lawful terms and to inquire into the facts on which insurance risks are based has not been lost. The application for fire insurance was part of the unsuccessful negotiations for an insurance contract. In preliminary transactions before the minds of the applicant and the insurance company meet on definite terms of insurance, both should contemplate an investigation resulting in all the information essential to an insurable risk and to reputable underwriting, since this is required by honesty and common sense. In such negotiations good faith on both sides is required. When plaintiff signed and delivered his application he made it his own instrument and he thus became chargeable with knowledge of and responsibility for its contents. It declared in bold type that the questions therein were to be answered in full. It showed on its face that the inquiry for the date of purchase was unanswered. This was a material fact to be considered with independent data for the purpose of determining the amount of insurance available to plaintiff and the nature of the hazard. Fechner was a soliciting agent without authority to enter into an insurance contract. On his part there is not even a suspicion of fraud or deceit. This is not an action on an insurance contract into which the parties deliberately entered, but is one

based on alleged wrongs—want of care in preparing the application and negligence in failing to act on it promptly. Considered solely from the standpoint of an actionable wrong, pending negotiations for a policy never issued, the defective application was plaintiff's document. It showed that defendant had demanded the omitted date of purchase. It implied inspection by defendant for the purposes of the risk, though the soliciting agent had not read the inquiry for the date of purchase. In an action based, not on a contract nor on a statutory right, but solely on negligence, plaintiff is chargeable with the consequence of his own acts in connection with the wrongs pleaded. On this phase of the case there is no evidence whatever to sustain a finding in favor of plaintiff.

Was the delay in acting on the application evidence of actionable negligence? The application was received at Lincoln November 19, 1919, and the new demand for the date of plaintiff's purchase of the truck was made November 28, 1919. One of the intervening days was Sunday, November 23, 1919. At most, therefore, there were eight working days between the receipt of the application and the request for further information. There is testimony that letters could have been exchanged within three days, making a delay of five days. Whether such a delay is evidence of actionable negligence depends on circumstances. If the public interest affecting the business of fire insurance extends to a case of this kind, plaintiff is on the same footing as other applicants similarly situated. Defendant was receiving daily many applications. Plaintiff was not a favorite entitled to have his application rejected or granted immediately without regard to the rights and business of others. The undisputed testimony is that applications containing all the information demanded are acted on first, requiring the time necessary to the issuance and delivery of policies; that defective applications required further examination and time, and that the application of plaintiff was acted on in the regular course of business, taking into consideration all applications. There is no evidence of

fraud or bad faith on the part of defendant. It seems clear that the mere delay under all the circumstances, taking into consideration the public interest with which the business of fire insurance is affected, the rights of other applicants, and the nature of the action, is not sufficient evidence of actionable negligence to sustain a judgment in favor of plaintiff. In *Wilken v. Capital Fire Ins. Co.*, 99 Neb. 828, cited by plaintiff, the application contained all information essential to the assuming of the risk, a material difference.

The payment and the conditional retention of the premium do not aid plaintiff's case. The record contains an offer to refund the amount paid. By the application plaintiff obligated himself as follows:

"I agree that the paying of a premium shall not bind the company unless the application is approved and the policy issued."

On these terms the premium was received and tendered back.

Under the evidence there is no theory on which plaintiff is entitled to a recovery. The judgment is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

OTTO BENDA ET AL., APPELLANTS, V. STATE OF NEBRASKA, APPELLEE.

FILED OCTOBER 20, 1922. No. 22689.

States: LIABILITY. Where individual members of a party, engaged in surveying a public road under the direction of an engineer employed by the state, enter a private pasture without permission of the owner thereof or of the engineer, for the private purpose of getting water to drink, and negligently shut off the only supply of water for cattle in the pasture, thus causing them to die of thirst, the state, as defendant in a judicial proceeding authorized by the house of representatives, is not liable as a matter of right and justice for the loss.

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

King, Bittner & Campbell and *C. C. Flansburg,* for appellants.

Clarence A. Davis, Attorney General, and *Charles S. Reed, contra.*

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

ROSE, J.

The claim of plaintiffs consists of six items aggregating $23,100 for the loss of registered Holstein and Hereford cattle which perished for want of water in a pasture in Polk county between July 22, 1919, and July 27, 1919. The supply of water for cattle in the pasture was negligently shut off by Fred H. Richards and Jesse M. Moore, members of a surveying party employed by the state of Nebraska under the direction of Vance W. Marquis, an engineer engaged in making a survey for a public highway. The claim was presented to the legislature for allowance. No appropriation to pay it was made, but the house of representatives by resolution adopted March 2, 1921, permitted plaintiffs to commence a proceeding in the district court for Lancaster county "for the purpose of ascertaining, determining and obtaining an adjudication of their respective claims and the liability of the state of Nebraska for the payment thereof." Plaintiffs acted under the resolution and filed a petition. The facts pleaded therein were conceded by the state for the purposes of the hearing and the district court disallowed the claim. Plaintiffs have appealed.

Plaintiffs concede there is no legal liability on the part of the state to pay for their loss, but they invoke the statutory doctrine of "justice and right" to procure the allowance of their claim. They state their position in the following language:

"A suit against the state by permission of the legislature is not a suit at law, but a special proceeding; and the court is required to hear and determine the matter accord-

ing to justice and right, as upon the amicable settlement of a controversy, and is required to render an award and judgment against the claimant, or the state, as right and justice may require." Rev. St. 1913, sec. 1180; *Commonwealth Power Co. v. State,* 104 Neb. 439.

The statute to which reference is thus made provides:

"The court in which such action may be brought shall hear and determine the matter upon the testimony according to justice and right, as upon the amicable settlement of a controversy, and shall render award and judgment against the claimant, or the state, as upon the testimony right and justice may require." Rev. St. 1913, sec. 1180.

For the purpose of determining the merits of the claim a more detailed statement of the facts is necessary.

The cattle perished in a pasture controlled by plaintiffs. It was nearly half a mile from a dwelling and over two miles from the home of any plaintiff. The only source of water supply for live stock in the pasture was a plant consisting of a drilled well, a windmill-pump, a cistern and a connected drinking tank automatically filled by gravity. The tank stood in the open pasture where the cattle could drink from it. The rest of the water-plant was surrounded by a fence which kept the cattle out. The conduit between the cistern and the tank was an iron pipe with a valve to shut off the flow of water from the cistern. By means of floats the windmill was automatically started or stopped as the tank in the pasture was emptied or filled. The capacity of the cistern was sufficient to supply the cattle with water for two weeks. After the water-plant had been in successful operation for five years plaintiffs examined it July 20, 1919, and found it in working order. There was then an ample supply of water in the cistern. When they returned a week later the cistern was full, but the tank was empty and animals valued at $23,100 had died or were dying of thirst. In the meantime plaintiffs had been at work early and late elsewhere caring for wheat which they had planted the fall before in response to a

patriotic appeal by the federal government, and did not see their cattle for a week.

Along one side of the pasture the surveying party had been engaged in surveying a public road, which, at the nearest point, was 40 rods from the water-plant described. Without any right, permission or authority, the two named members of the surveying party entered the pasture, went into the inclosure around the well, uncovered the cistern, took water from the inlet, and in some way closed the valve between the cistern and the tank, thus causing the loss for which plaintiffs seek a recovery from the state.

According to the standards of "justice and right" which plaintiffs have adopted as the test of recovery from the state, did the trial court err in disallowing the claim? According to the record Moore and Richards, in going into the pasture, in entering the inclosure at the water-plant, in opening the cistern, in taking water, and in closing the conduit between the cistern and the tank, were mere individual trespassers. Their demand for water was personal. Their effort to quench their thirst had no part in any operation of the government and had no legitimate connection with any public business in which the state was engaged. In committing the trespass and in causing the loss they were not directed by any public officer in the performance of an official duty. The work of surveying a public road was performed in the interests of the public as a whole, but the trespass and the negligence had no legal or just connection with such work. The business of the state did not take the government into the pasture, or to the cistern, or create a legal liability for the torts of individuals serving personal ends.

Taxpayers who provide the expenses of government may know about lawful public improvements, but neither they nor the state officers who represent them in public affairs know generally about, or contemplate, torts of private individuals and resulting losses.

If the wrongful acts pleaded by plaintiffs, however, could

have been contemplated by the state or its officers with a view to preventing the loss or to incurring liability therefor, the incentive to greater foresight to save the cattle is attributable to plaintiffs. They controlled the pasture, the stock and the water-plant. They knew the nature of the automatic devices used to supply water, the value of the stock in the pasture and the attending dangers. They were prompted by natural impulses to preserve their own rights and their own property. Knowing the conditions, they remained away from the pasture for a week. A visit which they could have made in the meantime might have prevented the loss. Officers of the state, performing duties directed by law only, did not have the same information or the same incentives as plaintiffs to protect the latter's property or to contemplate damages by trespassers. The state committed no wrong. No officer or employee, while acting for the state, did anything to injure plaintiffs.

The petition does not show that the individual trespassers who, on a personal mission, committed the wrongful acts which destroyed plaintiff's property are not financially able to pay, and legally liable for, the loss sustained. The state has never been held liable for individual torts under such circumstances. Justice and right do not require innocent taxpayers or the public at large to bear such burdens, created solely, as they were, by private persons, but the state has made provision for the punishment of trespassers and for the redress of private wrongs.

The statutory provision that the court shall "hear and determine the matter upon the testimony according to justice and right, as upon the amicable settlement of a controversy," did not strip the court of its power to determine the issue according to the principles of law and the rules of equity by which courts have always been guided in determining judicial questions. The legislature, by the use of that expression, never meant to make the state liable for a claim according to some indefinable, ethereal standard unknown to either law or equity. "Justice and right" are the aims of both. The standards for determining right and

justice in judicial proceedings are principles of law and rules of equity. This test is the result of the investigation, the thought and the wisdom of the ages, and must be respected if the government is to retain power to maintain itself.

With employees visiting all parts of the state on various missions of government, and with the state answering for the losses caused by individual wrongs and trespasses committed on private missions, no one could contemplate the extent of public losses or make timely provision for their payment.

As between individuals the trespasser is answerable for his wrongs. As between the state and an individual, why should the state be held liable for damages resulting from private wrongs? It would be a travesty to sanction such a liability in the name of "justice and right."

The state in its own courts should at least stand on an equality with private individuals.

The Sovereign's immunity from suit has long been a recognized principle of government. From such immunity to a one-sided "special proceeding," where the state, though committing no wrong nor violating any obligation nor neglecting any duty, is denied the protection of both law and equity and held liable for damages caused by the wrongful acts of individual trespassers, would be a radical and alarming step.

The use of the legislative expression, "amicable settlement of a controversy," in the connection used in the statute, presupposes the settlement of a controversy growing out of a claim having at least some support in the legal or the equitable principles by which "justice and right" are determined.

The claim allowed in *Commonwealth Power Co. v. State*, 104 Neb. 439, was founded on plain principles of equity leading to justice and right. The decision therein, when properly considered, is not authority for the contentions of plaintiffs in the present case.

The conclusion reached herein requires an affirmance of the judgment of the trial court.

AFFIRMED.

MORRISSEY, C. J. and DAY, J., dissent.

IN RE ESTATE OF EDMUND E. WOOLSEY.
OTOE COUNTY, APPELLEE, V. FRED A. WOOLSEY ET AL., APPELLANTS.

FILED OCTOBER 20, 1922. No. 21614.

Taxation: INHERITANCE TAX: VALUATION OF PROPERTY. Sections 6153 and 6163, Comp. St. 1922, being ambiguous as to the basis of valuation of property subject to inheritance tax, *held*, construing the whole statute, that the proper basis of valuation by the county judge is the "then cash value" of the property at the time of the death of the decedent, which is ascertained by finding the amount of money the property would produce if offered and sold for cash upon the open market at that time.

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

Pitzer, Cline & Tyler, for appellants.

George H. Heinke, contra.

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

ALDRICH, J.

Edmund E. Woolsey, a resident of Otoe county, Nebraska, died intestate May 20, 1919. His estate consisted of 1,467.94 acres of farm and pasture land in Otoe county, Nebraska, 729.14 acres of farm and pasture land in Cass county, Nebraska, and considerable personal property. On March 2, 1920, the county court of Otoe county entered an order finding the "fair market value" of the estate and assessing inheritance tax on that value as found. The appellants, sole heirs at law of Edmund E. Woolsey, deceased, excepted to the value of the land in Otoe county as

found by the county court, which was $412,205.50, and appeal was taken to the district court, where the "fair market value" of the Otoe county land was found to be $387,325. The case is now brought to this court on appeal from the district court, presenting for review and determination here the issue as to the value of the 1,467.94 acres of land in Otoe county. The valuation of the remainder of the estate is not questioned in this appeal.

A number of assignments of error are made, but in the view we take of the case it is unnecessary to discuss them all. The result of the case depends upon the construction of the Nebraska inheritance tax law found in sections 6153-6172, Comp. St. 1922, being sections 6622-6641, Rev. St. 1913, as amended in 1921. The statute is ambiguous and confusing as to what shall be taken as the basis of valuation.

The first-named section provides that the inheritance tax shall be based upon a certain percentage of the *"clear market value"* of the property received by each person, while in section 6163, Comp. St. 1922, treating of the subject of appraisement of estates, it is provided, in substance, that the county judge, whenever an estate appears to be subject to the inheritance tax, may appoint some competent person as appraiser, who, after giving notice, as provided in the statute, shall "appraise the property at the *fair market value of the same.*" He is given power to compel the attendance of witnesses and to take the evidence of such witnesses under oath concerning the value of the property. He is required to "make a report thereof and of such value in writing to the county judge with the depositions of the witnesses and such other facts relating thereto as the county judge may by order require, to be filed with the records of the county court; or the said county judge may by order fix a day and give notice to all interested parties and at such time appraise the property at the fair market value of the same; and from such appraisal as made by the county judge or report made by the appraiser, the county judge shall forthwith

determine and fix the *then cash value* of all estates, annuities and life estates for terms of years growing out of said estates, and the tax to which the same is liable." Construing the statute as a whole the "then cash value" refers to the cash value at the time of death of decedent.

The question now presented is whether the "fair market value" of the property, or the "clear market value" or the "then cash value" is the true measure of value of the property liable to inheritance tax. The county court and district court evidently were of the opinion that these terms are synonymous. The evidence in the record seems practically, but not entirely, to be confined to what is the "fair market value" or the "value of the property," or "what the property is worth," and not to the value in cash at the time of the death of the decedent. When we consider that the property of decedents' estates in order to pay legacies has very frequently to be converted into money, it seems to us that the intention of the legislature was that the property should be valued at the amount of money which it would produce if offered and sold for cash at the time of the death of the decedent. The language of the statute also seems to require this interpretation, since under section 6163, Comp. St. 1922, while the appraiser is required to report the "fair market value" of the property, the county judge is given power to require such other facts relating to the property as he may deem necessary to be furnished by the appraiser, and it is provided, "from such appraisal as made by the county judge or report made by the appraiser, the county judge shall forthwith determine and fix the *then cash value* of all estates." If the "fair market value" and the "then cash value" were synonymous, the county judge would only be required to fix the fair market value; but, considering the provisions that the tax shall only be upon the "clear market value," we are satisfied that the "clear market value" and the "then cash value" are intended to be synonymous.

It is a well-settled fact that farms and real estate gen-

erally in this state are usually sold partly upon credit, payments sometimes extending over long series of years, and that a higher price can usually be obtained for land sold upon this plan than for that sold for cash. The clear market value upon which the rate of tax operates, we consider to be the cash market value at the time of the death of the deceased, or, in other words, what the property would bring if then offered for cash upon the market.

In *Lynch v. Union Trust Co.*, 164 Fed. 161, it was held: "When congress employed the expressions 'actual value' and 'clear value' it very evidently intended to convey the idea of definite or certain value—something in no sense speculative." It was also held in that case that ambiguous statutes imposing special burdens should be construed most strongly against the taxing power. This is a general rule as to such statutes.

We are convinced that, had the witnesses been confined to giving their opinion as to what each separate tract of land would have brought, if offered for cash upon the open market at the time of the death of the decedent, the values given would be materially different from those fixed. This case is important, not so much for the result in the controversy before us, but because of the fact that upon its proper decision depends the rights of every person inheriting property within the state of Nebraska.

Another point urged merits attention. A number of witnesses for the county were county officers or persons who had formerly occupied such positions. Three were county commissioners, one was the county clerk, three were ex-county commissioners, and one a precinct assessor. Their valuations were high in comparison with those of appellants' witnesses, who were mainly farmers. The fact that appellee's witnesses were or had been county officials, their close association with county affairs, and the feeling which county officers sometimes have that a large estate should pay a liberal inheritance tax without question, perhaps unconsciously influenced them to appraise the land too high. This would naturally be expected, and

yet, on the other hand, the testimony of any person directly interested in the estate would be subject to the same imperfection. In any event, the evidence of interested or biased parties should be closely scrutinized, and the value should, if possible, be fixed by witnesses having competent knowledge and yet having no interest in the controversy, if such witnesses can be found.

Another point is worthy of mention. It appears that some of the witnesses for appellee were furnished with a list of the various pieces of land setting forth the values placed upon them separately by the county judge. This these witnesses had and used for purposes of reference at the trial. Such a practice is not to be commended.

On the whole case we are satisfied that the judgment should be reversed and the cause remanded to the district court for a new trial with the object of ascertaining the cash value of the property at the time of the death of Edmund E. Woolsey, deceased.

REVERSED AND REMANDED.

FARMERS UNION GRAIN COMPANY, APPELLEE, V. UNITED STATES FIDELITY & GUARANTY COMPANY, APPELLANT.

FILED OCTOBER 20, 1922. No. 22073.

1. Insurance: GUARANTY BOND: LIABILITY. A guaranty company is liable on its bond insuring the fidelity of an employee, without his signature, when issued upon his application, except in cases where it is positively and specifically provided that no liability attaches without it.

2. ———: APPLICATION: WARRANTIES. "Statements contained in an application for the issue of a policy of insurance will not be construed as warranties unless the provisions of the application and policy taken together leave no room for any other construction." *Modern Woodman Accident Ass'n v. Shryock*, 54 Neb. 250.

3. ———: GUARANTY BOND: STATEMENTS BY EMPLOYER. Certain answers set out in the opinion were made in a written statement

by an employer to the obligor in a bond of indemnity against the dishonest acts of an employee. *Held*, (1) not to be warranties, but representations; (2) that in order for such representations to constitute a defense to an action on the bond it is incumbent upon the bonding company to plead and prove that the statements and answers were made as written in the employer's statement; that they were false; that they were false in some particular material to the insurance risk; that they were made intentionally by assured; and that they deceived the bonding company to its injury.

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

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

McGilton & Smith and *Gaines, Van Orsdel & Gaines*, for appellant.

Baker & Ready and *Cain & Johnson, contra.*

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

ALDRICH, J.

This is an action at law brought by the Farmers Union Grain Company, a corporation, organized and existing under the laws of the state of Nebraska, as plaintiff, against the United States Fidelity & Guaranty Company, a corporation, and Charles S. Borin, as defendants. Plaintiff company instituted proceedings to recover on the defendant company's bond by which defendant undertook to insure plaintiff to the amount of $25,000 for losses incurred through the employment by plaintiff of its manager, Charles S. Borin. The bond was dated August 20, 1917, to be in force one year from that time, and was delivered to the Farmers Union Grain Company, though never signed by Charles S. Borin. The bond was renewed August 20, 1918, for another year.

On August 1, 1917, a new company, the Borin Grain Company, was formed by Mr. Shultz, the president of the Farmers Union Grain Company, and Charles S. Borin. They signed a contract to the effect that the business of

the Farmers Union Grain Company was to be conducted in the name of the Borin Grain Company, and that Charles S. Borin should be its manager. On December 1, 1917, the Borin Grain Company was incorporated under the laws of the state of Nebraska. Charles S. Borin continued to act as manager until the month of February, 1919, when he disappeared leaving a deficit of an amount over and above $25,000 in his accounts with the Borin Grain Company at that time.

In its petition plaintiff alleges the execution of the fidelity bond by the defendant, the employment of Charles S. Borin as its agent and manager, for the purpose of conducting a grain commission business in the city of Omaha, Nebraska, the defalcation and misappropriation of funds in the amount of $41,198.93 of the money of the plaintiff by Charles S. Borin, the refusal of the defendant to reimburse the plaintiff to the extent of the bond for this defalcation, and prayed for judgment in the amount of $25,000.

In its third amended answer the defendant company set up four defenses, in substance, as follows: (1) General denial; (2) the bond was not signed by the principal, Charles S. Borin, and that this was unknown to defendant until about the time this suit was brought; (3) the alleged falsity of statements and representations contained in the employer's statement relative to the nature and extent of the business and the manner in which it was to be transacted by Borin; (4) the alleged incorporation of the Borin Grain Company, whereby Borin ceased to be an employee of the Farmers Union Grain Company and became an employee of the Borin Grain Company.

During the trial defendant was granted leave to amend its answer by setting up a fifth defense, which, in substance, was that the bond was renewed for a second year upon the strength of the statements contained in the application for such renewal; that such statements were false, but were unknown to the defendant as such; and therefore the defendant was relieved from all liability by

reason of any defalcations arising subsequent to August 20, 1918. In view of the instructions given to the jury relative to this defense, they decided that particular issue in favor of defendant. Further inquiry into the fifth defense is unnecessary as that issue has been finally disposed of by the trial court.

The second defense was also disposed of by the trial court in instruction No. 8, given to the jury. No reference is made by appellant in its assignment of errors to instruction No. 8, nor is any complaint made relative to the correctness of such instruction.

The jury returned a verdict of $17,814, with interest at the rate of 7 per cent. per annum from June 28, 1919, to the date of the verdict, in favor of plaintiff, and in view of the instructions of the court this was the amount of the defalcation found during the first year of the bond. Judgment was entered accordingly, and defendant appeals.

The first proposition which we will discuss is whether defendant is relieved from liability because of the failure of Charles S. Borin, the employee, to sign the bond.

The case of *Title Guaranty & Surety Co. v. Bank of Fulton,* 89 Ark. 471, 33 L. R. A. n. s. 676, is directly in point. In that case the court disposed of this identical issue.

The defendant in the instant case had all the data and drew the bond in question, and therefore had an opportunity to use all its ingenuity to make the bond consistent with the contentions now advanced. Defendant Borin received the confidence and influence that attaches to such an obligation and was trusted with all the responsibility. There is nothing in the conditions of the bond which require that it should be signed by the employee.

This failure on the part of Borin to sign the bond will not release defendant only in such cases when the sureties sign upon conditions known to the obligee, and that the bond is only to take effect when it is signed by the principal. This was fully illustrated in the case of *Clark v. Bank of Hennessey,* 14 Okla. 572. That case, on a propo-

sition entirely analogous to this, completely sustains the principle laid down in *Title Guaranty & Surety Co. v. Bank of Fulton, supra.* This is also the law of this jurisdiction. *Johnson County v. Chamberlain Banking House,* 80 Neb. 96.

For other cases along this line, see *Douglas County v. Bardon,* 79 Wis. 641; *State Mutual Fire Ins. Co. v. Brinkley Stave & Heading Co.,* 61 Ark. 1, 29 L. R. A. 712; *Adams Co. v. Nesbit,* 38 S. Dak. 11; Stearns, Suretyship (2d ed.) sec. 149.

The next question is whether the declarations made by Mr. Shultz, president of plaintiff company, in the employer's statement to the defendant company were warranties and conditions precedent to be performed before a recovery could be had on the bond, or whether such declarations were in the nature of promissory representations requiring but substantial performance. The employer's statement, among other things, contained the following questions and answers:

"6. (a) What will be the title of applicant's position?
A. Manager.
(b) Explain fully his duties in connection therewith.
A. Manager the grain commission business at Omaha, under supervision of A. H. Shultz, Pres.

"7. (a) If his duties embrace the custody of cash, state largest amount likely to be in his custody at any one time.
A. $10,000.
(b) Also, the average amount of daily handlings.
A. $5,000.

"9. (a) If required to make deposits in bank, how often?
A. Each day.
(b) In what name are deposits kept?
A. Farmers Union Grain Co.
(c) Give name of depository.

A. First Nat'l Bank, Omaha, Neb.

(d) State approximate daily bank balances.

A. $5,000.

(e) State approximate largest bank balances at one time.

A. $10,000.

"11. To whom and how frequently will he account for his handling of funds, stock or securities?

A. Once per month.

"12. (a) What means will you use to ascertain whether his accounts are correct?

A. Personal audit by Pres. Shultz.

(b) How frequently will they be examined?

A. Once per month or oftener.

(c) How frequently will an inventory of the stock be taken?

A. Once per month or oftener.

(d) If applicant is a salesman or collector, are statements rendered to customers in arrears, and at what periods?

(e) If applicant is an insurance agent, state period when reports and settlements are required.

"13. When were his accounts last examined?

A. August 20, 1917."

The general rule is that a statement in an application is a representation, rather than a warranty, unless made a warranty by express terms or otherwise so clearly referred to as to become a part of the contract and necessitate such a construction, or unless the language used in the contract clearly and unequivocally evidences the intent that it should be construed as a warranty. Answers to questions in an application for insurance are therefore to be construed as representations, as to which substantial truth in everything material to the risk is all that is required of the applicant, unless clearly shown by the form of the contract to have been intended as warranties. So statements by an applicant for insurance, which by the terms of the policy are made part of the contract with

the insurance company, are not to be regarded as warranties, unless the policy upon its face plainly declares that they shall be treated as such. 3 Joyce, Insurance (2d ed.) sec. 1891.

In the case of *Title Guaranty & Surety Co. v. Bank of Fulton,* 89 Ark. 471, it is said: "Now, if it had been the intention of the parties to make these statements in the 'employer's declaration' warranties, it should have been so stated. But the bond does not say that any of these statements is a warranty. It does not employ any language which says or can be construed to say that any of these statements is a warranty. If it had been so desired, the bond could have well stated that, if any of the statements made in the 'employer's declaration' was incorrect, then the bond should be void." The bond in the instant case does not make the declarations in the employer's statement warranties, and such a construction will not be placed upon them independently.

The foregoing rules of construction have been generally approved and followed by this court in deciding cases involving insurance, and the laws of insurance generally are applicable in the instant case.

A contract of insurance, where the insurer has received and retains the consideration, is to be sustained, if possible, and should not be defeated upon any ground which does not materially increase the risk. *Billings v. German Ins. Co.,* 34 Neb. 502; *Phœnix Ins. Co. v. Barnd,* 16 Neb. 89; *State Ins. Co. v. Schreck,* 27 Neb. 527; *Farmers & Merchants Ins. Co. v. Newman,* 58 Neb. 504; *Hanover Fire Ins. Co. v. Gustin,* 40 Neb. 828.

"Courts will construe policies of insurance more strongly against the party by whom the contract has been drafted, and who has had the time and opportunity to select, with care and ingenuity, and with a view to its own interests, the language in which the contract is couched." *Connecticut Fire Ins. Co. v. Jeary,* 60 Neb. 338. See, also, *Woodmen Accident Ass'n v. Pratt,* 62 Neb. 673; *Soehner v. Grand Lodge, Order of Sons of Herman,* 74 Neb. 399;

Beber v. Brotherhood of Railroad Trainmen, 75 Neb. 183; *Modern Woodmen of America v. Wilson,* 76 Neb. 344; *Harr v. Highland Nobles,* 78 Neb. 175; *Ætna Ins. Co. v. Simmons,* 49 Neb. 811.

For other cases dealing with the question of representations and warranties, see *Beeler v. Supreme Tribe of Ben Hur,* 106 Neb. 853, 184 N. W. 917, and note; *Kettenbach v. Omaha Life Ass'n,* 49 Neb. 842; *Ætna Life Ins. Co. v. Rehlaender,* 68 Neb. 284; *Goff v. Supreme Lodge Royal Achates,* 90 Neb. 578, 37 L. R. A. n. s. 1191; *Yonda v. Royal Neighbors of America,* 96 Neb. 730; *Modern Woodmen Accident Ass'n v. Shryock,* 54 Neb. 250.

Having adopted the above rules, then it is plain that this court desired to have the law as therein provided, and the legislature showed a like intention in passing section 3187, Rev. St. 1913, which is now section 7787, Comp. St. 1922.

We have decided that the declarations made in the employer's statement are representations, and we are now confronted with the question whether there was substantial compliance on plaintiff's part with the same. This being a question of fact and it having been decided by the jury as such under proper instructions, we adhere to the same, and this phase of the case is entitled to an affirmance. We are not at liberty under the general rule of this court to disturb the finding unless the jury are clearly wrong.

The defendant company cannot be heard in their desire to evade responsibility, which they solemnly entered into, and voluntarily took upon themselves the duties to do certain things for the purpose of inducing the plaintiff to accept it as a surety, and in this way guaranteed them that Borin would be honest and square and would perform his responsibilities in this manner. Borin turned out to be a defaulter and absolutely failed to do and perform the things which he actually assumed responsibility for. Defendant drew the bond, used the language to suit its purposes. By every rule of justice and fair dealing we hold

they are bound to be responsible for what they undertook. It was by reason of this position that the plaintiff company trusted fully that Borin would carry out to the fullest extent these duties, and by reason of that position in which the plaintiff company was, it fully believed in the terms and conditions of the bond that the defendant company assured them against all loss, and for which the defendant received pay. In this transaction the defendant assumed no other or different risk than that for which it received pay, and undoubtedly, as a matter of fact, the jury made that finding under proper instructions. Under the rules of this court, unless it is clearly wrong, we will not disturb it. The evidence and the instructions of the court fully sustain the finding of the jury. This court is committed to the doctrine that on a question of fact the jury are supreme. That is the American doctrine and no court will be heard to disturb it. We do not feel in this case that there is any occasion to doubt the validity and justice of this finding. A disturbance of it would be revolutionary and start the wheels to overturn our methods of seeking justice and enforcing fair dealing.

Appellant makes complaint that the alleged incorporation of the Borin Grain Company changed Borin's employment and put him in a relation to the bonding company which created greater risks and new responsibilities that were not provided for in the bond. We say in answer to this that the Borin Grain Company was a mere fiction in every sense of the word. It will be noted in the beginning that the defendant Borin, by the organization of this new company, in no way created a new or greater risk and had no other or different responsibilities than had already been provided for. The object and purpose of this new formation was simply to give the plaintiff a better opportunity to take advantage of Borin's acquaintance among grain men and to do business on the grain exchange. Borin held a seat on the grain exchange and in order to use it the change of the name of plaintiff company was made. It seems that a corporation could not hold a

membership according to the rules of the exchange.

One thing should be borne in mind, and that is that Borin could not become a defaulter and otherwise violate the conditions of his bond and be in any different relation to the plaintiff and defendant than he was in the beginning. We say, then, that from any angle you view the position he is in, the same situation is found, so far as the plaintiff and defendant are concerned, as originally. Then, there being no greater risk and no different position in regard to his business transactions than there was when he started, it necessarily follows that the insurance contract which the defendant entered into with the plaintiff is good now, the same as it was before any change was made. This, in short, is what the jury found on the facts, and we affirm it.

We next direct attention to the instructions given by the court. We have examined specifically each of the matters complained of and note that one proposition prevailed, and that was to elucidate the law applicable thereto, and, in our judgment, only such rules of law were submitted to the jury as cleared up the complications involved, and the court accurately and learnedly demonstrated to the jury those propositions only which were involved and difficult of understanding. We affirm the instructions and say there was no reversible error. From any view-point you look at this situation, one thing is evident, and that is that we have not changed an iota nor made any difference in the insurance contract which they entered into in the first instance.

It appears of record that counsel for plaintiff have already been allowed $1,000 for services rendered in district court. We think if we allow $500 for their services rendered in this court in addition, that will be considered compensatory and reasonable, and the allowance of the same is hereby ordered.

Reviewing all the reasons that we have heretofore given in our discussion, and in furtherance of justice and fair

dealing, it is our duty under the law and the facts to affirm this case.

AFFIRMED.

THOMAS J. MILLER, APPELLEE, V. JOSEPH E. RUZICKA ET AL., APPELLANTS.

FILED OCTOBER 20, 1922. No. 22104.

1. **Quieting Title:** PARTIES. When the provisions of chapter 263, Laws 1919, providing for the quieting of titles to real estate by making the land a party defendant, are complied with and service had, as required under the general statutes (Rev. St. 1913, secs. 7641-7643), it is not necessary to comply with the provisions of chapter 143, Laws 1915, covering the matter of service upon unknown heirs.

2. **Vendor and Purchaser:** DEFECTS IN TITLE: RESCISSION. When a purchaser of land knows of a defect in the title of the land purchased which is not disclosed by the vendor's abstract, nor by the records, and which is unknown to the vendor, it is the duty of the purchaser to inform the vendor of the defect, where the vendor, if he had such information, could perfect his title within the time required by the contract, and, where the purchaser having such knowledge does not inform the vendor of such defect, he cannot later claim a right to rescission of the contract because of the failure of the vendor to cure the defect, without first giving the vendor notice and a reasonable opportunity to cure it.

3. ———: ———: ———. Where, in an action by the vendor to recover the purchase price of land sold, the purchaser did not disclose such defect until after the trial had commenced, but the vendor perfected the title and cured the defect before decree, *held*, that the defect of title existing at the commencement of the suit was not a defense available to the purchaser, nor a basis for a rescission on his cross-bill.

4. ———: VENDOR'S LIEN: FORECLOSURE: RECOVERY. Where one party agrees to convey certain land to another for a tract of land and a money consideration, the fact that the parties have recited the value of their lands in the contract, as a basis for a determination of the marginal consideration to be paid in money by the second party, does not, of itself, amount to a contract by the second party to pay in money an amount equal to the value placed upon his land in case he fails to transfer the land as agreed.

5. ———: DEFAULT: REMEDIES. In case of default by the second party, and where it appears that the first party has a full remedy in specific performance, the first party cannot be allowed a vendor's lien upon the property which he had contracted to convey, to secure the payment to him of an amount equal to the actual value of the land agreed to be conveyed by the second party, but must either require the conveyance of the land to him or seek his remedy in rescission or damages.

6. ———: VENDOR'S LIEN: FORECLOSURE: VENUE. An action to foreclose a vendor's lien on real estate is properly brought in the county where the property is located.

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

M. F. Harrington and *George A. Eberly,* for appellants.

J. J. Harrington and *Courtright, Sidner, Lee & Gunderson, contra.*

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

FLANSBURG, J.

This was a suit in equity by the plaintiff, Miller, to foreclose a vendor's lien on real estate in Holt county, which, by contract, he had agreed to convey for a consideration to defendants Ruzicka. Plaintiff claimed that he had tendered performance, but that defendants had failed and refused to perform. The trial court found in favor of the plaintiff; held that the plaintiff was entitled to a vendor's lien on the land; and allowed foreclosure. From this judgment the defendants appeal.

The contract entered into between plaintiff and defendants Ruzicka provided that the plaintiff should convey to the defendants the northeast quarter of section 7, township 27, range 11 west of the 6th P. M., in Holt county, Nebraska. The contract recited that this land was "valued at $24,180." It was to be conveyed subject to a mortgage of $6,000 in favor of Julius Duft. The defendants Ruzicka, in consideration of the conveyance, were to transfer to the plaintiff a property located in the town of Clarkson, Ne-

braska, which the contract recited was "valued at $4,500." They were to pay $2,780 in cash, $1,900 in liberty bonds, and were to execute to the plaintiff a mortgage for $8,000 upon the land in Holt county, of which they were to receive conveyance. The plaintiff was to retain possession of the Holt county property from the date of contract until March 1, 1921, which use was considered of the value of $1,000, and that amount was to be credited and treated as the payment by defendants of so much additional consideration moving from them upon the transaction.

The defendants Ruzicka contend that they were induced to enter into the contract by false and fraudulent representations of the plaintiff, and that the plaintiff had been aided to that end by acting in conspiracy with a brother-in-law of defendant Ruzicka, in whom Ruzicka placed special confidence, and upon whose judgment, it was known to the plaintiff, defendant Ruzicka very largely relied. It appears that defendant Ruzicka visited the Holt county land upon two occasions, and he alleges that the land was represented to be worth $160 an acre, that the land had good clay subsoil, and was as good as certain lands of defendants in Stanton county. Defendant observed, he says, that the corn crop then standing upon the land was dwarfed, and alleges that the plaintiff and defendant's brother-in-law represented that the land had not been properly farmed, and by other devices prevented his further investigation.

It appears from the evidence, and in part even by the testimony of the witnesses in behalf of the defendants, that the contract covering these properties was made when there was a boom in land values in Holt county, and that the value placed upon the Holt county land was in accordance with the current prices then being paid for land of similar kind and quality in that neighborhood. The trial court found the value of the land to be $150 an acre, and found generally against the defendants on all issues of fraud. Though expressions of opinion, falsely given

and relied upon, may constitute a basis for fraud, where a confidential relation exists (26 C. J. 1086, sec. 24), we cannot see from the record but that the trial court was justified in the findings made.

The further defense is made that the plaintiff, at the time of the commencement of this suit to foreclose his vendor's lien, did not have and had not tendered a good title to the property. The contract provided that an abstract showing good title should be furnished to the defendants on or before November 6, 1919. Plaintiff procured an abstract and delivered the same to the defendants in October, 1919, and defendants, through their attorney, notified the plaintiff that they would not further perform their contract, on the ground that false representations had been made by plaintiff regarding the land, and on the further ground that the plaintiff did not have a merchantable title to convey. The defendants did not then point out any specific defect in the title. This suit was commenced in March, 1920, and it was not until at the trial in December of that year that the defendants made specific objection to the title. They then objected that in 1891 the property had been sold at administrator's sale, that the notice given at that sale had misdescribed the property, that the sale was void, and that the plaintiff's chain of title was thus broken. The administration proceeding was, in fact, defective, as contended by the defendants. At some time, however, the records of the proceeding had been falsified by some one so as to conceal the defect, and the abstract tendered by the plaintiff was an abstract of the records as falsified. It does not appear, and no attempt was made to show, that the plaintiff was responsible for the mutilation of the records, nor that, through any fault of his, he had failed to discover this defect of title. The defect had, since October, 1919, been known to defendants, but, as it appears, was not made known to the plaintiff until after the trial had begun. The trial court continued the case for the purpose of giving the plaintiff opportunity to have the title quieted and the

defect cured. As time was not made of the essence of the contract, plaintiff had a reasonable time in which to perfect his title. Had the defendants notified the plaintiff of the defect complained of in October, 1919, when the defect was discovered by them, the plaintiff would have had ample opportunity and time within which to have corrected the title by the time he was required, under his contract, to deliver his deed. It would seem that if the defendants were intending to refuse to perform their contract because of this specific defect they should, in good faith, have called it to the attention of the plaintiff, so as to give him opportunity of clearing his title for them. As soon as specific objection was made, the plaintiff immediately took steps to have the record title established, and the title so established by decree of court was procured and furnished prior to the time, specified in the contract, when the plaintiff was required to deliver possession of the land to the defendants, though after the date specified for delivery of a deed.

Under the circumstances, it would appear that the trial court was justified in giving the plaintiff opportunity to establish and cure his record title against the technical defects complained of, since, under the circumstances and in view of the conditions of the contract and the attitude of the defendants in refusing to perform, and who could, by timely objection, have avoided the delay, it may fairly be held that the plaintiff has perfected his title and tendered his performance within reasonable time.

The defendants next contend that plaintiff was unable, at the time of decree, to furnish a good title to the land agreed to be conveyed by him, for the reason that the action which was brought by the plaintiff to cure the defect of title was by published service and was not in accordance with the provisions of chapter 143, Laws 1915. It is pointed out that the affidavit for service did not set forth that the plaintiff in the action was unable to ascertain whether certain defendants, who were alleged to be deceased, had died testate or intestate, and further did not

sufficiently allege and show that the plaintiff had made diligent search and investigation to discover the names of the unknown heirs and unknown defendants, and had been unable, after due diligence, to get such information.

The proceeding to quiet title, however, was brought under the provisions of chapter 263, Laws 1919, being an act particularly pertaining to actions to quiet title to real estate. The proceeding complies in all particulars with the provisions of this act (Laws 1919, ch. 263), and with the general law as to service by publication, and, as we view it, an affidavit for service by publication to meet the provisions of chapter 143, Laws 1915, was not required. The plaintiff at the time of decree had a clear record title to convey.

The trial court, then, was justified in denyi the defendants, upon their cross-bill, a rescission of the contract and a recovery of that portion of the purchase money which they had paid.

The court decreed that the plaintiff was entitled to a vendor's lien in the amount of $10,780, which represented the balance due of that part of the consideration which was to be paid in money, together with an amount of $4,500, which was to be in lieu of the land, which the defendants had agreed to convey, the $4,500 being the value which the defendants had, in the contract, placed upon the land.

It is strenuously objected by the defendants that the transaction was an exchange of lands, the lands being valued, and the defendants agreeing to pay only the marginal difference in money. It is contended that, since the consideration moving from the defendants was not liquidated in its entirety, the plaintiff is not entitled to a vendor's lien.

The plaintiff relies upon the fact that the property was valued by the parties at $4,500, which, it is claimed, is equivalent to a promise to pay that amount of money. However, we do not so interpret the contract. The obligation of the defendants in this case was to transfer certain

property and to pay certain moneys in addition. The property, it is true, was valued in the contract at $4,500, but that was an estimate agreed upon by the parties for the purpose of determining what marginal difference in value between the properties must be covered by a money consideration. The defendants did not guarantee that their property was worth $4,500; nor did they, by their contract, agree to pay $4,500 in lieu of the property, should they refuse or fail to transfer the property to the plaintiff. The parties not having made such a contract, the court cannot establish such a one for them.

Plaintiff relies upon the case of *Irving v. Bond,* 76 Neb. 293, and a number of cases from other jurisdictions, similar in principle to that case, but in that case and in the other cases cited the parties sued had agreed to pay a certain definite amount, either in money or in property, and it was held in those cases that, where the money obligation was not satisfied by the transfer of property, the obligation to pay in money still continued. In each of those cases the primary obligation to pay the purchase price in money is found embodied in the contract. Those cases are entirely distinguishable from the present case, for here there was no promise to pay in money, but simply an undertaking to transfer a specific piece of property; nor was there a guaranty by the defendants, as was true in the case of *Dixie Industrial Co. v. Benson,* 202 Ala. 149, that the land should be of a certain value.

A vendor's lien is a right which is resorted to in equity as a means of enforcement of a contractual obligation. It is intended to protect persons who have parted with realty without security, and, it has been said, rests upon the principle of natural justice that one who obtains the estate of another should not, in conscience, be allowed to keep it without paying the consideration. 39 Cyc. 1789. A relation of trust springs up in favor of the vendor, and an implied agreement is erected that the vendor may, as security for the purchase price, have a lien upon the property which he has parted with.

It is argued by the plaintiff that, even though the court should not hold the contract in this case to be, in effect, a specific promise to pay $4,500 in the event that the defendants should refuse to transfer the property which they had contracted to convey, still the plaintiff is entitled to recover in equity from the defendants the actual value of the defendants' land, and that a lien should be enforced to the extent of that value.

In order that a person be entitled to a vendor's lien, he should be able to point out an obligation to pay to him a consideration which is definite and precise and easily reducible to a monetary value. As a general rule at least, he cannot have a vendor's lien for a consideration which is in the nature of services to be rendered him, or of property to be transferred to him, where such consideration is unliquidated in amount. Though the refusal of the defendants in this case to transfer the property, which they had agreed to transfer, may have resulted in damage to the plaintiff, which he would be entitled to prove and recover in a proper action, he cannot convert the agreement to transfer property into a contractual obligation to pay in money the value of that property, and then secure its payment by a vendor's lien.

It is true that there are decisions where courts have established a vendor's lien to secure the payment of a consideration upon a contract where by the contract the consideration was to be the transfer of certain specific articles or property. In those cases the courts have ascertained the value of the property and determined that to be an indebtedness secured by a vendor's lien (*Busath v. Prival,* 84 N. J. Eq. 599; *Flickinger v. Glass,* 170 N. Y. Supp. 459; *Cordova Coal Co. v. Long,* 91 Ala. 538; *Neel v. Clay,* 48 Ala. 252; *Meyer, Bannerman & Co. v. Smith,* 3 Tex. Civ. App. 37); but in those cases the equitable remedy for specific performance was not available, or by reason of some other equitable ground the courts felt justified in the conclusion reached. The decisions upon that question are, even then, not without conflict. *Harris v. Hanie,* 37 Ark.

348; and see *Graham v. Moffett,* 119 Mich. 303.

As a general rule, a vendor's lien does not exist as a security for an unliquidated demand. The value of the defendants' property in this case is surely unliquidated. We do not say that, under no circumstances, could a vendor's lien be found to secure the value of property, parted with or contracted for, but we do say that this is not one of those extreme cases where such a rule must necessarily be applied in order that equity be done. There is no reason in this case why specific performance cannot be granted, and, that being true, we are unable to see why the doctrine of the vendor's lien should be extended. The plaintiff is not without security to compel conveyance of the defendants' land. By the contract itself he has, in effect, become invested with an equitable interest therein. Equity has the power to give full relief according to the exact terms of the contract entered into between the parties, and there is no logical reason why the defendants' contract to convey a specific property should be converted into a promise to pay in cash either the amount which he estimated to be the value of that property, or an amount which the court should find to be the actual value, so long as the property itself stands available, and which, by order of the court, may be required to be conveyed to the plaintiff. The plaintiff was entitled to his remedy in damages, had he sought to recover on the basis of the value of defendants' property; or he had a remedy in rescission or for specific performance. There is nothing inconsistent in his action to recover the purchase money and to enforce a vendor's lien as security for that payment, and at the same time to seek a transfer to him of the specific property which the defendants had agreed to convey. To go further and order the defendants to pay $4,500 in lieu of the property, as upon a money obligation and as a part of the purchase price, would be to make for the defendants an entirely different contract than they had entered into.

It is further insisted by the defendants that the court has no jurisdiction, for the reason that the action should

have been for specific performance and should have been brought where the defendants reside. In answer to this, it is only necessary to say that this action was, in part, an action to foreclose a lien upon land in Holt county, and the court, having acquired jurisdiction of the parties and the subject-matter, had jurisdiction of the parties for all the purposes of the suit.

The judgment of the lower court is therefore reversed and the cause remanded, with leave to the plaintiff to amend the prayer of his petition, and with directions that the trial court take further proceedings in accordance herewith.

REVERSED.

JACK FROST, APPELLEE, V. UNITED STATES FIDELITY & GUARANTY COMPANY, APPELLANT.

FILED OCTOBER 20, 1922. No. 22833.

1. **Master and Servant:** EMPLOYERS' LIABILITY ACT: COMPENSATION. Under the provisions of section 3044, Comp. St. 1922, *held*, that a claimant for compensation, who had sustained an injury to both legs, resulting in a total loss of the use of them for a period of two years, followed by a permanent partial loss of the use of them, was entitled to recover such proportion of the compensation allowed for total disability, under subdivision 1 of said section, as the extent of his loss would bear to the total loss of such members.
2. ———: ———: OPERATION. The unreasonableness of the refusal of an injured employee, who is seeking to recover compensation under the workmen's compensation law, to permit an operation to be performed, is a question of fact to be determined from the evidence.
3. ———: ———: ———. *Held*, the evidence in this case sufficient to support the finding that the refusal was not unreasonable.

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

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

Charles S. Roe, contra.

Clarence A. Davis, Attorney General, Charles S. Reed and *Lester L. Dunn, amici curiæ.*

Heard before MORRISSEY, C. J., LETTON, ALDRICH and FLANSBURG, JJ., REDICK and SHEPHERD, District Judges.

FLANSBURG, J.

This action was instituted to test the extent of the plaintiff's right to compensation under the workmen's compensation law. He was injured on December 26, 1919, while in the employ of the Nebraska Material Company. The defendant, United States Fidelity & Guaranty Company, carried the insurance covering the risk.

While the plaintiff was loading stone for the Nebraska Material Company, a load of the stone fell and crushed both of his legs, breaking each of them between the knee and ankle. For a period of two years from the date of the accident the plaintiff has been unable to walk, and the defendant has paid him compensation. The defendant now claims that an operation would cure him, and has instituted this proceeding, seeking permission to discontinue payments of compensation on the ground that the plaintiff unreasonably refuses to allow any operation to be performed. The trial court found that the refusal of the plaintiff to submit to a surgical operation was not unreasonable, and denied the defendant the relief asked. From this order the defendant appeals.

The defendant called three doctors by whom it was attempted to prove that an operation was proper and would probably cure or greatly improve the plaintiff's condition, and would be attended by no material risk or extraordinary pain, but these doctors did not agree among themselves as to the course to be taken, nor as to the exact cause of the continuance of the plaintiff's disability. One of these physicians testified that the bones of the leg should be rebroken; that they were out of alignment, and that, by placing them in proper alignment after rebreaking and holding them there by a plaster cast, a proper or greatly improved functioning of the feet and ankles would be ob-

tained; that this could be done by a closed operation, but that a general anæsthetic would be necessary. The other two doctors, who testified for the defendant, said that a rebreaking of the legs was unnecessary; that the disability existing in plaintiff's feet and ankles was due, not so much to a deformity of the bones of the leg, as to adhesions found in the muscles and tendons; and that the two bones of the right leg had become grown together, and that the operation necessary to be performed on the right leg was by an incision and opening of the skin and flesh, and the cutting away of the callous growth to such an extent as to separate the two bones; the adhesions in the tendons and tissues were also to be loosened and then the feet placed in plaster casts.

In opposition to this testimony, plaintiff introduced X-ray pictures showing that the bones of the right leg were not fastened together by any callous growth, but were, in fact, as far apart as they normally should be. Plaintiff's attending physician, testifying from the pictures, pointed out that there was no fusion of the bones nor growth between them. In his opinion, he said, the plaintiff's disability was due to the adhesion of tendons and muscles, and he strongly advised against an operation or a rebreaking of the bones, saying that to rebreak them would mean a breaking of the bones at another place than at the place of the original break, that this would create additional disturbances, and that the probabilities were that the plaintiff would receive more harm than good from either of the operations suggested. Two other physicians were called by the plaintiff, each of them having acted at one time or another as plaintiff's family physician. Their testimony was to the effect that an operation would not better but would probably aggravate and increase the plaintiff's disability.

It is unnecessary for us in this case to determine just how far a claimant under the workmen's compensation act must go in submitting to surgical operations, for, under any rule we might adopt, it must be conceded that the

evidence in this case is quite sufficient to justify the trial court in its finding that the plaintiff could not be compelled to submit to a surgical operation, the nature of the operation being one upon which the physicians for the employer could not themselves agree. The question of the unreasonableness of the refusal of an injured employee to permit an operation to be performed is, in all events, a question of fact, to be determined from the evidence. It was within the judgment of the trial court to accept the opinion of the plaintiff's witnesses that the operation was inadvisable. The evidence being clearly sufficient to support that fact, the finding made is conclusive upon this court.

The defendant further contends that the award made by the trial court was unwarranted and not in accordance with the provisions of the statute. This question involves the interpretation of certain provisions of the compensation law which are, as far as necessary here, as follows (Comp. St. 1922, sec. 3044):

"The following schedule of compensation is hereby established for injuries resulting in disability:

Subdivision 1. "For the first three hundred weeks of total disability, the compensation shall be sixty-six and two-thirds per centum of the wages received at the time of injury, but such compensation shall not be more than fifteen dollars per week, nor less than six dollars per week. * * * After the first three hundred weeks of total disability, for the remainder of the life of the employee, he shall receive forty-five per centum of the wages received at the time of injury, but the compensation shall not be more than twelve dollars per week nor less than four dollars and fifty cents per week."

Subdivision 2. "For disability partial in character (except the particular cases mentioned in subdivision 3 of this section), the compensation shall be sixty-six and two-thirds per centum of the difference between the wages received at the time of the injury and the earning power of the employee thereafter, but such compensation shall not

be more than fifteen dollars per week. This compensation shall be paid during the period of such partial disability; not, however, beyond three hundred weeks after the date of the accident causing disability."

Subdivision 3. "For disability resulting from permanent injury of the following classes, the compensation shall be in addition to amount paid for temporary disability. (Then follows a schedule of specifically described losses.) For the loss of a leg, sixty-six and two-thirds per centum of daily wages during two hundred and fifteen weeks. * * * The loss of * * * *both legs* * * * shall constitute total and permanent disability and be compensated for according to the *provisions of subdivision 1* of this section. * * * Permanent total loss of the use of a * * * leg * * * shall be considered as the equivalent of the loss of such * * * leg."

"In *all* cases involving a *permanent partial loss* of the use or function of any of the members mentioned in subdivision 3 * * * the compensation shall bear such relation to the *amounts named in* said *subdivision 3* * * * as the disabilities bear to those produced by the injuries named therein."

The plaintiff at the time of the accident was earning $30 a week. The trial court found that the plaintiff had lost the total use of his legs from the time of the accident, December 26, 1919, down to the date of the decree entered herein, April 29, 1922. This covered a period of 122 weeks. For that period the trial court awarded to the plaintiff $15 a week on the basis that a total loss of the use of both legs was a total disability and was to be compensated under the provisions of subdivision 1 of the section. To this extent the interpretation of the statute seems clear, since it is specifically provided that the loss of both legs shall constitute total and permanent disability, and shall be compensated under subdivision 1 as for a total disability.

The court, however, further found that from April 29, 1922, the plaintiff was permanently disabled only to the

extent of "sixty-six and two-thirds per cent of total disability," and for this disability the court, on the theory that the plaintiff would be able to earn $10 a week, allowed him two-thirds of $20, being two-thirds of the difference between what the plaintiff would be able to earn and what he had been able to earn at the time of the accident, and awarded him $13.33 a week for the period of 178 weeks. The allowance so far made was for a total period of 300 weeks subsequent to the date of the accident.

The court then further found that the plaintiff was entitled to recover 45 per cent. of this difference of $20 in earning power, or $9 a week, during the remainder of his life.

The award made for the period subsequent to the decree, based on a finding that there was a 66 2/3 per cent. loss of ability, is what is especially complained of by the defendant.

It is specifically provided by the statute, as appears above, that in all cases involving a *permanent* and *partial* loss of the use or function of any of the members mentioned the compensation shall be in such proportion to the amounts named in subdivision 3 as the loss of the use of the member bears to a total loss. For the total loss of one leg, plaintiff, it is true, would have been entitled to recover, under subdivision 3, two-thirds of his daily wages for 215 weeks; but, on the other hand, for the total loss of his two legs, he would have been entitled to total disability under subdivision 1. Where he has a partial loss of two legs, if the statute is to be literally followed—and we see no ground, and counsel has attempted to point out none, which would make it appear that the literal interpretation of the statute is not in accord with the intention of the legislature—he would be entitled to two-thirds of what he would have recovered for the total loss of two legs, or two-thirds of the compensation allowed for total disability under subdivision 1. This is the construction the trial court has given to the statute, and the award made for the partial disability of the plaintiff for a period continu-

ing from the date of the decree is based upon the proportion of the total award which the partial loss of the use of the plaintiff's two legs would have borne to a total loss of them. No complaint is made that the court did not properly apportion the award, should the interpretation followed be found to be proper, and we therefore do not go into that question.

The judgment of the lower court is

AFFIRMED.

MELVIN L. RAWLINGS ET AL., APPELLANTS, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL., APPELLEES.

FILED NOVEMBER 13, 1922. No. 22101.

State Railway Commission: FINDINGS: REVIEW. On an appeal from an order of the state railway commission, the finding of the commission will be given the same effect as the verdict of a jury, and the order will not be reversed unless it is clearly wrong.

APPEAL from the Nebraska State Railway Commission. *Affirmed.*

A. D. McCandless, Sabin & Vasey and *Pemberton & O'Keefe,* for appellants.

Byron Clark, J. L. Root, J. W. Weingarten, C. A. Magaw, T. W. Bockes and *D. F. Smith, contra.*

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

MORRISSEY, C. J.

The complainants made application to the state railway commission for an order directing defendants to install a connecting track between their respective lines of railroad at one of four designated points between the village of Blue Springs and the city of Wymore. The relief prayed was denied, and complainants have appealed.

A line of the Chicago, Burlington & Quincy Railroad

Company extends from St. Louis, Missouri, by way of Kansas City and St. Joseph, Missouri, Falls City, Table Rock, and Wymore, Nebraska, to Denver, Colorado. A line of the Union Pacific Railroad Company extends from Kansas City, Missouri, to Lincoln, Nebraska, by way of Topeka and Manhattan, Kansas, and Beatrice, Nebraska. The city of Wymore is located in the south central part of Gage county on the line of the Chicago, Burlington & Quincy Railroad Company and the village of Blue Springs is located one mile north of the city of Wymore on the line of the Union Pacific Railroad Company. The two lines of railroad intersect 2½ miles east of the Burlington depot at Wymore and run parallel to one another in a northwesterly direction about one mile. The Burlington line then takes a more westerly direction and enters the city of Wymore, while the Union Pacific line takes a more northerly direction and enters the village of Blue Springs. There is no physical connection between the two roads either at Wymore, Blue Springs, or the point of intersection, where cars may be transferred from one road to the other. The nearest point at which transfers may be made is the city of Beatrice, 13 miles distant from the city of Wymore.

Adjacent to the lines of railroad, where they parallel one another, there is a stone quarry from which is shipped large quantities of rock in car-load lots varying from 400 to 500 cars a year. Each railroad has a spur track on its line to handle this freight. The rock to be shipped over the Union Pacific line is loaded directly from the rock-crusher to the car by means of a chute. The rock to be shipped over the Burlington line, because of the absence of physical connection between the two lines, is hauled from the chute of the rock-crusher across both lines of track with teams and put on a dump from which it is loaded into the cars. The "round trip" for this haul is approximately 1,500 feet. The testimony shows that the cost of loading the cars on the Union Pacific track, through the chute from the rock-crusher, is merely nominal, while

the cost of loading by means of teams on the Burlington line runs from $2 to $4 a car.

The shipments vary from year to year, but during the first nine months of 1918 there were shipped over the Burlington 142 cars, and 130 cars were shipped over the Union Pacific. In the year 1912, 594 cars were shipped over the Burlington. As the record stands it presents a showing of an ice plant on the land of the Union Pacific Railroad Company at Blue Springs which is inconvenienced because of the absence of the physical connection asked. However, the showing as to this industry is not strong, and, since the argument in this court, the owners of the plant have filed in substance a disclaimer of interest in this proceeding.

The Farmers Lumber & Grain Company, doing business at Wymore, complains chiefly of its inability to handle Rock Springs coal which originates on the line of the Union Pacific because of the added freight charge by reason of the shipment having to travel north to Beatrice and thence south to Wymore, or a truck haul from Blue Springs. The testimony on behalf of complainants show an added cost on this coal of approximately $1 a ton, but the testimony on behalf of defendants makes it clear that because of a new rate, of which complainants were not informed, there was in fact a difference of only 30 cents a ton. The quantity of this coal affected is not easy to ascertain. There has been only a small quantity handled by this company, but with the installation of the connection sought, or with the lower rate now in force, the quantity may be increased. Complainants contend that the Farmers Grain & Elevator Company, located on the line of the Union Pacific at Blue Springs, suffers inconvenience and injury to business because of the absence of the connection. However, the testimony of the manager of this company fails to support the claim. At most, his testimony shows that this connection would be of substantial advantage only during the seasons when there is a failure of the corn crop west of his place of business. His testi-

mony is to the effect that, when "there is a scarcity of corn, we would not ship any wheat in that direction, but it might happen, and has happened, that through that territory there might be a chance to ship corn in preference to further south; not very often, but it has happened." The industry chiefly affected is the Rawlings Ice Plant located on the line of the Burlington about 2½ miles west of the proposed connection. The plant has a storage capacity of between 25,000 and 30,000 tons. Mr. Rawlings testified that he shipped about 600 cars of ice during 1917; that at various times he has shipped considerable ice over the Union Pacific lines, and that when shipments are made over that line to points south of Wymore the shipments go north to Beatrice over the Burlington line, where it is transferred to the Union Pacific line, and comes back by way of Blue Springs, practically repassing the point of origin. That in 1918 he thus shipped 33 cars of ice, and that on this shipment he paid $489.94 freight in excess of what it would have cost him had the connection which he here seeks been installed and in operation, except that from the amount stated there should be deducted a small sum for switching charges. He also mentions another shipment of 14 cars which was prejudicially affected because of the lack of the connection sought. Among other shipments pointed out is one of 40 cars sold to the Pacific Fruit Express, a subsidiary company of the defendant Union Pacific Railroad Company. Under his contract of sale he was required to deliver this ice to the purchaser for shipment over the Union Pacific railway and, the nearest point at which he could make the delivery being the city of Beatrice, he was compelled to pay the local freight on this shipment from his plant to that city, amounting to $800.

In 1917 he claims to have lost the sale of 2,000 tons of ice to the same company because he could not profitably make a sale and pay the freight to the point of delivery. On all shipments to the north and west over the Union Pacific lines he has been compelled to pay local freight

over the Burlington line to Beatrice, and it is claimed that this virtually shuts him out from the trade at these points. The railway commission found, and apparently its finding is supported by the evidence, that the interchange of carload traffic at Beatrice from November, 1916, to April, 1920, was approximately 500 cars, and that of this number, had there been a transfer switch at one of the points in question, 50 of these cars would have been there transferred.

As to the shipments of rock, the commission found that the transfer if installed would effect a saving only to the amount of the difference between the cost of loading the cars on the Burlington by wagon and the cost of loading from a chute, less a proper switching charge which it would be the duty of the commission to fix. No evidence was offered from which the cost of this switching charge may be determined, but it is said in the opinion of the commission that "it certainly would not be an appreciable amount less than $4. Therefore, there would not be an appreciable saving to the rock industry if the connection were made." If the conclusion of the commission that the switching charge on rock would be approximately $4 a car, and there is no evidence to indicate a different rate for switching other commodities, we may assume that it would be approximately that rate on ice, coal and grain.

So far as the affirmative proof goes, it shows Mr. Rawlings' sale of ice for shipment over the Union Pacific lines to be made chiefly to a subsidiary company of the defendant Union Pacific Railroad Company, and it is claimed by that company that it has built, or has in process of construction, plants for the manufacture of ice and that it is not likely to remain a purchaser of the Rawlings ice. The main market for the Rawlings ice appears to be along the Burlington lines, and so far as shipments to these points are concerned a transfer switch would be of no service. The statute under which this proceeding is had, section 5379, Comp. St. 1922, provides that the state railway commission has jurisdiction to make such order

as is here prayed, "where the tracks of the two railroad companies are within five hundred feet apart, whether on the same grade or not, where it is practicable and deemed reasonably necessary." Appellants demanded an answer to the two questions: "(1) Is the construction and operation of the proposed transfer switch between the two railroad companies practicable? (2) Is the construction and operation of the proposed switch between the two companies reasonably necessary for the use and benefit of the complainants or either of them or the public?"

It is said that the commission left the first question undetermined, while answering the second in the negative. From a construction standpoint there is little, if any, difficulty to be encountered. A number of different forms of construction are suggested and there is a substantial difference of opinion as to the cost of construction, but it is plain that no serious difficulties would be encountered in the matter of construction alone. It does not follow, however, that such construction is practicable. Indeed, the testimony offered by defendants raises a serious question as to the practicability of the transfer. It would serve no useful purpose to set it out in detail. It may be summarized by saying that it indicates a first cost of construction varying from $2,000 to $8,000 or $10,000. The objections seem to be made not so much to the cost of construction as to other matters. It is claimed that in the practical operation of the roads the cost to the companies would be out of proportion to the revenue derived. The only persons who have testified on this subject were officers and employees of the defendant roads. This testimony is calculated to show that, because the switch, if installed, would be located outside the yard limits of either Wymore or Blue Springs, it would be difficult and expensive to send switching crews to make the necessary transfers; that if switching crews are not sent to make the transfers it will be both difficult and expensive to the carriers to have the work done by the regular train crews;

that the federal safety appliance act requires interstate carriers to inspect cars when transferred from one line to another to make sure that the safety appliances are in order and that this would entail the expense of sending an inspector to overlook the cars transferred; that as the switch would be located at a point far distant from the regular office of either company it would require additional labor and entail unusual expense in the transfer of way-bills. Also, that the transfer tracks being without the city limits of either city the cars of merchandise left upon the tracks would be without police protection.

This testimony is not disputed. After a careful consideration the commission reached the conclusion that the connection prayed was not reasonably necessary. The rule in this state is: "Appeals from the orders of the state railway commission directly to this court, under section 7, ch. 90, Laws 1907, as amended by chapter 94, Laws 1911 (Rev. St. 1913, sec. 6132), are to be considered and determined in the same manner as appeals from a judgment of the district court upon trial by jury in civil cases. Such orders will not be reversed unless it affirmatively appears from the record that they are clearly wrong." *Byington v. Chicago, R. I. & P. R. Co.*, 96 Neb. 584.

When this rule is applied to the evidence submitted, there appears to be no ground for disturbing the finding of the commission, and it is

AFFIRMED.

L. R. PROUDFIT, APPELLEE, V. SCHOOL DISTRICT NO. 49 ET AL., APPELLANTS.

FILED NOVEMBER 13, 1922. No. 22380.

Schools and School Districts: CHANGE OF BOUNDARIES: NOTICE. In a proceeding under section 6703, Rev. St. 1913, to change the boundaries of existing school districts, before the county superintendent has jurisdiction to make the change, "a notice of the petition, containing an exact statement of what changes in district bound-

aries are proposed, and when the petition is to be presented to the county superintendent, shall be posted * * * at least ten days prior to the time of presenting the petition to the county superintendent," and, when in a direct attack upon the proceedings the record fails to show that the notice posted designated the date when the petition would be presented, the order made will be held void for want of jurisdiction.

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

J. C. Alexander and *J. A. Donohoe,* for appellants.

Williams & Kryger, contra.

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

MORRISSEY, C. J.

This is an appeal from the judgment of the district court for Antelope county wherein a joint order of the county superintendent of Antelope county and the county superintendent of Holt changing the boundary lines of certain school districts in a proceeding had under the provisions of section 6703, Rev. St. 1913, was set aside and decreed to be void.

Two school districts are involved, namely, school district No. 49 of Antelope county, which comprises the school district of the village of Orchard, and the rural school district lying adjacent thereto and comprising territory partially in Antelope county and partially in Holt county. That part of the district lying in Antelope county is designated as district No. 90 of Antelope county, while that part of the territory lying in Holt county is designated as school district No. 90½ of Holt county. The purpose of the proceeding was to detach territory from the rural district and attach it to the village school district No. 49 of Antelope county.

The controlling question is that of jurisdiction. An affidavit of one Fletcher was filed with the county superintendent of Antelope county in the following language, to

wit: "I, J. T. Fletcher, a legal voter of school district No. 49, county of Antelope, solemnly swear that notices of the above petition, containing an exact statement of what changes in the district boundaries are hereby proposed, and when the petition is to be presented to the county superintendent, were posted in three of the most public places in said district; one of said notices was posted upon the outer door of the schoolhouse in said district on the 27th day of January, 1921; one in the lobby of the post office in Orchard, within the district aforesaid, on the 27th day of January, 1921; and one on the bandstand situated on the north side of Second street in the village of Orchard, within said district, on the 27th day of January, 1921, being ten days prior to the time of presenting this petition to the county superintendent."

There was also filed with the county superintendent of Antelope county the affidavit of one Wilson, a legal voter of school district No. 90, in substantially the same form as the affidavit of Fletcher, except only that it fixed the date of posting the notice as January 24, 1921. Attached to the transcript now before us is a copy of the proceedings had before the county superintendent of Holt county. The affidavit as to posting notice in that county is in the same form as the affidavit heretofore set out and fixed the date of posting as January 24, 1921. The petition appears to have been presented February 5, 1921.

The court found that the county superintendent was without jurisdiction to make the order for the change of boundaries "for want of jurisdiction to act, on account of failure of proof of posting notice of the time of presenting petition by voters of school district No. 49, to show that such notice was posted ten days prior to the presenting of said petition."

Because of this finding by the trial court, appellants reason that the only defect in the record is what is claimed to be a clerical error in inserting the date of posting in the affidavit which states that the notice was posted in district No. 49, January 27, 1921. It is claimed that the

true date was January 24, 1921, as shown by the affidavit of Wilson as to district No. 90, and the affidavit filed with the county superintendent of Holt county; that the order appealed from is a joint order made by the two superintendents, and that the affidavit filed before the county superintendent of Holt county must be held to correct any defect or error in the affidavit filed with the county superintendent of Antelope county. It may be doubted if the transcript of the proceedings had before the superintendent of Holt county is properly before the court, but we deem it unnecessary to consider that phase of the question.

Subdivision 3, sec. 6703, Rev. St. 1913, under which the proceedings were had provides: "A notice of the petition, containing an exact statement of what changes in district boundaries are proposed, and *when* the petition is to be presented to the county superintendent, shall be posted * * * at least ten days prior to the time of presenting the petition to the county superintendent." The posting of this notice is jurisdictional. Until this provision of the statute was complied with the county superintendent had no power to change the boundaries of the several school districts. It is claimed by appellant that the notice fixed February 5, 1921, as the date when the petition would be presented, that the notices were posted January 24, 1921, and that the ten days' notice was in fact given. No copy of the notice appears in the record. The affidavit states that it contained the information as to "when" it would be presented, but it does not say what date was fixed. The transcript of the proceedings does not purport to give the date that was fixed. All jurisdictional facts should appear on the face of the record. This being a direct attack upon the proceedings, all steps necessary to confer jurisdiction on the superintendent must be shown to have been taken. *Dooley v. Meese,* 31 Neb. 424.

There is no reversible error in the judgment of the district court, and it is

AFFIRMED.

PRICE CARRICO V. STATE OF NEBRASKA.

FILED NOVEMBER 13, 1922. No. 22456.

Criminal Law: INTENT: EVIDENCE: MISCONDUCT OF COURT. The intent to commit a robbery may be manifested by the acts of the accused; but, when he offers evidence to explain his acts and from which the jury might reach the conclusion that they were not done with the intent of the accused to commit the crime charged, it is error for the trial court, in ruling upon the admissibility of the evidence, to make remarks which the jury might construe as a disparagement of the evidence.

ERROR to the district court for Madison county: WILLIAM V. ALLEN, JUDGE. *Reversed.*

Frank A. Warner and *William L. Dowling,* for plaintiff in error.

Clarence A. Davis, Attorney General, and *Mason Wheeler, contra.*

Heard before MORRISSEY, C. J., ROSE, DEAN and DAY, JJ., REDICK and SHEPHERD, District Judges.

MORRISSEY, C. J.

Defendant prosecutes error from a conviction of robbery. On the evening of February 22, 1921, Earl J. Reed was halted in the railroad yards of the Chicago & Northwestern Railway Company at South Norfolk, where he was employed as a brakeman, a shotgun was thrust against his person, and he was directed to deliver his watch and his pocketbook, which contained $35, to his assailant. Reed obeyed the order. He soon thereafter notified the police, and after a brief search by Reed and members of the police force defendant and one Flesner were arrested. Defendant, when first arrested, denied any knowledge of the affair. Subsequently he admitted that he was the man who had threatened Reed and demanded and received his watch and money. His explanation was that he and his companion, Flesner, went out with an unloaded shotgun with the intention of perpetrating a joke upon a friend

named Doloc; that, at the time he received the property from Reed, defendant believed he was confronting his friend Doloc, and that he received the property intending to return it again to its owner. Flesner, who was charged as an accomplice, made the same explanation, but in addition thereto denied that he participated in the taking of the property from Reed. The jury returned a verdict of not guilty as to Flesner, and he is, therefore, not involved in this proceeding.

That defendant committed the acts charged stands admitted. He testified that there had been a number of "fake holdups" perpetrated in South Norfolk; that these matters had been discussed by him and a number of his acquaintances, and that one of his acquaintances, a Mr. Doloc, had made the remark that no one could "hold him up;" that on the evening of this occurrence Flesner and others had been guests at defendant's home, and during the evening defendant and Flesner agreed that they would borrow a shotgun and "hold up" Doloc, not for the purpose of taking his property, but merely as a joke; that in pursuance of this agreement defendant and Flesner borrowed a shotgun and went to the railroad yards expecting to meet Doloc; that they did not meet Doloc, but did meet Reed, and, believing Reed to be their friend Doloc, proceeded to carry out the joke; that he did not discover his mistake until after he had taken the watch and purse and its contents from Reed; that he then became confused, but began arrangements to effect a return of the property to Reed without letting Reed or other persons know of defendant's identity. In much of his story he is corroborated by other witnesses.

The chief complaint of defendant is directed to certain remarks made by the trial judge when ruling on objections to the admission of evidence. In reciting the evening's transactions defendant testified: "We sat down to eat supper and were talking there, and I don't know just who mentioned it, but we got to talking about a little fake holdup that had been pulled off down there in the yards

about a week before that. Some of the boys at the roundhouse, just among themselves, had pulled off a fake holdup. And something was said about we ought to go down there and have some fun with them. Some of them had said they couldn't be held up, and so I mentioned"— County attorney: "I will object to testimony of this kind because it is incompetent, irrelevant and immaterial and constituting no defense whatever to this action, even if true." Defendant's counsel: "It goes to show the intent." By the court: "A man's intent is manifest by his actions. Objection sustained."

Defendant proceeded to testify along another line, but finally said: "Then Mr. Flesner and I * * * we thought we would disguise ourselves a little bit and go down and have a little fun with some of the boys, because they had said that nobody could hold them up." The county attorney objected to this testimony, and the court said: "I want it distinctly understood that there is no such a thing as a fake holdup. Get that in your mind. With that understanding, if this man wants to testify to what he did, he may go on." Defendant testified at length as to his motives and in relation to what he claimed he intended should be a mere make-believe robbery.

Defendant's wife was also permitted to testify to a conversation had at their dinner table between defendant and Flesner indicating that they went out to play a practical joke upon Doloc and not for the purpose of effecting a robbery. Defendant called a neighbor, one Smith, as a witness, who testified that defendant called at his home at 10 or 10:30 o'clock on the night the robbery is alleged to have been committed, and that the witness had a conversation with defendant "about a holdup." The witness was asked "What was said?" Objection was made to this question, and defendant's counsel thereupon stated that the testimony was offered for the purpose of showing defendant's intention. And the court said: "A man's intent is shown by his actions. There is no joke in this case. There is no such thing as a fake holdup." The ob-

jection was sustained. Defendant then offered to show by the testimony of the witness that about 10 o'clock on the night the robbery is alleged to have occurred defendant went to the home of the witness Smith and asked for advice as to what he should do "with respect to disposing of a watch and money which he had taken from a man by the name of Reed in carrying out what he intended to be a joke on a man by the name of John Doloc, and that the witness on the stand thought the defendant Price Carrico was joking with him and told him that the thing to do was to wait until morning and he would tell him." Objection was made to this testimony and sustained by the court. John Doloc was called as a witness for defendant, and defendant's counsel sought to show by him the facts and circumstances supporting defendant's contention that his conduct was intended as a joke, but his testimony was excluded. The court, after sustaining an objection, stated: "The question of a fake holdup does not enter into this case."

The record as a whole shows that defendant was permitted to tell his entire story, and we are not prepared to say that the rulings of the court on the exclusion of the testimony offered was prejudicially erroneous. Much latitude is allowed the trial court in the exercise of its judicial discretion. It must, however, be conceded that, under the circumstances of this case, the acts themselves being admitted, the material question was that of intent. The court by a formal instruction told the jury: "The law presumes that a mature man, in the possession of his mental faculties, intends the reasonable, probable and natural consequences of his acts voluntarily and intentionally done, and this presumption will prevail unless upon a consideration of all the evidence bearing on the point you entertain a reasonable doubt whether such intent exists."

This is a correct statement of the law in the abstract, but it did not submit to the jury defendant's theory of the case. The instruction is not directly challenged, but, as

said by the supreme court of Pennsylvania, in *Commonwealth v. White,* 133 Pa. St. 182: "The main defense upon the trial below was that the whole affair was a joke. The learned judge does not appear to have referred to this in his charge. On the contrary, he stated in his rulings upon the testimony that 'it makes no difference whether the prosecutor thought it a joke or not.' It is very true that a highway robbery cannot be turned into a joke. It is equally true that a mere joke cannot be turned into a highway robbery."

The acts complained of stood confessed before the jury. The information charged that they were done with the intent of defendant "unlawfully and feloniously to take, steal and carry away" the property of the complaining witness. Defendant's plea of not guilty put the question of intent in issue, and to supplement his plea of not guilty he offered evidence to show that the whole affair was intended to be a joke. This evidence ought to have been submitted to the jury without disparagement. The judgment is reversed and the cause remanded.

REVERSED.

HAHN SYSTEM, APPELLANT, V. THOMAS F. STROUD ET AL., APPELLEES.

FILED NOVEMBER 13, 1922. No. 22804.

1. **Equity.** "A suit in equity will not lie when the plaintiff has a plain, adequate and speedy remedy at law." *Western Union Telegraph Co. v. Douglas County,* 76 Neb. 666.
2. **Taxation:** EXCESSIVE VALUATION: REMEDY. Section 5975, Comp. St. 1922, affords a plain, adequate and speedy remedy to one whose property has been excessively valued for taxation and in cases in which the county board of equalization has committed prejudicial errors or irregularities in procedure.

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

Switzler, Ringer, Switzler & Shackelford, for appellant.

W. W. Slabaugh and *A. V. Shotwell, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH and FLANSBURG, JJ., SHEPHERD, District Judge.

MORRISSEY, C. J.

Plaintiff brought this action in the district court for Douglas county to enjoin the extension upon the tax records and the collection of certain taxes assessed against it for the year 1921. Defendants filed a demurrer to the petition, which was sustained by the court, and plaintiff has appealed. After setting out the purely formal matters, the petition alleges that it had property in Douglas county subject to assessment and taxation for the year 1921 in the sum of $200 only, which it listed at that amount; that without actual notice to plaintiff the assessor placed a valuation for assessment upon plaintiff's property of $10,000; that the defendants, the several members of the board of county commissioners, the county assessor and the county clerk, convened as a board of equalization June 14, 1921; that the following day, for the purpose of having the valuation placed upon its property reduced from $10,000 to $200, plaintiff, through its secretary, appeared before the board and presented evidence showing that the valuation of the property was on April 1, 1921, $200 only; that no other evidence was offered or received; that the board wholly disregarded the evidence offered by plaintiff, "and through a reckless disregard of it, in opposition to what would be the judgment of all persons of reflection, and in total disregard of the competent evidence given by the plaintiff, arbitrarily found and decided on said date and refused to consider said evidence and the pertinent information regarding the value of plaintiff's property, and arbitrarily set its value at a grossly excessive sum under rules passed by it for the occasion, thereby establishing a fraud in the making of said assessment." The petition further alleges: "That the

action of the said county board, in pretending to approve and sustain the valuation as set by the county assessor for the purposes of taxation, was contrary to law and without authority, and is and was wholly null and void, and by reason thereof the only lawful valuation of said property for taxation in the year 1921 is, as shown by the testimony of the plaintiff, which was the only testimony offered, namely, the sum of $200." The petition then recites that the board took the customary and usual steps preparatory to the extension of the tax against plaintiff based on a valuation of $10,000, when in fact the valuation should be but $200, offers to pay the tax based upon a valuation of $200, and prays for a permanent injunction.

Plaintiff took no appeal from the decision of the board, and its petition fails to state any reason for its failure to avail itself of the plain, adequate and speedy remedy for the redress of its grievances, if any it had, because of the action of the board of equalization, as is provided by section 5975, Comp. St. 1922. The case falls within the rules announced in *Western Union Telegraph Co. v. Douglas County*, 76 Neb. 666, wherein it was held:

"A suit in equity will not lie when the plaintiff has a plain, adequate and speedy remedy at law.

"The statute affords a plain, adequate and speedy remedy to one whose property has been excessively valued for taxation and in cases in which the county board of equalization has committed prejudicial errors or irregularities in procedure."

The demurrer was properly sustained, and the judgment of the district court is

AFFIRMED.

GEORGE BLEVINS ET AL. V. STATE OF NEBRASKA.

FILED NOVEMBER 13, 1922. No. 22531.

1. **Intoxicating Liquors: STILLS: UNLAWFUL POSSESSION: PROOF.** In order to constitute the possession of a still unlawful under

section 3252, Comp. St. 1922, it must be established that the still was intended to be used for the manufacture of intoxicating liquor, without permission being given as required by the statute.

2. ———: ———: ———. The possession of a still for legitimate purposes, such as the manufacture of distilled water, or other innocuous liquids, is not a crime under said section.

3. ———: "MASH." Considering the purpose and intention of the law, the word "mash" in section 3252, Comp. St. 1922, is held to include any mixture of grain or malt with water or other liquid in such a manner as to evidence that fermentation was intended to be produced as a stage in the process of manufacturing intoxicating liquor.

4. ———: ———: POSSESSION: PRESUMPTION. By the provisions of section 3273, Comp. St. 1922, the possession of mash except under permit, as by law required, is presumptive evidence of the manufacture of intoxicating liquors in violation of the act, unless the person having the same in possession "satisfactorily account for and explain the possession thereof, and that it was not kept for an unlawful purpose."

ERROR to the district court for Gosper county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

W. D. Oldham, John H. Lindermann and *E. T. Grunden*, for plaintiffs in error.

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

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

LETTON, J.

The accused were jointly charged in an information with two counts: The first charging that they unlawfully had possession of a still or part thereof and other equipment for making intoxicating liquor, and having in their possession mash and other material being used for the purpose of manufacturing intoxicating liquor; the second count charged them with the unlawful manufacture of intoxicating liquors. They were found guilty upon each count.

A number of errors are assigned We have examined and considered them, but find it unnecessary to discuss the points raised, since we are convinced that no prejudicial error occurred in the admission of exhibits, or in the giving or refusing of instructions. The assignment that the verdict is not sustained by sufficient evidence, however, is more serious. The evidence shows that a deputy sheriff, armed with a search warrant, in company with two officers, in their absence visited the home of the defendants, which was upon a farm belonging to one Robb. The dwelling was somewhat remote from a main road. In the pantry they found a 100-pound sack of sugar partly used, and in a tall patch of sunflowers near the house found a 40-gallon jar with about 2 bushels of grain, either rye or wheat, soaking in water. This jar had a wooden cover and was covered with a fur coat. Near this they found a beer keg with some fluid in it of the same nature as that in the jar. In a lean-to, or shed, at the back of the house, they found a galvanized iron can with a copper coil fastened to it. They also found in the cellar three cases of empty beer bottles and a number of empty beer and whiskey bottles, and by the side of the yard fence they found 35 or 40 empty beer or whiskey bottles. They also found a bottle with a small quantity of whiskey in it in an automobile near the house.

About a week afterwards defendants were arrested while putting up hay about four or five miles from the house In explanation of these facts, defendant Homer Blevins testified that he had been living upon the Robb place for five years; that his brother George had been living with him ever since he returned from the war; that while George was in the army his brother Arthur and his wife lived with him; that Arthur's wife was stricken with paralysis and was ill with it for about a year before she died; that during her illness Dr. Teeters directed his brother to get a coil (evidently meaning a still) for the purpose of making distilled water for her; that this was the coil taken by the officers and was the only one about

the place to his knowledge; that after she died the coil was thrown into the lean-to, which was used as a rubbish or junk room, and had never been used for any purpose since that time. It may be noted that one of the state's witnesses testified that the can and coil, or still, was full of mud and water. Blevins also testified that about two weeks before the search was made defendants had left their home to work upon one of Mr. Robb's other farms, and upon an island owned by Robb where they were arrested; that when they left the house the large jar was in the junk room at the back of the house, where it had been kept; that it had been used only to salt meat in. He denied making any mash or distilling any liquor of any kind, and denied that he had ever had a fur coat. The testimony of his brother George was substantially to the same effect. Dr. Teeters testified that he had recommended that Mrs. Blevins be given distilled water to drink, and that a still had been procured for her, but he did not identify the still in evidence as being the one he had ordered. Several witnesses testified to the previous good character of the defendants.

It is undisputed that a still was found in the shed, or lean-to, attached to the house. The shed was used for a storeroom for junk and rubbish, and had an opening for a window, with no sash in it. The statute (Comp St. 1922, sec. 3252) declares it shall be unlawful for any person to "have possession of any still, or equipment for the manufacture of alcohol or whiskey or of any mash or intoxicating liquor." If it be held that the word "still" in the statute is not qualified by the words "for the manufacture of alcohol or whiskey" in the succeeding clause of the sentence, then the conviction on the charge of the possession of a still in the first count must stand; but it is a well-known fact of which the court will take judicial notice that distilled water is used in medicinal and chemical preparations, also in the electrical and automobile industries, and that it is prescribed as a remedial beverage in certain diseases. The purpose of the statute was to pro-

hibit and prevent the manufacture and sale of intoxicating liquor, and it seems apparent that it was never intended to prohibit the process of distillation for other and lawful purposes. To so hold would interfere with legitimate industry to such an extent that we cannot conceive that the legislature had such an intention. We will not so interpret the statute, and must hold that the statute should be construed as if it read "or have possession of any still or equipment for the manufacture of alcohol or whiskey."

It may be observed that in the next sentence in the statute, which contains the penal clause, there is no comma directly following the word "still." We are convinced therefore that, in order to warrant the conviction for the possession of a still, it must be charged and proved that the purpose of its possession was the manufacture of intoxicating liquor. The testimony of an apparently unbiased witness is that a still had been purchased and brought upon the place for a lawful purpose. The still which was found was not in use, and so far as the evidence showed had not been in use for the manufacture of intoxicating liquor, one of the state's own witnesses testifying that it was full of mud and water. We conclude that the charge so far as based upon the unlawful possession of a still is not sustained by the evidence.

The conviction upon the first count may be sustained upon the charge that defendants had in their possession mash and other material used for making intoxicating liquors. There is no proof that any one else had inhabited their house during their absence. It was admitted that the 40-gallon jar belonged to them, and the "mash" which was in it was evidently in process of fermentation, having "an odor like cider." We have no sample of the mash before us, but the jury saw it, smelled the contents of the jar, and became satisfied that it was to be used for the purpose of manufacturing intoxicating liquor.

It is argued that "mash" is defined in Webster's Unabridged Dictionary as "crushed malt, or meal of wheat, rye, corn, etc., steeped and stirred in hot water to form

wort," and that the court erred in refusing to give the jury an instruction reciting this definition. No equally authoritative definition is found in the Standard Dictionary: "*Mash.* 1. A mass of something beaten into a soft state, or mixed in water so as to soften. * * * 2. *Brewing.* Crushed or ground grain or malt, or a mixture of such infused to produce wort."

While the soft mass in the jar may not answer the requirements of the technical definition according to the most approved methods of the art of brewing or distilling, we are satisfied, when we consider the purpose of the law, that the legislature evidently had in mind any mixture of grain or malt with water or other liquid in such a manner as to evidence that fermentation was produced or intended to be produced as a stage in the process of the manufacture of intoxicants. The evidence on this charge is sufficient to sustain a conviction on the first count.

The second count charges the unlawful manufacture of intoxicating liquors. Section 3273, Comp. St. 1922, after providing for the issuance of search warrants, and the disposal of any articles or materials for the manufacture of intoxicating liquors found upon the premises by the officers holding warrants, provides, further: "The possession by any person of any intoxicating liquors, still, mash, preparation or equipment for manufacturing same, except under permit as in this act authorized, shall be presumptive evidence of the manufacture, keeping for sale, selling, use or disposal of such liquors in violation of this act, unless after examination he shall satisfactorily account for and explain the possession thereof, and that it was not kept for an unlawful purpose."

Defendants failed to account for and explain the possession of the mash or to show that it was not kept for an unlawful purpose to the satisfaction of the jury. The evidence taken as a whole is sufficient to sustain the verdict.

AFFIRMED.

WALTER J. ERICKSON, APPELLEE, V. NINE MILE IRRIGATION DISTRICT ET AL., APPELLANTS.

FILED NOVEMBER 13, 1922. No. 22831.

1. **Waters:** IRRIGATION: EXEMPTIONS. It is within the legislative discretion to provide that city or town lots within an irrigation district, which are "occupied and used exclusively for other than agricultural purposes," shall not be assessed or taxed for irrigation district purposes, and the amendments to sections 3472 and 3478, Rev. St. 1913, so providing, are germane to the purpose of the act, and germane to the sections amended.

2. ———: ———: ASSESSMENTS. Assessments made by an irrigation district to pay bonded debts and for the maintenance and operation of its canal or ditch are special assessments, even though made in proportion to valuation, and not by acreage or frontage.

3. ———: ———: ———. If in an irrigation district all the property receiving special benefits is assessed substantially according to such benefits, this is as near equality and uniformity as may be attained in the matter of special assessments.

4. ———: ———: ———: CITY LOTS. City and town lots within an irrigation district which use no water for irrigation, and are used exclusively for other than agricultural purposes, and receive no direct special benefit from the improvement, may properly be distinguished from those lots susceptible of receiving and using water for a beneficial purpose and thus receiving direct special benefits.

5. ———: IRRIGATION DISTRICT BONDS: PROPERTY ASSESSABLE. Where bonds had been issued by an irrigation district under a statute which provides: "Such bonds, and the interest thereon, shall be paid by revenue derived from an annual assessment upon the real property of the district, and all the real property of the district shall be and remain liable to be assessed for such payments" —such liability still exists upon all the real property then in the district, in favor of the bondholders, notwithstanding the subsequent passage of a statute exempting from taxation by irrigation districts city and town lots within the district used exclusively for other than agricultural purposes.

6. **Injunction:** IRRIGATION DISTRICTS: ASSESSMENTS: DEFENSES. In an action brought to restrain the officers of an irrigation district from causing taxes for irrigation district purposes to be assessed

upon lots which, under the amended statute, are not liable to be assessed, such officers are not entitled to defend upon the ground that the amendment impairs the obligation of the contract with the holders of bonds, and with other taxpayers, neither the bond holders nor such taxpayers being parties to the action.

APPEAL from the district court for Morrill county: RALPH W. HOBART, JUDGE. *Affirmed.*

Morrow & Morrow, for appellants.

A. R. Honnold and *E. F. Carter, contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE, DAY and ALDRICH, JJ., REDICK and SHEPHERD, District Judges.

LETTON, J.

The object of this action is to enjoin the officers of the Nine Mile Irrigation District and the county treasurer of Morrill county from levying and collecting a tax for irrigation district purposes against certain city lots in the city of Bayard. The court granted the injunction. Defendants appeal.

In 1906 the Nine Mile Irrigation District issued $18,000 in bonds, due in 20 years thereafter, for the purchase of a canal and right of way. The bonds are unpaid. The statute at the time of the passage of the act provided: "Such bonds, and the interest thereon, shall be paid by revenue derived from an annual assessment upon the real property of the district, and all the real property of the district shall be and remain liable to be assessed for such payments as herein provided." Rev. St. 1913, sec. 3471. In 1917 section 3472 of the same statute was amended so as to provide: "That city and town lots within any irrigation district, which are occupied and used exclusively for other than agricultural purposes, shall not be assessed or taxed by such irrigation district during the time such lots are so occupied and used." Laws 1917, ch. 80, sec. 1. The officers of the district disregarded this amendment to the statute, and proceeded to levy and assess a tax against two lots belonging to the plaintiff which

were used exclusively for other than agricultural purposes, one of them being occupied by a hardware store. The owner of the lots then brought this action.

The appellants admit that the taxes levied by an irrigation district for irrigation purposes are special taxes, but insist that the legislative power to levy a special assessment is not unlimited; that the assessment must be apportioned by some rule capable of producing reasonable equality, and that a statute making this impossible is not a legitimate exercise of legislative authority; that to amend the statute so as to exempt part of the real property in the district from contributing its proportionate share to the payment of the bonded indebtedness is an impairment of the obligation of the contract existing between the bondholders and the district, and between the owners of other real estate in such district and the state of Nebraska; that the act is void as applying to irrigation districts organized before the amendment was made, and that it takes private property without due process of law in violation of the fourteenth amendment to the Constitution of the United States. It is also said that the 1917 amendment to section 3472, being made to a section which is merely a direction to the assessor as to what property to assess, does not affect section 3471, and that the latter section is still in full force and effect.

On the other hand, plaintiff and appellee relies upon the validity of the amended statute, and holds that the attempted levy and assessment, being in violation of the statute as amended, is void. He also argues that, since the bondholders are not parties to this suit, their rights cannot be adjudicated herein; that the tax complained of is levied, not only for the protection of the bondholders, but also for the annual cost of the operation and maintenance of the ditch; that the taxpayers alone are interested in this, and that they have no vested interest in the permanent retention of the lots as liable to assessment.

The irrigation district act of this state is based upon the Wright Act of California. It was first considered in

this state in *Board of Directors v. Collins*, 46 Neb. 411, and was upheld by the supreme court of the United States in *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112. There can be no doubt that, if the provisions added by the amendment had been in the act originally, they would have been germane to its purpose, and no complaint could properly be made against the exclusion of property of the nature of these lots from assessment for irrigation district purposes. In some of the California cases objections were made to the validity of the act because of the inclusion of city and town lots within an irrigation district, and their liability to assessment for district purposes. The court pointed out that it was difficult to draw the line between property which received direct special benefits from the creation of the district and that which received indirect special benefits, and that in such an indefinite zone the inclusion or exclusion of town lots was a matter for legislative determination. The argument would have been equally forcible, and the conclusion equally sound, if objection had been made to the act because it excluded city and village real estate lying within the district boundaries. *Turlock Irrigation District v. Williams*, 76 Cal. 360; *Board of Directors v. Tregea*, 88 Cal. 334; *Nampa & Meridian Irrigation District v. Brose*, 11 Idaho, 474. In such a matter the legislative determination is final in the absence of any circumstances which would constitute the inclusion or exclusion a violation of constitutional rights.

Is the act void as impairing the obligation of the contract with the bondholders? In view of the statutory provision, section 3471, Rev. St. 1913, that "all the real property of the district *shall be and remain* liable to be assessed for such payments," to exempt such lots from taxation to pay the interest on the bonds, or the bonds at maturity, by a statute subsequently passed, would clearly impair the obligation of the contract with the bondholders, and this the Constitution prohibits. Such liability to assessment still exists notwithstanding the passage of the

statute exempting lots "used exclusively for other than agricultural purposes." The legislature has recognized this principle in the same act (Rev. St. 1913, secs. 3504-3514, Comp. St. 1922, secs. 2904-2914), which provides that both parties to the contract, the bondholders and electors of the district, must assent before property can be detached from the district by the board. But no bondholder is here complaining, and it is not for defendants to raise this question, since no right of theirs is affected. *State v. Brandt,* 83 Neb. 656; *Cram v. Chicago, B. & Q. R. Co.,* 85 Neb. 586; *Bisenius v. City of Randolph,* 82 Neb. 520.

The levy for the bond fund on the lots affected is only $1.80, while for maintenance and other purposes of the district it amounts to $12.20. Since water-rights are apportioned ratably on the basis of the ratio which the last assessment for each tract for district purposes bears to the whole sum assessed, the withdrawal of water-rights from all such lots not assessed may add to the volume of water subject to be used by the other landholders, sufficient so that each may willingly pay the additional sum necessary to make up the diminution of the bond fund, or perhaps the water released may be applied to additional land added to the district in the manner provided by the statute (Comp. St. 1922, sec. 2892 *et seq.*), and thus no reduction in the acreage of the land assessable result. The court will not presume that the bondholders will suffer, and will not set aside the statute at the instance of parties not affected.

As to the assessment for upkeep, maintenance and salaries: Appellant insists that no change in the statutes can be made by which any part of the property included within the district may be released from its proportionate share of the tax, and that this would have the effect of rendering the taxation not equal or uniform, and that equality and uniformity is a necessary condition for the imposition of special taxes as well as general taxes.

In the opinion in *Board of Directors v. Collins,* 46 Neb.

411, 425, it is said: "Nor does said act conflict with section 1, article IX of the Constitution, requiring taxation to be equal and uniform; that provision relates to the revenue required for the general purposes of government, state and municipal, and has no application to taxes or assessments levied for local improvements"—citing cases. It may be said, also, that, if all the property receiving special benefits is assessed substantially according to such benefits, this is a uniform rule or principle, and is as near uniformity as may be attained in such a matter.

An irrigation district is a public corporation, but not a municipal corporation. *Board of Directors v. Collins,* 46 Neb. 411; *Lincoln & Dawson County Irrigation District v. McNeal,* 60 Neb. 613. Such corporations are subject to regulation, and their charter is subject to amendment by the legislature. Unless it is clearly shown or indisputably established that the result of its action will exact from the owner of private property within the district a sum in substantial excess of the special benefits accruing to him, he is not entitled to complain. To quote from *Norwood v. Baker,* 172 U. S. 269: "We say 'substantial excess' because exact equality of taxation is not always obtainable; and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment." The same is true as to legislation. The lots affected by the amendment, being used exclusively for other than agricultural purposes, use no water, receive no direct special benefit from the improvement, and may properly be distinguished from those susceptible of receiving and using water for a beneficial purpose, and thus receiving direct special benefits.

The argument is made that under the operation of the amended statute, by the growth of a city situated within the irrigation district, large tracts of land might be removed from the operation of the taxing power and thus an excessive burden be cast upon the landowners occupying land for agricultural purposes, but it must be remembered

that the assessments made upon the property in the district, although made by valuation, and not by acreage, foot frontage, or other rule, are special assessments, and must be levied upon the real estate in proportion to the special benefits received. 4 Dillon, Municipal Corporations (5th ed.) sec. 1433; *State v. Green River Irrigation District,* 40 Utah, 83.

Under the statute, the amount of water apportionable to each landowner is determined by the ratio which his assessment bears to the whole sum assessed by the district, so that his assessment and his benefits are proportionate. We have repeatedly held that special assessments for public uses may not exceed the special benefits received by the property, and if the amount of the tax should exceed the special benefit which the owner of the land receives, or is otherwise unjust, he may appeal from the decision of the board of equalization, or have other remedies available when it is sought to take private property for public use without due compensation. But, as we have seen, if the water apportioned to the lots assessed produces revenue elsewhere, this condition may never arise.

The defense in this case is not made by a landholder whose taxes have been increased, and it is not shown how much the tax per acre upon the land subject to assessment would be increased after the lots in controversy and others in their class are exempt from the assessment. We cannot declare an act of the legislature void upon a mere presumption, or at the instance of one not suffering a wrong from a violation of the rights guaranteed to him by the Constitution. It was the duty of the officers of the irrigation district to obey the statute.

AFFIRMED.

The following opinion on motion for rehearing was filed April 10, 1923. *Rehearing denied.*

LETTON, J.

The question whether ministerial officers may defend this suit on the ground that the statute involved is violative of the Constitution of the state has been briefed and

argued upon this motion for rehearing. There seems to be a slight variance between some of our decisions on this point. Compare *State v. Hall*, 99 Neb. 89, 95, with *Van Horn v. State*, 46 Neb. 62, 83. These cases were not called to our attention either in the briefs or upon the oral argument when the case was first argued. We think they are not irreconcilable; but, in the view we take of the statute under consideration, it is unnecessary to examine them in detail, and the point is left open to be further considered if occasion arises.

The constitutionality of an act may depend upon the result of its practical operation. In *Cram v. Chicago B. & Q. R. Co.*, 84 Neb. 607, 85 Neb. 586, an act was held valid *a priori*. Afterwards, *Davison v. Chicago & N. W. R. Co.*, 100 Neb. 462, where the evidence demonstrated that its practical operation was confiscatory, the same statute was held void. Conversely, in *Smyth v. Ames*, 169 U. S. 466, the United States supreme court held a statute regulating railroad rat void, but only void as long as its practical operation violated the protective clauses of the Constitution, and further held that under changed circumstances, making the rates reasonable, the injunction granted to restrain the operation of the statutes would be discharged. The acts in question in these cases were not void *ab initio*, but were only void when and in so far as they operated to take away constitutional rights. The act in question in this case should be obeyed. If in its practical operation it deprives the bondholders of rights protected by the Constitution, when such facts are made to appear, the courts are open to afford relief.

It is argued that by the creation of the district there was a contract made between the state and the landowners in the district to the effect that all real estate within the district shall remain liable for the mantenance of the canal and for running expenses of the district. No such contract exists. The relations of the landowners within the district to each other and to the district are

analogous to those of owners of taxable property within a municipality to each other and to the city or village. The effect of the statute is similar to that resulting when land is detached from the territorial limits of a municipal corporation. We think it has never been held that property thus detached remains *ipso facto* liable for taxation for municipal expenditures in the future. It is presumed that in such cases the legislature will act fairly with respect to all parties concerned, and that is the body which alone can furnish relief if any undue burden it created by the operation of the act in this respect.

Motion for rehearing

OVERRULED.

JAMES I. REDDING, APPELLEE, V. F. E. POSTEN, APPELLANT.

FILED NOVEMBER 13, 1922. No. 21713.

Evidence: SALE AND CREDIT SLIPS. In an action by a merchant to recover from a customer a balance due for goods sold and delivered on credit, sale and credit slips showing the original entries of charges, dates, articles, prices, and credits are admissible in evidence the same as books of account, if the proper foundation is laid.

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

Farrish A. Reisner, for appellant.

W. C. Heelan, John H. Evans and *Dale P. Stough, contra.*

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

ROSE, J.

Plaintiff was engaged in the mercantile business at Seneca, Nebraska, where he conducted a general store, and he brought this action to recover $1,085.38 for groceries and other articles of merchandise sold and delivered to de-

fendant between October 18, 1917, and November 23, 1918. The items comprising the claim were charged in a running account. Defendant pleaded payment in cash for all articles purchased, and denied the buying or ordering of any goods on credit or the incurring of any indebtedness whatever. Upon a trial of the issues the jury rendered a verdict in favor of plaintiff for $1,000. From a judgment thereon defendant has appealed.

The record presents little for review. If the position of defendant is correctly understood, the principal complaint is that there is no foundation for the introduction of the accounts on which the verdict is based. Plaintiff made his original entries in two different forms. During a portion of the period covered by the accounts, the dates, articles, prices and credits were entered by plaintiff, or an authorized clerk, in a book kept for that purpose. Thereafter similar data were likewise entered on sale or credit slips according to a new system. Plaintiff testified in substance that the charges under both methods showed a continuous dealing with the person charged; that the book and slips contained the original entries; that the charges were just and true and were made at or near the time of the transactions entered; that the prices charged were the fair and reasonable market prices for the goods at the time, and that they were sold and delivered as shown by the entries. Rev. St. 1913, sec. 7904. The objection seems to be that these slips were not admissible as books of account under the rules of evidence. They contain the same data, answer the same purpose, and are now considered admissible, if the foundation is properly laid, as it was in the present case.

The judgment is sustained by the evidence and there is no prejudicial error in the record.

AFFIRMED.

MARGARET A. MILLER, APPELLEE, V. NATIONAL COUNCIL, KNIGHTS & LADIES OF SECURITY, APPELLANT.

FILED NOVEMBER 13, 1922. No. 22114.

1. **Insurance:** BY-LAWS: VALIDITY. "A subsequent by-law, legally enacted, providing for the forfeiture of a fraternal benefit certificate when the death of the member is occasioned by suicide, whether sane or insane, is a reasonable by-law and will be upheld." *Lange v. Royal Highlanders*, 75 Neb. 188.

2. ———: SUICIDE: PRESUMPTION: REBUTTAL. Where suicide is a defense in an action to recover life insurance, any presumption arising from the instinct of self-preservation may be overthrown by circumstantial evidence that insured took his own life.

3. **Appeal:** REVERSAL. Where the finding of the trial court on the only issue of fact is clearly wrong in view of all evidential facts, the resulting judgment will be reversed on appeal, if the sufficiency of the evidence is presented for review.

4. **Insurance:** SUFFICIENCY OF EVIDENCE. In an action on a fraternal beneficiary certificate to recover insurance, the evidence outlined in the opinion *held* insufficient to sustain a finding in favor of the beneficiary on the issue of suicide.

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

A. W. Fulton, Fred Maurer and *Howard S. Foe*, for appellant.

Bernard McNeny, contra.

Heard before MORRISSEY, C. J., ROSE, DEAN and DAY, JJ., REDICK and SHEPHERD, District Judges.

ROSE, J.

This is an action on a fraternal beneficiary certificate to recover life insurance in the sum of $1,000. The certificate was issued by defendant, a fraternal beneficiary association, to Frederick W. Miller, insured, January 11, 1902, who died August 30, 1920, when his insurance was in force. His wife was named in the certificate as beneficiary and she is plaintiff. The defense was suicide, but

in this plea defendant conceded the right of plaintiff to recover on the certificate $281.22, the amount contributed by insured to the benefit fund, and defendant offered to confess judgment therefor. At the close of the testimony each party moved for a peremptory instruction. The trial court overruled the motion of defendant and sustained that of plaintiff. There was a judgment in favor of plaintiff for her claim in full, amounting with interest to $1,036.16. An attorney's fee of $200 was allowed as costs. Defendant has appealed.

Defendant invokes a by-law providing that the insurer is liable only for the amount contributed to the benefit fund by a member who commits suicide. This by-law was passed long after defendant issued insured's certificate. The insurance contract when executed limited the liability of the insurer to one-fifth of the maximum risk in the event of suicide within two years. Insured became a member under an agreement to comply with existing and subsequently enacted by-laws. It is insisted by defendant that the by-law in controversy is a valid enactment binding on the beneficiary. While there is a diversity of judicial opinion in different jurisdictions, this court seems to have expressed the view that such a by-law is reasonable and valid and that it applies to a preexisting certificate. *Lange v. Royal Highlanders*, 75 Neb. 188.

The sufficiency of the evidence to sustain the judgment is the remaining question. From the standpoint that the by-law is valid, the directing of the verdict in favor of plaintiff necessarily included a finding in her favor on the issue of suicide. Is that finding clearly wrong when considered on appeal? On this issue plaintiff adduced no evidence. The testimony of defendant's witnesses is uncontradicted. Insured at the time of his death was 67 years of age. He had lived at Guide Rock, but had left his wife there and remained away about two years, returning to that village a few months before his death. After his return he lamented the loss of his home. In conversation with neighbors he implied a purpose to take his own life.

He declined to work. From time to time he had drawn his savings from a bank. One witness testified to his having recently said that "when his money was gone he was going with it." In addition to domestic troubles and poverty he had been distressed over the war between this country and his native land. Early in the morning, August 30, 1920, his coat, pants and vest, neatly folded, one garment upon another, were found on the floor of the bridge across the Republican river near Guide Rock. His shoes and hat were beside his clothing. In the pocket of his coat was a note in his own handwriting. It contained the statement that he was an old man and that there was no place in this world for an old man without a home. Footprints made by stocking feet in the dust and the dew on the bridge led from insured's clothing to projecting planks above the water outside of the railing. There were traces of blood near the ends of the planks. Insured's body, with his underclothing, hose, shirt, collar and necktie on, was found in the river half a mile below the bridge. In the forehead there was a hole which examining witnesses took for a bullet wound.

In the argument of plaintiff on the sufficiency of the evidence to sustain the finding in her favor, reference is made to the instinct of self-preservation; to death by accident or homicide while insured was preparing for a bath; to failure of searchers to find a firearm in the river beneath the bridge; to the inference that the note was written 10 years prior to the death of insured.

Any presumption arising from the instinct of self preservation was overthrown by undisputed evidence of circumstances indicating suicide. There was nothing to prove accidental death or the violence of any person other than insured. The search for a revolver lasted 20 minutes only in a limited area and was made under difficulties in more than three feet of water while the river was rising. It required a protracted search of the river for half a mile to find insured's body. The search for a firearm was insufficient to show that one had not fallen into the river with

insured or to overthrow the evidence of suicide. The note left by insured was missing at the time of the trial, but several witnesses testified to its contents, though one of them, speaking from memory, said insured gave his age as 57, whereas, at the time of his death, he was 67; this was an obvious error of 10 years. The evidence shows that self-destruction was a recent purpose of insured and there is direct proof that he recently expressed orally what his written statement implied as to such a purpose. The inferences drawn by plaintiff are based on disproved presumptions. All evidential facts which appeal to the reason and convince the judgment point to suicide. There is no reasonable hypothesis in the evidence for any other conclusion. The finding of the district court to the contrary is clearly wrong.

The judgment is therefore reversed, with directions to the district court to enter a judgment in favor of plaintiff at her costs for the amount contributed by insured to the benefit fund, according to the terms of the certificate, the by-la[illegible] and the admission of defendant.

REVERSED.

STATE OF NEBRASKA, APPELLANT, V. BONE CREEK TOWNSHIP, BUTLER COUNTY, APPELLEE.

FILED NOVEMBER 13, 1922. No. 22434.

1. **Townships.** In a county under township organization, a township or town is a subdivision of state territory, convenient in area, for the purpose of carrying into effect limited powers governmental in their nature.

2. **Highways:** CONSTRUCTION: TOWNSHIPS: POWERS. A township in a county under township organization has statutory power to direct the raising of money by taxation for the construction and the repairing of roads within its jurisdiction and to make necessary contracts for that purpose.

3. ———: PAVEMENT: TOWNSHIPS: POWERS. A township may, within legal limitations, appropriate money to defray a portion

of the expense incurred by the state in voluntarily paving a road within the township.

4. ———. Public roads constructed and controlled exclusively by the state or a subdivision thereof are not "works of internal improvement" within the meaning of that term as used in the constitutional provision prohibiting "donations to any railroad, or other works of internal improvement, unless a proposition so to do shall have been first submitted to the qualified electors thereof, at an election by authority of law." Const. 1875, art. XII, sec. 2.

APPEAL from the district court for Butler county: GEORGE F. CORCORAN, JUDGE. *Reversed.*

Clarence A. Davis, Attorney General, and *Mason Wheeler,* for appellant.

E. A. Coufal, contra.

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

ROSE, J.

This is an action by the state of Nebraska, plaintiff, to recover from Bone Creek township, Butler county, Nebraska, defendant, $4,000 appropriated by it to defray a portion of the expense of paving a road therein a distance of 4,360 feet from the foot of Hookstra Hill across the Platte river bottom to the Schuyler bridge over the Platte river. In consideration of this paving defendant agreed to contribute that amount but refused payment after plaintiff had completed the improvement at a cost of $25,000. This action to pay part of the expense of paving was taken at an annual meeting held March 5, 1918, as shown by a resolution declaring:

"An appropriation of $4,000 be and is now made, to be applied on paving the road between the river bridge and Hookstra Hill, * * * and that said appropriation be turned over to the state authorities for that purpose."

The trial court sustained a demurrer to the petition and dismissed the action. Plaintiff has appealed.

Defendant contends that the pavement in Bone Creek township is part of a post road or national highway which the federal and the state governments selected, planned and improved at their own expense for their own purpose without regard to defendant; that there is no state or federal law authorizing such paving for a township; that defendant was without power to make the donation; that the paving was an internal improvement to which a township could make no contribution without a vote of the electors at an election authorized by law; that no such election was ever held; that the annual township meeting was not an election within the meaning of the state Constitution, which provides:

"No city, county, town, precinct, municipality, or other subdivision of the state, shall ever make donations to any railroad, or other works of internal improvement, unless a proposition so to do shall have been first submitted to the qualified electors thereof, at an election by authority of law." Const. 1875 art. XII sec. 2.

The argument in favor of these propositions is plausible, but the opposite view seems to be based on more substantial grounds.

In a county under township organization, a township or town is a subdivision of state territory, convenient in area, for the purpose of carrying into effect limited powers governmental in their nature. *Wilson v. Ulysses Township,* 72 Neb. 807. Included in these governmental functions was the statutory power to direct the raising of money by taxation for the construction and the repairing of roads within the township and to make contracts necessary to the exercise of such power. Rev. St. 1913, secs. 1007, 1008, 1012; *Wilson v. Ulysses Township,* 72 Neb. 807. It was under this authority that defendant acted in making the appropriation. If the highway improved was part of a government or post road under the control of the state or nation, as argued by defendant, those sovereignties were not obliged to make a permanent pavement across the Platte river bottom through

Bone Creek township. In voluntarily assuming the principal burden of paving a single road for a short distance, the state and nation did not take from defendant the governmental functions mentioned.

The petition does not allege that a proposition to appropriate money for the purpose of defraying a portion of the expense of the paving had been submitted to the qualified electors "at an election by authority of law" —a requirement of the Constitution, if the paving is a work of "internal improvement" in the sense of that term as used in the supreme law. Const. 1875, art. XII, sec. 2. Did defendant have power to make the appropriation without a vote of the electors? In other words, was the appropriation a "donation" to "works of internal improvement," within the meaning of the Constitution? The supreme court of Minnesota said that an appropriation to aid in the construction or repairing of a public road is an appropriation for a work of "internal improvement" as the words are used in the Constitution of that state, and the supreme court of Kansas seems to have followed the precedent. *Cooke v. Iverson,* 108 Minn. 388, 52 L. R. A. n. s. 415; *State v. Knapp,* 99 Kan. 852, L. R. A. 1917C, 1034. The supreme court of Maryland, however, took the opposite view of a somewhat similar constitutional provision. *Bonsal v. Yellott,* 100 Md. 481, 69 L. R. A. 914. In forbidding subdivisions of the state to "make donations" to any railroad, or other "works of internal improvement," without submitting to the electors a proposition to do so, the framers of the Nebraska Constitution of 1875 and the people who adopted it had in mind the evils arising from excessive donations of public funds to enterprises performing public services for private gain. Public buildings used exclusively for governmental purposes, without direct pecuniary profit to any corporation, or individual, are, in a popular sense, internal improvements, but they are obviously not within this constitutional inhibition.

At the time defendant agreed to make its contribution

to the costs of the paving, the primary burden of constructing highways and of keeping them in repair fell on counties and on townships in counties under township organization. The function exercised in making and improving roads for the state under such a system was governmental, involving taxation. Money thus raised and used for the benefit of the public as a whole can scarcely be called a "donation," unless all taxes devoted exclusively to public purposes are viewed in the same light. The limited governmental powers of a township are not shared by private corporations or individual agencies acting for private gain. No commercial enterprise will manage or control the paved road through Bone Creek township or derive any direct pecuniary benefit from it as a business institution.

The paved road, though an "internal improvement" in a general or popular sense, is not such in the restricted sense contemplated by the Nebraska constitutional provision declaring that no subdivision of the state "shall ever make donations to any railroad, or other works of internal improvement, unless a proposition so to do shall have been first submitted to the qualified electors thereof, at an election by authority of law." *Bonsal v. Yellott*, 100 Md. 481, 69 L. R. A. 914. This conclusion is in harmony with a familiar rule of construction, which has been stated as follows:

"Where an enumeration of specific things is followed by some more general word or phrase, such general word or phrase is to be held to refer to things of the same kind." 19 C. J. 1255.

In the Constitution "railroad," an enterprise performing public services for private gain, is first specifically designated. This is followed by the general term, "or other works of internal improvement," the word "railroad" indicating the kind of internal improvement to which the provision applies. The paved road is an internal improvement of a different kind. It is financed wholly by the government for the benefit of the public

alone. The interpretation which does not extend the phrase to paved roads of this kind seems to be more in keeping with the language and purpose of the Constitution than the popular definition of "internal improvement," when that term is separated from the context.

Union P. R. Co. v. Commissioners of Colfax County, 4 Neb. 450, has not been overlooked. In that case the court denied an injunction to prevent the collection of taxes to pay interest on county and precinct bonds which had been issued to aid in the construction and in the repairing of a wagon bridge over the Platte river near Schuyler. The bonds had been issued under statutory provisions "To enable counties, cities and precincts to borrow money on their bonds or to issue bonds to aid in the construction or completion of works of internal improvement." The acts were in force in 1869, and the case was decided before the Constitution of 1875 was adopted. While one section of the statutes authorized subdivisions of the state "to issue bonds to aid in the construction of any railroad or other work of internal improvement," other statutory provisions provided for the raising of money to aid in the construction and repairing of bridges. Construing the statutes as a whole, and the term "internal improvement" in its popular sense, a public bridge was held to be an internal improvement. The decision is not regarded as a binding precedent defining that phrase as it subsequently appeared in a restricted sense in the Constitution of 1875.

Having reached the conclusion that the appropriation was not made for an internal improvement within the meaning of the Constitution of 1875 and did not, therefore, require a vote of the electors, it is unnecessary to inquire whether the action taken at the annual meeting was equivalent to an election.

The trial court erred in sustaining the demurrer to the petition. It follows that the judgment of the district court is reversed and the cause remanded for further proceedings. REVERSED.

The following opinion on motion for rehearing was filed May 26, 1923. *Rehearing denied.*

Highways: PAVEMENT: TOWNSHIPS: POWERS. The paving of a public highway at the partial expense of a township is not a work of "internal improvement" within the meaning of that term as used in the constitutional limitation inhibiting "donations to any railroad, or other works of internal improvement, unless a proposition so to do shall have been first submitted to the qualified electors thereof, at an election by authority of law." Const. 1875, art. XII, sec. 2; *State v. Bone Creek Township, ante* p. 202.

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

PER CURIAM.

A reargument was granted to permit further consideration of the holding that the paving of a public highway at the partial expense of a township is not a work of "internal improvement" within the meaning of that term as used in the constitutional limitation inhibiting "donations to any railroad, or other works of internal improvement, unless a proposition so to do shall have been first submitted to the qualified electors thereof, at an election by authority of law." Const. 1875, art. XII, sec. 2; *State v. Bone Creek Township, ante* p. 202.

The question has been reexamined in the light of an able argument by defendant's counsel after extended research and the exercise of praiseworthy skill. It is insisted that the former opinion is a departure from precedents construing the identical language in question and that due weight has not been given to authentic historical data relating to statutes and constitutional provisions containing the words, "railroad, or other works of internal improvement."

Particular reference is made by defendant to two cases in which the expression, "railroad, or other works of internal improvement," was construed to include bridges as parts of public highways: *Union P. R. Co. v. Commissioners of Colfax County,* 4 Neb. 450; *Traver v. Mer-*

rick County, 14 Neb. 327. In those cases the constitutional provision containing the words under consideration was not construed. The interpretation was confined to the meaning of statutes passed in 1869. The purposes of the legislation were considered in connection with the entire enactment. The question for determination involved a grant of power, and not a constitutional limitation. The same words considered with the context in a legislative grant may mean something else in a constitutional limitation. Phrases, like words, may vary in meaning with the context. One of those cases was decided before, and the other after, the Constitution of 1875 was adopted. The author of the opinion in each case was a member of the constitutional convention of 1875, and, between the two decisions in point of time, he concurred in an opinion construing the constitutional provision itself. The identical words of the Constitution, "any railroad, or other works of internal improvement," were construed, when the history of both statutes and Constitution was fresh in the minds of the court, as follows:

"Bridges built by a county upon the line of its highways and wholly within such county are not 'works of internal improvement,' according to the constitutional meaning of that term; and money raised and expended therefor cannot be counted as a donation to a work of internal improvement." *DeClerq v. Hager,* 12 Neb. 185.

The attitude of the public changed in regard to donations for the purpose of aiding railroads and other enterprises performing public services for private gain. The early statutes, enacted when the state was undeveloped, were apparently intended to facilitate the making of such donations, but the Constitution of 1875 put a limitation on the power to do so. The decisions of the court, considered in the light of history, seem to have followed the law in both instances. While the reargument on behalf of defendant created serious doubts as to the correctness of the views expressed in the former decision in the

present case, there does not seem to be a sufficient reason to recede from it. Relief therefrom on the motion of defendant is denied.

REHEARING DENIED.

FRITZ LAUE, APPELLEE, V. JULIA BRADDOCK, APPELLANT.

FILED NOVEMBER 13, 1922. No. 22143.

Equity. "Equity seeks the real and substantial rights of the parties, and applies the remedy in such manner as to relieve those having the controlling equities." *Weckerly v. Taylor*, 77 Neb. 886.

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

E. D. Crites, F. A. Crites and *Good & Good*, for appellant.

Lee Card, contra.

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

ALDRICH, J.

In November, 1914, William Braddock, now deceased, entered into a partnership agreement with the plaintiff, Fritz Laue, and Richard Laue, who shortly afterwards retired from the business with the consent of Braddock. The agreement was to run for five years, ending in May, 1919, and covered the raising of live stock, the breeding and sale thereof, and the use of land owned by William Braddock for that purpose. While the agreement is in form a lease, it is recognized by both parties in their pleadings as a partnership agreement. According to the arrangement Laue lived on the land and had personal supervision of the business with the advice and aid of Braddock, who lived in town. Subsequently more land was added to the ranch covered by the partnership, part of it by purchase by Mr. Braddock, and part by lease. Plaintiff contends that the land which Mr. Braddock

bought was to be used by the partnership free of charge; that at all times the plaintiff was to furnish the labor and Braddock the land—that is, the deeded land. As to the leased land there is no controversy, plaintiff admitting that they were to share equally in the rental charge.

On January 7, 1917, Mr. Braddock died, leaving a will by which all the land owned by him was left in trust for his children, and all of his personal property was left to Mrs. Braddock, the defendant herein, for her use. A part of the will refers to the cattle-raising business carried on by the testator during his lifetime. This reads as follows: "My business for many years has been that of a ranchman and conducted on the lands devised to my said daughters, with live stock and other personalty bequeathed to my said wife. * * * It is my desire that if practicable that said business be continued after my decease, my said wife using said land, and paying into the trust created by the second paragraph of this will such sum, in lieu of rental therefor, as shall, by the probate court of the county of my residence at the time of my decease, be determined to be fair under all the circumstances."

Thereafter Mrs. Braddock, the defendant herein, and widow of William Braddock, entered into an arrangement with Mr. Laue to continue the business for the remainder of the period covered by the original partnership agreement, which had yet two years and four months to run. The evidence is conflicting as to the exact nature of this arrangement, Mrs. Braddock contending that the plaintiff Laue, agreed to bear one-half the expenses of rent for the land as required by the will, and plaintiff contending that there was no agreement whatever on that subject, and that it was never mentioned between the parties.

The parties, on May 10, 1919, agreed to a division of the stock which they had theretofore owned jointly as partners, and the partnership was dissolved. They were

unable, however, to agree as to numerous items claimed. On September 20, 1920, plaintiff instituted this action in equity for a partnership accounting. Plaintiff claimed the sum of $1,715.51 on account of feed purchased, advances made by him, cattle purchased, etc., conceded that $271 was owing to defendant on account of small items which had not been settled, and prayed for judgment in the sum of $1,444.01. In her answer defendant denied that she owed anything to plaintiff, and alleged various items were owing from him to her, chief among which is one-half of the rental on the lands involved which she was required to pay. The total amount of her claims was $3,491.36, and she also prayed for an accounting.

The case was tried by the court and judgment was rendered in plaintiff's favor for $1,291.04, with interest, making a total of $1,454.21. There was a special finding that the defendant was not entitled to recover any rentals for the land. Defendant appeals.

From the foregoing facts it is easy to determine the intention of the parties originally. The same relation was to continue between them for the balance of the lease. It is plain that the plaintiff was to perform the work and labor in running this ranch, and that the defendant was to furnish the real estate the same as Braddock had done during his lifetime. The plaintiff and defendant continued to carry on the business after Braddock's death on the same terms as originally. In making a division of this partnership property and in deciding the rights and liabilities of the parties under the arrangement, we must be governed by an application of law which is reasonable, fair and just. The record shows that plaintiff did not agree to pay one-half the rentals for what had been Braddock's land—the deeded land used by the original partnership. In paying the rent for this land the defendant did nothing more than keep in force and effect the original partnership agreement, and carried out the expressed wish of the deceased partner. According to the will it was optional as to whether or not the widow

should continue the live stock business. She decided to carry on the business with plaintiff as her partner, and the evidence preponderates in favor of plaintiff's contention that the terms and conditions of the original partnership agreement were to be followed. Defendant's claim for rents, alleged to be chargeable to plaintiff, embraced the leasing of 5,760 acres of land from January 7, 1917, to May 12, 1919, at 40 cents an acre *per annum,* which was the rental charge fixed by the county court in the probate of William Braddock's will. This made a total of $5,376 claimed by defendant for rents. For the reasons stated the same is hereby disallowed, and the finding of the court below on this question is affirmed.

The primary object and purpose of equity courts being called upon to dissect and analyze the difficulties existing between litigants is to apply the remedies in a just manner to so relieve the situation as to give him the remedy and relief who has the controlling equities. When this is done substantial justice will have been done and equity will prevail.

Both parties asked for a partnership accounting in the court below. We are satisfied with the conclusion reached by the trial court, and the judgment is

AFFIRMED.

DONALD H. CLARK, APPELLANT, V. S. AGNES HOLMES, APPELLEE.

FILED NOVEMBER 13, 1922. No. 22127.

1. **Deeds**: CANCELATION: MENTAL CAPACITY: BURDEN OF PROOF. "Where it is sought to cancel a deed for the want of mental capacity of the grantor to make the instrument, the burden of proof is on the one who alleges the mental incapacity." *Brugman v. Brugman*, 93 Neb. 408, followed.

2. ———: ———: UNDUE INFLUENCE. The undue influence which will avoid a deed is an unlawful or fraudulent influence which controls the will of the grantor.

3. ———: DELIVERY: PROOF. The possession of a deed by the grantee is *prima facie* evidence of its delivery.

4. ———: CANCELATION: INSUFFICIENCY OF EVIDENCE. Evidence examined, and *held* insufficient to show mental incapacity of the grantor to execute the deeds, or undue influence exercised by the grantee, or that the deeds were never delivered.

APPEAL from the district court for Nuckolls county: RALPH D. BROWN, JUDGE. *Affirmed.*

H. H. Mauck and *F. H. Stubbs,* for appellant.

Hayes & Hayes and *T. W. Cole, contra.*

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

DAY, J.

Action by Donald H. Clark against S. Agnes Holmes to cancel two certain deeds, each for a quarter section of land in Nuckolls county, which were executed by Marcella F. Adams to S. Agnes Holmes on March 28, 1917. The trial resulted in findings and judgment for the defendant. Plaintiff appeals.

The plaintiff bases his right to recover the lands in question by virtue of the last will and testament of Marcella F. Adams duly admitted to probate, which by its terms devised all of the real and personal property of the testatrix to the plaintiff. The will was dated November 25, 1914. The testatrix died December 8, 1917. The testatrix was the aunt of both plaintiff and defendant, they being cousins.

It is the contention of the plaintiff that the deeds above mentioned are void and of no effect for three reasons: First, that the grantor at the time of making and executing the deeds was mentally incapable of transacting business, and did not comprehend the nature and import of her act when she signed said deeds; second, that the defendant, by means of overpersuasion and undue influence and by false and fraudulent acts and statements

made with the intent to prejudice the failing mind of the grantor, stated and caused to be represented to her that the plaintiff had married, or was about to marry, a certain named woman; third, that the deeds were never delivered.

Upon the question of the mental capacity of the grantor at and about the time the deeds were executed, the testimony is, as is usual in this class of cases, somewhat conflicting. The plaintiff, as well as three servants employed by him in the house, testified that beginning in the fall of 1916, and thereafter until the time of her death, the grantor was in a very weak physical and mental condition; that her actions and speech indicated that she was losing her mind; that at times she would talk incoherently, would imagine that some of her friends and relatives long since deceased were present in the room with her, and with whom she would attempt to converse, and when told that they were not there she would insist that she just saw them; that she would arise from her bed and walk out of the house clothed only in her night-dress; that she would order medicine prepared for her and then decline to take it, insisting that she never ordered it; that practically all of the time she was confined to her room by her sickness, and was under the care of a physician and a nurse. The plaintiff was of the opinion, based upon his observations of her conduct and manner, that she was not competent to make the deeds.

Another witness on behalf of the plaintiff gave it as his opinion that the grantor had not sufficient capacity to make the deeds, but his opportunities for seeing the grantor were very limited; and the force of his opinion is very much weakened by the fact that a short time after the execution of the deeds in question he accepted a deed from her as grantor.

Opposed to this line of testimony, the grantor's physician, as well as a large number of her friends, testified that, while she was suffering from physical ailments, her

mind was bright and active; that she would inquire about her business affairs; would pay her debts; read the morning papers, or have them read to her; and that she manifested a general interest in what was transpiring; that on one occasion she asked the doctor to give her a statement of his bill, which he did, and she thereupon wrote and gave him a check for $109.

All agree that she was a woman of unusual attainments. Some of the witnesses testified that during her sickness she directed the servants in the household in regard to the meals, and when it was reported to her that some purchases were needed she would give them money with directions to purchase articles about the house. A number of women testified that she was able to go out on the porch during most of the period. The witnesses to the deed testified that they noticed nothing unusual in her mental condition at the time, although stating, however, that she said but little.

In addition to the testimony of the witnesses detailing her actions and speech, during a period both before and after the execution of the deeds, a number of letters (nine in number) written by the grantor are in evidence, extending over a period from February 28, 1917, to November 9, 1917. These letters are such as an old lady would ordinarily write to a niece. They tell of her physical condition, what the doctor says about her, and family matters. There is nothing in the letters that would strike one as singular or out of the ordinary, except the statement in one that "confederate money is worth nothing."

The testimony upon this branch of the case covers a great many pages of the record, and it would be impossible to give even a summary of it without extending this opinion to an unwarranted length; and we must content ourselves with the mere brief statement as above outlined. The plaintiff having alleged the incapacity of the grantor to make the deeds, the burden was upon him to establish such fact. This he has not done. Our con-

clusion of the record upon this branch of the case is that it falls very much short of proof of a lack of mental capacity to make the deeds. The rule of law is settled that, to set aside a deed on the ground of want of mental capacity on the part of the grantor, it must be established that the mind of the grantor was so weak and unbalanced at the time of the execution of the deed that he would not understand the purport of what he was then doing. *Schley v. Horan,* 82 Neb. 704; *West v. West,* 84 Neb. 169.

With respect to the claim of the plaintiff that the deed was procured by undue influence, the testimony in that behalf fails to convince us that any improper method was employed by the defendant or any one for her in securing the deeds. The plaintiff's claim in this behalf is that the defendant had told her aunt, for the purpose of prejudicing her mind against the plaintiff, that he, the plaintiff, was about to marry, or had married, a certain lady against whom the aunt entertained some dislike. There was no competent testimony whatever supporting this claim. The only testimony upon this subject was given by one of the nurses who never knew Mrs. Adams until some eight months after the deeds were executed. She testified that Mrs. Adams had told her that Miss Holmes had stated to Mrs. Adams that the plaintiff was about to marry, or had married, a certain lady in the city. It is clear that this testimony was hearsay. Besides this, there is no connection between the remark and the execution of the deeds. Conceding that the statement was made, we cannot presume that it was made as an inducement to the execution of the deeds. It is shown that the defendant was in Georgia visiting her aunt at the time the deeds were made, but this circumstance alone casts no suspicion upon their validity. The defendant was reared in the home of the grantor from her earliest infancy; was educated by the grantor; and it is not at all improbable that under those circumstances a friendly

feeling existed between the aunt and her niece. That the aunt desired to assist her niece is also probable on account of the fact that the niece had been a school teacher for 24 years; she was a maiden lady, while her nephew (the plaintiff), with whom she was on most cordial relationship, having lived in his home for a number of years, was a lawyer, 62 years old, and enjoying a lucrative practice in the state of Georgia.

Lastly, it is claimed that the deeds are void because they were never delivered. The testimony shows that at the time the deeds were executed they were left in the possession of the grantor; that at that time the defendant was living in the house; but, owing to the rule of evidence that transactions and conversations between persons and the representatives of a deceased person are excluded, we are deprived of the defendant's version as to how and when she became possessed of the deeds. Competent testimony is before us, however, that some months after the deeds were executed they were in the possession of the defendant in the state of Maine; and upon the advice of one of her friends she sent them to Nuckolls county, Nebraska, for record, and they were duly recorded about a month before the death of the grantor. The rule of law is settled that the mere possession of a deed by the grantee is *prima facie* evidence of its delivery. This being shown, it was incumbent upon the plaintiff to overcome the *prima facie* case thus made out. This he did not do. We are clearly of the opinion that the plaintiff has utterly failed in his attack upon the validity of the deeds, and that the judgment of the district court is sustained by the record.

The judgment is

AFFIRMED.

MARY L. HUNTER, APPELLEE, V. SAMUEL MILLER ET AL., APPELLANTS.

FILED NOVEMBER 13, 1922. No. 22106.

1. **Wills:** DEVISE BY IMPLICATION. A devise by implication must so clearly result from the express wording of the will that an intention to the contrary cannot be supposed.

2. ———: PRESUMPTIONS. The presumption that a testator intended to fully cover the disposition of his estate by his will will not overcome the rule requiring express provision, or necessary implication, to disinherit an heir.

3. ———: CONSTRUCTION: INTENT. It is the intention which the testator expresses in his will, either by its terms or by necessary implication, that controls, and not merely what the testator may have had in his mind, nor what the court may believe he would have done had he completed what appears to be an incomplete disposition of his property.

4. ———: ———: IMPLIED REMAINDER. Where a will provided a life estate to testator's daughter Mary and, should she die without issue surviving her, to Rebecca, another daughter, but made no express disposition of the property after Mary's death in case she should leave issue surviving her, *held*, that, in view of all the provisions of the will, there was no implied remainder in favor of the issue of Mary, should they survive her.

5. ———: ———. As to any disposition of the remaining interest in the property, subject to the life estate of Mary, in event Mary should die leaving issue, *held* the testator died intestate, and that the title to the property, subject to the life estate of Mary and the right to a contingent remainder in Rebecca, vested in the heirs at law.

6. ———: ———: ISSUE. *Held*, that the term "issue" of Mary, as used in the will, was not used in any restricted sense, nor intended to refer to the one child of Mary, only, who was expressly named in the will, but to other children or descendants of Mary, in view of the fact that Mary had several children at the time of the execution of the will, and there being nothing from the terms of the will which would indicate that the testator used the term in any peculiar sense.

APPEAL from the district court for Wayne county: WILLIAM V. ALLEN, JUDGE. *Reversed and dismissed.*

C. H. Hendrickson, for appellants.

A. R. Davis and *M. O. Cunningham, contra.*

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

FLANSBURG, J.

This was an action to quiet title. The property involved constitutes a part of the estate of George Scott, [illegible] ghter of George Scott, was, by the will, given a life estate in the property. She bases her claim to a fee-simple interest in the property in part upon this devise of a life estate to her, but especially upon certain quitclaim deeds, made to her by the parties who, she claims, were the devisees of the remainder of the estate after the carving out of her life estate. The defendants are the heirs of the said George Scott other than those who are grantors in the deeds mentioned, and their contention is that George Scott made no disposition of the remainder in the property after the devise of a life estate to plaintiff, and, therefore, as to such remainder, died intestate. The trial court found in favor of the plaintiff and quieted title in her. From this decree defendants appeal.

George Scott, a resident of Wayne county, died in 1894, owning the real estate in controversy, and left surviving him as his heirs seven children and the children of his deceased daughter, Annie Scott Miller. Mary L. Hunter, the plaintiff in this case, was one of the daughters of the deceased, and has several living children. Her oldest son was Scott Hunter. Rebecca Hunter was another daughter of the deceased.

The provisions of the will, so far as here involved, are as follows: "I give and devise unto my beloved daughter, Mary, the following described tract of land situated in said county of Wayne, to wit: The north half of the southwest quarter, and the southeast quarter of the southwest quarter of section twenty-seven (27) in town

ship twenty-six (26) of range four (4) east, during her life, and I give and bequeath unto my said daughter Mary all my personal estate of every description whatsoever, except as herein otherwise provided."

Then there follows a number of specific bequests, in the amount of $5, to each of the respective children of the deceased other than Mary L. Hunter. Among these bequests was one to Annie Scott Miller, a daughter of the testator, who was living at the time of the execution of the will, but deceased at the time of the death of the testator.

Then follows this provision: "Upon the death of my beloved daughter Mary, or upon my own death in case I survive her, I give and devise the tract of land above described and devised to her, unto her oldest son Scott Hunter in case she dies leaving said son, and the personal property to be divided equally among the remaining issue subject to above legacies, but in case my said daughter Mary should die without issue surviving her, then I bequeath said property above mentioned real and personal to my beloved daughter Rebecca, the same to be subject to the legacies above mentioned."

Shortly after the decease of George Scott, the plaintiff's oldest son, Scott Hunter, died, leaving no issue. The provision limiting a remainder to Scott Hunter has, therefore, become inoperative, for that interest was conveyed only in case Scott Hunter should survive the plaintiff, Mary L. Hunter.

It has been suggested that in the phrase, should Mary "die without issue surviving her," the testator used the word "issue"as referring to Scott Hunter, and, as Scott Hunter had not survived Mary, Rebecca would, upon the plaintiff's death, take the remainder. The term "issue" in its general sense, however, would refer to all the children or descendants of Mary, and not to one specific child, unless, at least, there was something in the will which unequivocally showed that the testator was using

the term in that sense. Since at the time of the execution of the will Mary had several children then living, Scott Hunter being the eldest, it would be unreasonable to assume that the testator, in using the term "issue" of Mary, intended to refer only to Scott Hunter, and not to the other children.

It is the claim of plaintiff, Mary L. Hunter, that, by the provisions of the will, she received a life estate with a vested remainder, by implication, in her children, to be enjoyed by them should they survive her, but, in event she should die without issue, that a contingent remainder should vest in Rebecca Hunter.

Prior to the commencement of this suit Rebecca Hunter and each one of the plaintiff's children made quitclaim deeds to the plaintiff of whatsoever interest they might have in the property in controversy, and it is plaintiff's contention that, by the deeds from these alleged remaindermen, she has become vested with a fee-simple title. The heirs of George Scott, other than Rebecca and the children of Mary, claim that the testator has made no disposition, beyond the life estate of Mary, in event that Mary should die leaving issue surviving her, but that in such event the testator has, to the extent of any interest in remainder in the property, died intestate.

The whole case hinges, therefore, upon the question of whether there is a limitation, after the death of Mary, of a remainder in the property to her issue, should she die leaving issue surviving her. There is no such express provision in the will. The devise of such an estate in remainder, if such a devise can be found, must rest entirely upon implication.

In order that a devise by implication can be found to have been made to the children of Mary, to the exclusion of the children and heirs of the testator, the implication must be found to be so strong a probability that an intention to the contrary cannot be supposed. Where there is a doubt as to the distribution of property under a

will, the heirs at law will be favored, and, so far as consistent with the terms of the will, or the reasonable inferences to be drawn therefrom, the law of descent will be followed as presumptively in accord with the intention of the testator. *Heilman v. Reitz*, 89 Neb. 422; 40 Cyc. 1412; 28 R. C. L. 229, sec. 190.

It is argued that the testator has, by his will, given to each of his own children a legacy of $5, and that this signifies an intent on his part that they were to be limited, in what they should receive from his estate, to those specific bequests. But it might as well be argued that Mary's children were, on the other hand, given all the personal property of deceased on the death of Mary, and that, therefore, this indicates that the testator intended that they should not receive more.

A mere negative inference, however, that heirs were not to receive an interest in the estate of the testator is not sufficient to exclude them, unless there is some other actual disposition of that interest found in the will. *Herter v. Herter*, 97 Neb. 260.

It is further argued that the testator has manifested an especial interest in the issue of Mary by his repeated mention of them and by the provision in the will to the effect that at the death of Mary all the personal property should be divided among them; that it was also, no doubt, the testator's intention that the real estate should be distributed in the same manner. Such a conclusion is not a necessary one. By the provisions of the will, so far as it affects the property in question, an entirely different disposition is made than as to the personal property. It is not necessary to presume that the testator intended that the real estate, except as to the express limitations made, should descend in the same manner as his personal estate.

Since it was only in event that Mary had no issue surviving at her death that the testator provided that Rebecca should take, the query arises: Is there not such

significance in that fact as to show that the testator intended some disposition to the surviving issue of Mary, or why would the testator make the disposition over to Rebecca dependent upon the particular event only that Mary should leave no issue? It is easy to conjecture that it may have been the testator's intention to make provision for a remainder to the issue of Mary which, through some oversight, he failed to express in his will. But it is certain that he did not express it. It is true that the limitation in remainder to Rebecca was not to take place except in the event that Mary should die without issue, and, in case she should die leaving issue, the testator no doubt intended to make some other disposition of the remaining interest in the property, but just what that disposition was to be, we are left to conjecture.

Who can say what disposition he intended to make? Having in mind that he had given all his personal property to the children of Mary, when he should come to the final disposition of his real estate, though it might be that he intended to give Mary's issue an interest therein, how can we say that he would not, in its disposition, have taken into consideration, and been, at least to some degree, guided by, the gifts previously made in his will and have sought to equalize the inheritance.

The question, however, is not what would the testator have done, but what did he do, and has the will, which he executed, by its terms expressly given or raised, by necessary implication, a devise of the property to the issue of Mary.

As said in *Wright v. Denn*, 10 Wheat. (U. S.) 204, 228: "It is not sufficient that the court may entertain a private belief that the testator intended a fee; it must see that he has expressed that intention with reasonable certainty on the face of his will. For the law will not suffer the heir to be disinherited upon conjecture. He is favored by its policy; and though the testator may disinherit him, yet the law will execute that intention only when

it is put in a clear and unambiguous shape. * * * (p 239) We may indulge conjectures; but the law does not decide upon conjectures, but upon plain, reasonable, and certain expressions of intention found on the face of the will. * * * (p. 245) The testator may have intended it, and probably did, but the intention cannot be extracted from his words with reasonable certainty, and we have no right to indulge ourselves in mere private conjectures."

It is further true that there is a presumption that the testator intended to devise all of his property, and did not intend to die intestate as to any part of it, but that presumption is not stronger than the other presumption, which is, that a testator will not be held to have disinherited any heir except where that conclusion is impelled by the express provisions or by necessary implication from provisions specifically set forth. *Watson v. Martin,* 228 Pa. St. 248.

As to what shall be done with the property in the event of Mary's death without issue surviving her, except as to such uncertain inferences as may be drawn from the matters pointed out above, it must be admitted, the will itself is utterly and entirely silent. The children of the deceased, heirs of his estate, cannot be disinherited by conjecture. What the testator intended to do with his property, in case Mary should be survived by her children, is only a matter of speculation. Nothing in the will impels to the idea that they, to the exclusion of the others, were given a remainder in the property.

We are of opinion that Mary L. Hunter took a life estate and that the heirs of George Scott took a vested remainder, subject, however, to be divested in the event that Mary should die without issue, in which case the contingent remainder would become vested in Rebecca.

For the reasons given, the judgment of the trial court is reversed and the action dismissed.

REVERSED AND DISMISSED.

CARRIE A. BIRSS, APPELLANT, V. ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, APPELLEE.

FILED NOVEMBER 13, 1922. No. 22108.

1. **Insurance:** PLEADING. As to an insurance policy, exempting from its provisions death resulting from "inhaling of gas," the allegation in the petition that the insured was "suffocated by certain poisonous, irritating, noxious and injurious fumes and odors," arising from oil which had been obtained from an oil well and which had been stored in tanks, was sufficient to show that the insured was suffocated by a "gas," within the meaning of the term as used in the policy.

2. ———: POLICY: "GAS." The term "gas," as used in the policy, must be accepted in its common and ordinary meaning, and would cover any substance in the aeriform state having noxious or poisonous qualities, as perhaps distinguished from smoke or dust, which is matter in the solid state finely diffused through the air.

3. ———: ———: EXEMPTION. Where the insured, through accidentally inhaling gas arising from an oil tank, dies, *held* that the death loss was one which came within the exemption in the policy providing that the company should not be liable where death resulted from "inhaling of gas * * * (voluntary or involuntary, conscious or unconscious)."

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

Baldrige & Saxton, for appellant.

John A. Millener and *Nolan & Woodland, contra.*

Heard before MORRISSEY, C. J., ALDRICH, DAY and FLANSBURG, JJ., SHEPHERD, District Judge.

FLANSBURG, J.

This was an action by the plaintiff, as beneficiary under an insurance policy, issued upon the life of her husband by the defendant insurance company. The defendant demurred to the petition. The demurrer was sustained and, the plaintiff having elected to stand upon her petition, judgment was entered against her and her

suit dismissed. From this judgment she has appealed.

So far as the questions raised here are concerned, the petition sets forth that the insured, Frank J. Birss, "while in the act of examining the flow of an oil well and in attempting to measure the amount of oil in several tanks with a long stick or rake handle, kneeled down inserting his head and arms into the opening of the cover of an oil tank from which the cap had been removed, and then and there was accidentally overcome, bruised, wounded and suffocated by certain poisonous, irritating, noxious and injurious fumes and odors, which arose from said oil and surrounded, engulfed and overcame the said Frank J. Birss. As the direct result whereof the said Frank J. Birss immediately became very sick and ill and his lips became blue and his face colorless and an inflammation of his respiratory organs and of the mucous lining of his lungs was thereby produced, directly leading to and bringing on a congestion of same and pneumonia, and thereby inflicting upon him personal injuries and death by external, violent and accidental means."

A copy of the policy sued on is attached to the petition, and in the policy appears the following exemption: "Benefits * * * shall not cover * * * any death * * * resulting from * * * inhaling of gas or asphyxiation (voluntary or involuntary, conscious or unconscious)."

It is the defendant's contention, as the insured is shown to have died as a result of the inhalation of gas, that the death loss falls within the express exemption provision of the policy, and that the company is not liable.

In answer to this, the plaintiff urges that the petition does not disclose that the insured inhaled gas, the only allegation being that he inhaled certain fumes and odors arising from the oil stored in the tank.

The term "gas" is, in a sense, a generic term and is broad and sweeping in its meaning. In Webster's Unabridged Dictionary it is defined as "an aeriform fluid;

a term used at first by chemists as synonymous with *air*, but since restricted to fluids supposed to be permanently elastic, as oxygen, hydrogen, etc., in distinction from vapors, as steam, which become liquid on a reduction of temperature. In present usage, since all of the supposed permanent gases have been liquefied by cold and pressure, the term has resumed nearly its original signification, and is applied to any substance in the elastic or aeriform state."

We must accept the term according to its common and ordinary meaning. Should we try to limit the meaning in such a way as to distinguish gas from all fumes and vapors, it would be necessary to arrive at some restricted definition which we do not find in common usage, and one which apparently has not been employed in the policy. Matter in the aeriform state, having noxious or poisonous qualities, as perhaps distinguished from smoke or dust, which is matter in the solid state finely diffused through the air, is a gas within what, we believe, was intended by the term in the policy. The description in the petition of poisonous, noxious and injurious fumes and odors, arising from oil in an oil tank, to our minds describes what, in common understanding, would be a gas. The allegations in the petition are therefore sufficient, to that extent, to bring the case within the exemption clause.

The plaintiff has laid considerable stress upon the meaning of the word "inhale" and contends that the phrase "inhaling of gas" means only the *voluntary* inhaling of gas. It is true that, as to provisions using the term "inhale," the term, when not qualified by other words, has been defined to mean the *voluntary* inhalation of gas, and the provisions interpreted as exemptions, which, in effect, protect the company only against losses growing out of suicides. *Paul v. Travelers Ins. Co.*, 112 N. Y. 472, 3 L. R. A. 443; *Pickett v. Pacific Mutual Life Ins. Co.*, 144 Pa. St. 79, 13 L. R. A. 661; *Menneiley v.*

Employers' Liability Assurance Corp., 148 N. Y. 596, 31 L. R. A. 686.

Some of the decisions have gone even further, and to an extent which does not appear to us justified, and have held that only the *voluntary* inhalation of gas fell within the exemption, though the exemption clause was so worded that a loss should not be covered which resulted from "anything accidentally or otherwise * * * inhaled," or which resulted "wholly or partly, directly or indirectly * * * from any gas or vapor." *Fidelity & Casualty Co. v. Waterman,* 161 Ill. 632, 32 L. R. A. 654; *Fidelity & Casualty Co. v. Lowenstein,* 97 Fed. 17, 46 L. R. A. 450; *Travelers Ins. Co. v. Ayers,* 217 Ill. 390, 2 L. R. A. n. s. 168.

The wording of the exception in the case here is, however, far broader and more sweeping than in any of those cases. Here the term "inhale" cannot be restricted to mean only the voluntary inhalation of gas, for any inhalation of gas, "voluntary or involuntary, conscious or unconscious," is expressly brought by the terms of the policy within the exception. The provision appears to us to be so plain as not to be open to construction. *Minner v. Great Western Accident Ass'n,* 99 Kan. 575, L. R. A. 1917D, 738; *Porter v. Preferred Accident Ins. Co.,* 95 N. Y. Supp. 682; *Jones v. Hawkeye Commercial Men's Ass'n,* 184 Ia. 1299.

Under the terms of the policy we are unable to see but that the insured in this case died as a result of the inhalation of gases which, though accidental, must have been either voluntary or involuntary, conscious or unconscious, and therefore within the express exception of the policy.

The judgment of the lower court is therefore

AFFIRMED.

CLARA JOSEPHINE MYERS, APPELLEE, V. LEVI MYERS ET AL., APPELLANTS.

FILED NOVEMBER 13, 1922. No. 22546.

1. Wills: CONSTRUCTION: "LAWFUL HEIRS." Where a testator by his will devised a life estate in real property to a person, and at her death to her "lawful heirs," *held*, that by the rule in Shelley's case the word "heirs" is to be taken as a word of limitation, and that such person becomes vested with a fee.
2. ———: RULE IN SHELLEY'S CASE. The operation of the rule in Shelley's case does not conflict with any Nebraska statute and is in strict accord with the public policy of this state.

APPEAL from the district court for Fillmore county: RALPH D. BROWN, JUDGE. *Affirmed.*

Sloan, Sloan & Keenan and *F. B. Donisthorpe*, for appellants.

Waring & Waring and *William R. Fulton, contra.*

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

FLANSBURG, J.

This was an action by plaintiff, Clara Josephine Myers, to quiet title to certain real estate which she claimed under the will of Miller Valentine. The will, by its terms, gave her a life estate, and after her death directed that the property go to her "lawful heirs." The trial court found that the plaintiff was vested with a fee title and granted the prayer of her petition. Appellants, the children of the plaintiff, appeal.

It is admitted by the appellants that nothing in the will in any way restricts or qualifies the meaning of the term "lawful heirs," and, if the rule in Shelley's case is to operate in this state, that the plaintiff's life estate and the remainder in her heirs would merge and the plaintiff be vested with a fee.

It is contended, however, that the rule in Shelley's

case is not and should not be a part of the law of Nebraska. No objections have been urged against the rule, which was not passed upon in the case of *Yates v. Yates*, 104 Neb. 678. The decision in that case hinged entirely upon the question of whether the rule existed here, and, if so, to what extent it could operate. The limitation there was to Almeda Yates for life and then in *"fee simple"* to the "heirs begotten of her body." At common law a grant to Almeda Yates and to the heirs of her body would have created an estate tail, in this state a fee simple conditional. But the grant in the *Yates* case was of an estate in *"fee simple"* to the heirs of the body of Almeda Yates. The term could not, therefore, be allowed to be given its technical effect without violating the express intention of the testator, which was that the heirs should take in *fee simple* and *not* a *conditional fee.* The terms "heirs begotten of the body" could not, by reason of the context in which they were used, be given effect as words of limitation. They were therefore construed as words of purchase, describing only those heirs which should be begotten of the body of Almeda Yates—in other words, her children. In the *Yates* case the rule in Shelley's case was invoked, and, without an understanding of the rule and a decision as to its principle and the extent of its operation in Nebraska, the issues raised in that case could not have been fairly decided. We do not consider that part of the opinion dealing with the rule in Shelley's case to be dictum.

The testator in the instrument now under consideration used the term "heirs" without restriction. We have no reason to believe he did not mean just what he said, that after the death of Clara Josephine Myers he wanted the property to go to her "lawful heirs," whoever they might happen to be at the time of her death. He did not specify in what manner he wanted the estate to be distributed among them, nor what the shares should be, nor whether the property should descend *per stirpes* or

per capita. He was satisfied, no doubt, that the law of descent and distribution would, when the time came, fully and in a fair manner control the disposition of the property. When he drew his will, he did not know whom Mrs. Myers would have as her heirs. He did not know whether she would leave a living spouse, children or only grandchildren; or whether there would be none but collateral heirs. Had he been concerned as to who among them should take, he would have indicated his desire. He certainly did not intend to refer only to her children as particular individuals who should take by purchase, and, should she leave no living children, that her grandchildren should not take; nor did he intend, should she leave no direct heirs, that her collateral heirs should go unprovided for under the will.

Under the rule in Shelley's case, the term "heirs," except where the testator, by expressions in his will, is shown to have used the term in another sense, is held to have had reference to all legal heirs left by the life tenant at her death, and not to some restricted class among them, and, furthermore, the testator is held to have intended that the property devised should, at the termination of the life tenancy, go to the lawful heirs, then determined, in the manner as provided by law. Manifestly, the rule does not in such interpretation violate the expressed intention of the testator; on the other hand, it establishes and makes stable the meaning of terms, and gives to the instrument the only interpretation of which it is reasonably capable.

Counsel for appellants, in the same breath with their argument that such an interpretation violates the intention of the testator, seek to construe the term "heirs" as being limited in this case to immediate children only. The rule they seek to establish is that the term "heirs" is to be interpreted, not in the light of what the testator may have had in mind at the time of the execution of the will, but, rather, in such a way in any particular case as

to meet peculiar exigencies after they may have arisen; that we should embark upon the field of speculation; in one case, the term "heirs" would be given one meaning, in another case, quite a different one. Such a rule would inject into the law uncertainty and confusion in the construction of instruments using terms which now have a settled meaning not only among lawyers but with the layman as well.

Appellants admit that there is nothing in the will to indicate that the testator intended to restrict the term "heirs" to refer to children only. The term "heirs," even in its ordinary use, is not so restricted in its meaning. Had these appellants been the grandchildren of Mrs. Myers, their parents being dead, would they now be willing to abide by the same interpretation which they are now contendng for, or would they then wish to extend the meaning of the term "heirs" to include grandchildren as well as children? And, had these appellants been collateral heirs of Mrs. Myers, there being no children or grandchildren, would their counsel not contend that the testator had intended to include them within the term "heirs," or would they concede that, as to the remainder in the property, the testator had died intestate, and that the property should descend to his heirs, rather than to the heirs of the life tenant? These are some of the difficulties to be met in the interpretation of the term "heirs," once the court departs from the real meaning of that term.

Having interpreted the will, in accordance with the expressed intent of the testator, to be a direction that the estate to go to Mrs. Myers for life and then, at her death, to descend to her heirs, the rule in Shelley's case goes one step further. It establishes the principle that such a disposition is contrary to public policy, and the two interests, the life estate and the remainder to the general heirs, are caused to merge. The life tenant then takes the entire title.

When a testator gives a property to one for life and then to his heirs, it appears that he intends to convey to the life tenant an interest in the property, which has, in practical effect, all the attributes of a fee-simple title, except as to the right of alienation. The life tenant is by terms given the full use and control of property which must, at his death, descend to such persons as shall then be determined to be his heirs, and he cannot, by his act, cut off the inheritance. The testator's intention is to tie up the disposition of the estate during the life of his devisee and then to require the property to descend according to law, the same as if the devisee had, in fact, had a fee title.

Where the testator has particular beneficiaries or a class of beneficiaries in mind, he is justified in preserving the property for them until the time when they shall take. But, where he thinks of no such devisees, as particular persons who shall take, and only attempts to direct the course of the descent of the property from his named devisee, should he be allowed, by a dead arm stretching from the grave, to withhold from that devisee the right of alienation, the only attribute of a fee simple title which is lacking, and which right should be included within that full enjoyment and complete control of property which is the right of the living? It is of course the province of a testator to tie up property for a period after his death for a justifiable end, but is the mere object, that that property shall descend by operation of law from the first taker to his heirs, a good reason for his exercising such restraint?

Let us stop here to mention a rule quite universal, one which exists in this state, and one with which the appellants have no quarrel. Where a testator devises property to a person and to his heirs, the conveyance of a fee, he cannot, by his will, make a valid restriction to the effect that such person shall not alienate the property during his lifetime; and yet, is not the rule based upon the same principle of public policy as is the rule in Shel-

ley's case? In either event, the extent and nature of the estates attempted to be created are, in practical effect, the same. In the one case, the devisee is given the title which must descend to his heirs, for he is prohibited from disposing of it during his lifetime; in the other, he is given the property to use during his life, which prevents him from conveying a fee, and then it is provided that at his death the property shall descend to his heirs.

The law looks to the substance and not to the letter. If the attempt to tie up property, in the one case, by a prohibition against alienation is considered against public policy, then surely an attempt to do the same thing by a different phraseology is also to be condemned.

The history and a discussion of authorities involving this rule are found in the *Yates* case.

We are of opinion that the rule was properly applied by the trial court, and the judgment is

AFFIRMED.

ROSE, J., dissents.

ANNA JOHNSON, APPELLEE, V. NEBRASKA BUILDING & INVESTMENT COMPANY, APPELLANT.

FILED NOVEMBER 13, 1922. No. 22107.

1. **Contracts:** RESCISSION: PLEADING. In an action to rescind a contract for fraud, a petition which sets out the facts from which a presumption of damage arises is sufficient to show injury to plaintiff by reason of the fraud.
2. **Evidence** examined, and found sufficient to support the verdict.
3. **Evidence:** RESCISSION: PAROL EVIDENCE. The parol evidence rule in actions to enforce a written contract is not applicable in an action to rescind the contract for fraud in procuring it.
4. **Corporations:** RESCISSION: DEFENSE OF ULTRA VIRES. Where a corporation has secured money of plaintiff by fraud, a plea of *ultra vires* is not admissible in an action to recover it.
5. **Appeal:** FRAUD: INSTRUCTIONS: HARMLESS ERROR. An instruction in an action for fraud which fails to state that plaintiff

must show he has been damaged, is erroneous. In this case the error was without prejudice.

6. **Corporations:** CONTRACTS: RATIFICATION. Receipt by plaintiff of dividends *held* not a ratification of the contract preventing rescission under circumstances detailed in the opinion.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Doyle, Halligan & Doyle and *Good & Good,* for appellant.

Stewart, Perry & Stewart, contra.

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

REDICK, District Judge.

Action to rescind a contract for the purchase of stock of defendant on the ground of false representations claimed to have been made which induced such purchase. Among the representations alleged as false were: That the defendant company was in a sound and prosperous condition; that its assets consisted principally of high class securities, mostly first mortgages on real estate; that the stock was worth $109 a share; and that defendant had provided for and would repay money received for stock with 7 per cent. interest after one year on 30 days' notice if purchaser desired. Plaintiff tendered return of the stock and demanded her money, which was refused.

Defendant by its answer admits the purchase of stock. alleges that the agreement therefor was evidenced by a written subscription contract containing, *inter alia,* provisions that the stock "will be subject to the regular resale provisions as provided in the by-laws of the company and printed on the reverse side of the application," and "no conditions, agreements or representations, other than those, shall bind said company." The resale provisions are, so far as material, that "it shall be the duty of the Lincoln Security Company (the stock selling agent of defendant) * * * to resell or take over such stock as

offered for resale upon such terms as said company shall deem to be for the best interest of the company and to resell such stock without any discrimination among stockholders; funds remaining for a period of three years will be credited with their proportionate surplus earnings of the company; if withdrawn within that period, 7 per cent. interest on the original investment will be the maximum earning of said stock." Defendant denies all fraudulent representations, or notice thereof, and alleges that its agent had no authority to make any representations beyond those contained in the subscription contract, of which limitation plaintiff had notice; other defenses alleged will be referred to later on. Trial to a jury resulted in a verdict and judgment for plaintiff, and defendant appeals.

The errors assigned are: (1) Errors of law at the trial; (2) failure of plaintiff to state a cause of action; and (3) insufficiency of the evidence to sustain the verdict.

Regarding the second assignment it is claimed the petition is faulty in not alleging in so many words that plaintiff was damaged by the false representations; but the petition sets out representations of a character which, if false, would raise a legal presumption of damage. This is sufficient in an action to rescind. *Rihner v. Jacobs*, 79 Neb. 742.

Regarding the third assignment of error, the evidence is sufficient to support the verdict, if competent, and binding upon defendant. While the witnesses were not as clear and specific in their statements as could be desired, the witness Nelson testified in effect that the agent represented that the business of the company was erecting buildings, one-half or one-third to be paid for and the company take first mortgages for the balance; that its principal assets were first mortgages; that the company had made money so that the stock in two years had become of the value of $109 a share (the price paid by plaintiff); that any time after one year, on thirty days'

notice, the money would be paid back. It appears from the evidence that during the year 1918 defendant company operated at a loss of about $134,000, but the books showed a profit of $402,211.95 by means of sales to hotel companies of properties purchased or built by defendant. A sample of these transactions is the Lincoln Hotel deal. Defendant bought this property in 1918 for $467,000 and very soon afterward turned it over to the Nebraska Hotel Company for $642,000, showing a book profit of $175,000; taking in payment stock of the hotel company and a *second* mortgage for $300,000. The hotel company was affiliated with defendant company, which owned 80 to 90 per cent. of its stock. Although defendant's statement showed current assets December 31, 1918, of $926,645.69, only $169,939.66 represented mortgages from persons or companies outside of affiliated corporations, and from the latter $586,252.06. Defendant at that time also held $610,975 par value of stock in Nebraska Hotel Company. It also appears that defendant's principal operations consisted of purchasing and selling buildings, rather than constructing them. There is considerable more evidence of the same nature, but the above is sufficient to show the falsity of the representations as to the nature of defendant's business and character of its assets.

The first assignment of errors at the trial presents the question upon which defendant chiefly relies. It is claimed that the provision in the contract of subscription, "no conditions, agreements or representations, other than those, shall bind said company," was notice of the limits of the agent's authority, and that the company was not bound by any other representations. This contention is based upon the idea that plaintiff's action is to enforce a contract to pay back the money, and that such an agreement cannot be proved by parol, in view of the terms of the subscription contract regarding a resale. But the action is one to rescind for fraud and the parol evidence rule is not applicable, as is well ex-

pressed by Flansburg, J., in *Schuster v. North American Hotel Co.*, 106 Neb. 679. Furthermore, this case does not rest solely upon a promise, but upon representations of fact regarding the financial condition of the company and the nature of its business, which are matters generally within the scope of the agent's authority whose business it is to sell stock; and, in addition, there is ample evidence of actual authority in this case, as there is in evidence a prospectus of defendant delivered to plaintiff before the contract of subscription, containing, *inter alia*, the following:

"We make no loans on old properties, nor on any property which we do not build ourselves."

"Safety. The placing of a loan on a newly improved piece of real estate, on a conservative basis as to the market value, so arranged as to be reduced by a payment each month, is providing one of the safest investments known today.

"Newly improved high class real estate, with the improvements of the most modern class, the highest type of architectural design and construction, has no equal for security of the investment, when consideration of the earnings are taken into account.

"Considering the fact that our assets are chiefly just such securities, on which there is the very least element of chance of loss (our properties all being fully insured in both fire and windstorm insurance), coupled with the liberal earnings of our preferred shares, is the very reason why our shares are meeting with such ready sale.

"By confining our operations to the improvement of real estate and to buildings of the very highest type of structure known to modern science, we are keeping our operations within the limits of the most conservative business methods."

"We pay 7% on the money *invested* with us, paid semi-annually; and, in addition thereto, a share of the net profits of the company. *Provision is made for with-*

drawal of your money after twelve months if you so desire." (Italics are ours.)

"Our securities consist chiefly of mortgages on newly improved real estate."

The agent making the sale, while denying all false representations, admits making those contained in the prospectus, so, whether these representations are considered as made by the agent or the company itself, they are equally binding. Moreover, the last sentence of the "Provisions for resale" on back of subscription contract above quoted is open to construction, as it speaks of the amount to be credited in case "funds" are "withdrawn" —terms of very slight, if any, application to a "sale" of stock. We think, under the circumstances shown, that the limitation of the agent's authority was ineffective as applied to the representations contained in and based upon the prospectus. We conclude that the evidence of representations was competent and binding upon defendant. See *Schuster v. North American Hotel Co.*, 106 Neb. 679.

It is contended that the contract to repurchase the stock is *ultra vires*, and that to enforce it would interfere with the rights of other stockholders and creditors. The principle referred to has no application here. A corporation may not procure money by fraud and then plead *ultra vires* as a defense to repayment; the stockholders and creditors have no equity superior to plaintiff.

Defendant complains of the failure of the court to instruct the jury that before plaintiff could recover she must show that she was damaged by the fraud. Of course, it was necessary to show injury, and the jury should have been so instructed; but the court instructed that the representations must be proved, that they were false, and that plaintiff relied upon them and paid for the stock, and the evidence is conclusive that the stock was not of the character and value represented, and the error was not prejudicial.

Finally, it is urged that plaintiff lost any right to rescind because she accepted three dividends after knowledge of the fraud. The evidence shows that about July, 1919, two months after the purchase, plaintiff heard from several persons that "this company wasn't any good," but "I let it go until they stopped paying dividends," that it would have been all right if she got the dividends, and in July, 1920, she put the matter in the hands of Mr. Godfrey, a lawyer. With each dividend payment she received a letter and semi-annual statement, in which the business of the company was shown to be in thriving condition, containing such expressions as "The future of the company was never brighter, and we are glad you are in position to share in our prosperity which is your prosperity" (July 1, 1919), "Business is excellent," "Our prosperity is your prosperity" (January 1, 1920), "On January 1, 1920, the value of each share was increased to $112" (February 5, 1920); and many more highly colored statements, all of which undoubtedly had a tendency to allay plaintiff's suspicions and delay action upon her part. She never had any knowledge of the real facts until shortly before this suit was brought in October, 1920. We think that, by these acts of defendant, plaintiff was lulled into a belief of false security, and that, under these circumstances, the receipt of the dividends should not be considered a ratification of the transaction. *Rhines v. Skinner Packing Co.*, 108 Neb. 105.

Objections to instructions given and refused have been considered and we find no prejudicial error. Decree of district court is

AFFIRMED.

CHRISTIAN SCOW, APPELLEE, V. BANKERS FIRE INSURANCE COMPANY, APPELLANT.

FILED NOVEMBER 13, 1922. No. 22283.

1. **Venue:** RESCISSION OF CONTRACT. An action in equity to rescind a contract for the purchase of stock of a corporation for fraud

is transitory, and the fact that part of the relief asked is the delivery up and cancelation of real estate mortgages to secure notes given for the purchase price of the stock does not characterize the action as local, where it is not sought to quiet the title nor to expunge the record of the mortgages.

2. ———: ———. In such case, the action is not required to be brought in the county where the mortgaged land is situated.

3. **Corporations:** CONTRACTS: RESCISSION: EVIDENCE. Assuming that a promise to make the purchaser of stock vice-president of the corporation is void as against public policy, and that no action arises upon its breach; in an action to rescind the contract for the purchase of the stock on the ground of false representations, such promise may be shown as part of the fraud inducing the purchase.

4. **Evidence** examined, and *held* to require a decree for plaintiff.

5. **Corporations:** PURCHASE OF STOCK: RESCISSION: RIGHT OF RECOVERY. The fact that all purchasers of stock in the corporation (except the promoters) have been defrauded in the same way will not prevent one of them from recovering the full purchase price in an action of rescission for fraud, where neither the rights of creditors or third persons have intervened, nor proceedings instituted to distribute the corporate assets; other stockholders, in such case, are not "third persons" within the meaning of the rule, in the absence of circumstances giving rise to an estoppel, and then a different principle applies.

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

Holmes, Chambers & Mann, Slama & Donato, and *John C. Hartigan,* for appellant.

Rolland F. Ireland, for intervener.

J. H. Barry, for appellee.

Heard before MORRISSEY, C. J., LETTON, ROSE, ALDRICH and DAY, JJ., REDICK and SHEPHERD, District Judges.

REDICK, District Judge.

This is an action in equity to rescind the purchase of 2,010 shares of stock of defendant insurance company and to cancel the notes and mortgages given as security for the purchase price of 1,800 shares, and for a decree

for $5,250, the amount of cash paid for 210 shares. The ground alleged for rescission is fraudulent representations inducing the purchase. The action was brought in Saunders county, where defendant was served, while the land conveyed by the mortgages was situated in Dodge county. Decree was rendered in conformity with the prayer of the petition, and the insurance company appeals.

The first question for determination is one of jurisdiction. Defendant contends that the action, so far as the cancelation of the mortgages is concerned, is local as one affecting an interest in lands, and could only be brought in Dodge county. The argument is based upon the proposition that the action is to quiet title as against the mortgage lien; but the prayer of the petition asks no such relief; it is that the notes and mortgages "may be canceled and surrendered to this plaintiff." In such case, the decree does not directly affect the title to the land, but merely operates against the person of defendant; the action is analogous, conversely, to one for specific performance, which by express statute is classed as transitory (Rev. St. 1913, sec. 7614); the difference being only that in the one case performance is prayed, while, in the other excuse from performance is asked. The primary question in this case is the validity of the contract for purchase of the stock, dependent upon whether the contract was procured by fraud; it is a purely personal action; the delivery up and cancelation of the notes and mortgages were merely incidental. If it had been sought to have the record of the mortgages expunged and title quieted in plaintiff, the action must have been brought in Dodge county. The distinction between the cases is clearly pointed out in *State v. District Court,* 94 Minn. 370; *State v. District Court,* 120 Minn. 99, and cases cited. See, also, 40 Cyc. 58.

Among the representations and promises complained of was that defendant promised to make plaintiff vice-president of the insurance company at a salary of $2,500

a year. Evidence of this fact was objected to as incompetent, as such a contract is void and will not support an action. For purpose of the argument this may be conceded, and if the action were upon such contract for damages for its breach, the evidence would be incompetent except for the purpose of defeating the action. But this promise is set up as one of the inducements to plaintiff to subscribe for the stock, and the salary of $2,500 a year it was stated would take care of the interest on the notes. We think from a careful consideration of the evidence, and the situation of the parties, that the promise was a part of the fraudulent scheme, was deceitfully made, and evidence of it was properly received. That the promise could not be enforced as being against public policy did not deprive it of all influence upon plaintiff, for it might have been perfectly proper to perform it; that plaintiff was not guilty of any fraudulent intent in this connection was abundantly shown by the evidence.

Hubbard v. Long, 105 Mich. 442, is cited by appellant as authority for the proposition that a promise to give employment cannot be made the basis for a claim for rescission of a purchase of stock. That case, however, does not hold that the promise might not be shown as one of the inducements (rather the contrary), but that plaintiff could not in an action for fraud show the breach of such promise and recover as damages the difference between what he was earning and what he would have earned if the promise had been performed.

It is claimed that the evidence is insufficient to sustain the finding of the trial court, as to the agency of the persons making the representations, and the damage to plaintiff. A full statement of the manner in which this insurance company was organized will be found in *Ehlers v. Bankers Fire Ins. Co.,* 108 Neb. 756. It is sufficient here to state that the par value of the stock was $10 a share; that a pretended sale of 150,000 shares was made to the "Bankers Brokerage Company," a corporation organized at the same time and by some of the

same people, for $15 a share, and that the latter corporation sold the stock to the public at $25 a share before a dollar's worth of business was done, and even before a license was issued. The brokerage company was capitalized for $5,000, but gave its note to the insurance company for $2,225,000 on account of such purchase. The stock was never issued to the brokerage company, but when sales were made was issued direct to the purchaser, and $15 paid the insurance company, and $10 retained by the brokerage company as profit or commission. The mere statement of thees facts convinces the mind that the entire transaction was a fraud; the brokerage company and its agents were the agents of the insurance company for the sale of its stock, and that the stock was not of the value of $25 needs no argument to establish.

A number of errors in the reception of evidence are claimed; but, disregarding all the evidence objected to, there remains sufficient to compel the finding and judgment of the trial court.

One other question requires attention. At the instigation of the insurance company, which was to bear all cost thereof, a petition of intervention was filed by a stockholder, Ernest Hurst, in which it was alleged that all other sales of stock were made under the same conditions as that to plaintiff; that 47,519 shares were so sold at $25 a share, or $1,187,975; that the remaining assets of the company are only $634,960.73. The claim is that, if plaintiff is allowed to recover the full amount which he paid for the stock, it will result in loss to the others standing in like position, and that in equity the most he is entitled to is his proportion of the assets. The cases cited do not apply; they sustain the proposition that a rescission will not be granted when the rights of third parties have intervened. *Martin v. South Salem Land Co.,* 94 Va. 28, was a contest between creditors of the corporation and the stockholder who had paid only 30 per cent. of his subscription, *Dettra v. Kestner,* 147 Pa. St. 566, was an action by the receiver of a mutual in-

surance company to recover assessments to pay losses. In both these cases the question arose between creditors and the stockholder, and the others cited involve contracts between individuals under circumstances having no bearing upon the question here presented. No connection is shown between the contracts sought to be rescinded and the contracts of other stockholders; the rights of creditors are not involved; neither is the dissolution of the corporation and a distribution of its assets contemplated. We see no reason why plaintiff is not entitled to recover the full purchase price of the stock. The petition of intervener was properly dismissed.

We find no error in the record, and the decree of the district court is

AFFIRMED.

F. H. GILCREST LUMBER COMPANY, APPELLANT, V. SAMUEL D. RENGLER, APPELLEE.

FILED NOVEMBER 13, 1922. No. 22884.

1. **Master and Servant:** WORKMEN'S COMPENSATION: ACCIDENT: PRE-EXISTING DISEASE. Where an employee accidentally suffered a slight bruise upon the shin, which was not sufficient of itself to cause disability, but which, three days later, owing to a diseased condition of his blood, broke open and formed an ulcer at the center of the bruise; *held*, that the accident was the proximate cause of the disability resulting from the existence of the ulcer, and that such disability was caused by an accident arising out of the employment.

2. ———: ———: ———: ———. The fact that disability is prolonged by a pre-existing disease does not prevent the award of compensation for the entire period of such disability.

3. ———: ———: ———: ———. It is sufficient to show that the injury and pre-existing disease combined to produce disability, and not necessary to prove that the injury accelerated or aggravated the disease, in order to satisfy the requirement that the accident arise out of the employment.

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

Pratt, Hamer & Beynon and *E. T. Morrison,* for appellant.

W. T. Thompson, contra.

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

REDICK, District Judge.

This is an appeal from a judgment of the district court awarding appellee compensation for an accident occurring to him while in the employ of appellant. The injury was caused July 3, 1920, by a bundle of maple flooring weighing about 50 pounds falling against appellee's leg, causing a slight bruise on his shin, but did not break the skin. He suffered no inconvenience from it except a little pain, and that night he examined it and found "a black and blue mark on the shin," reported to the office the 4th and 5th of July, but did little work, as they were holidays; worked all day Tuesday at his desk; Tuesday night suffered more or less pain; Wednesday morning reported he would not be down to the office as his leg had broken open; first time he noticed the skin had been broken, pajamas stuck to it a little; called a doctor, put on hot applications for 48 days, lost weight from 120 pounds to 89 pounds, September 14, when he left for California; has done no work since except a little gardening up to the time of taking his deposition in November,1921; has been taking treatment ever since; there are still signs of a sore (November, 1921) not quite closed; no discharge for about four months; there was a slight discharge up to that time; his weight at this time was about normal. It is further shown that appellee had never had any trouble with his leg at the point of injury until after the occurrence of the falling lumber.

The evidence establishes the fact that, at the time of the accident, appellee was suffering from syphilis, and a year later the disease was found to be in its tertiary stage, being localized at the point of the injury to the

leg, up to the time of which occurrence it had remained dormant; that an ulcer formed and had not entirely healed a year after the accident and appellee's disability arises from this ulcer in his leg. The district court allowed claimant for full disability up to the date of the decree and until such time as it is shown disability has ceased, and the employer has appealed.

The question of fact for determination is: What is the proximate cause of appellee's condition, the accidental injury to the leg or the disease? Appellant claims that it is solely due to the disease, and that therefore it did not arise out of the employment.

There is considerable discussion in the evidence and briefs as to whether in a syphilitic patient trauma aggravates the disease or the disease aggravates the trauma, but this presents a question more academic than practical. Doctors for both sides agree that the healing processes will be retarded by the existence of a syphilitic condition of the blood, that is, an open wound which without specific or other infection would heal in, say, ten days, might not heal in as many months if syphilis were present. That the ulcer on appellee's leg appearing only four days after the injury and not healing for over a year was occasioned by the condition of the blood seems beyond question. According to the medical testimony, in the absence of such condition an ulcer would not be expected, or, if present, would not develop for three or four weeks, and would heal in much less time.

The crucial question, then, is whether or not there is any causal connection between the trauma and the disability of appellee. If such disability is attributable only to the disease, that is the only proximate cause; if, however, the disability is the result of a combination of trauma and disease, the former is a part of the proximate cause.

Dr. French, called by appellant, testified that the injury described by appellee, in the absence of syphilis, would not have caused any disability, and that in his

opinion the present disability was caused by the syphilitic condition and not the accident, and that he would expect to find the same condition of the shin bone if the accident had not happened. He also testified, however, that he would expect a different result for any injury such as appellee described in a person with syphilis and one without, and that "syphilis does aggravate the trauma," "because the slight disturbance we will say localized, upon any part of the body, will become aggravated by syphilis." Dr. Cameron testified that he diagnosed the case as periostitis, an injury to the covering of the bone, caused by a blow, and that thereby a running sore might be set up in a healthy person without breaking of the skin, and that he attributed appellee's condition in September when he left for California to both his blood condition and the injury to the leg.

We think the inference to be drawn from the testimony is that the primal cause of appellee's disability was the accident, aggravated by the disease from which he suffered. While Dr. French says he would expect to find the same condition of the shin bone if the accident had not happened, he does not say that the condition he found was entirely independent of causes set up by the accident; it is no more than to say that such an ulcer might exist without trauma; and his opinion that appellee's disability was caused by the disease and not the accident was not one which he was specially qualified to give as an expert, as the answer to that question is to be found by the application of the rules of logic rather than those of medicine. The evidence does not suggest any cause for the existence of the ulcer at the precise place of injury and so soon thereafter, other than the accident which occurred in the course of the employment. While it is true that the disease caused the wound to ulcerate, the evidence is most persuasive that without the wound there would have been no ulceration. We conclude that the accident was at least in part the proximate cause of appellee's disability, and the fact that his recovery was de-

layed by the existence of the disease will not prevent a full recovery.

Hills v. Oval Wood Dish Co., 191 Mich. 411, was a quite similar case in which the period of disability was prolonged by the existence of the same disease which had remained inactive until the injury, and it was there contended, the same as here, that "compensation 'should be allowed only for the period for which the injury complained of would disable a person of average condition not suffering' from the disease;" but the court said: "We agree with the Industrial Accident Board that, under the circumstances of this case, the act does not contemplate any such apportionment of the period of disability as respondents ask for. Assuming that such disability is being prolonged by the disease, there is yet no point at which the consequences of the injury cease to operate. It is the theory of respondents, not that the consequences of the injury cease, but that they are prolonged and extended. There is no part of the period of disability that would have happened,or would have continued, except for the injury. The consequences of the injury extend through the entire period, and so long as the incapacity of the employee for work results from the injury, it comes within the statute, even when prolonged by preexisting disease."

In *Hanson v. Dickinson,* 188 Ia. 728, a hammer which the workman was using slipped and struck him on the leg causing a red spot and black and blue discoloration; the skin was not broken, and he thought it would get all right; about three weeks later the leg became inflamed and swollen and an operation disclosed the existence of gonorrheal arthritis; there was evidence that "hidden gonorrhea can be lighted up by a bruise." The court sustained the finding of the industrial commissioner that the striking of the leg by the hammer was the proximate cause of claimant's disability, although without the existence of the disease, the injury would have been of a trivial nature.

In *Ramlow v. Moon Lake Ice Co.,* 192 Mich. 505, it was held that the fact that claimant had so weakened his system by the excessive use of alcoholic liquors that he was unable to withstand the effects of the injury does not shift the proximate cause of his death from his injury to his intemperance.

It is generally held that the fact that a preexisting disease contributed to the disability does not affect the right to compensation, provided the accident produces physical conditions which in connection with the disease bring about the disability. *Big Muddy Coal & Iron Co. v. Industrial Board,* 279 Ill. 235. The test to be applied is, did the employment develop the injury in a material degree? *Hartz v. Hartford Faience Co.,* 90 Conn. 539.

The cases cited by appellant are not in point. *McCoy v. Michigan Screw Co.,* 180 Mich. 454, was where claimant claimed for the loss of his eye from steel splinters entering it, but it was shown that the gonorrheal infection was caused by rubbing the eye with his hand *after* the accident, and not by the presence of the steel splinters, and the court held that the proximate cause of the loss of the eye was the rubbing. *Spring Valley Coal Co. v. Industrial Commission,* 289 Ill. 315, in which it was shown that the whole effect of the accident had spent its force in an impairment of vision, which was fully compensated, but that the subsequent blindness was caused by choroiditis independent of the injury. No connection was shown between the cinders in the eye and the disease. The case of *Borgsted v. Shults Bread Co.,* 167 N. Y. Supp. 647, really makes for appellee, as it holds claimant entitled to compensation for the prolonged disability caused by the syphilitic condition of the blood, though refusing it for the loss of vision, as having no causal connection with the accident which caused a broken leg. In *Springfield District Coal Mining Co. v. Industrial Commission,* 300 Ill. 28, compensation was sought for an aggravation or acceleration of heart disease claimed to have resulted from the employee

having been caught and squeezed between two coal cars; and it was held that he could recover only upon proof that the disease had been aggravated or accelerated by the accident which was insufficient in that case; it was a claim of permanent disability. Counsel quotes from that case: "He is not entitled to compensation for a condition resulting from a preexisting disease and not from an injury suffered in the course of employment and arising out of it. If there is a preexisting disease the employee is entitled to recover for all the consequences attributable to the injury in the acceleration or aggravation of such disease." But that is very far from holding that compensation may not be awarded for an increased or prolonged disability occasioned by preexisting disease, where the injury itself brought about the condition which, in turn, caused the disease to become active. In the case at bar it was not necessary, if indeed it was possible, for appellee to show that a disease of the blood had been aggravated by a trauma; it was sufficient to show the trauma and resulting disability, though the latter was contributed to by the disease. The other cases cited, *Blackburn v. Coffeyville Vitrified Brick & Tile Co.*, 107 Kan. 722, and *Eastman Co. v. Industrial Accident Commission*, 186 Cal. 587, are distinguishable along the same lines.

We think the disability for which compensation was awarded arose out of and in the course of the employment, and that the decree below is right, and it is

AFFIRMED.

EDWIN G. HOOK, APPELLEE AND CROSS-APPELLANT, V. JOHN BARTON PAYNE, DIRECTOR GENERAL OF RAILROADS, APPELLANT: JOHN MINOGUE ET AL., CROSS-APPELLEES.

FILED NOVEMBER 13, 1922. No. 22125.

1. **Trial:** VERDICT. Where in a negligence damage suit against a corporation and certain of its employees there is a plea of con-

tributory negligence on the part of the defendant, and evidence tending to establish the same, the jury may, if the evidence justifies it under the comparative negligence rule, find in favor of said employees and against the corporation.

2. **Evidence:** NEGATIVE EVIDENCE. If the witness was in such exceptional position, by reason of proximity and interest in what was going on, that by seeing or hearing he ought to have known that the thing in question was or was not done, and if this appears by way of foundation, he will be held to have knowledge through the medium of his senses which enables him to affirm, and his testimony that the thing was not done may be received to contradict the positive testimony of another that it was done; nor does admission of the possibility of error on the part of said witness alter the case.

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

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

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

Abbott, Rohn & Robins, for appellee.

F. Dolezal and *Thomas F. Hamer,* for cross-appellees.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and FLANSBURG, JJ., SHEPHERD, District Judge.

SHEPHERD, District Judge.

This is a railroad crossing accident case. The plaintiff was severely and permanently injured, and sued the company (per John Barton Payne, Director General) on the theory that the collision occurred by reason of its negligence, first, in that its engineer ran the crossing at a high and dangerous rate of speed without giving the statutory signals and without keeping a proper lookout; secondly, in that it permitted weeds to be upon its right of way at or near the crossing so as to prevent the plaintiff from a timely view of the train, and the engineer from a timely view of the plaintiff and his automobile; and, thirdly, in that another of the defendant's engineers, the engineer of a second train which was lying at the cross-

ing, motioned plaintiff to come across. The accident happened at what is known as the Middaugh crossing, a short distance east of Ames, Nebraska, and in it plaintiff's car was struck by Union Pacific Flyer No. 1 westbound from Fremont. It is not disputed that the train was going 50 or 55 miles an hour. It commonly ran at that speed, and, being behind time upon this occasion, it was perhaps exceeding schedule. There is much dispute as to whether the whistle was blown and the bell rung, and also in regard to weeds and the degree to which they obscured the view. Plaintiff's witnesses say that they stood uncut on the right of way and along the right of way fence, and greatly interfered with seeing an approaching train. On the other hand, defendant attempts to show that they were negligible in effect. The road on which the crossing was located led from the Lincoln Highway, 90 or a 100 feet north, in an "S" shaped meander across the track. This meander had a considerable depression in it and was rough, rutted and hard to drive.

The defendant company claims that the verdict was not supported by the evidence, a contention which is somewhat helped by the fact that the jury, though finding against the company in the sum of nearly $15,000, returned a verdict in favor of both of said engineers who were joined as party defendants. It cites *Zitnik v. Union P. R. Co.*, 91 Neb. 679, in support of this contention. That case was the subject of a vigorous dissent by Judges Reese and Fawcett; but, conceding the soundness of its majority opinion, the facts were so different that it can hardly have controlling application in the case at bar.

There was but one allegation of negligence pleaded, *i. e.*, that the defendants negligently ran an engine over the plaintiff, and no issue of contributory negligence whatever. The rule of comparative negligence prescribed by section 8834, Comp. St. 1922, was therefore not involved. Here contributory negligence is made prominent in both pleadings and evidence, and the rule referred to is unquestionably invoked. Obviously, the jury might

have properly found that there was negligence on the part of engineer Minogue—for instance, on account of his running the crossing so fast when his view of its approach from the north was partially obstructed—but not enough to amount to gross negligence in comparison with that of the plaintiff, and hence not enough to hold him liable. And yet, imputing such negligence on the part of its engineer to the company under the doctrine of *respondeat superior,* and finding, as it could have found, that the company was also primarily negligent in not cutting the weeds, the jury may have been convinced that the company was guilty of comparative gross negligence, and so have found against it. A number of similar combinations might be taken from the evidence to further illustrate. We do not view the *Zitnik* case as applicable to the different facts of this case.

Nor are we able, after a careful examination of the testimony, to say as a matter of law that the negative testimony of the plaintiff on the ringing of the bell and sounding of the whistle was not sufficient to contradict the positive testimony of the trainmen that these things were actually done, so as to make a question for the jury. Negative testimony sufficient to afford such contradiction should be from such knowledge through the medium of the senses as would enable the witness to speak affirmatively. But to speak affirmatively is not to speak infallibly. To give such interpretation to the word would be absurd. Infallibility is an attribute only of the Infinite, and no human knowledge derived from the senses can approach it. And the converse is equally true. Though the testimony be the most positive, though the witness may say, "I did," the possibility of error still remains. The witness Frank Mundy was close at hand, interested in the operation of the passing train because it was new to him, looking and listening, observing its speed, standing at gaze to see what he could see in connection with it. He said all this on direct examination, and testified that the train did not whistle. On

cross-examination he admitted the possibility that it may have whistled, but repeated that he did not think that it did. The facts being as stated, it is fair to say that he had knowledge derived through the medium of his senses which enabled him to affirm that the whistle was not sounded. Admitting the possibility that it might have been sounded does not detract from the certainty of his affirmance. It simply betokens an understanding of the limitations of human sense. The conditions were such that he should have seen and heard and known. When he spoke first and said that the whistle was not blown, he spoke with all the certainty of the engineer when the latter said that it was blown. This satisfied the rule and made his evidence proper to be considered by the jury as contradicting the testimony of the engineer and other trainmen.

It follows, then, that there was evidence from which the jury might reasonably find in favor of the plaintiff and against the defendant company, even though we adopt the contention of said company that weeds alone cannot constitute an independent actionable element of negligence, unless it be decided by this court as a matter of law that the plaintiff was guilty of more than slight negligence in driving upon the track.

The question thus reached is one of much difficulty. It is commonly hard to understand how a plaintiff could have been struck on a crossing had be been in the exercise of due care. But the trouble is, the student of these cases sees so much of injury and disaster which might have been avoided by the exercise of just a little more care that his standard of ordinary care keeps continually advancing in the interest of preventing accident. The thing to be decided, however, is not what the court would have done had the question of fact been presented to it in the first instance, but whether or not there was evidence respecting the act of the plaintiff from which reasonable men might find him entitled to a recovery according to the forms of law.

Plaintiff approached the crossing by the muddy little meander leading from the Lincoln Highway. Granting, as a number of the witnesses besides the plaintiff testify, that the weeds grew high along the east side of this short road, obstructing the view of the track for a distance variously estimated from 100 to 300 yards, it is understandable that a reasonably careful man, somewhat confused with the difficulties of the road and with his Ford running noisily in low, might have driven on to the right of way without being aware of the proximity of the train. And from there his rate of speed would carry him to the track in just about the time that it would take the flyer to traverse a distance of 250 or 300 yards and run him down. The company insists, and its photographs to some extent support it, that a first view from the plaintiff's car after it was on the right of way must, if it was really taken, have discovered the approaching train. But Mrs. Middaugh and the witness Mundy, as well as plaintiff, testify that the weeds not only grew in and along the right of way fence but stood uncut out in the right of way where the old Northwestern switch had been, still obstructing the view of the track to the east and obscuring the approach of the train. Both engineer and fireman say that they did not see plaintiff's car till they were right upon it, though it must have been within their line of vision save for these weeds or some other obstruction. The car was going at 5 miles an hour, the train at nearly 60. Plaintiff says that he was about to stop entirely at a point approximately 15 feet north of the track, but, catching the signal of the freight engineer who stood near his engine on the south track, he looked no further and drove across.

It is probably true that, had he looked and listened at this point, he could and would have stopped his car and avoided the collision. But the question with which we are concerned is whether or not in ceasing to look further and driving on in obedience to the signal of said engineman he abandoned the exercise of ordinary care,

and, if so, whether or not his negligence in this regard was more than slight. We feel sure that both of these inquiries, certainly the latter, should be answered in the negative. The engineer on the south side stood where there was nothing whatever to obstruct his view, and his character as a railroad man upon duty gave authority to his act and inspired confidence in his direction. That his authority was less real than apparent makes no difference. His act justified the plaintiff in relaxing his own lookout and in accepting that of the engineman in its stead. Prudent persons would have done as the plaintiff did. Perhaps a surpassingly cautious man would have made absolutely sure, but such abnormality of care is neither expected nor required.

Of course, in thus resolving the evidence, every proper presumption has been indulged in favor of the plaintiff, and the fullest credence warrantable has been given to the testimony of all of his witnesses. This is as it should be when the reviewing court passes upon an assignment of error challenging the sufficiency of the evidence to sustain the verdict.

Counsel for the company has not failed to set forth the rule of care required of him who essays to cross a railroad track, and to marshal law and facts in a masterly way in support of his contention for a reversal. But the rule in *Rickert v. Union P. R. Co.*, 100 Neb. 304, and *Askey v. Chicago, B. & Q. R. Co.*, 101 Neb. 266, finds exception in the facts of this case. One should look where he may see and listen where he may hear, is the doctrine in these cases. But the court expressly adds, *and if he fails to exercise such precautions without reasonable excuse he cannot recover.* We have before referred to the circumstance which afforded the plaintiff an excuse for not looking further when he was about to stop on the north of the track, but caught the signal of the trainman and went on. We think that such excuse was reasonable, as hereinbefore indicated, and that in connection with other things it was sufficient to warrant the

trial court in submitting the case to the jury.

Not deeming it necessary to decide whether or not weeds and grass upon the right of way may be an independent basis of recovery in a negligence case, and holding the views above expressed as to the sufficiency of the evidence to sustain the verdict, the court is of opinion that the decision of the lower court should be affirmed

AFFIRMED.

JOHN SKALA, APPELLEE, V. JOHN BROCKMAN, APPELLANT.

FILED NOVEMBER 13, 1922. No. 22135.

1. **Process:** CONSTRUCTIVE SERVICE. An absconding resident may be served with summons by publication in accordance with the provisions of subdivision 5, sec. 7640, Rev. St. 1913, which provides that service may be made in such wise "in all actions where the defendant, being a resident of the state, has departed therefrom, or from the county of his residence, with intent to delay or defraud his creditors or to avoid the service of a summons or keeps himself concealed therein with like intent."
2. ———: ———: AFFIDAVIT. And where the affidavit for service by publication states that service cannot be made on the defendant within the state, and states facts that show that the case is one of those mentioned in subdivision 5, sec. 7640, Rev. St. 1913, it is sufficient.
3. **Venue.** In this case, *held* that the action was one which could be brought within Cuming county, Nebraska, whether the defendant was a resident or a nonresident.

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

A. R. Oleson, for appellant.

John J. Gross and *P. M. Moodie, contra.*

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

SHEPHERD, District Judge.

This is a question purely of jurisdiction. On the 7th

day of September, 1920, the plaintiff, John Skala, sued his lessee, John Brockman, for a chattel mortgage on crops, according to the terms of the lease between them. He alleged that defendant by said lease agreed to give him such a mortgage upon demand to secure rent in the sum of $500; that on the 3d day of September, 1920, he went upon the land to make such demand; that defendant had concealed himself so that plaintiff was unable to find him, then or since, and had absconded with intent to defraud plaintiff of his due and to prevent him from making the demand in question. The petition contains other allegations appropriate to the cause of action, which need not be recited in this opinion.

Upon the filing of the petition, September 7, as aforesaid, a summons was issued and served upon the defendant by copy left at his last known domicile on the farm, and immediately thereafter plaintiff proceeded to get service by publication in addition, completing the same and filing proof thereof on the 2d day of October of the same year. The affidavit for publication, which is the subject of attack, is here set out, omitting the title, signature, jurat and formal parts generally:

"John Skala, being first duly sworn, says that he is the plaintiff in an action started in the district court of Cuming county, Nebraska, against John Brockman; that said John Brockman has been a resident of Cuming county, Nebraska; that he has departed and absconded from said Cuming county, Nebraska, with intent to delay and defraud said plaintiff in the collection of the debt mentioned in the petition in said action; that he keeps himself concealed with the intent to so delay and defraud the plaintiff and to avoid the service upon him of a summons in said action; and that because of the said actions of said defendant it is impossible to serve him with a summons in this state; further affiant saith not."

On the 7th day of October, 1920, shortly following the completion of such service by publication, the defendant appeared specially and objected to the jurisdiction of the

court over his person. It was stated in his objections, and in affidavits by the defendant and his wife, that defendant had left on the 2d of September, 1920, with the intention of abandoning his residence in Nebraska and permanently residing in Connersville, Indiana; that he had established a residence there on the 7th of September, 1920, and that he had been a nonresident of Nebraska from and after the date of his described departure from the state. He followed this objection to the jurisdiction of the court over his person by additional objections filed October 14, 1920, in these words:

"Comes now the above named defendant and objects to the jurisdiction of the court in the above entitled action over the person of defendant and of the cause of action therein for the following reasons, to wit: (1) That there is no sufficient affidavit in said action authorizing service upon defendant by publication; (2) that the court is without jurisdiction in said action to proceed against a nonresident defendant; (3) that the pretended service by publication in said action is unauthorized and void and confers no jurisdiction upon this court in said action either upon the subject of the action or over the person of the defendant."

The court sustained these objections as to jurisdiction acquired by the residence service first made, but overruled them as to jurisdiction acquired by the service by publication, and, defendant refusing to plead further, took proofs and entered a decree in favor of the plaintiff.

It is of importance, and should be noted, that the court found the facts as they were alleged in the petition, that is to say, that the defendant had departed from the county and state of his residence to hinder and delay his creditors, etc.

The defendant contends in his brief that he was a nonresident, and on that assumption insists that, in order to get service upon him, the plaintiff must have followed him to another state. But where the absconder remains

a resident of Nebraska the case falls under section 7620, Rev. St. 1913, and the plaintiff may sue him in the county in which he resides, taking care to serve him according to the provisions of the statute, *i. e.*, under subdivision 5, sec. 7640, Rev. St. 1913, the section providing for service by publication. This was the theory of the plaintiff, who, so far from asserting that defendant was a nonresident, inferentially pleaded the opposite, alleging that he had left to defraud him out of his due, and then proceeded to serve him as if he was a resident, first, by copy of summons left at his home, then by publication according to the particular terms of the appropriate subdivision of said section 7640.

The finding of the court is entirely in consonance with this. The decree proceeds: "This cause then coming on to be heard upon the petition of the plaintiff and the evidence offered in support thereof, the court finds that the allegations of the plaintiff's petition are true, and a finding is made to that effect as though said allegations were incorporated into and made part of this petition." (Journal entry.) What this evidence was we are unable to say, inasmuch as there is no bill of exceptions here. But we are bound to conclude that there was enough in it to satisfy the trial court that defendant remained a resident, though an absconder, and so determined in his disposition of the case.

Unless, therefore, the affidavit for publication was insufficient, the decision of the lower court must be affirmed. The nature of the action is stated in such affidavit in order that it may appear whether or not the case falls within the category of cases in which service by publication is authorized. Section 7641, Rev. St. 1913, immediately following section 7640 thereof, which is the section setting forth such category, is: "Before service can be made by publication, an affidavit must be filed that service of a summons cannot be made within this state on the defendant or defendants to be served by publication, and that the case is one of those mentioned in

the preceding section. When such affidavit is filed, the party may proceed to make service by publication."

The preceding section in its fifth subdivision provides for service by publication, "in all actions where the defendant, being a resident of the state, has departed therefrom, or from the county of his residence, with intent to delay or defraud his creditors or to avoid the service of a summons or keeps himself concealed therein with like intent."

As applied to the particular situation, none of the defendant's authorities supports his contention that this affidavit is not sufficient. "No case, unless it is identical in its facts, can serve as a controlling precedent for another, for differences, slight in themselves, may, through their relation with other facts, turn the balance one way or the other." *Home Telephone Co. v. City of Los Angeles,* 211 U. S. 265, 274. We are satisfied that the affidavit was sufficient.

That the doctrine of *Horkey v. Kendall,* 53 Neb. 522, does not condemn the affidavit because it was made before the attorney is quite clear, as pointed out in appellee's brief. No attack upon this service was made against it in the court below, and none will be considered in this review.

Supposing that the defendant was a nonresident, and that the court had so found, the question presented by the able brief of defendant would be of great interest. Even then, in the opinion of the court, it would not do to assent to defendant's contention that the action was a personal one. As suggested by counsel for the plaintiff, finding support in *Ryan v. Donley,* 69 Neb. 623, the action was an action *in rem* in which the *res*, the crops belonging to the defendant, were in the custody of equity from the time of the commencement of the action. Section 7619, Rev. St. 1913, authorized, we think, the bringing of the action in Cuming county, and, reasoning along familiar lines, the problem works to the same conclu-

sion. But it is unnecessary to discuss this, as the conclusions above arrived at dispose of the case.

AFFIRMED.

WILLIAM R. MCGREW, APPELLANT, V. NEBRASKA TELEPHONE COMPANY, APPELLEE.

FILED NOVEMBER 13, 1922. No. 22146.

1. **Telegraphs and Telephones:** DEPRIVATION OF SERVICE: LIABILITY. One who uses a station on a private branch telephone service of his corporation for his own purposes and on his own private business, notwithstanding that said service is expressly limited by contract with the telephone company to the business of said corporation, all in accordance with the order of the state railway commission, cannot make an injury to such private business of his own, caused by a deprivation of the continuance of such personal and private use by him, a basis for the recovery of damages from the company.
2. **Principal and Agent:** ACTS OF AGENT. He who commits the matter of readjustment of his own and his concern's service connections and relations with a telephone company to a servant cannot accept a portion of such servant's doings in that behalf, and reject the rest, at least without notice to said company.
3. **Trial:** DIRECTION OF VERDICT. *Held*, that reasonable men could not have concluded from the evidence adduced that the order for what the defendant did was not given upon the authority of the plaintiff; and that the court's direction of a verdict in defendant's favor was not erroneous.

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

Blackburn & King, for appellant.

Edgar M. Morsman, Jr., contra.

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

SHEPHERD, District Judge.

The plaintiff was listed in the October, 1917, issue of defendant's directory in four ways: (1) "Douglas 6345

McGrew, Dr. W. R. Phys., 714 Keeline Bldg."; (2) "Douglas 2170 McGrew, Dr. W. R. Office, 735-40 Keeline Bld.;" (3) "Harney 5181 McGrew, Dr. W. R. Res. 506 So. 31st St.;" (4) "Douglas 6345 McGrew, W. R." The first was an alphabetical listing by virtue of a joint user service with one Dr. Pollard under the latter's contract with the defendant company, and the last was a business classification listing under said contract and service. The second was an alphabetical listing going with a station on a P. B. X. (private branch exchange) which the Prairie Life Insurance Company had by contract with the defendant, and was all that plaintiff could claim under such a P. B. X. And the third was by virtue of plaintiff's residence telephone agreement.

By the joint user of 6345, above referred to, the plaintiff, McGrew, had general telephone service. By the described P. B. X. he could telephone or be telephoned to only in connection with the business of the Prairie Life Insurance Company. We hold this from the language of the contract, though plaintiff does not concede it. It remains to be explained that the plaintiff was at all times the medical director of said insurance company, and that in order to give him a station on its P. B. X. it was necessary to run a wire from the company's suite, out and around other offices, to 714 Keeline building, where plaintiff had his professional offices with Dr. Pollard, and joint user of Douglas 6345. This explains why plaintiff was shown in the above listings at both 714 and 735-40 of the building. It also indicates, as was the fact, that he had two telephones in his room at 714, one of which was in connection with 6345 and the other of which was his P. B. X. connection with 2170 in the insurance company's office.

Later in the fall, and before the issue of the February, 1918, telephone directory, Dr. McGrew, having been made the president of the Prairie Life Insurance Company, as well as its medical director, gave up his office at 714 of the Keeline building and ordered out his two telephones

there. His brief concedes so much, though it probably was not his intention to give up his station on the company P. B. X., or the listing that went with it, but only to have that station transferred to the company offices at 735-40 and to have his P. B. X. listing changed to correspond. The order for these removals was conveyed by telephone from the young lady operator (so she styles herself) in the Prairie Life Company's offices to the defendant, which at once took out said telephones and proceeded to issue its February directory without any listing of Dr. McGrew either at 714 or 735-40. This was more than he wanted, for, as the giving up of his joint user service at the former number automatically removed his name from the business classification listing, he was left without mention in the new directory, except as possessing a telephone at his residence. He alleges in his petition that he was entitled to a listing of his name, telephone number, and office address in said February issue; that defendant was negligent in omitting the same; and that in consequence he suffered damage in loss of practice to the extent of $5,000. The defendant telephone company denied the averments of the petition, and said that it conducts its business under the state railway commission, which exercises exclusive control of its rates and service, and prescribes its rules in all details of its operation; that all of its service is under contract with subscribers in accordance with such rules; that it has a joint user service whereby one who pays $1.50 a month may use the telephone of a subscriber, providing it be in the subscriber's room or in a room adjacent thereto, and may have alphabetical and business listing in the company's directories; that plaintiff, McGrew, had such a joint user with Dr. Pollard, but gave it up in December, 1917; and that he never was a subscriber to defendant's business service. The answer contains other matter not necessary to be noted here. The facts established by the evidence are in large part as heretofore stated. The trial court directed a verdict for the defendant company. The

assignments of error are two: That the court erred in so directing a verdict; and that the court erred in admitting in evidence exhibit 21, the general supplemental tariff of the defendant.

It appears that the defendant took and acted upon orders over the telephone for discontinuances and reduction of service, though requiring written verification for extensions and new business. It was doubtless figured that the work of reduction and discontinuance would by its very nature discover mistakes, if mistakes there were, and lead to their immediate correction. But, while the rule may have worked well in the main, it resulted in this case in the removal of both listings as well as both telephones, a matter of at least much irritation to the doctor, who had upon the giving up of his office at 714, moved over to 735-40 and used a station on the P. B. X. of the Prairie Life for all of his business, company and personal.

The change of service clerk at the telephone exchange took the message from the Prairie Life operator and is positive in her testimony that the latter ordered just what was done. Examination of her information forms and work orders (exhibits 13, 14, etc.) rather confirms than discredits her testimony in this regard. And the Prairie Life operator or stenographer does not testify in opposition—does not testify at all. True, Dr. McGrew testifies that he gave no order for such removal or listing. But he personally gave no order whatever to the defendant in connection with the removal of his telephones at 714. The order was given by the Prairie Life operator. It was according to his purpose that the two telephones be removed. In his brief he stands sponsor for that part of what the girl ordered. Such being the case, he should not be permitted, we think, to repudiate the remainder of her order. Reasonable men could not have concluded from the evidence adduced that the order for what the defendant did was not given upon the authority of the plaintiff.

Further consideration supports the judgment of the district court on other grounds. Considering that the withdrawal of plaintiff's listing was unauthorized, negligent, and such as to damage him, upon what basis could he recover? Clearly, if at all, upon a right to use a station on his company's 2170 P. B. X. for his own private business. But he had no such right. He had no contractual relation with the defendant and his right to use such station was limited entirely to his company's business. Exhibits 20 and 23 make this obvious: "The right of the lessee is to use the instruments and connecting wire where the lessor may place them, but not elsewhere, nor in connection with another line, under such rules as the lessor may from time to time prescribe, for the purpose of personal wire connection within the zone and with persons whom the exchange may connect with him for that purpose, upon his own and their business."

It is quite possible that the plaintiff habitually used the telephone of his company for purposes of his own, unconnected with the business of the company of which he was the president. Employees and officers of corporations commonly do. But this is by sufferance, and can work no estoppel against the company furnishing the service, nor establish such persons in a right to said use. The plaintiff was not entitled to user or to listing in his own behalf, and the denial of the same by the defendant, whether intentional or not, cannot be the basis of a recovery in his favor.

Taking this view of the case, it is quite immaterial that exhibit 21, the general supplemental tariff schedule, was received in evidence. We believe that the lower court committed no error in directing a verdict for the defendant.

AFFIRMED.

FRED HANS V. STATE OF NEBRASKA.

FILED NOVEMBER 13, 1922. No. 22508.

1. **Criminal Law:** VERDICT: SUFFICIENCY OF EVIDENCE. Where the evidence is sufficient to justify a jury in believing therefrom beyond reasonable doubt that the accused is guilty, the verdict will not be set aside because of the mere possibility of his innocence.
2. Evidence examined, and found sufficient to sustain the verdict of the jury.
3. **Criminal Law:** MISCONDUCT OF COURT AND COUNCIL: REVIEW. Alleged misconduct of court and counsel during argument, though argued in the brief, will not be considered, in the absence of any reference thereto in the record.

ERROR to the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

C. E. Walsh and *Ray J. Abbott,* for plaintiff in error.

Clarence A. Davis, Attorney General, and *Mason Wheeler, contra.*

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

SHEPHERD, District Judge.

The defendant, Fred Hans, stoutly insists that the verdict of his conviction in the trial court was not sustained by the evidence, but upon a careful examination of the record we are unable to agree with his contention.

He was charged with receiving stolen property, a Ford sedan, belonging to one Rudolph Luttgen, of Omaha. The car was taken on the city street, and about three weeks later the owner found it in the hands of Alfred Hans, a brother of the defendant, who said that the latter had recently purchased it. Mr. Luttgen's identification of his property was complete. Indeed, defendant does not seriously contend that the car was not Luttgen's, or that it was not stolen from Luttgen, but only that he was not guilty of stealing it, and that he did not know that it

had been stolen when he bought it. He asserted, as did his brother, that he had innocently purchased it for $400 in cash from a J. H. Clark, who had a bill of sale for it from Jake Hudspeth, an Omaha dealer in used motor vehicles. And in this two of his fellow employees at the garage where he worked corroborated him.

On the other hand, the state showed by testimony, both competent and convincing, that the said Clark was none other than the said Alfred Hans, and that the described bill of sale from Hudspeth was for an old Ford chassis actually bought by Alfred, which bill of sale was more or less cunningly altered to show the purchase of a sedan instead of such chassis. It further appears by competent evidence that the engine number of the sedan was obviously defaced and changed, a circumstance which in itself infers guilt on the defendant's part, and also that the two brothers were in close association, much in each other's company, living together, and using their cars considerably in common.

From all this, which the evidence was sufficient to establish, if believed, the jury were at liberty to find that the defendant was guilty of the crime charged. And since the issue was fairly submitted under unimpeachable instructions, both as to reasonable doubt and otherwise, the verdict will not be disturbed. Where the evidence is sufficient to justify reasonable men in believing beyond reasonable doubt that an accused is guilty, the reviewing court will not set aside the finding of the jury because of the possibility of his innocence.

Complaint is made by defendant that the county attorney was guilty of misconduct in his argument to the jury, and that the trial judge was remiss in leaving the courtroom for a time while such argument was going on. But there is no reference to anything of the kind in the bill of exceptions, and, being without support in the record, it cannot be considered by this court.

The other assignments of error are not much argued in defendant's brief, and perhaps should not be noticed

in this opinion. We have, however, examined them in close connection with the record. They pertain to the conduct of the case upon trial, and are mainly directed to the rulings of the court in the reception of evidence, evidence as to the sale of the Ford chassis from Hudspeth to Clark, and as to the finding of the same at or near the Hans home, evidence as to the alteration of the bill of sale in question, and evidence as to the identity of Clark with Alfred Hans. Such evidence was generally competent and material. Nor can we find any ruling in the record wherein the court committed reversible error.

The judgment of the lower court should therefore be, and it hereby is

AFFIRMED.

HOWARD F. BRAY V. STATE OF NEBRASKA.

FILED NOVEMBER 25, 1922. No. 22578.

Evidence examined, and *held* to support the verdict. *Held*, further, that no prejudicial error is shown by the record.

ERROR to the district court for Thurston county: GUY T. GRAVES, JUDGE. *Affirmed.*

A. R. Oleson, for plaintiff in error.

Clarence A. Davis, Attorney General, and *Charles S. Reed, contra.*

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

LETTON, J.

Howard F. Bray was convicted of unlawfully being in possession of intoxicating liquor in a place other than his dwelling-house. The complaint as it appeared in the original transcript was defective in several respects, but, upon a diminution of the record being suggested, a true copy was made a part of the transcript. Several of the assignments of error are based upon the defect in the

original copy of the complaint, and are now unavailing.

A witness was allowed to testify that he smelled the contents of the bottle and believed it to be intoxicating liquor. It is said no sufficient foundation was laid for this testimony. The undisputed testimony shows that a portion of the contents of the bottle was transmitted, under seal, to the state chemist, and, by a stipulation in the case, his report upon the analysis, which shows the alcoholic contents of the liquid to be 50.6 per cent. alcohol, and that its taste resembled newly distilled whisky, was in evidence in the case. The error, if any, was not prejudicial.

Instructions No. 4 and No. 6 are complained of. We see nothing erroneous in instruction No. 4.

It is said instruction No. 6 gave undue prominence to the interest defendant had in the result of the case and to the weight to be given his testimony. A like instruction has been approved in some states. In *Peterson v. State,* 84 Neb. 76, in which case the judgment was reversed for prejudicial error in another respect, it was said that such an instruction gave undue prominence to the fact that defendant's interest might induce him to testify falsely, and the instruction, with others, was criticised, but the court said: "We are not inclined to reverse the case because of such errors alone." The court seems to have based its strictures upon the instruction in the case of *Burk v. State,* 79 Neb. 241, but it is pointed out in that case that the statement criticised was referred to in three instructions, and that the fact of defendant's interest in the result of the prosecution was thus unduly emphasized and kept prominently before the jury, and that by such repetition it would seem quite probable that the jury "were led to consider it their duty to give his evidence little or no weight in determining the question of his guilt." This it is held was prejudicial error. No such condition exists in this case. The general instruction as to credibility of witnesses was sufficient, more was unnecessary; but, taking the in-

structions as a whole, no error justifying a reversal was committed.

The jury were justified in finding the defendant guilty from the evidence.

AFFIRMED.

JOHN W. HALL V. STATE OF NEBRASKA.

FILED NOVEMBER 25, 1922. No. 22755.

1. **Criminal Law:** ERROR: REVIEW. Alleged errors not brought to the attention of the trial court in any way in a motion for new trial are not entitled to be considered and reviewed by this court.
2. **Evidence** examined, and *held* to support the verdict.

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

J. H. Hanley, M. F. O'Donnell and *P. H. McNally,* for plaintiff in error.

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

Heard before MORRISSEY, C. J., ALDRICH, DAY, FLANSBURG, ROSE and LETTON, JJ., REDICK and SHEPHERD, District Judges.

LETTON, J.

Bradley, Martin & Smith conducted a mail order business dealing in general merchandise at Thirteenth street and Capitol avenue in Omaha. The accused had been employed by them for several years prior to April 15, 1921. He was in charge of the warehouse and shipping department, and had three keys, two of them to outside doors and one to an inside door. His connection with the firm ceased on April 15, 1921. On that date some police officers, in company with Mr. Smith, a member of the firm, made a search of the home of accused. At that time, according to Hall's own testimony, he settled with Mr.

Smith for the sum of $1,000, partly evidenced by notes, upon which he has paid over $600. Subsequent to April 15, other goods were missed by Bradley, Martin & Smith. On information given to the police department, certain police officers were secreted in the building on the night of November 21. In the night three men with flash lights entered the warehouse, and, after a melee, were arrested. On one of them, Monk Trummer, were found three keys, one of which, the evidence on behalf of the state tends to prove, was one of the original keys furnished to the accused when he was employed by the firm, and the other two were duplicates of other keys which had been furnished to him. Another search warrant was sworn out, the accused's house again searched, and a number of articles, among them a rifle, a police revolver, a number of ammeters, some gingham, some ladies' hose, etc., were found. These were all identified more or less positively as being part of the stock that was in the warehouse after April 15.

The testimony on behalf of the defense is that some of the goods had been owned by accused for years, and that the other articles had been settled for with Mr. Smith on April 21. A number of police officers and Mr. Smith testified positively to the fact that they searched the house of the accused, and the garage, thoroughly on April 21 and that none of these goods were there at that time, and other witnesses testify that the goods were in the warehouse after that date. On the other hand, defendant, his wife and his daughter testified that these goods were all in the house on April 21, and that the officers and Smith only made a very partial search. One or two other witnesses testified that they had seen one or two of the articles before April 15, 1921, at defendant's house. On this issue of fact the jury found for the state.

It is asserted that it has not been proved that the goods found were stolen goods, or that they were stolen, or received with knowledge that they were stolen, in Douglas county, Nebraska. We are satisfied that the

identification was sufficient as to goods found in the house of more than the value of $35. Defendant's counsel must have overlooked the fact that several witnesses testified that the goods were taken from Bradley, Martin & Smith's place of business, and there is direct testimony by one witness that this was in Omaha, Douglas county, Nebraska. There is also direct testimony that Hall's house is in the same county. Aside from this direct proof, there is sufficient circumstantial evidence to establish these facts. We have examined the other points relied on to establish a failure of proof, and find them equally unconvincing.

The only error assigned in the motion for a new trial is that the verdict is not sustained by the evidence. Several other alleged errors are assigned in the briefs and have been considered and held not sufficient to justify a reversal; but, in view of the fact that they were not called to the attention of the trial court in the motion for a new trial, and hence are not entitled to be reviewed, the opinion will not be extended by a discussion of them. We are satisfied that no prejudicial error occurred, and that there is ample evidence to sustain the verdict.

AFFIRMED.

DEAN S. EFNER ET AL., APPELLEES AND CROSS-APPELLANTS, v. FLORENCE E. REYNOLDS, APPELLANT: INGEBERT J. THOMSEN, CROSS-APPELLEE.

FILED NOVEMBER 25, 1922. No. 22619.

1. **Partnership:** DISSOLUTION: MANAGING AGENT: COMPENSATION. After a court has dissolved a commercial partnership, stated an account between the partners, ordered a sale of the partnership property and appointed the managing partner to conduct the partnership enterprise until the judicial sale is made, he may be allowed reasonable compensation for his services under his appointment, without regard to his salary as fixed by the partnership agreement.

2. ———: ———: EXPENSES. In a proceeding to settle the af-

fairs of a partnership conducting a newspaper enterprise, the allowance of the expenses of conducting a subscription contest under authority and direction of the court, *held* not shown to be erroneous.

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

J. L. McPheely, F. L. Carrico and *James & Danley,* for appellant.

C. P. Anderbery and *J. H. Robb,* for appellees.

King & Bracken, for cross-appellee.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and FLANSBURG, JJ., SHEPHERD, District Judge.

ROSE, J.

The nature of this case was stated in a former opinion as follows:

"This is a suit in equity for a partnership accounting, for a judicial sale of partnership property and for a distribution of the proceeds of the sale. The name of the firm is the Minden News Publishing Company and its business is the publication of a weekly newspaper, called 'The Minden News,' in connection with job-printing. There are three partners—Dean S. Efner and his wife, plaintiffs, and Florence E. Reynolds, defendant. Plaintiffs reside in Long Beach, California. Defendant resides in Minden and is the editress of the Minden News and the manager of the partnership. The litigation grew out of a controversy over the claim of defendant for compensation for services. In her answer she joined plaintiffs in a demand for an accounting and for the closing of the partnership affairs. The material issues are the proportionate shares of the partners in the partnership property and defendant's claim for compensation." *Efner v. Reynolds,* 105 Neb. 646.

In the original accounting the district court allowed defendant, the managing partner, $40 a week for her

services, notwithstanding an implied partnership agreement fixing her weekly compensation at $20 and Dean S. Efner's at $5. From the decree allowing $40 a week and fixing the proportionate shares of the partners in the partnership property, the defendant appealed. The issues were determined on appeal as follows:

"The implied agreement which allows defendant $20 a week and Dean S. Efner $5 a week must be respected by both of them until the final decree stating the account and directing a judicial sale of the partnership property is rendered. Plaintiffs' proportionate share will be 18/25 and defendant's 7/25 of the net proceeds." *Efner v. Reynolds*, 105 Neb. 646.

The original decree of the district court was reversed and the cause remanded for further proceedings. In the court below a master in chancery to sell the newspaper and printing plant was appointed, with directions to keep it in operation to prevent losses resulting from a suspension of the enterprise. To that end defendant was by order of the trial court retained as manager and the reasonable value of her services in that capacity was $40 a week. The property was sold and the sale confirmed. The trial court, however, interpreting the opinion on the former appeal to limit her salary, while serving under the master in chancery, to the amount fixed by the partnership agreement, allowed her $20 a week only. From that part of the decree there is an appeal.

The trial court was in error in limiting the compensation of defendant under her new employment to the salary fixed by the partnership agreement, which was only half the reasonable value of her services in that capacity. This limitation was not intimated in the former opinion. The contrary is clearly indicated by the following language:

"The implied agreement which allows defendant $20 a week and Dean S. Efner $5 a week must be respected by both of them until the final decree stating the account

and directing a judicial sale of the partnership property is rendered." *Efner v. Reynolds,* 105 Neb. 646.

This weekly compensation continued during defendant's management under the partnership arrangement and during the time she voluntarily remained in charge to manage the partnership affairs. After the entry of the final decree stating the account and directing the judicial sale, the plant was operated by the district court, and not by the partnership, the master in chancery and the manager being court officers subject to judicial control at all times. In appointing them and in allowing claims for running expenses and for expenses in making the sale, the district court was not embarrassed by any partnership agreement as to compensation. While in the service of the district court as manager, defendant was entitled to the reasonable value of her services, or $40 a week. This part of the decree is therefore reversed, with a direction to correct the error.

In a cross-appeal by plaintiffs the allowance of expenses aggregating $3,072.32 is assailed as erroneous. These expenses were incurred by the master in chancery in conducting the newspaper plant under the management of defendant. They grew out of a contest to procure subscriptions to the Minden News, prizes being awarded to successful contestants. It is argued by plaintiffs that the contest was unauthorized and illegal, and that the expenses incurred in conducting it were not allowable as legitimate expenses incurred in operating the newspaper plant. The principal prize was won by the wife of the master in chancery and her participation in the contest is criticised. Plaintiffs knew of the contest and their excuse for not stopping it was their inability to give an injunction bond. The persons conducting the contest were officers of the district court and were at all times subject to its orders. A bond for an injunction was not needed. An application and a proper showing were all that was necessary. This step was not taken. The master in chancery and the manager acted under

the directions of the district court for the benefit of the publishing enterprise with a view to increasing its sale value. The subscription list was practically doubled with a corresponding increase in the value of the Minden News as an advertising medium. In addition, the net proceeds of the contest amounted to $1,293.96, and of this plaintiffs will receive their distributive share. The trial court approved the contest and the manner in which it was conducted. The evidence sustains the allowance of the expenses and the record does not present a sufficient reason for a contrary view. This part of the decree is therefore affirmed. The judgment below is reversed as to compensation of defendant and affirmed as to the expenses of the subscription contest at the costs of plaintiffs.

AFFIRMED IN PART AND REVERSED IN PART.

DAVE HUKILL ET AL. V. STATE OF NEBRASKA.

FILED NOVEMBER 25, 1922. No. 22656.

1. **Criminal Law:** VERDICT: REVIEW. "It is the province of the jury to determine disputed matters of fact in criminal as well as in civil cases. The verdict will not be set aside in this court upon proceedings in error for want of evidence to support it, unless it is clearly wrong." *Henry v. State*, 72 Neb. 252.
2. **Robbery:** SUFFICIENCY OF EVIDENCE. Evidence examined, and *held* sufficient to sustain verdicts finding defendants guilty of robbery.
3. ———: SENTENCE. *Held*, that the sentence imposed upon each defendant is in accordance with law and not excessive.

ERROR to the district court for Burt county: L. B. DAY, JUDGE. *Affirmed.*

B. C. Enyart, for plaintiffs in error.

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

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

ALDRICH, J.

The defendants, Dave Hukill and Roland Shafer, were convicted of the crime of robbery in Burt county in November, 1921, and sentenced to the penitentiary from six years to fifteen years. Defendants prosecute error.

The first question which is presented to us for consideration is: Was the evidence sufficient to sustain the verdict of the jury? This is purely and absolutely a question of fact, and within the realm of fact the jury are supreme. Were the defendants present on the night of the commission of the crime at the shack occupied by Barney Kelso and Jo Shafer? The defendants evade this fact by attempting to prove an alibi, which the jury, considering it and the other evidence introduced, disbelieved. As a matter of law they had a right to do this. We will not disturb the verdict of the jury where the evidence is in conflict, unless it is clearly and apparently wrong. Two witnesses swore positively, directly and in the fullest manner possible to the fact that the two defendants broke into their place and, through fear, force and violence, robbed Barney Kelso of $24 in cash. The evidence shows the defendants unmercifully beat Jo Shafer and Barney Kelso with clubs, one of them being temporarily stricken unconscious. Shafer was in close proximity to the defendant Roland Shafer and was able to clearly and positively identify him. In fact, Barney Kelso in the bright moonlight clearly and unquestionably identified each of the defendants and talked with them. Together with all the evidence in the case the jury believed what the witnesses for the state said as to the actual participation of the defendants, in preference to the unsupported evidence of the defendants. It is not within the province of this court to say what evidence the jury shall believe and what it shall not. It is peculiarly within their province to believe such testimony

as seems to them to be truthful and consistent with the facts.

It is claimed the trial court erred in permitting the state to withdraw its rest and introduce the evidence of the sheriff, and on its own motion withdraw defendants' rest. The court had the right to do this, and there was no abuse of discretion to permit the state to offer evidence in chief, for the record shows that both sides rested in the regular manner before arguments to the jury were made. This is a statutory right. The statute, section 10144, Comp. St. 1922, provides, among other things: "The state will then be confined to rebutting evidence, unless the court for good reason in furtherance of justice, shall permit it to offer evidence in chief."

It is a well-established proposition of law that: "The order in which a party shall introduce his proof is, to a great extent, discretionary with the trial judge, and the action of the court in that regard will not be cause for reversal when no abuse of discretion is shown." *Basye v. State,* 45 Neb. 261.

If the trial judge absented himself during the argument of counsel and no one's attention was called to it, then his absence was supposed to be by consent of the parties and objection is waived. The record does not affirmatively show that the trial judge was not present at all times, and if he was absent at any time during the arguments, the defendants by not objecting waived their right to do so at this time.

There is also complaint of alleged misconduct of the prosecuting attorney. Whatever that may have been it should be disregarded, because it is the law of this state that, where the only objection by accused to the misconduct of the county attorney was that he made statements unwarranted by the evidence, an instruction directing the jury to disregard such statements left no ground for complaint. *Hoover v. State,* 48 Neb. 184. A cautionary instruction was given in the instant case, and that cured any error because of misconduct of counsel.

We have already discussed the fact that the evidence was fully sufficient to justify verdicts of conviction. All the material elements of robbery have been fully established and based upon evidence sufficient to satisfy the jury. This being a crime against the person, it is very serious, especially when accompanied by uncalled for and wanton violence upon two old men. The sentence was entirely justified by the evidence and responds to a truthful conclusion, especially when it is true that no extenuating circumstances were shown and premeditation was proved.

We have gone through the record carefully and are unable to say there was reversible error. Justice was done and proper punishment meted out to undoubtedly guilty defendants.

AFFIRMED.

LEWIS W. LITTLEJOHN, APPELLEE, V. JOHN FINK, APPELLANT.

FILED NOVEMBER 25, 1922. No. 22122.

1. **Boundaries.** The boundary lines between two quarters of a section of land are ascertained by drawing straight lines between the opposite quarter-section corners.

2. ———: LOST CORNER: REESTABLISHMENT. Where the quarter corner of a section bordering on the north or west township line is lost, and its location cannot be identified, it is reestablished by first determining the section corners on the side where the lost corner is sought to be reestablished, and then locating the quarter corner at a point on a line connecting the section corners so as to divide the actual distance between the section corners in the same proportion as the field notes purport to divide it.

3. ———: GOVERNMENT CORNERS. Government corners fixed by a United States surveyor at the time of the original survey will control the field notes of the survey made at the time, and will control the field notes or courses and distances of any subsequent survey.

4. Evidence examined, and *held* to present an issue of fact to be submitted to a jury.

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

Morrow & Morrow, for appellant.

A. R. Honnold and *Robert G. Simmons, contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE, ALDRICH and DAY, JJ., REDICK and SHEPHERD, District Judges.

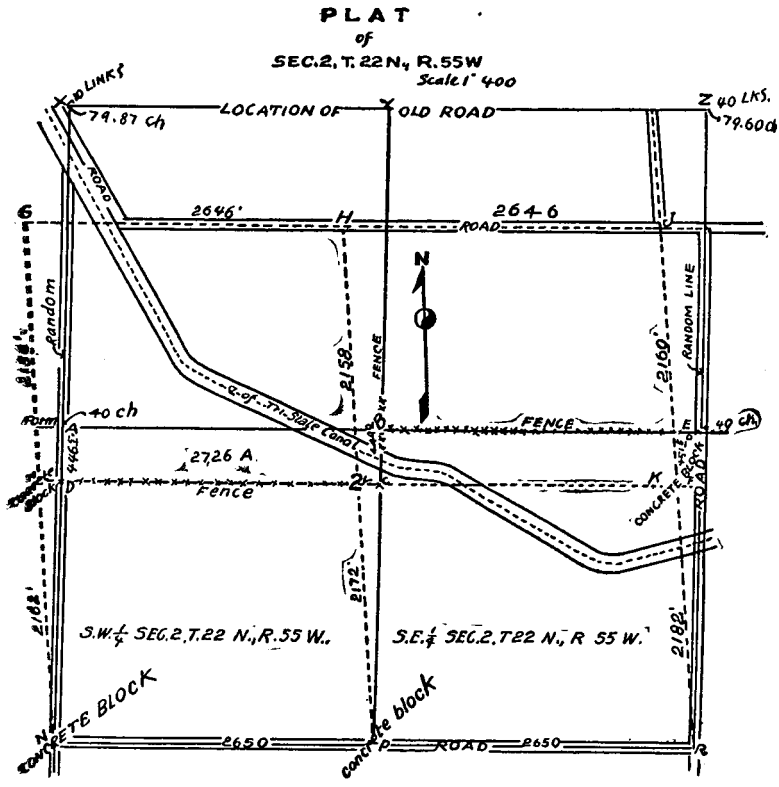
DAY, J.

This is an action in ejectment to recover the possession of a strip of land containing about 27 acres along the boundary line between the S. W. ¼ and the N. W. ¼ of section 2, township 22, range 55, in Scotts Bluff county.

At the close of the testimony, on motion of the plaintiff, the court directed the jury to return a verdict for the plaintiff, which was done, and thereafter judgment was rendered for the plaintiff. Defendant appeals.

The defendant contends that there was a conflict in the evidence upon the issues of fact, and that, therefore, the court erred in not submitting such issues to the jury. The record shows that the plaintiff is the owner of the S. W. ¼ and the defendant the owner of the N. W. ¼ of said section. The dispute betwen the parties arises over the proper location of the dividing line between their respective quarter sections.

For the purpose of a clearer understanding of the claims of the respective parties and the discussion of the evidence, we present herewith a diagram, to which reference will be made. The strip of land in dispute may be designated by the lines connecting the points A, B, C and D on the diagram.



There is no dispute in the record as to the location of the southwest and southeast corners of the section. Both parties agree that the original government corners are properly located at the points designated on the diagram by the letters N and R. There is a controversy as to the proper location of the northeast and northwest corners of the section, and also as to the location of the east and west quarter corners. The courses and distances of the original field notes place the northeast corner of the section 79.60 chains north of the southeast corner, designated on the diagram by the letter Z; and, in like manner, the northwest corner is located 79.87 chains north of the southwest corner at the

point indicated by the letter X. Straight exterior lines connecting the points N, R, Z and X form a parallelogram coinciding with the courses and distances as shown by the original field notes. The testimony shows that, when this section, together with other lands in the immediate vicinity, was settled upon, the corners as above indicated were taken to be the true corners of the section. The settlers within this section built their fences, laid out roads, cultivated their lands, and made improvements thereon, upon the theory that the section embraced land as indicated by the field notes. The defendant in entering his land located his northwest corner at the point X, and built his north fence along the line from X to Y. He also constructed a fence along his south line from A to B, approximately 40 chains north of the south boundary line of the section. The west quarter corner as fixed by the field notes was at a point 40 chains north of the southwest corner of the section, and 39.87 chains south of the northwest corner of the section. The field notes also located the east quarter corner 40 chains north of the southeast corner and 39.60 chains south of the northeast corner of the section. On the diagram these quarter corners are located at the points E and A. The settler upon the southeast quarter built his north fence on the line between the points E and B, and also built his house at the point indicated by a square a few rods south of this fence line, and a few rods west of the line connecting the points R and Z.

In 1906 the United States reclamation service made a survey and plat of this section, together with many others, for the purpose of determining what lands were under the Tri-State canal. These surveyors, in examining the land in this section, found what they concluded to be the original government monuments designating the northeast and the northwest corners of the section. These monuments were located at the points J and G, over 900 feet south and a few rods west of the points indicated by

Z and X. The testimony shows that these surveyors were unable to find any original east and west quarter corners; that they thereupon proceeded to locate the quarter corners along the lines connecting the points R and J, and N and G, according to the proportional rule, at the points K and M, and erected concrete blocks to designate these corners. The distance between the points R and K is 2,182 feet, and from K to J, 2,160 feet. The distance between the points N and M is 2,162 feet, and from M to G, 2,156 feet. It will be observed that the section, as fixed by the reclamation survey, is considerably short of a full section. After the reclamation survey, the defendant, on the theory that the lines made by such survey were the true boundaries of the section, established his south boundary along the line indicated by the letters D and C.

The issue to be determined turns upon the proper location of the east and west quarter corners, as the line connecting these two points forms the boundary line between the north and south half-sections.

The field notes of the original survey show that the east and west quarter corners of this section were established at the points indicated on the diagram by the letters E and A, and monuments consisting of mounds, pits and stakes were erected. The field notes also show that the northeast and northwest corners were established and pits, mounds and stakes erected.

Upon the trial there was testimony which tended to show that the original government corners were located at the points designated by the letters Z and X on the diagram, and, while there is no positive testimony that monuments such as the field notes describe were ever found at these corners, still we think the evidence sufficient to present an issue of fact for the jury's determination as to whether the original corners were located at the points Z and X. In support of this view, some of the early settlers testified that they were considered as original corners; the original entrymen, the defend-

ant among them, made their entries and proved up on their lands upon the theory that these points were original corners; and, in addition, the corners thus designated are at the points where the field notes would place them. On the other hand, the reclamation surveyors who surveyed this section, as well as other witnesses, testified that pits and mounds tallying with those described in the original survey were found at the points J and G, and in their opinion these were the original corners.

There is this further fact which must be considered. Plaintiff's witness Reige testified that in 1885 he saw a quarter corner on the east line of the section, the marking corresponding with the monuments erected by the original surveyors; that later he was present with McCoskey, who surveyed the line, and that McCoskey located the east quarter corner at the point E where the witness had previously seen the original pits and mounds. McCoskey testified that at that time he located the quarter corner at the point E, but later concluded he was mistaken. The reclamation surveyors found no east quarter corner, and therefore located the east quarter corner according to the proportional rule at the point K on the diagram. If the east quarter corner be established at the point E, and the west quarter corner at M, the boundary line would be the line connecting these two points, and a part of the land in controversy would belong to the plaintiff, and a part to the defendant.

There is no testimony that the original west quarter corner was found. That corner would be located under the proportional rule, hereinafter considered, at the point A or M, depending on whether the northwest corner of the section be established at X or G.

The plaintiff argues that, in any aspect which may be taken of the evidence as to the location of the disputed corners, the trial court was right in directing a verdict for the plaintiff. It is his contention that the southeast and southwest corners being known original corners, and conceding that the quarter corners are lost,

the quarter corners are established by measuring north from these known corners 40 chains as indicated in the field notes, and establishing the quarter corners at such points, thus leaving any loss or gain upon the north quarter section. This rule would throw the disputed land in the southwest quarter of the section. Although there is respectable authority sustaining this contention—one of the leading cases being *Knight v. Elliott,* 57 Mo. 317—we think that the weight of authority, as well as the better reason, is to the contrary.

The rule promulgated by the general land office, as well as text-books on the subject of surveying, and the weight of judicial decisions sustain the view that, where the quarter corner of a section bordering on the north or west township line is lost, and its location cannot be identified, it is reestablished by first determining the true section corners on the side where the lost corner is sought to be reestablished, and then locating the quarter corner at a point on the line connecting the section corners, so as to divide the actual distance between the section corners in the same proportion as the field notes purport to divide it. Hawes, Manual of United States Surveying, p. 128; General Land Office Rules, Revision of June, 1909, Rule 49; Hodgman, Land Surveying, p. 282; *Martz v. Williams,* 67 Ill. 306; *Jones v. Kimble,* 19 Wis. 452; *James v. Drew,* 68 Miss. 518. While possibly not necessary to a decision of the case, the rule is recognized in *Brooks v. Stanley,* 66 Neb. 826.

In passing, it may not be amiss to say that the proportional rule applies only to sections bordering on the north or west of the township, and that any excess or deficiency arising in an interior section is divided equally.

The rule of law is well settled that government corners fixed by a United States surveyor at the time of the original survey will control the field notes of the survey made at the time, and will control the field notes or courses and distances of any subsequent survey. Such corners, if identified by proof, are the best evidence of

where the line should be. *Knoll v. Randolph,* 3 Neb. (Unof.) 599; *Harris v. Harms*, 105 Neb. 375; *Halley v. Harriman,* 106 Neb. 377.

Applying the proportional rule to the present case, and assuming for the purpose of illustration that the northwest corner of the section is located at the point designated G, the west quarter corner would be determined as follows: As 5,271.53 feet (the length of the line as indicated by the original field notes) is to 4,318 feet (the length of the line of the new survey), so 40 chains or 2,640 feet (the length of the plaintiff's line as called for in the field notes) is to 2,162 feet (the length of the line under the new survey). Omitting some small fraction, the west quarter corner would, therefore, be placed 2,162 feet north of the southwest corner, and 2,156 feet south of the northwest corner.

Considering all the testimony, we think there is such conflict that the issues should have been submitted to the jury; and we conclude that the trial court erred in peremptorily instructing the jury to find for the plaintiff.

REVERSED AND REMANDED.

MORRISSEY, C. J., and REDICK, District Judge, dissent.

IN RE ESTATE OF ROBERTSON C. MARTIN. SARAH WILLIAM MARTIN, APPELLANT, V. SARAH E. MARTIN ET AL., APPELLEES.

FILED NOVEMBER 25, 1922. No. 22404.

1. **Wills:** REVOCATION BY IMPLICATION: DIVORCE. A divorce and settlement between husband and wife, which agreement provides that the husband shall pay to the wife $2,500 as permanent alimony, *held* in legal effect to have foreclosed the claim of the wife to the property rights of the husband, and to have given rise to an implied revocation of his previously executed will.

2. ———: ———: REBUTTAL. When the circumstances are insufficient to show that an express reservation or understanding, preserving the will, entered into the agreement or settlement

between the parties, a showing of an affectionate attitude on the part of the husband toward the wife at the time of the divorce and settlement, or that he then had a mere intention that the will should stand, is insufficient as tending to rebut the implication that his will has been revoked.

3. ———: ———. Circumstances occurring after the revocation is presumed to have taken place cannot be resorted to as an aid to determine whether there has been, in fact, a revocation.

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

Weaver & Giller and *Atwood, Wickersham & Hill,* for appellant.

William L. Dowling and *Baker & Ready, contra.*

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

FLANSBURG, J.

This was a proceeding, originally brought by Sarah William Martin in the county court of Douglas county, to probate the will of her deceased husband, under the terms of which she was sole beneficiary. The contestants are the father and mother of the deceased. In both the county court and on appeal in the district court, the probate of the will was disallowed on the ground that there had been a revocation implied by law, as a result of a divorce and property settlement had between proponent and her husband, subsequent to the execution of the will. Proponent brings an appeal here.

Sarah William Martin, the proponent, and Robertson C. Martin, the testator, were married in 1908, and made their home in Omaha. In the forepart of September, 1912, it appears that Mrs. Martin went to her mother's home at Montgomery, Alabama. The record does not show that there was, then, any domestic difficulty; nor that Mrs. Martin left her husband with the understanding that she was not to return; nor that a separation or severance of the bonds of matrimony was at that time

in the least contemplated. She does testify that after her departure at that time they never again lived together as husband and wife. But when their domestic difficulties began, or what they were, does not affirmatively appear. However, there is in evidence a letter, written by Mr. Martin to Mrs. Martin and mailed about two weeks after she left for Alabama, and in that there is no mention of any separation, nor any intimation of domestic difficulties; but, on the contrary, the letter is written in very endearing terms, as a letter between husband and wife where a happy relation exists and where nothing has come between them. With the letter was inclosed a copy of the will, which is now the subject of this action. It is argued by counsel for proponent that the record shows that the will was made after the parties had agreed to separate, and nad in fact separated, knowing that they could not live together longer as husband and wife. We do not believe the record bears out that fact. On the contrary, the record is entirely silent as to any domestic difficulties, or contemplated difficulties, existing between the husband and wife at the time of the execution of the will.

By the terms of the will Mrs. Martin was given all the property of the testator, including "a farm of 160 acres in Stanton county, Nebraska." Immediately after its execution, it was transmitted by the testator to the county judge of Douglas county, where it was placed on file. As has been said, a copy of this will was inclosed in the letter above mentioned and sent to Mrs. Martin, in Alabama.

It appears that Mrs. Martin, after her departure in 1912, continued to live with her mother; that her husband sent her a monthly allowance of from $50 to $60, and that the parties carried on a correspondence.

In the spring of 1914 Mr. Martin visited his wife at her mother's home, then in Nashville, Tennessee. At that time the record for the first time shows that a divorce was considered. On July 3, 1914, a decree of di-

vorce was entered in favor of the wife. Though no provision was made in the decree for alimony or a settlement of property rights, the parties did, on the same day, enter into a written agreement with one another, wherein it was recited that, whereas a divorce proceeding was pending and a decree would probably be entered, "the following agreement with reference to alimony is entered into:

"Robertson C. Martin shall pay to Sarah William Martin an aggregate sum of $2,500; $100 of which has heretofore been paid and the balance of which shall be paid at the rate of $50 a month upon the first of each and every month, commencing August 1, 1914, and continuing until the full amount of the balance of $2,400 has been paid, providing that if Sarah William Martin shall marry before the said full amount of the balance of $2,400 is paid, then and in such event the payments which have not accrued theretofore shall cease to be due and payable."

Mr. Martin was further required to pay attorney's fees and court costs, and to secure the $2,500 payment by a first mortgage on the 160-acre farm in Stanton county, or by a bond with satisfactory surety. Neither party remarried, and the payments provided for by this contract were made as had been promised. On June 24, 1920, Mr. Martin died.

By the agreement he was required to pay her $2,500. That was the amount which the parties agreed between themselves should be a sufficient total amount of permanent alimony. What relation that amount bore to the total value of his property, or what his earning power was, does not appear. The amount was no doubt arrived at after a consideration of the value of Mr. Martin's property and his ability to pay, and the agreement, though it does not expressly by its terms state that it is to be a full settlement of property rights, does have, in law, that effect. There was nothing in this agreement, nor in the record of the divorce proceeding, indicative of

any reservations, which would show that the proponent's rights under the will were to be preserved or continued; on the other hand, the separation was complete and the accounting with one another full and comprehensive. The divorce and the agreement are sufficient to raise a clear presumption that the parties were for all time providing for a severance of their marriage tie, and for a complete settlement of all pecuniary obligations and property rights without any reservations. Under our decision in *In re Estate of Bartlett,* 108 Neb. 691, this change in circumstances, subsequent to the execution of the will, is sufficient to work a revocation of the will by implication of law.

It is contended by the proponent that the continued affection, as well as the positive declarations of the testator, subsequent to the divorce, shows that he had no actual intention of revoking the will, and that an implied revocation, if any, would have been by these facts destroyed. It appears from the testimony of Mrs. Smithson, proponent's mother, that in 1916 the testator, who, it appears, was a dealer in live stock, made a trip or two to Chicago, where proponent and her mother were then living, and that while there he called upon them; that for two or three days the three of them had dinner together and attended theaters. She testified that Mr. Martin had never lost his affection for his former wife, and that he, at that time, stated that he was worried about her health; that he told witness not to worry, that he would always take care of Sarah; that he had made a will and left her all of his property and that the will was filed in the courthouse in Omaha. Mrs. Smithson said she asked what his father would say, and that he replied that his father had nothing to do with it; that "They tell me he is a millionaire. * * * He is well off. His children are provided for, and I want to know that my wife is cared for;" that he said, "She is my wife, in the sight of God, and always will be," and stated that the reason he did not want his father to have his prop-

erty after his death was because "his father had given him as a boy, or a young man, that was just before he was of age, the awfulest whipping anybody ever gave a living mortal;" that witness said to testator, "You must forgive your father," and he replied, "I will try, but I never can forgive (forget) it."

It is the proponent's contention that the evidence shows that the testator had never, at any time, lost his affection for her, and that the statements made to her mother affirmatively show that he never intended that his will should be revoked, but rested firmly in the belief that he had provided for her and that she would so be taken care of.

When the circumstances are insufficient to show that an express reservation or understanding, preserving the will, entered into, the agreement or settlement between the parties, a showing of an affectionate attitude on the part of the husband towards the wife at the time of the divorce and settlement, or that he then had a mere intention that the will should stand, is incompetent as tending to rebut an implied revocation of his will. *Will of Battis*, 143 Wis. 234; *Wirth v. Wirth*, 149 Mich. 687; *Donaldson v. Hall*, 106 Minn. 502.

Circumstances occurring after the revocation is presumed to have taken place cannot be resorted to as an aid to determine whether there has been, in fact, a revocation. Declarations made by the testator after the divorce and settlement cannot, by reverting back, modify the effect of a state of facts which was at the time sufficient. To allow that to be done would indeed make unstable, if not utterly destroy, the rule itself. Where the acts, therefore, of the testator, subsequent to the occurrence of facts which work an implied revocation, are not sufficient, under our laws, to accomplish a republication of the will, we believe that the revocation must be held to stand.

The judgment of the lower court is therefore

ALDRICH, J., dissents. AFFIRMED.

HARRY H. ADAIR ET AL., APPELLANTS, V. WALTER E. MILLER, TREASURER, APPELLEE.

FILED NOVEMBER 25, 1922. No. 22702.

1. **Statutes:** CONSTRUCTION. Statutes should be construed as having a prospective operation only, unless a retrospective effect is expressly declared or is necessarily implied from the express provisions.
2. **Taxation:** INTANGIBLE PROPERTY: PROSPECTIVE STATUTE. The section of the statute (Comp. St. 1922, sec. 5884) providing that intangibles, as defined by the statute, should be separately listed and should be taxed at 25 per cent. of the mill rate levied on tangible property, *held* to be prospective only in its operation and not to apply to notes and bonds which were listed for taxation on April 1, 1921, before the enactment in question had gone into effect.
3. ———: ———: ———. Under the old law, the status of personal property for the purpose of taxation had become fixed on April 1, 1921, and this status was not affected by the new law which went into effect on July 28 of that year.

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

William P. Warner and *Sidney T. Frum,* for appellants.

Clarence A. Davis, Attorney General, Charles S. Reed and *George W. Leamer, contra.*

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

FLANSBURG, J.

This case calls for an interpretation of section 5884, Comp. St. 1922, providing for a special rate of taxation for certain properties which are described in the statute as "intangibles." The enactment (Laws 1921, ch. 133, art. VIII) carried no emergency clause and became a law on July 28, 1921. It provided:

"Moneys, gross credits, including corporation shares or stocks, * * * notes, * * * accounts, * * * securities, debentures, bonds, * * * shall be separately listed and shall be taxed on the basis of twenty-five per cent. of the mill rate levied upon tangible property."

The appellants, trustees of the estate of Marion O. Ayres, complain that certain notes and bonds, belonging to the estate and in their custody, which were, in fact, intangible properties, within the terms of the statute, were returned for taxation at their full value and were not separately listed or scheduled, as required by the act, and were assessed at the same full rate as other personal property, and not at 25 per cent. of that rate.

The question presented is whether or not the statute in question was intended to apply and govern the rate of taxation on "intangibles" for the year 1921. The trial court held that the statute was not operative as to personal property listed before the statute went into effect, and that the notes and bonds belonging to the estate of Marion O. Ayres were therefore properly assessed at the same rate as all other personal property, since such was according to the provisions of the law existing prior to the enactment in question.

The matter resolves itself, in short, to this; whether or not the statute is to be interpreted as retrospective or prospective in its effect.

It is necessary to consider the provisions of the law, existing in the year 1921, which pertain to the scheduling and assessing of personal property, and to determine how far the assessment for the year 1921 had actually progressed at the time the statute in question became effective, on July 28. The law at that time required that a person list for taxation the property of which he was owner, or which he held in trust, on April 1 of the year in which the property was to be assessed. Rev. St. 1913, sec. 6339; *Wood v. McCook Water-Works Co.*, 97 Neb. 215. These property lists were required to be transmit-

ted to the precinct assessor, whose duty it was to complete the assessment rolls, schedules and lists in his precinct and deliver them to the county assessor not later than the last Monday in May of that year. The county assessor was required to complete his revision of these lists and file them with the county clerk on or before the second Monday in June. Rev. St. 1913, sec. 6431. On the first Tuesday after the second Monday in June the statute required the county board of each county to sit as a board of equalization (Rev. St. 1913, sec. 6437), and the county assessor, after equalization, was required to prepare an abstract of the assessment roll and to forward it to the state board of equalization on or before July 10 of the same year. Rev. St. 1913, sec. 6442. The state board of equalization was required to meet on the third Monday of July (Rev. St. 1913, sec. 6447), and, after the state board had completed its work of equalization, both the county board and the state board were authorized to then fix the tax levy. Rev. St. 1913, secs. 6450, 6456. On or before the first Monday in August of such year the state board was required to transmit to the county clerk of each county a statement of the rate of taxation required for the general and other state taxes. Under these provisions of the statute the proceedings for the assessment of property and the levy of taxes would be, to a large extent, completed by the time the statute in question, containing the specific provision with regard to the taxation of intangibles, would go into effect; that is, on July 28, 1921.

Before the taxing authorities can fix the amount of a levy, it is necessary, as a basis for their action, that there be some official estimate of the value of all property subject to the tax, and a determination of the apportionment. In all the proceedings taken in the year 1921, prior to July 28 of that year, there was no statute then requiring that intangibles should be listed separately, nor that they should bear a special rate of tax. Boards

of equalization, acting under the laws as they then existed, unless they should interpret the statute in question as retroactive, would estimate the value of property for the purpose of the tax, and arrive at the apportionment and equalization of the tax, based upon the schedules and lists as made up under the then existing laws. When the statute in question, affecting intangibles, went into effect on July 28, the basis for the tax levy would so far have ripened into a finality that intangibles could not be separated and taxed as distinct and apart, under the provisions of the 1921 law, without then revising and working over all the work that had up to that time been done in the gathering of property schedules, valuations and equalization, for in all those steps intangibles would have been classed as personal property bearing the same rate of taxation as other personal property generally.

There is nothing in the statute which indicates that it was to have a retroactive effect. It declares that intangibles "*shall be separately listed and shall be taxed* on the basis of twenty-five per cent. of the mill rate levied upon tangible property." The legislature recognized the necessity of a separate listing and valuation of intangibles as a basis for the final levy. But surely it was not intended that in anticipation of the new statute, which would not go into effect until July 28, the taxing authorities should make the necessary changes in their method of procedure, beginning with April 1 of that year; nor, on the other hand, that after the law should go into effect, on July 28, all the steps taken up to that time by the taxing authorities of the state should be revised and altered so that a separate listing of intangibles should be made and the tax levy determined upon that new basis.

Under the old law the status of personal property for the purpose of taxation had become fixed on April 1, 1921. This status we do not believe was affected by the new law. It is a general rule of construction that stat-

utes should be construed as having a prospective operation only, unless a retrospective effect is expressly declared or is necessarily implied from the express provisions. 36 Cyc. 1205. The statute in this case must, we believe, be interpreted as prospective in its effect, and its meaning to be that, from and after July 28, intangibles shall be listed separately whenever it is required, under the law, that personal property be listed for taxation, and that, from and after the time for that listing, such property shall be entitled to the special tax rate.

A case very similar to the one at bar, where a like decision was reached, is that of *Dodge v. Nevada Nat. Bank*, 109 Fed. 726, approved in *Air-way Electric Appliance Corporation v. Archer*, 279 Fed. 878. See, also, *New York Railways Co. v. City of New York*, 218 N. Y. 483.

This interpretation disposes of the case, and it is unnecessary to pass upon the other questions presented, or whether or not the form of action here was maintainable.

The judgment of the lower court is therefore

AFFIRMED.

SECURITY STATE BANK, APPELLANT, v. WALTER E. MILLER, TREASURER, APPELLEE.

FILED NOVEMBER 25, 1922. No. 22703.

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

William P. Warner and *Sidney T. Frum*, for appellant.

Clarence A. Davis, Attorney General, Charles S. Reed and *George W. Leamer, contra.*

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

FLANSBURG, J.

This case involves a complaint as to the taxation of certain bank stock listed in April, 1921, and which was not given the benefit of the special rate of tax provided by section 5884, Comp. St. 1922.

The decision in *Adair v. Miller, ante,* p. 295, holding that the statute is prospective only in its operation, disposes of this case, and the judgment of the trial court is therefore

AFFIRMED.

TRACY C. REWICK, APPELLEE V. DIERKS LUMBER & COAL COMPANY, APPELLANT.

FILED NOVEMBER 25, 1922. No. 22115.

1. **Fraud:** DAMAGES: EVIDENCE. In an action for false representations, where it is claimed that plaintiff was entitled under contract to receive par, earned dividends, and undivided surplus upon sale of his stock, but that he was induced to take less by fraud of defendant, the contract is properly received in evidence for the purpose of showing amount of plaintiff's damages.

2. ———: VALUE OF STOCK: STATEMENTS OF OFFICERS. In making a contract for the sale of his stock to the corporation, a stockholder may rely upon statements of an officer thereof as to the value of the stock as representations of fact.

3. **Evidence:** VALUE OF STOCK: STATEMENTS BY EXPERTS. On the question of the value of corporate stock, statements prepared by expert accountants employed by the corporation, forming part of the records of the same and acted upon by the corporation as correct statements of its financial condition, are receivable in evidence as admissions against interest.

4. ———: FALSE REPRESENTATIONS. In an action for false representations, while the questions are finally for the jury, plaintiff may be permitted to testify that he believed and relied upon such representations.

5. **Fraud:** VALUE OF STOCK: EVIDENCE. While it is proper upon cross-examination, for the purpose of testing the opinion of a witness as to the value of corporate stock, to inquire as to his knowledge of other sales made about the same time, evidence of such sales is not admissible as substantive proof of such value.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

J. S. Kirkpatrick and *M. L. Easterday,* for appellant.

Peterson & Devoe, contra.

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

REDICK, District Judge.

Action to recover damages for false representations. Petition alleges that plaintiff while in its employ entered into a contract June 28, 1906, with defendant, whereby he agreed to sell and defendant agreed to purchase any stock owned by plaintiff in defendant company, in case plaintiff left their employ, at its value to be agreed upon by the parties or by arbitration; "provided that the value so determined shall not be less than par, earned dividends, and undivided profits;" that about May 1, 1918, plaintiff was about to leave the employ of the defendant, and sold to defendant 72 shares of stock held by plaintiff for $225 a share; that plaintiff was induced to make the sale at that price by false representations on the part of the defendant that the "value of said stock did not exceed $225 a share." and "falsely and fraudulently concealed from plaintiff by the aforesaid false statements * * * what the value of the stock was;" that at the time of the sale the value of the stock computed at par, plus earned dividends and undivided profits, and its actual value was $335.73 a share, and asked judgment for the difference, $7,972.56. Defendant answered admitting its incorporation and denying all other allegations of the petition. Trial to a jury resulted in a verdict for plaintiff for $4,050, and defendant appeals.

Error is assigned on overruling defendant's motion to make the petition more definite and certain by stating the actual value of the stock and by setting out what

false representations as to the value were made. The petition alleged the actual value at $335.73 and the false representation that its value was $225. This was sufficient.

Error is claimed in the reception in evidence of the contract referred to in the petition, that it was immaterial and irrelevant. Defendant's position seems to be that at the time of the sale of the stock the parties dealt without reference to the contract; this was one of the litigated questions. It was perfectly competent for the parties, by the terms of the contract itself, to agree as to the value of the stock, and such an agreement, fairly made, would render the contract immaterial; but plaintiff claims he was induced to enter into the agreement of sale by fraud and that thereby he lost the benefit of his contract; and it seems clear that on plaintiff's theory the contract was quite material to show what he was entitled to receive for his stock and how much he was damaged. It will be noted that, in the absence of this contract, plaintiff's measure of damages would be the difference between the amount he received and the market value of the stock; with the contract, the second term of comparison is par, unearned dividends, and undivided profits. Moreover, it appears from the evidence that, at the date of the transfer of the stock, the contract was canceled. "This contract is hereby canceled April 27, 1918. Tracy C. Rewick." There was ample evidence to support a finding that the parties were dealing with the contract, and it was properly received in evidence.

On the question of the value of the stock, there were received in evidence audits by expert accountants showing condition of defendant's business December 31, 1916, 1917, and 1918. Defendant claims these were incompetent, although conceding that the books of defendant would have been competent. These audits were procured to be made by defendant, were a part of its records, and were used by it in securing credit at the banks, for in-

formation to commercial agencies, and as bases for income tax reports to the government. They were compiled from the accounts of defendant, a resumé of what the books showed as to the financial condition of defendant, and were receivable as admissions against interest on the plainest principles. They showed the net assets of the company, which tended to establish the value of the stock, as well as the price plaintiff was entitled to receive under his contract. These statements, being records of defendant, procured and acted upon by it, as correct statements of the condition of the company's affairs, were evidence as against defendant, of equal probative value as the books and accounts themselves from which they were compiled.

Complaint is made that plaintiff was permitted to testify that he relied upon the statements alleged to be false and believed them. These, of course, were questions for the jury, but in this class of cases, contrary to the general rule, evidence of the state of mind of the party is admissible. *Arnstine Bros. & Mier v. Treat,* 71 Mich. 561. Defendant offered to prove a number of stock sales from 1915 to 1918 as showing the value of the stock, and the refusal of the court to receive this evidence is assigned as error. Such evidence is clearly incompetent. *Union P. R. Co. v. Stanwood,* 71 Neb. 158.

Objections to the instructions are made, some of which we will refer to. By No. 4 the court instructed the jury that, the corporation having received the benefit of the purchase of plaintiff's stock, it was bound by any representations of its officer whether he had authority or not to make them. It is not contended that this is not the law, but that there was nothing in the case calling for it, and that it had a tendency to prejudice the jury; but defendant's officer testified that he was not authorized to buy the stock, and this justified the instruction.

Appellant contends the jury should have been instructed that the representation must have been known

to be false; but that is not the law of this state. *Gerner v. Mosher,* 58 Neb. 135, 149. Also that the representation as to the value was only an opinion; the representation having been made by a superior officer of the company as to a fact supposedly within his knowledge, the truth of which could only be learned by an investigation, plaintiff had a right to rely upon it. *Foley v. Holtry,* 43 Neb. 133; *Ludowese v. Amidon,* 124 Minn. 288.

A number of other errors are assigned; but, while we have carefully considered them all and read the record and appellant's brief, we do not deem it necessary to further refer to them.

Defendant, however, finally contends that the increased book value of defendant's stock is due entirely to an item of "appreciation" entered in 1917, which it is said added nothing to the value of the stock. True, the mere entry upon the books added nothing, but it is our understanding that such an item represents an increase in the value of the item to which it refers, over its cost; the entry upon the books of defendant of this item was an admission by them of such increased value, and, if it represented the fact, such increase would be reflected in the value of the stock. It was open to defendant to show that there was in fact no appreciation, but it did not do so. The item was, therefore, proper to be considered by the jury in determining the value of the stock. The jury evidently considered the evidence carefully and reduced plaintiff's claim nearly 50 per cent., and the verdict is fairly sustained by the evidence.

We find no prejudicial error in the record, and the judgment is

AFFIRMED.

JOHN SKALA, APPELLEE, V. MATILDA MICHAEL ET AL., APPELLANTS.

FILED NOVEMBER 25, 1922. No. 22134.

1. **Landlord and Tenant:** COVENANT FOR LIEN: INJUNCTION: CUSTODIA LEGIS. A lessor of farm land has a right of action in equity against his lessee to enforce the provision of his lease for the giving of a chattel mortgage on the crop to secure rent, provided his lessee fails or refuses to give such mortgage upon timely demand therefor; and such an action, properly brought, impounds the crop for the benefit of the lessor against all liens attaching thereto subsequently to the commencement of said action. *Ryan v. Donley*, 69 Neb. 623.
2. ———: LIENS: PRIORITIES. Attachments in favor of third parties levied after the filing of a lessor's petition to secure a mortgage according to his lease, and after the issuance of a summons thereon with *bona fide* intent to serve the same, are subject to the equitable right of such lessor, provided that the latter had filed his lease and taken possession of the property so that such third parties had actual and constructive notice of the equities existing in his favor.
3. **Appeal:** FINDINGS: REVIEW. This court will not reverse the district court for a finding of fact which the evidence was sufficient to sustain, even if it might have found differently had the matter been before it in the first instance.
4. **Injunction:** LANDLORD AND TENANT: LIEN. Evidence examined, and injunction found to have been the proper remedy. The equitable right of the lessor in this case was not a legal lien, nor could the remedy at law, if such a remedy at law existed, have been adequate.

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

A. R. Oleson, for appellants.

John J. Gross and *P. M. Moodie*, *contra.*

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

SHEPHERD, District Judge.

Two injunction suits were brought September 22, 1920, by the plaintiff, John Skala, one against Matilda Michael

and the sheriff, and the other against Henry Heyne and the sheriff, to restrain the sale of crops grown by the lessee on his land under judgments in attachments entered September 18, 1920, in actions against said lessee by said defendants. Plaintiff alleged, in substance, in each of said suits that his lessee, one John Brockman, owed him a balance of rent amounting to $500, falling due November 12, 1920, which by the terms of his lease he was to secure by mortgage on the described crops; that he called at the farm on the 3d of September of said year to get such mortgage, but that said Brockman had absconded, leaving crops and stock uncared for on the place; that he at once took possession of the premises, fed and watered the cattle, and on the 7th day of September, 1920, commenced an action in equity for specific performance, the establishment of his chattel mortgage lien, foreclosure thereof, and all equitable relief; that on the same day, and only shortly following the action of the plaintiff, defendants Michael and Heyne filed petitions and obtained orders in attachment against said Brockman, and had the same levied upon all the property of the latter, including the crops in question, and afterward, to prevent plaintiff from collecting his rent and by collusion with Brockman to that end, obtained a stipulation from said Brockman to the effect that such attachments might be sustained and judgment rendered against him in the action in which they were issued, and that so the said judgments of September 18, 1920, were procured and entered; that, nevertheless, said attachments were void and of no effect as against the rights of the plaintiff, because no summons was issued in either of said suits; because in the Michael case a false affidavit was filed for the purpose of securing attachment upon a debt not due, and an order obtained from the county judge when the district judge was in the county; because in the Heyne case no order or attachment was ever issued; and because of the collusion referred to; also, that said John Brockman was insolvent.

Answers were filed by the sheriff generally denying the allegations of the petitions, except as to the ownership of the land, the lease, and the filing of plaintiff's petitions for specific performance against Brockman, and justifying under the attachments and orders of sale, alleging undisputed possession of the property thereunder, etc. The replies were the usual qualified denials.

The two cases were consolidated by agreement and tried as one. The court found for the plaintiff and perpetually enjoined the defendants from selling, conveying, removing or interfering with said crops. It found specifically that the Michael attachment was void for the reason that the order for the same was issued by the county judge at a time when the district judge was in the county; found that the plaintiff was in possession of crops to care for and preserve them for the satisfaction of his chattel mortgage when it should be obtained; found that he took possession September 3, and was entitled to have his mortgage enforced from and after the 2d day of that month; and found that plaintiff had commenced his specific performance suit before the commencement of any actions by defendants; and found that plaintiff had no adequate remedy at law in the premises.

All of these findings are separately assigned as erroneous; and defendants also complain in their assignments of error that the finding in favor of the plaintiff and against the defendants was contrary to law and unsupported by the evidence.

That the original action of the plaintiff to secure a mortgage on the crops, etc., was proper is not left in doubt by the holdings of this court. *Sporer v. McDermott,* 69 Neb. 533; *Ryan v. Donley,* 69 Neb. 623; *Rogers v. Trumble,* 86 Neb. 316.

This being decided, the first, and perhaps the controlling, inquiry is: Did the plaintiff by his action in that behalf and otherwise impound the crops in equity so that the attachments and subsequent orders of sale procured by the defendants were of no effect against the plain-

tiff's claim? We think that this question should be answered in the affirmative.

The plaintiff was diligent. His petition was filed before those of the defendants. Further than this, his summons was issued immediately with the *bona fide* intent that it should be served. If the rule observed in attachment proceedings (that the action is deemed commenced upon the filing of a petition and the issuance of a summons with the *bona fide* intent of serving the same) obtains in a suit in equity where the debtor has absconded and the object is to impound his property, then plaintiff's action was begun, and his equitable right established, before the levy of the attachments. Undoubtedly this rule of attachment arises by a liberal construction of the statutes, to the end that the provisional remedy may be made effective. *Johnson v. Larson,* 96 Neb. 193; *Coffman v. Brandhoeffer,* 33 Neb. 279. In the nature of things, it frequently becomes impossible to serve an absconding debtor by a summons issued upon the filing of the petition. If that had to be done to invest the court with jurisdiction over the property sought to be reached, the remedy would prove no remedy at all. Equity has the power, and it would seem that equity ought to hold similarly for the relief of a diligent plaintiff. Under any other rule the dishonest debtor has but to hide and connive in order to defeat the most deserving creditor, if that creditor, as in the instant case, is compelled to resort to equity for his remedy.

As a matter of fact, this was about what happened here. The defendants filed their petitions, and, without the least attempt to serve the debtor, or even to issue a summons for him, secured an order of attachment and a levy of the same. The debtor disclosed his whereabouts to them. And then, in conference with them, he gave them a written stipulation confessing their attachment and authorizing entry of judgment against him, which entry was made at chambers two or three weeks afterward. The plaintiff pleaded fraud and collusion in the

obtaining of said judgment, and we cannot say that the court's finding for him in that regard was not fully justified by the evidence.

But, independently of the foregoing, we are convinced, and hold, that, in conjunction with the bringing of his suit, the plaintiff established his equitable right to the crop by filing his lease and taking possession of the property on or about the 4th day of September. This was some days before the attachments were levied. The lease provided that he should have a chattel mortgage upon demand. The defendants had both actual and constructive notice of his rights, for, besides the notice of the record, they found him in possession and talked with him about the precedence of his claim before they filed their petitions.

In the case of *Rogers v. Trumble*, 86 Neb. 316, a case of the same general nature as this, the court used the following significant language: "The fact that plaintiff had duly demanded such lien was not of itself sufficient, under the evidence, to charge defendant Bell with constructive notice of his equity thereby acquired; and as this court is committed to the doctrine that one who takes a chattel mortgage to secure a debt actually and justly owing to him, whether preexisting or not, without actual or constructive notice of prior equities against the mortgaged property, is a mortgagee in good faith (*State Bank v. Kelley Co.*, 49 Neb. 242), we reluctantly hold that defendant Bell's mortgage is a first lien upon the chattels in controversy." It is obvious that, had the defendant Bell been charged with actual and constructive notice, as in the case at bar, the plaintiff would have been awarded a first lien. We have no hesitancy in deciding that the plaintiff's equitable lien in this case antedates the attachments.

Defendants complain of plaintiff's affidavit for publication, asserting that the same was not jurisdictional, because not sufficiently disclosing the nature of his action. On the contrary, it appears to the court to be quite with-

out fault in this particular. His averment was not that Brockman was a nonresident, but that he had absconded. His affidavit was under subdivision 5, sec. 7640, Rev. St. 1913, and was sufficient. Some of the authorities cited by defendants, notably *Fouts v. Mann,* 15 Neb. 172, and *Scarborough v. Myrick,* 47 Neb. 794, so hold. There are none, we think, to the contrary, as applying to the facts here.

The finding of the district court that the attachment issued upon the suit of Matilda Michael was void because order for the same was obtained from the county court when the district court judge was in the county seems to have ample support in *Ferson v. Armour & Co.,* 103 Neb. 809. There is also abundant evidence to sustain a finding that the plaintiff did not resign his possession and submit to the taking of the sheriff under the attachment orders held by him, as one does who acknowledges a superior right. He admits that he pointed out articles or stock and personal property upon which the sheriff might levy, but maintains that he asserted his right to the crops and continued to harvest and care for them. It appears that he filed his lease for record on the 4th day of September. The provisions of this lease indicate that his taking of possession was justifiable, wholly apart from the fact that under the circumstances it was also a work of necessity and mercy.

It is urged by the defendants that injunction did not lie; that plaintiff might have resorted to an action at law. But he had no lien, merely an equitable right arising from his action against Brockman, which resulted in placing the crops in the custody of the law, rather than in vesting him with a specific lien. His remedy at law would have been doubtful, and would not in any event have afforded him complete and adequate relief. Hence, his resort to equity was permissible. He was entitled to injunction by the authorities hereinbefore referred to. *Sporer v. McDermott,* and *Ryan v. Donley, supra.*

Other objections urged by appellants have been ex-

amined and found untenable. Holding these views, it will be unncessary to comment upon the authorities cited. The court is of opinion that the judgment was without reversible error and that it ought to be affirmed.

AFFIRMED.

FRANK HALLETT V. STATE OF NEBRASKA.

FILED NOVEMBER 25, 1922. No. 22809.

1. **Assault and Battery:** INTENT. The intent with which an assault is made may be inferred from the facts and circumstances surrounding the performance of the act.
2. ———: "GREAT BODILY INJURY:" QUESTION FOR JURY. The term "great bodily injury," as employed in the Criminal Code, is not susceptible of a precise definition, but implies an injury of a graver and more serious character than an ordinary battery; and whether a particular case is within the meaning of the statute is generally a question of fact for the jury.
3. ———: ———: ———. Evidence examined, and found sufficient to justify the trial court in permitting the jury to determine therefrom whether or not the defendant's assault was made with intent to inflict great bodily injury.
4. **Criminal Law:** NAMES OF WITNESSES. The object of the statute providing that the names of the state's witnesses must be indorsed on the information is to protect the defendant by apprising him of the identity of those who are to testify against him; and, if this end is fully attained, the defendant cannot complain because the witness is designated by his title, Doctor, instead of by his given name or initials.

ERROR to the district court for Boyd county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

W. T. Wills and *Josiah Coombs,* for plaintiff in error.

Clarence A. Davis, Attorney General, and *Jackson B. Chase, contra.*

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

SHEPHERD, District Judge.

In this case the plaintiff in error, defendant below, was convicted of an assault with intent to do great bodily injury. He attacked Mr. Cliff Penn, a school-teacher and superintendent of schools of the town of Lynch, as they met upon the village street, knocked him down with his fist and struck him again while down, inflicting upon him by his blows and by the described fall a deep two-inch cut above his eye, a contusion on the back of his head, a cut on the inside of his check, and several minor abrasions on his face.

The evidence is conclusive that the teacher made no hostile demonstration toward the defendant, and that he offered no resistance. He was completely knocked out, lost a good deal of blood, fainted at the end of his surgical treatment, and was carried to his home, where he was laid up for nearly ten days. For some additional time he experienced a difficulty of locomotion, due to dizziness. There was medical testimony to the effect that permanent partial disability might result from his rough-handling.

But the question raised here, as well as in the court below, is this: Did the defendant do what he did with intent to inflict great bodily injury, that is to say, with intent to inflict an injury of graver and more serious character than an ordinary battery? He swears positively that he had no such intent. Was the evidence sufficient to enable the jury to properly find therefrom that he had? If this question be answered in the negative, the verdict ought not to stand, however aggravated the assault.

Without much doubt, defendant bore the superintendent some ill will, as prominent in the denial of school privileges to his daughter. The school board had made a ruling that the latter was not entitled to schooling in Lynch until tuition should be paid for her, and Mr. Penn, as superintendent, was attempting to enforce such ruling by refusing to permit her to recite with the other pupils. Defendant contended that he had returned to

Lynch to live, and that his daughter had a right to the benefit of public school without the payment of any tuition. He had arranged with a member of the board for a hearing at its next session, and, meeting Mr. Penn upon the street, he accosted him and sought to discuss the matter with him. Penn replied that he did not want to talk to him, and he struck him. Such was the testimony of the defendant. On the other hand, Mr. Penn testifies that no word whatever passed between them; that he was reading a letter as he passed along, and did not even see his assailant, or know that he was at hand, till he came back to consciousness under the ministrations of his physician.

Though his irritation was ever so real, it cannot, of course, afford the defendant any justification for his violence. His daughter may have been humiliated. She probably was. The ostracisms of the school-room, so often inflicted for the purpose of compelling parents, are frequently peculiarly distressing to the child. But, even if she had been insulted or abused, her father would have been without any valid excuse for his resort to the code of the club, claw and fist. His provocation, if any he had, is important mainly as disclosing a motive that might beget the intent charged. In other words, it only helps to prove that he had in contemplation all that he accomplished in his brutal assault. Without a fixed purpose to beat his victim beyond the bounds of mere battery, it would seem that the success of his first paralyzing blow would have appeased his anger. But he struck him again, and perhaps again, as he struggled, knocked-out and bleeding, upon the walk, striking so hard in one instance that his fist, missing or glancing and landing on the walk, was badly broken. Moreover, the teacher was undersized, five feet five and one-half inches in height, and a cripple. Further than this, there was testimony, denied and not at all conclusive, it is true, that defendant had been looking and waiting for Mr. Penn in the vicinity of the schoolhouse.

In the Nebraska cases, more particularly in *Murphey v. State,* 43 Neb. 34, and *Lambert v. State,* 80 Neb. 562, it is held that whether the defendant intended to inflict great bodily injury, which this court defined as an injury of graver and more serious character than a battery, was a question for the jury. There was breaking of bones in those cases, but nothing to indicate that the attack was more savage and unsparing. Indeed, the unsparing and follow-through quality of the assaults in those cases finds a counterpart in this, and argues not only deliberation, but determination to injure to a very serious degree. Futhermore, it was held in such case that the intent of the assailant was proper to be inferred, in the judgment of the jury, from the facts and surrounding circumstances of the case.

These considerations lead us to the opinion that the case was for the jury, and that the verdict and judgment cannot be disturbed if the trial was fair and if the issue was properly submitted.

The contention of the defendant that the court erred in permitting Dr. Kirz to testify, his name being indorsed on the information as Dr. Kirz merely, and not by given name or initial, is not well taken. The object of the statute is that the accused may be apprised of the identity of those who are to testify against him. Doctors are better known by their title than by their Christian names in a country town. Dr. Kirz was well known to the defendant by his professional designation. He had treated his hand at the time it was hurt. The statute will be considered as a protection to the defendant, but not as a weapon against the state. *Ossenkop v. State,* 86 Neb. 539. No prejudice was done to the defendant's rights. No substantial harm was done. No miscarriage of justice resulted. Comp. St. 1922, sec. 10186.

A careful examination of the record discloses no reversible error in the rulings of the court in the reception or rejection of evidence.

We are unable to discover any error in instruction No.

8, given by the district court. The court closely followed the definition of "great bodily injury" adopted in *Murphey v. State, supra,* and approved in *Likens v. State,* 63 Neb. 249, and *Lambert v. State,* 80 Neb. 562, and instructed that whether a particular case is within such definition is a question of fact for the jury. In this, as in its further statement that great bodily injury does not necessarily mean permanent injury, it is supported by the express language of the above cases. The instruction seems quite above reproach.

Likewise instruction No. 9 is an approved one, telling the jury that the proof of intent on the part of the defendant is indispensable to a conviction. It properly directs that this may be inferred from words and acts and surrounding facts and circumstances. Taken in connection with instruction No. 12 (and all the instructions must be considered together), it correctly stated the law and abundantly safeguarded the defendant.

Instruction No. 10 is somewhat involved in its language, but it is not susceptible of a construction under which it might be said to misstate the law, or to be injurious to the defendant. The first part, in which it is stated that it is not essential to a conviction that the accused should have intended the precise injury that followed the assault, is in the familiar language of the *Murphey* case, while the latter part says, in substance, that it is enough if it be shown beyond reasonable doubt by the circumstances that great bodily injury was contemplated. Taken with the preceding instruction, which directed that all the evidence bearing on intent should be considered, it is not objectionable, and could not have been misleading.

The same may be said of instruction No. 11, which is assailed as telling the jury that the assault was deliberate and inexcusable. That this is not the case is obvious from a reading of the instruction. The instruction is as follows: "No wrong, however serious to the person of another, will alone warrant a conviction for an assault

with intent to inflict great bodily injury; but, when the injury proved is the natural and necessary consequence of the deliberate and inexcusable act of the accused, the presumption is that it was the result contemplated by him in the commission of the assault." This is a correct statement of the law. *Murphey v. State,* 43 Neb. 34. Nor can the defendant complain of it, particularly since he offered no instruction presenting the alternative, and none specifically directing its application.

The case was well tried and submitted, and the judgment of the district court should stand.

AFFIRMED.

C. L. MAJORS V. STATE OF NEBRASKA.

FILED DECEMBER 8, 1922. No. 22605.

Forgery: PROOF. In a prosecution for uttering a forged instrument knowing it to be forged, a conviction cannot be sustained without proof of the forgery.

ERROR to the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Reversed.*

J. E. Willits, for plaintiff in error.

Clarence A. Davis, Attorney General, and *Jackson B. Chase, contra.*

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

PER CURIAM.

In a prosecution by the state in the district court for Lancaster county, defendant, under the name of "Mrs. C. L. Majors," was convicted of uttering a forged check knowing it to be forged, and for that felony was sentenced to the penitentiary for a term not less than one nor more than twenty years. As plaintiff in error she presents for review the record of her conviction.

Insufficiency of the evidence to sustain the conviction

is urged as a ground for a reversal of the judgment. The alleged forged check was dated October 7, 1921, was apparently drawn by H. E. Meyer on the Bank of Roca for $20, and was payable to C. L. Majors. The state proved the following facts: A person representing himself to be H. E. Meyer had previously presented himself at the Bank of Roca, had deposited $30, and had opened an account. Defendant went to the grocery of Brehm & Son, at Twenty-seventh and Vine streets, Lincoln, on or about October 8, 1921, bought a bill of groceries amounting to less than $4, uttered the check for $20, and received the balance in change. The check was worthless and defendant swindled the confiding grocers out of at least $20. The evidence also shows that she cheated other merchants in the same manner and that she procured money under false pretenses. However, she was not charged with that offense and cannot be punished for it in this prosecution. In law there can be no legal conviction in a prosecution for uttering a forged instrument without proof of the forgery. While there is proof that defendant uttered the check, there is no proof that it was forged. For this reason, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

PETER O'SHEA, APPELLEE, V. NORTH AMERICAN HOTEL COMPANY ET AL., APPELLANTS.

FILED DECEMBER 8, 1922. No. 22144.

1. **Insurance:** INDEMNITY CONTRACT: LIABILITY OF SURETY. Where a contract provided that, upon the happening of a certain event, the contract was to become null and void, and the consideration of the contract returned, and that a bond given by a surety company to secure the faithful performance of the contract should be surrendered and canceled by the obligee, the liability of the surety became so far fixed upon the happening of the specified event that the damages against the surety could not exceed the amount then accrued. Subsequent negotiations between the parties to the original contract without the consent of the surety,

and of which the surety was not advised until long afterwards, did not operate to change or extend the liability of the surety company for damages for a breach of the contract.

2. ———: ———: DEFAULT: WAIVER. A provision in a contract bond that the obligee shall give notice within ten days after knowledge of a default in performance of the contract is for the benefit of the surety company, and may be waived by the conduct of its managing officers after knowledge of such default.

3. **Contracts:** ACTION: PARTIES. Section 8528, Comp. St. 1922, which provides, in substance, that a person in whose name a contract is made for the benefit of another may bring an action without joining with him the person for whose benefit it is prosecuted, is not inconsistent with section 8542, Comp. St. 1922, requiring the joinder of all parties interested in an action as plaintiffs, or defendants; section 8542 states a general rule, to which section 8528 is an exception.

4. **Insurance:** INDEMNITY CONTRACT: ACTION: DEFENSES. Where a contract is entered into in the name of one party for the benefit of himself and two others, with the knowledge and consent of the other contracting parties, and a surety bond is issued to him to guarantee the faithful performance of the contract, and the premium is paid, and retained by the surety company after knowledge that he is acting for others as well as himself, the fact that the bond provides, "no right of action shall accrue upon, or by reason hereof, to, or for the use, or benefit, of any one other than the obligee herein named," is not a sufficient defense to an action by the obligee on the bond in his own name, for the benefit of all, since the surety company has received and retained the full consideration for its obligation, and its liability is no greater than it would have been had the obligee been the sole party interested.

5. ———: ———: ———: DAMAGES. In an action against a surety company upon a bond to secure the performance of a building contract, damages for nonperformance may be recovered, not exceeding the penalty of the bond, with interest from the time the contract was broken. *Mullen v. Morris*, 43 Neb. 596.

6. **Damages:** Gains prevented as well as losses sustained may be recovered as damages upon the breach of a contract, but it must appear that the profits were reasonably certain to have been realized by performance, that they are not speculative or contingent, that such damages must have been within the contemplation of the parties, and the loss must appear to have resulted proximately and naturally from the breach.

7. ———: SPECULATIVE PROFITS. Profits which are speculative in

their nature and depend upon so many contingencies as to render them exceedingly difficult of determination with any definiteness or certainty will not be considered as elements of damages for a breach of a contract, unless no other reasonable method of ascertaining the damages can be obtained; more especially if such profits depend upon the contingency that subsequent and collateral contracts are made from which such anticipated profits are expected to arise, and other and more definite means of arriving at the damages exist.

8. ———: ———. Where the title to certain real estate and $5,000 in money was transferred to a corporation by the owners of adjacent property as consideration for the erection, within a specified time, of a hotel upon the lots donated, evidence tending to establish the value of adjacent lots belonging to the donors at the date of the expiration of the contract, and of the value of such lots as they would have been at that date had the hotel been completed and in operation (the contract not providing that the donee should operate the hotel), is too remote and speculative and depends upon so many uncertain elements and contingencies that it does not furnish a proper measure of damages. In such a case, the proper measure of damages is the return of the property donated, or its value, with interest from the time of the breach of the contract to the time of trial.

9. **Fidelity Insurance.** Under section 7814, Comp. St. 1922, "guaranteeing the performance of contracts other than insurance policies, or guaranteeing and executing all bonds, undertakings and contracts of suretyship," is classified as "fidelity insurance."

10. **Insurance:** ACTION: ATTORNEY'S FEES. Section 7811, Comp. St. 1922, provides in substance that, where a beneficiary, or other person entitled thereto, brings an action at law upon any policy of guaranty, or fidelity insurance, against any company doing business in this state, the court is authorized, upon rendering judgment against such company, to allow the plaintiff a reasonable sum as attorney's fee in addition to the amount of his recovery, to be taxed as part of the costs, and the appellate court is authorized on appeal to allow a reasonable sum as attorney's fee for the appellate proceedings, *held*, that under the statute an allowance of attorney's fees should have been made in the case.

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

Montgomery, Hall & Young, Kimball, Peterson & Smith and *Gaines, Ziegler, Van Orsdel & Gaines,* for appellants.

Brogan, Ellick & Raymond and *P. J. Barron, contra.*

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

LETTON, J.

This action was brought against the North American Hotel Company to recover damages for the breach of a contract to construct a hotel at Scottsbluff, and against the American Surety Company upon a bond executed by that company in favor of the plaintiff to secure the faithful performance of the contract. These parties will be hereinafter designated "the Hotel Company" and "the Surety Company."

Plaintiff O'Shea, J. C. McNish, and H. H. Ostenberg were the owners of a number of lots and tracts of land in and about the city of Scottsbluff, among them three lots upon the corner of Main street, two or three blocks north of the then business center of the city. They believed that the erection of a hotel on these three lots would greatly enhance the value of their adjacent real estate, and, on the 21st of March, 1917, plaintiff, on behalf of himself and his associates named, entered into a written contract whereby in consideration of the conveyance to the Hotel Company of the three lots, and the payment of $5,000 in cash, the Hotel Company agreed to erect thereon a modern fireproof hotel consisting of 80 rooms, and to complete the same within 15 months after the delivery of the deed and payment of the $5,000. The contract contained the provision that, if the erection of another hotel was started in the city by other parties before the Hotel Company began the erection of the hotel provided for, the contract should be null and void, and the Hotel Company should reconvey the lots and repay the $5,000. The Hotel Company failed to fully complete the erection of the hotel building within the time limited. Plaintiff alleges that, by reason of such failure, he and his associates were damaged by the loss of the increased value of the remaining lots to the amount of $60,000.

It is alleged that plaintiff notified the Surety Company on July 7, 1919, of the default in the construction of the hotel; that no objection was made by it on account of his failing to give notice earlier; and that it denied all liability on the bond and thus waived any defense by reason of failure to give notice.

The Hotel Company pleads fraud on the part of O'Shea by reason of a representation in a letter that no other hotel was being erected in Scottsbluff, an estoppel based on the fraud, and a general denial.

The Surety Company defends upon the ground that, after the bond was executed, the plaintiff and the Hotel Company, without its knowledge, made a material alteration in the contract whereby the Surety Company was discharged. It also alleges failure to give notice within ten days, as required by the terms of the bond, and that the bond was given for the benefit only of the plaintiff O'Shea. The reply alleges that the letter was intended by the plaintiff and understood by the Hotel Company merely to be a waiver of the right of plaintiff to declare the contract null and void in the event a third party should start to erect another hotel in Scottsbluff before the Hotel Company should begin to erect the hotel contemplated in the contract, and further alleges that the letter was written without consideration and at the special instance and request of the Hotel Company.

The original contract contains the following provisions:

"It is further agreed that if there shall be erected or started to erect another hotel in Scottsbluff, Nebraska, by any other party than the party of the first part, before the party of the first part shall start the erection of said hotel, then this contract is to be null and void, and the party of the first part is to deed back to the party of the second part the said lots so donated and to return the $5,000 in cash as hereinbefore recited, and the party of the second part is to surrender and cancel said bond furnished to him by the party of the first part."

Before the contract was executed, another concern, the

Nebraska Hotel Company of Lincoln, had entered into negotiations with the chamber of commerce of Scottsbluff for the erection of a hotel. Before April 16, 1917, a site had been acquired, and it had begun the erection of a hotel building. This was within the knowledge of O'Shea, and, under date of April 16, O'Shea signed the following letter to the Hotel Company:

"Gentlemen: I have investigated the possibility of any other party erecting a hotel at Scottsbluff, and have satisfied myself that there is no possibility that any move will be made to construct a hotel here. You are, therefore, authorized and instructed by me to proceed with the erection of the hotel building as provided for in our contract under date of March 21, 1917.

"It is expressly understood and agreed that any right to cancelation of said contract and the return of the donations therein specified are hereby waived by the undersigned, and that no demand by reason of any other hotel proposition will be made on you for cancelation of said contract. Yours very truly, Peter O'Shea."

The evidence establishes that this letter was prepared at the office of the Hotel Company in Omaha at the instance of Peter Elvad, who was in active charge of the negotiations of the company; that one Henzie, an agent of the Hotel Company, had been in Scottsbluff about three weeks before the letter was prepared, and had then ascertained that the Nebraska Hotel Company was about to erect a hotel there. When he returned he reported this fact to Elvad. Henzie, under Elvad's directions, then returned to Scottsbluff with the letter. He presented the same to O'Shea, saying that the company wanted him to sign it as a waiver "so that he could not back out in case the other hotel was built." It was then signed by O'Shea and returned to Elvad. It is also shown that the original contract was negotiated directly with Elvad by Ostenberg, McNish and O'Shea, and that Elvad was then informed that the Nebraska Hotel Company was negotiating with the Scottsbluff chamber of

commerce with respect to building a hotel in Scottsbluff. In the negotiations preceding its execution, Elvad stated that the Nebraska Hotel Company could not build the hotel on account of its financial situation.

If any other party started to erect another hotel in Scottsbluff before the defendant Hotel Company, the contract was to be null and void, the real estate was to be reconveyed, the $5,000 repaid, and the bond surrendered. These provisions were for the benefit of both parties to the contract. Under the evidence it is clear that both of the parties understood this letter to be a change and modification of the contract, and a waiver of the right of O'Shea to rescind by reason of the erection, or the beginning of the erection, of another hotel at Scottsbluff, and that there was no fraud or deceit as between O'Shea and the Hotel Company. The original contract in all other terms and conditions was left unaffected by these waivers. Considering both the direct and circumstantial evidence, we are convinced that the Hotel Company has not sustained the defense of estoppel based upon the letter.

The Hotel Company also defends upon the ground that O'Shea is not the real party in interest except as to his own one-third interest in the real estate, and assigns as error the ruling of the court allowing him full recovery. Before the contract was executed the Hotel Company was in possession of full knowledge as to the relations between McNish, Ostenberg, and O'Shea, and knew that the contract was being executed in the name of O'Shea for the benefit of himself and his two associates. It is said that though under section 8528, Comp. St. 1922, a person in whose name a contract is made for the benefit of another may bring an action without joining with him the person for whose benefit it is prosecuted. It is required by section 8542, Comp. St. 1922, that all parties united in interest must join as plaintiffs or defendants, and that the latter provision is mandatory, and controls. Of course, if the latter provision is mandatory, it would

entirely nullify section 8528. While section 8542 states the general rule, section 8528 constitutes an exception, under which this case falls. We conclude, therefore, that the defenses of the Hotel Company against an action for damages for breach of contract have not been sustained.

Coming now to consider the defenses of the Surety Company, we think it clear that the contract was materially altered as to this defendant by the letter of April 16, and the conduct of the parties to this contract thereafter. When the bond was executed the contract provided that, if the erection of another hotel had been begun in Scottsbluff before the Hotel Company began its building, the contract should be "*null and void,*" and that O'Shea should "cancel and surrender" the bond. The condition upon which the contract and bond were to become void existed before the letter of April 16 was written. Under the contract it then became the duty of the Hotel Company to reconvey the three lots and to repay the $5,000. The extent of the liability of the Surety Company at that time became and was fixed, unless it assented to the change in the contract. This it did not do. Nothing that either of the parties could or did do thereafter without the consent of the Surety Company could increase its liability. We think, therefore, that the court erred in its instructions to the jury with regard to the measure of damages against the Surety Company. The measure against this defendant cannot exceed the fair market value of the three lots at the time the erection of the Lincoln Hotel was begun, with interest at 7 per cent. per annum from that date, together with the sum of $5,000, with interest at the same rate for the same time, but not exceeding its liability on the bond, or the liability of the Hotel Company.

As to the other defenses of the Surety Company: The defense of want of notice was not raised in its original answer, which was a general denial of all liability upon the policy. Moreover, defendant, by the conduct of its managing agent, his assurance to plaintiff after receiv-

ing notice of default that a full investigation would be made and the matter taken up for adjustment, and by the request of defendant for more time for investigation and negotiation with the Hotel Company, and its extension of the time fixed in the bond within which it is provided suit must be begun in case of a default, must be held to have waived the provision for 10 days' notice. It is clear that defendant treated the policy as in effect long after this period had expired. *St. Paul Fire & Marine Ins. Co. v. Gotthelf,* 35 Neb. 351; *Jensen v. Palatine Ins. Co.,* 81 Neb. 523; *Farrell v. Farmers & Merchants Ins. Co.,* 84 Neb. 72; *Morgenstern v. Insurance Co. of North America,* 89 Neb. 459.

The provision of the bond that no right of action shall accrue for the use or benefit of any one other than the obligee herein named is not inconsistent with the recovery of the whole damages by O'Shea. The contract and bond must be construed together. The case is not that of a voluntary surety, who is a favorite of the law, but the bond must be construed as an insurance policy, and most strictly against the insurer. The premium collected by the Surety Company was to cover the risk of all damages that might arise from the nonfulfilment of the contract. It is not called upon to respond for more than it would reasonably anticipate from a violation of the terms of the contract. Having received and retained the premium after knowledge that O'Shea was acting for others as well as for himself, it cannot now defend on the ground that it is only liable to O'Shea for his share of the loss. Under the allegations in the petition, and the facts in the case, a recovery by O'Shea in this action will effectually bar any subsequent recovery by Ostenberg and McNish, or either of them.

At this point it may be well to consider a matter which concerns the measure of damages with respect to the Hotel Company. During the trial plaintiff sought to prove the value, on July 2, 1918, of the real estate belonging to the donors, near the hotel corner, and the

value of those lots as they would have been on the same date had the hotel building been completed. Objection was made, among other reasons:

"Because the alleged damages, if any, were uncertain and speculative and not the direct or probable result of the failure of the Hotel Company to complete the hotel contracted for, and that any such alleged damages do not appear to have been within the contemplation of the parties to the contract pursuant to which the hotel was constructed."

"Mr. Gaines: And for the further reason it simply calls for a guess.

"Mr. Ellick: I don't know, Your Honor, but what this record ought to show that this is the very rule that these lawyers contended for when we tried this case the other time.

"Mr. Gaines: You cannot contend that for me,

"The Court: Well, with some qualifications, perhaps, that is the correct rule; it don't make any difference perhaps. Objection overruled. Answer the question.

"A. I would say $10,000 and $15,000 to $16,000."

The original petition, which was introduced in evidence for another purpose, shows that the action was begun against both defendants for the $5,000, and for the value of the three lots donated, with interest. At the oral argument in this case, Mr. Ellick, counsel for plaintiff, stated that the action was begun upon that theory; but, upon objection made by the defendants that this was not the true measure of damages, the objection was sustained, and the court ruled that the actual damages must be proved.

Of course, if the trial court, at the insistence and request of a party to a suit, adopts an erroneous measure of damages, the party who thus misled the court will not afterwards be permitted to take a contrary position and attack the soundness of the ruling in a reviewing court. This would trifle with the administration of justice. The quotation set forth is the only portion of the record con-

taining any reference to the ruling upon this question at the former trial, so far as has been pointed out, or we have been able to ascertain, and it is not sufficient to establish that such ruling was made, or, if made, was made at the instance of the Hotel Company. Considering the amount of the recovery permissible against the Surety Company in either event, it makes little difference to that defendant which measure of damages is adopted, but as to the Hotel Company the question is material. Objections were repeatedly made to the admissibility of testimony of this nature. When such testimony was first offered, the trial court seemed to be somewhat in doubt, saying, "Of course, it is somewhat speculative, but whether there is any different character of evidence that can be found that is more consistent or competent, I don't know; we have to take the best we can get," and the evidence was admitted.

We must consider and determine whether such testimony is speculative in its nature, too remote, and (as stated in some of the objections) invades the province of the jury. The court instructed the jury:

"In estimating the fair and reasonable market value of the lots in question you are entitled to take into consideration all the circumstances shown by the evidence to have existed in and about Scottsbluff on or about July 2, 1918, including the population of the town and probable increase in the same, the business transacted in Scottsbluff and surrounding country, the railroad, automobile and other transportation facilities and connections of Scottsbluff, the situation of said hotel with reference to the business portion of the city, the number of persons for whom hotel accommodations would be required, competition as affecting the probable success of the hotel, all such other hotels, rooming houses and facilities as are shown by the evidence to have actually existed in Scottsbluff on or about July 2, 1918, the opinions of witnesses as to such market value, and all other facts

and circumstances shown by the evidence having a bearing upon that question."

"The measure of plaintiff's damages, if any, is the difference between the fair market value of the lots belonging to plaintiff and his associates on or about July 2, 1918, with the hotel building as it stood in its uncompleted state at said time, and what would have been the fair and reasonable market value of said lots had said hotel building been completed at that time, provided there would have been an increase in the value of the lots, and provided, further, that plaintiff would only be entitled to recover such increase as would have resulted directly from the completion of said hotel building."

Mr. McNish, one of the persons for whose benefit the action was brought, after having testified as to the increase in value of the lots which would have been caused if the hotel had been completed by July 2, 1918, upon cross-examination testified as follows:

"Q. Now, assuming for the purpose of the question, that the hotel building upon those lots had been completed, but was not occupied as a hotel, simply a completed building, not used at all, would that make any difference in your estimate? A. Why, certainly. * * * Q. The lots, I said, assuming that the building on the lots owned by the North American Hotel Company had been completed as a hotel building in June or July, 1918, but was not occupied or used as a hotel property, merely a vacant building; would that make any difference in your estimate? A. An unoccupied building is always a detriment, I would say. Q. Yes, sir; in other words, if that building was completed and should continue unoccupied as a hotel building, it would not be a benefit to the addition, would it? A. Well, the people would not be up in there, that is a cinch. Q. Well, property of that character, a hotel building of 80 rooms, that couldn't be utilized as a hotel, wouldn't be of benefit to the surrounding property, would it? A. Well, if it was fully completed they surely wouldn't leave it unoccupied. Q. You are basing

your statement then that the property would be worth from $1,200 to $1,500 more per lot upon the assumption that the building would be completed and run as a hotel, as a profitable investment, a successful investment; isn't it based upon that assumption? A. I wouldn't put it a successful investment, I would say if that was the best hotel in town it would bring the people there and it would naturally put other businesses in that vicinity. Q. That is, upon the assumption that it is running successfully as a hotel? A. That it is operated as a hotel. * * * Q. So, your whole estimate of values is based upon the assumption that the hotel would have been completed and being operated as a hotel, when you say under those circumstances it would be worth from $1,000 to $1,500 more per lot? A. No, sir; I wouldn't say. I would say a town growing from 1,200 to 1,500 in practically a ten-year period to 8,000 or 9,000 certainly has some increase in value."

Mr. Ostenberg, another of the parties for whose benefit the action was brought, testified that the value of the lots was about as high in June, 1918, as at any time. "Q. Since then, I suppose, they have gone down some. Is that correct? A. Well, there hasn't been anything selling. Q. Haven't gone down, but you can't sell, is that the idea? A. Not selling. I suppose if you wanted to sell you would have to take off something, just like you do on farm land."

Other witnesses for plaintiff testified that the lots would have been increased in value on an average of $1,000 by the completion of the hotel building in June, 1918. In answer to a question that, "If that hotel building were completed today, would that fact, in your judgment, increase the value of the lots in this tract that I have described? * * * A. Hardly to the extent it would if completed in 1918, as real estate at that time was more active than at present. The completion of the hotel at this present time would not have the effect of increasing the present value of the lots as much as it would had the

hotel been completed in 1918; possibly 25 to 50 per cent. less increase than in 1918."

Another witness for plaintiff testified that if the building were completed now it would add approximately $1,000 to the value of each lot.

For defendants, a number of witnesses testified, in substance, that the lots in question on July 2, 1918, were worth from $1,000 to $1,500 with the hotel building in the condition it then was, and that its full completion would not have enhanced their value at that time. One of the witnesses gave as his reason for this opinion: "Because any advance made on property by reason of the construction of any improvements are generally made anticipating the completion, or prior to the completion of the property, and not after the completion of the property." He also testified that the value of a large portion of the property in controversy has increased since July 1, 1918, to almost double what the value then was.

It seems clear that at least some of the witnesses testified having in mind the enhanced value of the lots if a first-class modern hotel were being operated at the point where the building was constructed. The quoted instruction permits the jury to consider the operation of the hotel. The contract contains no provision for the operation of the hotel, or for the carrying on of a hotel business in the building. It merely provides for the erection, and not for the operation, of the hotel. At the time of the trial over $150,000 had been expended on the building, the walls were up, the roof on, the rough cement floors in, no windows or doors in, and it was partly lathed. It was practically in the same condition as in July, 1918, when work was stopped.

While plaintiff has the right to recover all the damages which he actually suffered by the noncompletion of the building, if it is afterwards completed the use to which it might be put may result in an equal enhancement of the value of the unsold lots. There is testimony

that the building when completed is suitable for a hotel, a club, or a hospital.

We have repeatedly held that gains prevented as well as losses sustained may be recovered as damages upon a breach of contract. But it must appear that the profits were reasonably certain to have been realized by performance; that they are not speculative or contingent; that such damages must have been within the contemplation of the parties, and the loss must appear to have resulted proximately and naturally from the breach. *Punteney-Mitchell Mfg. Co. v. Northwall Co.*, 70 Neb. 688; *Wittenberg v. Mollyneaux*, 55 Neb. 429; *Silurian Mineral Springs Co. v. Kuhn & Co.*, 65 Neb. 646; *Roper v. Milbourn*, 93 Neb. 809.

"But anticipated profits cannot be recovered where they are dependent upon uncertain and changing conditions, such as market fluctuations, or the chances of business, or where there is no evidence from which they may be intelligently estimated. So evidence to establish profits must not be uncertain or speculative. It is not necessary that profits should be susceptible of exact calculation, it is sufficient that there be data from which they may be ascertained with a reasonable degree of certainty and exactness." 17 C. J. 785, sec. 112.

Plaintiff has cited cases to support the proposition that the loss of profits to be derived from the resale of lots or lands arising from the failure to perform a contract to erect factories, build railroads, switches, etc., may be recovered. As a general rule profits from collateral contracts are too remote to constitute elements of damage, yet there may be circumstances under which they are allowable. In the case of *Ironton Land Co. v. Butchart*, 73 Minn. 39, the contract not only provided for the erection of buildings for a structural steel manufacturing building, with a capacity for 500 employees, but also provided for its operation for a specified time. In other cases, where the contract provided for the building of a switch to a tract of land upon which a factory was to

be erected, or to extend an electric street car line to a proposed addition to a city, it was held that the measure of damages was the difference between the value of the property as it was and as it would have been had the lines been constructed. We have no quarrel with these decisions under the facts in each case, though in some of them the rule seems to have been adopted as the best available under the circumstances. In *Chesapeake & O. R. Co. v. McKell Co.*, 209 Fed. 514, it is said that such a measure of damages "must be adopted at the peril of otherwise saying that the damages are too speculative to permit recovery."

In other cases such recovery is denied, especially where the damages are claimed for a prospective loss of profits to be derived from a collateral transaction. *Fitzsimmons v. Chapman*, 37 Mich. 139; *Dullea v. Taylor*, 35 U. C. Q. B. (Canada) 395; *Clyde Coal Co. v. Pittsburg & L. E. R. Co.*, 226 Pa. St. 391; *Fox v. Harding*, 61 Mass. 516. If the evidence had been the best obtainable as to damages, and the testimony as to enhanced value, or loss of profits, had been confined to that which would reasonably have been caused by a failure to complete the erection of the building, with the factor or element of the operation of the hotel excluded from the consideration of the jury, a different question would be presented.

Each case must be determined upon its own peculiar facts. Where the evidence is sufficient as to definiteness and certainty, and the other elements necessary are shown to exist, such damages may be recovered. But, unless this condition obtains, the evidence may not be admitted if there is any other reasonable, more definite and satisfactory basis by which to measure the damages suffered.

If the building had been completed within the time limited, it would be improbable that plaintiff could at once realize on the 50 or 60 lots involved and secure the profits, and there is no evidence of this nature in the record. The sale of the lots both then and thereafter

would depend upon many contingencies—the growth of the city, the use to which the building would be placed, the business conditions in the country generally, and many other factors affecting the market for real estate in that particular locality. We are satisfied that the evidence as to the enhancement of value and loss of profits is so speculative, remote and uncertain, and depends upon so many contingencies, that it ought not to be accepted as the measure of damages in this case. The damages which plaintiff has suffered are easily ascertainable by a definite standard. In an action for a breach of a contract of this nature, where the damages are uncertain, speculative and not reasonably susceptible of definite ascertainment, the consideration money, or the value of property conveyed as a consideration, with interest, is the proper measure of damages. He has been deprived of the use of the three lots and of the $5,000 since the date of the payment, and of the conveyance to the Hotel Company. He is therefore entitled to recover the $5,000 paid, together with the fair market value of the lots at that time, with interest at 7 per cent. from the date stated. This returns to the plaintiff the entire consideration with interest as damages for the loss of the use of the money, and leaves him with the other real estate susceptible to any enhancement of value which may have occurred, or which may occur in future, by reason of the improvement of the adjacent property by the erection of the building.

It is alleged as error that the court allowed interest upon the penalty of the bond from the date of the breach. There is a conflict in the decisions on this point, but the question has been settled in this state in *Mullen v. Morris,* 43 Neb. 596, 611, and *Thomssen v. Hall County,* 63 Neb. 777, where it is shown that the weight of authority is in accordance with the holding of the trial court.

After the judgment was rendered, a motion was filed on behalf of plaintiff for the allowance of attorney's fees against the American Surety Company to be taxed as

part of the costs. The motion was overruled, and from this order the plaintiff has filed a cross-appeal. By section 7814, Comp. St. 1922, "guaranteeing the performance of contracts other than insurance policies, or guaranteeing and executing all bonds, undertakings and contracts of suretyship," is classified under the head "fidelity insurance." By the amendment to section 3212, Rev. St. 1913, made by section 2, ch. 103, Laws 1919 (Comp. St. 1922, sec. 7811), it is provided that, in actions upon "guaranty, fidelity or other insurance of a similar nature, * * * the court upon rendering judgment * * * shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his recovery, to be taxed as part of the costs, and if such cause is appealed the appellate court shall likewise allow a reasonable sum as an attorney's fee for the appellate proceedings." The contract and bond in this case were executed and breached before the passage of this amendment; but, since the attorney fee is part of the costs, it pertains to the remedy, and the legislature has power to regulate the same, even though the cause of action accrued before the passage of the amendatory act. The insurance policy was for the purpose of "guaranteeing the performance" of a contract "other than an insurance policy," and is clearly within the definition of "fidelity insurance," as to which an attorney's fee is provided for by the statute.

The judgment of the district court is reversed and the cause remanded for further proceedings. It is further ordered that each party pay one-half the costs in this court.

REVERSED.

CHARLES NICHOLS V. STATE OF NEBRASKA.

FILED DECEMBER 8, 1922. No. 22571.

1. **Criminal Law:** TRIAL. Defendant in a prosecution for murder in the first degree is not entitled to a discharge without a trial on the statutory ground that he was not indicted at the term at which he was held to answer, where the record shows that the felony was committed after the jury called to serve at the present term had been discharged; that by order of the examining magistrate he was held to answer at the next regular jury term, and that at the beginning thereof the information was filed in the district court. Comp. St. 1922, sec. 10044.

2. **Information:** VARIANCE. In a criminal prosecution an immaterial variance between the complaint before the examining magistrate and the information filed in the district court is not a ground of abatement, where the same crime is properly charged in both.

3. **Courts:** RULES OF PRACTICE. Under recent statutory and constitutional provisions the supreme court may promulgate rules of practice and procedure not in conflict with existing laws on those subjects. Comp. St. 1922, sec. 10074; Const., art. V, sec. 25.

4. **Information.** Form of information for murder in the first degree set out in opinion.

5. **Criminal Law:** IMPANELING JURY. Where impaneled jurors are shown to have the statutory qualifications, and defendant in a criminal prosecution has not exhausted his peremptory challenges, assigned errors in accepting or excusing veniremen are unavailing for the purpose of reversing his conviction.

6. **Witnesses:** PRIVILEGED COMMUNICATIONS. Where a communication by a patient to his physician is not necessary and proper to the discharge of the latter's professional duties or services, it is not privileged within the meaning of the statute forbidding the disclosure of confidential communications between physician and patient. Comp. St. 1922, sec. 8840.

7. **Criminal Law:** INTENT: HARMLESS ERROR. Defendant in a criminal prosecution may testify directly to his intention, if it is an element of the crime charged, and where he does so and the answer to the question calling for his conclusion remains in the record unchallenged, a mere ruling subsequently sustaining an exception to the question is not necessarily a prejudicial error.

8. **Homicide:** SUFFICIENCY OF EVIDENCE. Evidence discussed in the opinion *held* sufficient to prove the criminal intent, the premedi-

tation, the deliberation, and the other elements essential to a conviction for murder in the first degree.

ERROR to the district court for Cheyenne county: J. LEONARD TEWELL, JUDGE. *Affirmed: Sentence reduced.*

J. E. Willits, for plaintiff in error.

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

Heard before MORRISSEY, C. J., LETTON, ROSE, ALDRICH, FLANSBURG and DAY, JJ., REDICK and SHEPHERD, District Judges.

ROSE, J.

In a prosecution by the state in the district court for Cheyenne county, Charles Nichols, defendant, was convicted of murder in the first degree and for that felony was sentenced to suffer the penalty of death. As plaintiff in error he presents for review the record of his conviction.

The first assignment of error challenges the overruling of a plea to discharge defendant on the ground of delay in the filing of the information. A statutory provision authorized a recognizance requiring accused to appear forthwith before the district court, if in session. Laws 1915, ch. 162. This, however, applied to a bailable offense, and not necessarily to a charge of murder in the first degree. Another statutory provision declares:

"Any person held in jail charged with an indictable offense shall be discharged if he be not indicted at the term of court at which he is held to answer." Comp. St. 1922, sec. 10044.

This applies to prosecutions by information also. Defendant was not entitled to a discharge. He shot and killed Emma Carow, June 17, 1921. The complaint charging him with murder in the first degree was filed with the county judge as an examining magistrate June 21, 1921. Defendant was arraigned the same day and

pleaded not guilty. He waived preliminary examination and was committed to prison without bail "for his appearance before the next jury term of the district court," not at the April term, which convened April 25, 1921, and adjourned July 25, 1921. The jury for the April term had been excused May 14, 1921, prior to the homicide. The transcript of the preliminary proceedings before the examining magistrate was filed in the district court June 23, 1921. The next regular or October jury term convened October 17, 1921, and adjourned December 31, 1921. This is the term at which defendant was "held to answer." The information was filed in the district court October 17, 1921, during the term at which defendant was required to appear, and the trial began October 20, 1921, and lasted three days. The sentence was pronounced October 24, 1921. Under the circumstances the committing magistrate was not required to bind defendant over to the April term. He was properly "held to answer" at the next or October term. The information was filed at the beginning thereof within the time limited by law. There was clearly no error in overruling the plea to discharge defendant without a trial.

The next assignment of error is based on the overruling of a plea in abatement. It is contended that the prosecution should have been abated on the ground of a variance between the complaint before the examining magistrate and the information filed in the district court. The import of the argument under this head is that the preliminary complaint charged that defendant assaulted Emma Carow with the intention of killing himself, while the information on which he was tried accused him of making the assault with intent to murder her; the deduction being that, on the latter charge, there was no preliminary hearing or waiver thereof, or opportunity to plead thereto before the examining magistrate, and that therefore the plea in abatement should have been sustained. This is a technical point without merit. It grows out of an obvious reference in a single place in the

preliminary complaint to the accused instead of the victim of the homicide. Both the original complaint before the examining magistrate and the information subsequently filed in the district court charge defendant with murder in the first degree. The inaccuracy of the reference was perfectly plain on the face of the complaint and did not eliminate a material fact or mislead or prejudice defendant in the slightest degree.

Instead of a short form, charging the felony in simple and direct language without unnecessary details, repetitions or other superfluous matter, the county attorney felt called upon to use a form long sanctioned by the judiciary in attempting to observe portions of the English common law adopted by the legislature of Nebraska. The information, though valid and sanctioned by precedent, is not in a form suited to present conditions. It is as follows:

"In the District Court of Cheyenne County, Nebraska.

"The State of Nebraska,
Plaintiff,
vs. Information.
"Charles Nichols,
Defendant,

"Now, in this October, 1921, regular Term of the District Court, of Cheyenne County, Nebraska, duly convened herein, on the 17 day of October, in the year of our Lord, One Thousand Nine Hundred Twenty-one, comes into Court, Allen E. Warren, the duly elected, qualified and acting County Attorney of Cheyenne County, Nebraska, and for and in behalf of and in the name of the State of Nebraska, gives the Court to understand and be informed, that Charles Nichols, on or about the 17 day of June, 1921, in the County of Cheyenne and the State of Nebraska, aforesaid, then and there being, in and upon one Emma Carow, then and there being, unlawfully, wilfully, purposely, feloniously and of his deliberate and premeditated malice, did make an as-

sault, with the intent, her, the said Emma Carow, unlawfully, purposely and of his deliberate and premeditated malice, to kill and murder, and that the said Charles Nichols, a certain pistol, commonly called a 'revolver,' then and there loaded and charged with gunpowder and divers leaden bullets, which said pistol, commonly called a 'revolver,' he, the said Charles Nichols, in his hand or hands, then and there had and held, then and there, unlawfully, wilfully, purposely, feloniously and of his deliberate and premeditated malice, did discharge and shoot off, to, at, against and upon, the said Emma Carow and that the said Charles Nichols, with the leaden bullets, aforesaid, out of the pistol, aforesaid, commonly called a 'revolver,' then and there, by force of the gunpowder, aforesaid, by the said Charles Nichols, discharged and shot off, as aforesaid, then and there, unlawfully, purposely, feloniously and of his deliberate and premeditated malice, did strike, penetrate and wound, with intent aforesaid, thereby, then and there giving, to the said Emma Carow, in and upon the left side of the body and in and upon the left side of the head, of her, the said Emma Carow, with the intent aforesaid, thereby, then and there, to give to her, the said Emma Carow, in and upon the left side of the body and in and upon the left side of the head, of her, the said Emma Carow, with the leaden bullets, aforesaid, so as aforesaid, discharged and shot out of the pistol, commonly called a 'revolver,' aforesaid, by force of the gunpowder, aforesaid, by the said Charles Nichols, in and upon the left side of the body and in and upon the left side of the head, of her, the said Emma Carow, two mortal wounds, each, circular in form, about one-half of an inch in diameter and of the depth of five inches, of which said mortal wounds, she, the said Emma Carow, instantly died, and so the said Allen E. Warren does say that the said Charles Nichols, her, the said Emma Carow, unlawfully, wilfully, purposely, feloniously and of his deliberate and premeditated malice, did kill and murder, contrary to the form of the statute,

in such case made and provided and against the peace and dignity of the State of Nebraska.

"ALLEN E. WARREN,
"County Attorney of Cheyenne County, Nebraska."

"The State of Nebraska,
Cheyenne County, } ss.

"Allen E. Warren, of lawful age, being first duly sworn, deposes and says, that he is the duly elected, qualified and acting county attorney of Cheyenne County, Nebraska, and that he has made and read the foregoing information and that the offense charged therein, is true, as he verily believes and that the said offense contained and charged in said information, is true, as he verily believes.

"ALLEN E. WARREN.

"Subscribed in my presence and sworn to before me, this 17 day of October, 1921.

(Seal) "ISOLA B. WASSON,
"Clerk of the District Court of Cheyenne County, Nebraska."

It was in attempting to follow this complicated form, giving and repeating unnecessary details, that the complainant before the examining magistrate inadvertently referred in one place to the accused instead of the victim of the homicide. While the charge in the present instance was sufficient notwithstanding the error, justice is sometimes delayed or defeated by errors in vain and pompous repetitions found in common-law forms. The ancient form used by the county attorney in the present instance is a relic of times when blood-thirsty rulers, religious bigots and political tyrants intentionally inflicted punishments on innocent victims under false charges. Those abominations have passed away, but some of their forms still remain to embarrass the courts in the administration of justice under new conditions.

The legislature has made provisions for averting some

of the evils resulting from the failure to observe technicalities of the common law in regard to informations. A statute on this subject provides:

"No indictment shall be deemed invalid, nor shall the trial, judgment or other proceedings be stayed, arrested or in any manner affected: First. By omission of the words, 'with force and arms,' or any words of similar import; or, Second. By omitting to charge any offense to have been contrary to a statute or statutes; or, Third. For the omission of the words, 'as appears by the record' nor for omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense; nor for stating the time imperfectly; nor for want of a statement of the value or price of any matter or thing, or the amount of damages, or injury in any case where the value or price, or the amount of damages or injury, is not of the essence of the offense; nor for the want of an allegation of the time or place of any material fact, when the time and place have once been stated in the indictment; nor that dates and numbers are represented by figures; nor for an omission to allege that the grand jurors were impaneled, sworn or charged; nor for any surplusage or repugnant allegation when there is sufficient matter alleged to indicate the crime or person charged; nor for want of the averment of any matter not necessary to be proved; nor for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." Comp. St. 1922, sec. 10074.

Further means of relief are found in a new constitutional provision declaring:

"For the effectual administration of justice and the prompt disposition of judicial proceedings, the supreme court may promulgate rules of practice and procedure for all courts, uniform as to each class of courts, and not in conflict with laws governing such matters." Const., art. V, sec. 25.

Under the statutory and constitutional provisions now

in force, any properly verified information may be held sufficient, if it states the name and the authority of a qualified informer and facts constituting every element of murder in the first degree as defined by statute and pleads the name of defendant and the district court of competent jurisdiction wherein he is required to answer; the date of filing the information within the time limited by law while the court named is in session at a regular jury term; the time of the fatal assault and the date when the victim of the homicide died therefrom, which must be shown to be within a year and a day; and the place where and the means by which the felony was committed. Tested by these standards the following brief form meets all requirements of the law in a prosecution like the present:

"In the District Court for Cheyenne County, Nebraska.

"The State of Nebraska,
Plaintiff,
v.
Charles Nichols,
Defendant.

"Allen E. Warren, the duly elected, qualified and acting county attorney of Cheyenne county, Nebraska, prosecuting pursuant to law in the name of and for the state of Nebraska, plaintiff, makes information to the district court for Cheyenne county in session October 17, 1921, at the regular October term of that year, as follows:

"In Cheyenne county, Nebraska, June 17, 1921, Charles Nichols, defendant, feloniously, purposely and of his deliberate and premeditated malice, shot Emma Carow with a revolver, and as a result thereof she died June 17, 1921. Defendant thus committed murder in the first degree.

"ALLEN E. WARREN,
"County Attorney of Cheyenne County, Nebraska.

"The State of Nebraska,
County of Cheyenne, } ss.

"Allen E. Warren, being duly sworn according to law, says the facts stated in his foregoing information are true as he verily believes.

"ALLEN E. WARREN,
"County Attorney of Cheyenne County, Nebraska.

"Subscribed in my presence and sworn to before me October 17, 1921.

(Seal) "ISOLA B. WASSON,
"Clerk of the District Court for Cheyenne County, Nebraska."

Many pitfalls will be avoided by omitting unnecessary details, repetitions and other superfluous matter not essential to a proper information or to the protection of accused. Procedure more in harmony with modern conditions will result from reforms which eliminate objectionable technicalities of the common law formerly adopted by the legislature.

Complaint is made of alleged irregularities in selecting the jury. It is insisted that competent veniremen were erroneously excused and disqualified ones accepted. An examination of the record shows that all members of the jury impaneled were qualified according to statutory requirements and established rules of criminal law. Defendant did not exhaust his peremptory challenges and error in impaneling the jury is not shown. This assignment of error is therefore overruled.

An argument of considerable length is directed to the proposition that the trial court erred in permitting a physician to testify to a conversation between himself and defendant in which the latter admitted that he shot both himself and Emma Carow. It is insisted that this testimony was admitted in violation of the statute forbidding the disclosure of confidential communications between physician and patient. Comp. St. 1922, sec.

8840. The physician was called to the scene of the tragedy to attend Emma Carow and arrived a few minutes after she died. He found her on the ground with two bullet holes in her body. Defendant was beside her suffering from self-inflicted bullet wounds. The physician asked him what the shooting was about, and he replied: "Emma and I were supposed to be married tomorrow." He was then asked: "Did you shoot yourself and her?" To this he answered, "I did." This is the conversation said to be privileged. When it took place the relation of physician and patient between the physician and defendant did not exist. The former had been called to perform professional services for Emma Carow, the victim of defendant's homicidal acts. The disclosures by defendant to the physician were not shown to have been made with a view to treatment of the former. After the conversation the physician, prompted by humane consideration under conditions as he found them, voluntarily performed services for defendant. The admission that defendant shot Emma Carow was not a confidential communication necessary and proper to the discharge of professional duties or services on behalf of defendant and was not, therefore, protected by the statute. *Koskovich v. Rodestock,* 107 Neb. 116. Assuming, however, that the evidence should have been excluded, the ruling admitting it would not be reversible error, for the reason that the shooting by defendant was established beyond question by other uncontradicted evidence and was inferable from testimony of defendant himself while on the witness-stand.

The principal reason urged for a reversal is based on the sustaining of an exception to a question calling for direct testimony by defendant that it was not his intention to shoot Emma Carow. In considering this feature of the trial, details of a few facts disclosed by the evidence seem necessary.

Emma Carow, 25 years of age, lived with her widowed mother, Lena Carow, on a farm in Cheyenne county. De-

fendant, 43 years of age, had been in their employ as a farm hand for several months. During that time he made his home at the farm-house occupied by the Carows. Emma and defendant sometimes worked together on the farm. During the afternoon, June 17, 1921, she went to a field where he was at work and told him to quit, terminating his employment. The two went separate ways to the house, Emma in advance. When defendant arrived he asked for her and was told by her mother that she was out. He immediately left the house. The Carows promptly met and decided to start to the home of a neighbor by the name of Vick, a mile away, and with that purpose in view got into their automobile. It had only one seat and this they occupied. Behind the seat there was an open box and defendant got into it. When half way to Vick's, he leaned forward and pulled the key out of the switch, thus stopping the motor. The Carows got out and started toward Vick's on foot. When they had gone a short distance defendant called to Emma to come back, saying he wanted to speak to her. She did as requested, leaving her mother standing in the road. A few minutes later, after there had been time for conversation, he shot Emma twice in different parts of her body. He also shot himself twice.

The theory of the defense seems to be that defendant procured and carried the revolver for the sole purpose of committing suicide; that this purpose was formed as a result of Emma's refusal to marry him according to promises to which he testified; that his first shot was fired at himself and that he did not know what occurred thereafter. While he was testifying in his own behalf he was asked: "Did you entertain in your own mind an intent or thought that you would kill Emma Carow?" His answer was, "No, sir." This answer was followed by the sustaining of an exception to the question itself on the ground that it called for the conclusion of the witness. Assuming the exception should have been overruled under the principle announced in *Cummings v.*

State, 50 Neb. 274, to the effect that a defendant in a criminal prosecution may testify directly to his intention where it is an element of the offense charged, the error was not prejudicial to defendant. By his answer, "No, sir," he told the jury it was not his intention to shoot Emma Carow. The answer was never stricken out of the record and the jury were never directed to disregard it. Prejudicial error in this respect, therefore, is not shown.

It is insisted further that the evidence is insufficient to prove the criminal intent, the premeditation and the deliberation essential to murder in the first degree. The point does not seem to be well taken. Defendant testified that for several months he and Emma Carow had been engaged, and that in the meantime on two or three occasions she had declined to be married at the appointed time. He admitted he had been dismissed as a suitor when discharged as a farm-hand. These experiences, if he told the truth, would naturally imply a warning sufficient to prevent surprise or sudden emotion in the event of a new disappointment of the same kind. Some time elapsed between his rejection in the field and the tragedy in the highway. After he learned his fate as a suitor there was time for reflection before he committed his homicidal acts. In addition, the story of the engagement, though it may be true, is open to suspicion. A sister of Emma Carow testified that the latter had made no preparation for marriage—a circumstance at variance with common experience, if she were engaged. According to the testimony of her mother there was time for conversation after Emma went back to converse with defendant in the highway. When she was a few feet away from him, her mother said, he pointed the revolver at her and fired twice. Two witnesses testified to admissions by him that he first shot her and, distressed by her suffering, shot her again. From all of the evidential facts the jury were at liberty to find a felonious purpose or intention, and deliberation and premeditation beyond a reasonable

doubt. Circumstances indicate that he was in possession of his mental faculties. There was no proof of insanity. While his testimony on direct examination contains a statement that he did not know what occurred after he fired the first shot, his cross-examination indicates the contrary. The evidence is sufficient in every respect to sustain the conviction.

In other assignments of error there is criticism of rulings on evidence, of instructions, and of conduct of counsel, jury and judge. These are all found upon examination to be without merit. Reversible error has not been pointed out. The majority, however, express the following views:

The penalty of death is intended by the law to punish a vicious intent carried into effect by accused after forming and deliberating upon a plan to commit murder. The only time for deliberation in the present instance intervened between the act of accused in calling Emma Carow back to him in the highway and the shooting. The stress of the situation was such as to preclude that cool calculation and consideration which the law contemplates in providing for the extreme penalty. The present case is one wherein justice should be seasoned with mercy.

The sentence of death is reduced to imprisonment for life in the state penitentiary and the conviction affirmed.

AFFIRMED: SENTENCE REDUCED.

ROSE, J.

It seems to me the reasons of the majority for reducing the sentence are not sufficient to justify interference with the penalty fixed by the jury, and I am authorized to say that Letton, J., and Shepherd, District Judge, are of the same opinion.

WILBERT MORRIS, ADMINISTRATOR, APPELLEE, V. EQUITABLE LIFE ASSURANCE SOCIETY, APPELLANT.

FILED DECEMBER 8, 1922. No. 22172.

1. **Evidence.** Uncontradicted evidence should ordinarily be taken as true, and where the evidence tends to establish a fact which it is within the power and to the interest of the opposing party to disprove, if false, his failure to disprove it strengthens the probative force of the evidence tending to prove it.
2. **Marriage:** BURDEN OF PROOF. The burden of proof of marriage rests upon the party who pleads it.
3. **Evidence:** NONEXISTENCE OF PERSON. A witness may testify as to the nonexistence of a person; the extent of the search affects the weight, and not the competency, of the evidence.
4. **Insurance:** IDENTITY OF BENEFICIARY: BURDEN OF PROOF. Where the beneficiary in an insurance policy is designated as "his wife, Bessie Morris," and some person who is not "his wife, Bessie Morris," claims the fund, the burden of proof is upon such claimant to establish the fact that she is the person referred to in the policy as "his wife, Bessie Morris."
5. **Evidence** examined, and *held* sufficient to sustain the judgment.

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

Gurley, Fitch & West and *Munn & Norman,* for appellant.

Prince & Prince and *Davis & Davis, contra.*

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

ALDRICH, J.

This is an action by Wilbert Morris, administrator of the estate of Joseph Morris, deceased, against the Equitable Life Assurance Society of the United States, upon a life insurance contract.

The facts are substantially as follows: The defendant insurance company entered into an insurance contract with the Union Pacific Railroad Company, insuring

its employees. Under this insurance contract, a certificate was issued to Joseph Morris, which certificate was made payable to "his wife, Bessie Morris." Upon the death of the insured, Joseph Morris, the plaintiff, who was administrator of his estate, brought suit on the policy, alleging briefly that Joseph Morris was not married, had no wife, Bessie Morris, and alleging further that the defendant had paid the plaintiff the sum of $310. The defendant answered, alleging briefly payment of the balance to Bessie Morris, and alleging that the payment to the plaintiff was at the request of Bessie Morris. The reply, in general, reiterated the denial of the existence of Bessie Morris, either as the wife of Joseph Morris, or otherwise, denied the payment to her, and denied that the payment made to the plaintiff was made at the request of Bessie Morris.

Upon the trial plaintiff introduced evidence as to the following points: That Joseph Morris was not married from 1915 until his death; that there was no such person as Bessie Morris; that the defendant had paid the plaintiff $310. The plaintiff rested, and the defendant then rested without introducing any evidence. The case was tried to the court without a jury, and resulted in a finding and judgment in favor of the plaintiff. Defendant appeals.

The first proposition of law that is presented to us for consideration is that uncontradicted evidence should be taken as true, citing 23 C. J. 37, sec. 1779. It is a rule well established that uncontradicted evidence should ordinarily be taken as true, and that where the evidence tends to establish a fact which it is within the power and to the interest of the opposing party to disprove if false, his failure to attempt to disprove it strengthens the probative force of the evidence tending to prove it. The probabilities and nature of the situation add greatly to the fact that Bessie Morris was a fictitious person. Every circumstance and every fact and all of the *res gestæ* of the case go a long way to establish this proposition. If

she was in fact not a fictitious person, why was it not generally known in the neighborhood where she lived that she was living with him as his wife?

The next proposition is that, if she was living with him, why did she keep it a secret and withhold the information from her friends? Is it reasonable to believe that she would sit idly by and allow herself to be barred forever from recovering $2,500, when by letting herself be known and telling the alleged truth she could easily have sustained her position? Such a circumstance is unnatural, entirely suspicious, and makes it unworthy of belief, and makes it wholly reasonable to say under the circumstances of the case that she was a fictitious person and of no existence so far as this case is concerned. Further, as supporting this proposition, see *Gibbons v. Chicago, B. & Q. R. Co.*, 98 Neb. 696.

Another rule which is self-evident in this case is that the burden of proof of marriage rests upon the person who pleads it. 26 Cyc. 871, and cases therein cited. It was never claimed by any one at any time during the lifetime of the deceased, nor did he have the reputation of living with any woman as his second wife. Anyhow, under these circumstances, the burden of proving a marriage rests upon the party asserting it. 26 Cyc. 871. All persons acquainted with the deceased during his lifetime were ignorant of the fact as to whether he lived with a woman whom he called his second wife. If he did sustain marital relations before his death, naturally, would he not have the reputation of it? His son, the administrator, Wilbert Morris, had no information or knowledge of the father sustaining marriage relations with any woman since the death of his former wife, and there is no evidence whatever of any woman who designated herself as a beneficiary of her deceased husband after his death, when but to have done so would have established her right to the sum of $2,500 in this case. Nor does the defendant make any attempt, either directly or indirectly, to show that Joseph Morris, deceased, left a

widow on February 9, 1920. Defendant remained silent when it was its duty to have spoken.

It was said in *People v. Sharp,* 19 N. W. 168 (53 Mich. 523), and it is in point here: "Evidence of a sheriff's inability to find or hear of any such person as witnessed an instrument is admissible to show that the same is fictitious; and the extent of his search and his opportunities go to the weight, but not to the competency, of his evidence."

That is the situation here. This defendant had every opportunity to know and ought to have known and does know whether such a person existed. This defendant, by remaining silent, went to sleep on its rights and is forever barred from being heard on this subject. One thing is true, uncontradicted evidence which bears the semblance of truth is entitled to be believed, and courts, as a rule, under these circumstances take this kind of evidence for the truth, as the court undoubtedly did in the instant case.

Wilbert Morris, the administrator, testified as to whether his father had married Bessie Morris. He inquired of the county clerk as to whether or not a marriage license had been issued from his office to his father and Bessie Morris, and whether or not this marriage license was issued to his father between January 1, 1917, and the date of his death. He also testified as to the nonexistence of such a person as Bessie Morris. It appears of record as follows, to wit: "Q. State whether or not you found a woman by the name of Bessie Morris? * * * A. No. Q. Do you know any person by the name of Bessie Morris? A. No, sir. Q. So far as you know, does such a person exist as Bessie Morris? A. No, sir." While it may be that this evidence is weak and unsatisfactory and not as strong as it might have been, consistent with the truth, yet it is strong enough, not only to put the burden of proof upon the defendant, but impels it to take this testimony as true or forever remain silent. In other words, it undoubtedly at least raises a

strong presumption as aforesaid that Bessie Morris only had an imaginary existence and she was treated as such by the decedent.

It is generally conceded to be the law that a witness may testify as to the nonexistence of a person; the extent of the search affects the weight, and not the competency, of the evidence. *State v. Hahn,* 38 La. Ann. 169; *People v. Eppinger,* 105 Cal. 36.

If it appears in the record that the beneficiary in an insurance policy is designated as "his wife, Bessie Morris," and some person who is not "his wife, Bessie Morris," claims the fund, the burden of proof is upon such claimant to establish the fact that she is the person referred to in the policy as "his wife, Bessie Morris."

It appears of record that defendant made a part payment of the insurance and that it paid $310 on the same. We understand this to be admitted by the appellee and there is no controversy about this fact. After deducting this payment from the face of the policy, there is found the difference between this item of $310 and the face of the policy, or $2,190.

As a general rule of law, it is true that part payment of a debt raises a presumption that there is a promise to pay the balance. In support of this, see 30 Cyc. 1220, and cases therein cited.

The burden of proving payment is upon the party pleading it. 30 Cyc. 1264; *Davis v. Hall,* 70 Neb. 678; *Mullally v. Dingman,* 62 Neb. 702; *Curtis v. Perry,* 33 Neb. 519; *German v. Boslough,* 28 Neb. 33.

As a matter of law, it is presumed that the name of a beneficiary is the legal one. It is equally true that the name mentioned in the policy is often fictitious and imaginary, and testimony of relatives and friends is competent and entitled to great weight. While the deceased was running on the railroad between Ord and Grand Island almost daily the year around, friends and relatives would be in position to give testimony as to whether

or not he ever knew or was acquainted with one Bessie Morris.

Furthermore, there is no evidence as to what was the intention of the deceased as to conveying his property to Bessie Morris, nor is there any evidence whatever that Bessie Morris ever saw this policy or knew of its existence, and, furthermore, whatever evidence there is on the subject goes wholly to prove that Bessie Morris was a fictitious person. Would it be possible to have her living in the community of Ord, a small village, and be unable to find any person who knew her or had any acquaintance with her? Is there any evidence, either directly or indirectly, that Bessie Morris was to be the beneficiary of this policy? Is it not true as a matter of fact that it is the duty of the court to give an intention effect? Yet, in this case, is it not true that the alleged second wife of the decedent is a mere fiction, spurious entirely and fraudulent? This evidence at least raises the presumption unanswerable that Bessie Morris was purely fictitious, never had an entity, and therefore never knew or had any relation with the deceased. Therefore, it seems logical, and inevitable, and we are forced to the conclusion that the children of the deceased, Joseph Morris, and other relatives, as a matter of law, can be the only beneficiaries of this insurance policy.

As a matter provided for by statute, the attorney for plaintiff is entitled to reasonable pay for services in this court. We therefore consider that the amount allowed should be $100, and the same is allowed.

After considering the entire record of this case, and after going over the facts, and while the evidence is weak and unsatisfactory, yet it is also true enough to warrant the court, as a matter of law, in affirming this case.

AFFIRMED.

RUSSELL ROZEAN V. STATE OF NEBRASKA.

FILED DECEMBER 8, 1922. No. 22616.

1. **Contempt.** Where a juror, during the trial of a case which he is hearing, discusses the merits of the case with a person outside of court in wilful violation of the court's orders, such juror is guilty of contempt of court under the provisions of subdivision 3, sec. 9189, Comp. St. 1922.
2. **Evidence** examined, and *held* sufficient to sustain the judgment.

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

Lambert & Hawxby and *McCarty & Hager,* for plaintiff in error.

Clarence A. Davis, Attorney General, and *Mason Wheeler, contra.*

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

DAY, J.

Russell Rozean, the defendant, was convicted on a charge of contempt of court, and adjudged to pay a fine of $100 and costs. From this judgment he has brought error to this court.

The record shows that the defendant was a juror in the case of the State of Nebraska v. Lucille Neal, a charge of murder, which came on for trial November 6, 1921, and continued until November 24, 1921, at which date Judge Raper, the trial judge, discharged the jury and declared a mistrial on account of the misconduct of this defendant in discussing the case pending the trial.

The errors relied upon for reversal are: First, that the evidence was not sufficient to sustain the judgment; and, second, that the court should not have admitted in evidence the order of Judge Raper dimissing the jury in the Neal case.

During the trial of the Neal case the jurors were not

required to remain together, but were permitted to disperse during the recesses of the court.

Section 9189, Comp. St. 1922, provides that every court of record shall have power to punish by fine and imprisonment, or by either, as for criminal contempt, persons guilty of any of the following acts: "Third. Wilful disobedience of or resistance wilfully offered to any lawful process or order of said court."

It appears from the record that, during the trial of the Neal case, the jury were repeatedly admonished by the court not to talk to any one about the case, nor to discuss it among themselves, and not to permit any one to talk to them about it, and to refrain from making up their minds as to the merits of the case until the case was finally submitted to them. That this was a proper order cannot be successfully denied. The due administration of justice requires that cases should be determined upon the evidence in court, and not upon what people outside think or say concerning the merits or demerits of a case. The law demands the judgment of the jury upon the evidence, and not the judgment of public opinion. The testimony of Mr. Milam, the principal witness for the state, shows that on Thanksgiving day, and while the case was pending, the defendant came to the witness' greenhouse, and discussed the case with the witness and his wife and son. Among other things pertaining to the case, the defendant said that there had been no evidence produced by the state to convict the woman of the crime she was charged with; that the case should have been stopped with the coroner's inquest; that there was no evidence to warrant the bringing of the case, or to warrant the expense to the county; that if there was a county attorney of any sense and knew his business the case would never have been brought to trial; and that he would never vote for conviction. This conversation was denied by the defendant. The testimony of Mr. Milam was corroborated in the main by his wife and son. While there were some circumstances

which tended to weaken the testimony of the two corroborating witnesses, we think that the testimony was amply sufficient to support the judgment. The rule is thoroughly established that in this class of cases, on conflicting testimony, the judgment of the district court will not be reversed unless, on a review of the testimony, we can say that the judgment was clearly wrong. *McAleese v. State,* 42 Neb. 886.

With respect to the contention that it was error to admit in evidence the order of Judge Raper dismissing the jury, it would seem that it is unnecessary to pass upon this assignment, because it has frequently been held that, upon review in this court of a trial by the district court without a jury, it will not be presumed that the trial court acted upon or considered incompetent evidence, and that the action of that court in admitting evidence will not be reviewed. *Kemmerling v. State,* 89 Neb. 98.

We find no reversible error in the record. In view of the fact, however, that no bad purpose can be imputed to the defendant for the remarks made to his neighbor, we think the ends of justice will be subserved by reducing the amount of the fine to $25.

As thus modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

PETER JACOBSON, ADMINISTRATOR, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.

FILED DECEMBER 8, 1922. No. 22147.

1. **Carriers:** DUTY TO PASSENGERS. The rule requiring a street railway company to furnish the passenger a safe place to alight upon the street does not require it to protect all passengers at such place against independent agencies operating in the street.
2. ———: ———. A street railway company, carrying passengers on city streets, is not, as a general rule, bound to provide means for warning passengers, about to alight from its cars upon the street, of the danger from passing vehicles, that being an ob-

vious danger, incidental to the street, and a condition over which the carrier has no control.

3. ———: ———: EXCEPTIONS. The rule is not held to be an inflexible one, not subject to exceptions in the case of children or in the case of persons not apparently possessed of normal faculties for protecting themselves, or where a person of normal faculties actually is known by the employee to be about to incur a danger in alighting of which the employee knows the passenger is unaware.

4. ———: ———. The company must give the passenger a reasonable opportunity to select his time to alight and to direct his own progress, having regard for his own protection and safety, and must not influence or compel him to alight so as to cause him to be placed in way of danger from passing vehicles.

5. ———: ———. TERMINATION OF RELATION. A street car passenger who alights at his destination upon the street becomes a pedestrian upon the street, and the street railway company is not bound to guard or protect him in his progress on the street from the place where he alights.

6. ———: ———: ———. But the rule is not so strict as to hold that a passenger, so alighting, ceases to be a passenger the instant that he alights upon the ground.

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

John O. Yeiser and *E. A. Conaway,* for appellant.

John L. Webster, contra.

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

FLANSBURG, J.

This was an action brought by plaintiff as administrator of the estate of Anna Pauline Jensen, deceased, to recover damages from the defendant Omaha & Council Bluffs Street Railway Company, on the charge that the defendant company had, through its negligence, caused the death of plaintiff's intestate while, it is claimed, she sustained the relation to it of a passenger. The deceased sustained the injuries, of which she died, from a motorcycle, which passed the defendant's street car and struck

her immediately after she had alighted in the street, at the termination of her journey. The defendant contends, first, that it was guilty of no negligence; and, second, that at the time the accident happened the relation of carrier and passenger had ceased to exist, and that the company owed the deceased no duty of protection from passing vehicles. The trial court directed a verdict in favor of the defendant, and from a judgment on that verdict the plaintiff appeals.

There is testimony in behalf of the plaintiff to show the following facts: Anna Pauline Jensen, a young woman, was a passenger on a street car operated by the defendant company. The car was proceeding south on Thirteenth street in the city of Omaha. A signal was given for the car to stop at a street intersection, a regular stopping place. Miss Jensen went forward to the front end of the car, stepped down into the front vestibule, and, as soon as the car stopped and the door opened, she stepped on down into the street. She was immediately followed by another passenger who stepped down close behind or beside her and was in the street at the time of the accident. As Miss Jensen descended from the car, she took one long step out onto the pavement, and was just in the act of swinging her other foot forward, to take another step, when she was struck by a motorcycle which was just then passing close to the car at a great speed. The motorman of the street car did not see the motorcycle until after the accident had happened, though by looking in a small mirror, so arranged that he had a view of the outside of the car and of the rear entrance, it may have been that, had he looked for it, he could have seen the motorcycle as it approached. The conductor, however, stationed at the rear end of the car, had noticed the man on the motorcycle when he was some two blocks distant behind the car, and had remarked to the passengers near him that the man was approaching at a high speed. Different witnesses fixed the speed of the motorcyclist at from 40 to 60 miles an hour,

and the motorcyclist himself testified that he passed the car at the rate of 42 miles an hour and probably not more than two feet distant from it. He was engaged at that time in the police service of the city of Omaha and was attempting to overtake a speeding automobile.

Plaintiff contends that the street railway company was negligent in having failed to discover and to warn Miss Jensen of the approaching vehicle. The defendant, on the other hand, contends that it was not the duty of the street railway company to watch for such vehicles; that those were obvious dangers, at all times more or less present upon the street, and dangers which the passenger must, himself, take notice of. The defendant further urges that at the first moment Miss Jensen stood upon the pavement, after descending from the car, she ceased to be a passenger, and from that instant, whatever may have happened to her, the company can be held to no responsibility, growing out of any duty it owed her as a carrier.

A long list of cases is cited by the defendant to show that a person alighting from a street car ceases to be a passenger after he alights and moves away from the place of his landing. *Chesley v. Waterloo, C. F. & N. R. Co.,* 188 Ia. 1004, 12 A. L. R. 1366; *Hammett v. Birmingham R., L. & P. Co.,* 202 Ala. 520; *Morris v. Omaha & C. B. Street R. Co.,* 193 Ia. 616; *Creamer v. West End Street R. Co.,* 156 Mass. 320; *Powers v. Connecticut Co.,* 82 Conn. 665; *Conroy v. Boston Elevated R. Co.,* 188 Mass. 411; *Haskins v. St. Louis & S. R. Co.,* 193 Ill. App. 437; *Street R. Co. v. Boddy,* 105 Tenn. 666; *Smith v. City R. Co.,* 29 Or. 539.

Though in some of those cases it is stated as a rule that a person ceases to be a passenger the moment he alights upon the street, yet in no case cited was the person injured at that moment, nor immediately afterward, at the place where he had alighted. In each of the cases he had taken his way from that spot and was injured upon the street, after he had left the car and when, with-

out question, he had become a pedestrian, entirely beyond the control of the carrier. In those cases, therefore, it did not become necessary to determine the exact instant when a person alighting from a street car would cease to be a passenger. Whether or not a person in the act of alighting, or who had alighted and had been injured immediately and before he had had an opportunity to move away from the spot, had ceased to be a passenger was not in question nor passed upon.

In some of those cases (*Chesley v. Waterloo, C. F. & N. R. Co., Hammett v. Birmingham R., L. & P. Co., Creamer v. West End Street R. Co., Street R. Co. v. Boddy,* and *Smith v. City R. Co.*), it is stated generally that a street railway company is not obliged to warn passengers, about to alight from the car, as to the danger they may encounter from passing vehicles. Obviously, however, in these particular decisions the danger from passing vehicles, against which it is said the company is not required to warn its passengers, was a danger which the passenger was to encounter after he had descended from the car and moved away, and at a time when the relation of carrier and passenger would unquestionably have been terminated. These decisions do hold that the company need not warn its passengers as to those dangers, which the passenger may encounter after the relation of carrier and passenger has terminated, yet they do not directly pass upon the question of whether or not the company must keep a lookout and warn passengers of the danger from vehicles that he may encounter while in the act of alighting, or at the very spot where he shall alight upon the street, and before the relation of carrier and passenger has ceased. During that period, when a passenger is alighting from the car and until after he has ceased to be a passenger, the company owes him certain duties and obligations, to the end that it may furnish him a safe delivery at his destination. Whether or not, in the performance of those duties, it must warn and guard him against the

danger from passing vehicles is the precise question here to be determined, and which is not, as we view it, entirely solved by any of the decisions above mentioned, though some of the general statements made would seem broad enough to cover it. In the case of *Hammett v. Birmingham R., L. & P. Co., supra,* as an instance, the court announced as a general rule that "It is the duty of a street railroad carrier to provide a reasonably safe place for the landing of its passengers," and "The rule as to providing a safe place for alighting has no reference to independent agencies operating in the street such as a motorcycle."

We are unable to agree with the contention that the company owed Miss Jensen no duty for the reason that, at the time of the accident, she was no longer a passenger. We do not believe the rule is quite so strict as to hold that a person who has taken passage on a street car ceases to be a passenger at the moment, upon reaching his destination, that his feet touch the pavement in the act of alighting. It is a conceded rule that the company must exercise care in selecting the place for the passenger to alight, since that is a part of the obligation of transportation which the street railway company has assumed. If there are defects or obstructions in the street, it must avoid them, if it reasonably can, and select landing places where the condition of the street is free from those dangers. If there are dangers in the condition of the street at the place of alighting, known to the company and not known to the passenger, it is its duty to warn the passenger as against those dangers. Where a passenger has alighted upon the street, the company still owes him protection at that place, as against the act of its employees or the movement of its car. *Johnson v. Washington Water Power Co.,* 62 Wash. 619; *Virginia Trust Co. v. Raymond,* 120 Va. 674; *Houston v. Lynchburg Traction & Light Co.,* 119 Va. 136. If such a person is, in any sense, a passenger at the place where he alights upon the street; if the company at that

time owes him any obligation of protection, either as against its own negligence or otherwise, by reason of his relation to it, then, of course, he is a passenger in all respects. So long as the relation continues, the company owes him every obligation that springs from that relation.

The plaintiff relies upon the case of *Wood v. North Carolina Public-Service Corp.*, 174 N. Car. 697, 1 A. L. R. 942. In that case it was held that a passenger, who was struck by a passing vehicle immediately after he had alighted upon the street, did, at the time of the accident, retain his character as a passenger, and that the company owed him a duty of protection. Since the relation of carrier and passenger was found to exist, the court concluded that the company had owed him the duty of watching for and warning him against the danger from passing vehicles. We do not believe that that conclusion necessarily follows from the mere fact of the relation of carrier and passenger.

In the case of *Loggins v. Southern Public Utilities Co.*, 181 N. Car. 221, the court carried the principle, established in the *Wood* case, one step farther, for in the *Loggins* case the person had alighted from the street car, and had stepped away from the place of alighting and was struck by a passing vehicle as he was making his way across the street to the curbing, at a time, we believe, when the relation of carrier and passenger had ceased to exist. The *Loggins* case is clearly in conflict with the numerous decisions which we have above cited. In both of the decisions by the North Carolina court there were strong dissenting opinions.

Though Miss Jensen may have still retained her character as a passenger at the time she was struck by the motorcycle, it does not follow that the company was an insurer as to her safety. The company, it is true, is bound to exercise the utmost skill, diligence and foresight, consistent with the practical conduct of the business in which it is engaged, but it is not bound to do

everything that can possibly be done to insure the safety of passengers. *Bevard v. Lincoln Traction Co.,* 74 Neb. 802; *Omaha Street R. Co. v. Boesen,* 74 Neb. 764. Were it to take every possible precaution conceivable for the safety of its passengers, and were they allowed to depend entirely upon the precaution taken by the company, the company would be so engrossed with the care of its passengers and the protection of itself against liability that its practical performance as a transportation company would be seriously impaired. A street railway company is compelled to deliver its passengers upon the public streets. It cannot control nor secure absolute safety as to its landing places. The street is not under its control and its right to operate vehicles on the street is not paramount to the rights of other persons to do the same thing. It has no control over the condition of the roadway, nor can it control the traffic. The question here is not, as we view it, to be determined by the fact of whether or not Miss Jensen retained her character as a passenger, but, rather, what was the extent of the company's obligation toward her as a passenger, at the time and under the circumstances in question.

The duty which the company owed her as a passenger while she was upon the street was necessarily much more limited than the duty it owed her while she was in the car. As said in the lower court's opinion in the case of *Keator v. Scranton Traction Co.,* 191 Pa. St. 102, 105: "Of course, the defendant's duty of protection was much less while she was upon the street than while she was in the car. As long as she was upon the street, the defendant was not bound to protect her against assault or injury at the hands of other persons. It had no control over the highway, outside of its rails, nor any right to interfere with persons pursuing their avocations on the street, either upon foot or otherwise. Having no right of control it owed her no duty of protection against strangers; but upon what ground had the defendant

ceased to owe the plaintiff protection as a passenger against its own conduct?" The appellate court in that case added (p. 112): "Unquestionably, the carrier is not answerable for the condition of the highway on which the passenger alights, or from which he stands or steps before entering the car; nor is it answerable for the conduct of third persons who, by neglect, cause injury in such situation to the passenger."

In the case of *Farrington v. Boston Elevated R. Co.*, 202 Mass. 315, the company stopped its car at a place where there was a curbstone on the street at the place where the passenger was given an opportunity to alight. By reason of the irregularity in the surface of the street, the place was one of more or less difficulty as a place for landing passengers. However, the danger was inherent in the street and one which was obvious to any person who looked. The court stated that, where a street is temporarily defective and a passenger alighting is apt to step on the defect, the street railway company may be held to reasonable care either by way of warning or otherwise, but where there is nothing in the appearance of the passenger to indicate to the conductor that she has not ordinary capacity to care for herself, or that it would be more dangerous for her to alight than for other persons, the company has a right to assume that she knows generally of the danger, and the court stated that any other rule would impose upon the defendant a burden at once unreasonable and practically impossible of performance.

In a somewhat similar case, *Scanlon v. Philadelphia Rapid Transit Co.*, 208 Pa. St. 195, the surface of the street at the point where the passenger was allowed to alight was of an irregular character, requiring of the passenger a long step. The passenger alighting at this place was injured, and the court said (p. 197): "The car was running upon the public highway, over which it must be remembered, the defendant company has no control. In laying its tracks, it must conform to the

established grade. It can neither construct nor alter any of the places at which passengers are to step on or off its cars. It is obliged to place its tracks and run its cars where the public authorities direct. The contour of the surface of the street, and the sides and gutters are all fixed by the municipal authorities. Passengers leaving the cars must step upon the surface of the street in the condition in which it is placed by the city which fixes and maintains the grades. Obviously, the rules which might well and reasonably apply to steam railroads owning their own right of way and having complete control of the approaches thereto, cannot reasonably be applied to street railways which have not the right of eminent domain, and are only allowed the use of the public highways in common with other vehicles. It may be that in this case the conductor misunderstood the signal of the plaintiff, and stopped the car sooner than she wished; but, if so, she had only to signify that fact and retain her seat and be carried to the desired spot. She was under no compulsion nor did she receive even a suggestion from the conductor as to where she should get off. That was a matter solely for herself. * * * The fact that the street sloped off at the side upon a descending grade to the gutter necessitated a very long step for any passenger attempting to get off in that vicinity. But this fact was perfectly obvious to the plaintiff, if she used her eyes, which she was certainly bound to do."

We cannot say that a street railway company is, as a general rule, required to watch for and to warn its passengers, who are about to descend into the street, against those obvious dangers from moving vehicles which are incidental to and common on the street, and which are known to all. Such a warning would, in most instances, be utterly superfluous. A rule requiring the company to watch for and warn its passengers as to all such dangers would be impracticable and extremely burdensome. The danger from moving vehicles and from other independent agencies operating upon the street is an ever-present one,

intermittent in character, varying in degree with each occasion, and is of such kind that previous warning by the company of each specific danger as it arises would become practically impossible. The danger is not constant, but often arises suddenly, and is only momentary. The person encountering danger, having alone the control over his own movements, must rely upon himself and upon his own precaution and judgment. The responsibility of the company should be coextensive with its practical control. It is impracticable for another to take the responsibility of attempting to control and guard, as to such dangers, the person able to take care of himself. The passenger is in a much better position to guard against those dangers than is the company. The passenger standing upon the step or at the door, in readiness to alight, has a full view of the street in all directions. If there are approaching vehicles, it is solely within his power to fix the exact moment when he shall alight from the car. The company cannot hurry him nor compel him to alight, but must give him a reasonable opportunity to select his time and to direct his own progress, having regard for his own protection and safety. If the company does not give him proper opportunity to alight, or compels him to alight so as to cause him to be placed in the way of danger from such vehicles, it of course would be liable. *Norton v. Third Avenue R. Co.*, 49 N. Y. Supp. 898. The danger of being struck by passing vehicles is commonly known to all, and one which the street railway company cannot guard the passenger against, any more than it can guard the passenger against conditions of the street where it is required to discharge passengers and which do not furnish the passenger as safe a place for landing as could have been furnished by platforms or stations.

In the case of *Oddy v. West End Street R. Co.*, 178 Mass. 341, a passenger had signaled the conductor that she wished to alight at the next street intersection. The conductor, observing that fire engines were passing along

the street, brought the street car to a stop in the middle of the block, in accordance with the custom of the company and the ordinances of the city. The passenger, believing that she had reached her destination, stepped off the car, unobserved by the employees of the company, and was struck by a passing hose cart immediately upon alighting from the street car. That case differs from the one here in that the car there was not stopped for the purpose of the discharge of passengers, and the company was not, therefore, at the time, exercising, or perhaps required to exercise, toward her that watchfulness that it would over a passenger which the company was voluntarily discharging, but the court stated as a general rule: "Street car companies carrying passengers in ordinary public streets or highways are not negligent in not providing means for warning passengers about to leave a car of the danger of colliding with or of being run over by other vehicles in the street. The risk of being hurt by such vehicles is the risk of the passenger and not that of the carrier. It is not a danger against which the carrier is bound to protect the passenger or to give him warning."

A case, which comes nearer passing upon the question which we are considering here than any that has come to our attention, is the case of *Ellis v. Hamilton Street R. W. Co.,* 48 Ont. Law Rep. 380. In that case the car had stopped, at the instance of the passenger, in the middle of the block, and not at the customary stopping place. The passenger, upon leaving the car, and at a moment when the court recognized that the relation of passenger and carrier still continued, was struck by a passing vehicle. The court held that the company was not negligent in failing to warn the passenger of the danger of passing vehicles at the point where she was allowed to alight. The court said: "There is nothing in the evidence to show that the motorman knew that the plaintiff did not know and appreciate, as much as he did, any risk she was taking in asking that the car be

stopped; and, though she had an opportunity of doing so, she did not, before stepping from the car, look for an approaching motor. Situated as she was, she must have had a better opportunity of doing this than had the motorman. I know of no statute or case, and none was cited to us, which imposes on a street car company the duty of warning passengers about to leave the car of the danger of being run over or injured by other vehicles in the street. Section 15 of the motor vehicles act was, no doubt, passed to protect persons about to board or to alight from cars, but the duties and obligations are put by that act upon the driver of the automobile, and not upon the street car company. There is nothing in the act which obliges a street car company not to stop for the purpose of discharging passengers when other vehicles are passing, or not to permit a passenger to alight without seeing that the street is free from vehicular traffic, or even to warn its passengers to look out for passing traffic."

Though as a general rule we believe that a street railway company is not obliged to warn passengers against the dangers from passing traffic that they may encounter in alighting from the company's cars, yet we do not say that that rule is inflexible and not subject to exceptions. Where the passenger is a child, or a person who does not possess full and normal faculties for protecting himself, which condition is known, or, in the exercise of due care, should have been known to the company's employees, the company no doubt owes him a greater degree of care to protect him from danger at the place where he alights than it does the ordinary individual, and, it may be, in such a case, should be on the lookout to warn him of the dangers of passing vehicles. And in any case where there is a particular danger from a passing vehicle, which danger has become known to the company's employee, and where it has become apparent to such employee that such danger is not known to the passenger about to alight, we take it, of course, to be the duty of the employee to

notify the passenger where there is reasonable opportunity to do so. See *McCoy v. Omaha & C. B. Street R Co.*, 104 Neb. 468.

In this case the plaintiff's intestate was a young woman, alert and apparently keenly alive to the conditions which surrounded her. We cannot say that there was any negligence on the part of the motorman, who was unaware of the approaching danger, and on whom we do not find that there was any affirmative duty to watch for such danger. The question, however, remains as to whether negligence can be predicated upon the action of the conductor on the car, who knew of the approaching vehicle, in failing to give warning. The conductor, it must be remembered, was at the far end of the car. He had seen the motorcyclist approaching at a high rate of speed, but he had a right to assume, until the contrary affirmatively appeared, that the motorcyclist, when he neared the car, would slacken his speed, and so far turn out toward the curb as to avoid hitting or endangering any passengers who might happen at the time to be in the act of descending from the street car. He also had a right to assume, where the contrary did not appear, that passengers on the car who were about to alight were also on the alert and watching for passing vehicles. His attention was directly concerned with the passengers immediately under his observation. It appears to us from a reading of the evidence that the conductor, after the danger had become apparent to him, did not know that Miss Jensen was unaware of the danger, and, even had he then known it, that he would have had no time or opportunity to notify her, so as to have prevented her from meeting with the accident.

The record would justify holding the motorcyclist civilly, as well as criminally, but we are of opinion that the evidence in behalf of the plaintiff, as we have set it out above, was insufficient to support a finding of negligence on the part of the company and of a violation of an affirmative duty which it owed to the plaintiff's in-

testate, upon which an action for negligence and recovery of damages could be properly predicated against it.

The ruling of the trial court, therefore, directing a verdict in favor of the defendant, was, as we view it, correct, and the judgment should be

AFFIRMED.

CITY OF UNIVERSITY PLACE, APPELLEE, V. LINCOLN GAS & ELECTRIC LIGHT COMPANY, APPELLANT.

FILED DECEMBER 8, 1922. No. 22129.

1. **Municipal Corporations:** POWERS: GAS CONTRACT: RATES. By section 1708, Comp. St. 1909, set forth in the opinion, a city of the second class not having power to regulate rates had power to *contract* for the furnishing of gas to the city and its inhabitants and fix therein a maximum charge for such service. *Wabaska Electric Co. v. City of Wymore*, 60 Neb. 199, distinguished.
2. **Constitutional Law:** GAS CONTRACT: IMPAIRMENT. An ordinance reciting "that, in consideration of the rights and privileges granted herein, the grantees shall have a right to charge not in excess of $1.50 per 1,000 cubic feet of gas," etc., which is accepted by the company, constitutes a contract the obligation of which may not be impaired by either party.
3. **Quaere.** Whether or not the state, by the exercise of its paramount authority to regulate rates which may be charged by public utility corporations, may intervene upon a showing that the rate fixed by the contract is unreasonable or confiscatory, not decided.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Reavis & Beghtol and *C. A. Frueauff*, for appellant.

J. A. Brown, contra.

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

REDICK, District Judge.

This action is brought by the city of University Place,

a municipal corporation, against Lincoln Gas & Electric Light Company, a corporation engaged in the manufacturing and distribution of gas to the inhabitants of the plaintiff, seeking to perpetually restrain the defendant from charging more than $1.50 per 1,000 cubic feet, less a discount of 25 cents for gas so furnished.

By section 1708, Comp. St. 1909, the city of University Place, as a city of the second class, was authorized "to grant a franchise to and *make a contract with* any person, company, or association for the privilege of granting to such person, company or association the furnishing of light for the streets, lanes, alleys and other public places and property of said city and the inhabitants thereof, and to levy a tax for the purpose of paying the costs of such lighting the streets, lanes, alleys and other public places and property of said city; and the furnishing of power to the residents, citizens and corporations doing business in such city."

At the time of the adoption of the ordinance hereinafter referred to, no power had been granted by the legislature to cities of the second class to regulate the rates which a public utility corporation might lawfully charge for furnishing gas to the inhabitants of the city; such power was not granted until 1911. Rev. St. 1913, sec. 5019.

In the summer of 1909 one Springer and one Phillips made a proposition to the city that, in consideration of a franchise therefor, they would construct and maintain a gas plant to furnish gas to said city and its inhabitants during the term of the franchise, for a price not in excess of $1.50 per 1,000 cubic feet, and on the 28th of August, 1909, the city accepted the proposition and passed an ordinance conferring upon the company a twenty-year franchise in the streets and alleys of the city and fixing the price as contained in said proposition. Springer and Phillips assigned all their right in and to the franchise to the defendant company, which ac-

cepted the same upon the terms provided in said ordinance.

In December, 1920, the company notified the consumers of gas in University Place that on and after January, 1921, the rates for gas would be $1.75 per 1,000 cubic feet, with a fixed meter charge of 25 cents a month. The district court granted the injunction, and the gas company appeals.

The question for determination in this case is the proper construction of section 1708, Comp. St. 1909, above set out, the claim of the gas company being that such section gave the city no power to regulate the rates the company might charge for its service, and that a contract entered into between the city and the company whereby it was attempted to fix the maximum rate to be charged for the service was an attempt at regulation and beyond the competency of the city to contract. On the other hand, it is contended by the city that the statute in question gave it the right to fix and determine the terms and conditions upon which it would grant the franchise, and that the provision of the ordinance fixing the rate constituted a valid contract as distinguished from a regulation of the rates, and that to now permit the company to charge the higher rate would impair the obligation of such contract.

The question is important, as it appears that, while the amount fixed by the ordinance as the price to be charged for the service, at the time thereof and for a considerable time thereafter, was a fair and reasonable one, and one which would enable the company to make a profit, it is now claimed, and not disputed, that, owing to the increase of the cost of materials and labor since the war, the price fixed is confiscatory, and if the company is not permitted to charge the rate proposed by them they will be required to furnish the service at a loss. The consideration of this fact would have an important bearing if the proceeding were one before the

city council or a state board for the purpose of fixing the rates to be charged for the service, but, manifestly, the fact that the enforcement of a contract will result, by reason of changed conditions, in loss to one of the parties is no ground for refusing judgment. *Knoxville Gas Co. v. City of Knoxville,* 261 Fed. 283; *City of Moorhead v. Union Light, Heat & Power Co.,* 255 Fed. 920. The question, therefore, is whether there is a contract the obligation of which would be impaired by the proposed action of the gas company.

At the start it would be well to distinguish the two powers, to contract and to regulate, as related to the question at issue. The power to contract is one which exists in every person, natural or artificial, and involves a meeting of the minds of the respective parties resulting in the agreement; it requires the participation of more than one. On the other hand, the power to regulate, as applied to the precise question presented, is a power existing in one party to dictate and command the action of another without his consent thereto. The power to contract may be said to be an attribute of the person or individual, while the power to regulate is an attribute of sovereignty; and, as will appear later on in this opinion, while the Constitution of the United States jealously guards and protects the right of contract and inviolability of the obligation of contracts, it is equally insistent that the powers of government shall be exercised only by the properly constituted authorities of government, or those to whom such powers may have been lawfully delegated. It is, however, true that the right of a municipal corporation to contract is a restricted one and is to be found by an examination of its charter, and exists only when conferred in express words or is necessarily to be implied therefrom; and in determining what implications are proper from an express grant of power, the subject of the grant and nature of the power are important considerations, and if the power has reference to the proper conduct of the particular municipal con-

cern as distinguished from general powers ordinarily exercised by the state, we think a more liberal rule of construction should be adopted. Now, a city exercises its business or proprietary power in contracting for the construction of gas works, while the power of a city to regulate or fix the rates which a gas company may collect from private consumers partakes of the nature of a governmental power and also of the nature of a business power. *Omaha Water Co. v. City of Omaha,* 147 Fed. 1. In that case Judge Sanborn said: "The making of a contract for the construction and operation of waterworks wherein the parties agree what rates may be collected by the owner of the works from private consumers during a reasonable term of years is the exercise of one of the business powers of the corporation. The purpose of such a contract is not to regulate rates, for there are no rates to regulate. It is to procure water and to get rates for the city and for its inhabitants."

Contracts involving franchises for use of the public streets for supplying water, gas and electricity to the inhabitants of a city for a limited time are common in the history of municipalities and have been quite generally sustained. The subjects of such contracts are of intimate municipal concern affecting the health, comfort and general welfare of the inhabitants. So far as the supplying of such facilities is concerned, the city is exercising its proprietary or business powers rather than its governmental prerogatives, and the rules and principles of law applicable to contracts and transactions between individuals apply thereto. *Reed v. City of Anoka,* 85 Minn. 294.

We are of the opinion that in determining whether the fixing of a maximum rate in the ordinance in question was within the competency of the parties, particularly the city, we are not required to follow the strict rules of interpretation or construction which apply to a delegation of strictly governmental powers—the power conferred is to *contract,* not to *govern;* and although the contract has

the effect to suspend for a time the governmental power to regulate rates, when it exists, this does not affect its validity, if the time limit be reasonable, and the power to enter into the contract is found. *Home T. & T. Co. v. City of Los Angeles,* 211 U. S. 265, 273. True, in that case it was held that the existence of the power to make a contract which *pro tanto* extinguishes a governmental power must clearly and unmistakably appear, and that all doubts must be resolved in favor of the *continuance* of the power; but in that case the city itself had been delegated the power of regulation and that fact entered into the decision. Further reference to this case will be made later.

With these principles in view, let us read the statute in question. Its language is somewhat involved and requires some reconstruction to give it the meaning intended, but without doubt power is given "to grant a franchise to and make a contract with" any person or company for the furnishing of light to the city and its inhabitants. To "grant a franchise"is a governmental act, involving power to fix terms which the other party may accept or reject. To "make a contract" involves negotiation and agreement of the parties. Why did the legislature insert the words, "make a contract with," unless it was intended to grant a power to render more effectual the power to grant a franchise? In the opinion in *Detroit v. Detroit Citizens Street R. Co.,* 184 U. S. 368, Justice Peckham remarked (p. 384): "The rate of fare is among the most material and important of the terms and conditions which might be imposed by the city in exchange for its consent to the laying of railroad tracks and the running of cars thereon through its streets." True, the learned justice did not rest his decision upon the statute authorizing the city to name the terms and conditions, as the statute provided that rates of fare should be established by agreement, but he clearly expressed the opinion that the power existed without reference to the provision as to agreement. In *Flynn v.*

Little Falls Electric & Water Co., 74 Minn. 180, it was held that a contract by a city to pay an agreed price for water hydrants for a reasonable time was authorized by a statute authorizing it "to grant to third parties the right to erect water-works * * * in accordance with such terms and conditions as might be agreed upon."

In *Reed v. City of Anoka, supra,* it was argued that, "though the general right and power to contract does not necessarily involve the exercise of legislative functions, the power to fix rates and charges to be paid by the municipality in consideration of the performance of contracts does," but it was pointed out that the purpose was "not to govern the inhabitants, but to secure for them and for itself a private benefit." And in *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, 17, it was said: "But where a contract for a supply of water is innocuous in itself and is carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it."

In *Vicksburg v. Vicksburg Water-works Co.*, 206 U. S. 496, it was held that municipal corporations may be authorized to exclude themselves from the right of regulation of such matters as water-rights, and, following the state decisions, may, "under a broad grant of legislative authority conferred without restrictions or conditions, make a contract with a corporation, fixing a maximum rate at which water should be supplied to the inhabitants of the city for a limited period, which, in the absence of fraud or convention, will be beyond legislative or municipal power to alter to the prejudice of the other contracting party under the impairment of obligation clause of the federal Constitution." The legislative authority in that case was "to provide for the erection and maintenance of a system of water-works to supply said city with water, and to that end to contract with a party or parties, who shall build and operate water-works." While the decision was based to a very large extent upon the

decisions of the supreme court of the state cited therein, the logic of the opinions in those cases commends itself to us.

In *City of Cleveland v. Cleveland City R. Co.*, 194 U. S. 517, the city was empowered to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended and consolidated, and it was held that a contract fixing the rate of fare at five cents was within the powers granted, and that an ordinance attempting to change the contract as to rates was void as an impairment of its obligation, although under a previous ordinance the right to diminish fares had been reserved.

Our attention has not been called to any case where the power to contract for a supply of water, gas, or other similar necessity, has been granted, the authority to fix a maximum rate has been denied, except *Freeport Water Co. v. Freeport City,* 180 U. S. 587; but in that case there were two statutes under construction, one in which the city was authorized to contract "for a supply of water for public use" and the other, passed the following day, by which it was empowered to "authorize any person or private corporation to construct and maintain the same (water-works) at such rates as may be fixed by ordinance, and for a period not exceeding 30 years;" and it was held the statutes were *in pari materia*—should be construed together; and that as the words "fixed by ordinance" might be construed as fixed for the whole period, or from time to time, the latter construction should prevail as it was more favorable to the public. Four justices dissented, but in view of the difference in the facts the case cannot be considered as militating against the construction we have given to the term "make a contract" in the statute under review. The opinions, however, are most instructive. A similar conclusion was reached in *Central Power Co. v. City of Kearney,* 274 Fed. 253, holding the power to contract was subject to the power to regulate conferred by the same statute. See,

also, *Knoxville Water Co. v. Knoxville,* 189 U. S. 434. It will be remembered that no power of *regulation* was vested in the City of University Place at the time of the execution of the contract under discussion.

In *Omaha Water Co. v. City of Omaha,* 147 Fed. 1, the city was granted power to contract with third parties for the construction and operation of water-works "on such terms and under such regulations as may be agreed on," and it was held that rates came within "terms and regulations," citing the *City of Cleveland* case, *supra.* Does the addition of the words above quoted add anything to the general grant of a power to contract without restrictions? We think not. "A municipal corporation possesses, as incidental to its express powers and the object of its existence, implied authority to do those things essential to efficiently accomplish the latter." *Schneider v. City of Menasha,* 118 Wis. 298. The power to contract carries with it, as a necessary incident, the power to insert such terms and conditions as are appropriate and necessary, and are germane to the subject. What more important consideration, both to the citizens and the company, than the price that was to be charged for gas? Let it also be borne in mind that we have no question here about the power of the legislature to regulate rates; the question arises between the company and a city which did not possess that power; and what it did not possess it could not relinquish; therefore, the lack of mutuality referred to in *Central Power Co. v. City of Kearney,* 274 Fed. 253, is not present; and the contract may be valid between the parties, regardless of the question whether the state may, by the exercise of its paramount authority, interfere with its complete fulfilment (*City of Manitowoc v. Manitowoc & Northern Traction Co.,* 145 Wis. 13), which we do not decide.

The appellant cites a number of cases to sustain the proposition that the provision of the ordinance fixing the price to be charged for gas is void because of lack of authority in the city to regulate rates. The first case

cited is *Wabaska Electric Co. v. City of Wymore,* 60 Neb 199, which was an action by the company to enjoin the city from establishing by ordinance rates to be charged for furnishing electricity to the city and its inhabitants. The franchise ordinance under which the company was operating provided for a certain number of street lights at $8 a month, and it was alleged the city proposed to discontinue the use of said lights. This was the only provision in the franchise relating to rates, and this court denied the injunction as to the street lights upon the ground that the plaintiff had an adequate remedy at law; and, as to the proposed regulation of the rates to be charged private consumers, on the ground that the proper parties were not before the court, viz., the mayor and city council. The court, however, held that the proposed ordinance fixing the rates was beyond the power of the city authorities and rested in the state, as at that time the legislature had not delegated the power to cities of the second class to regulate rates. It was stated by the court that it was not necessary to determine whether the city was authorized by its charter to grant an exclusive franchise for the erection and operation of an electric light plant. It will be noted that the ordinance granting the franchise did not assume to fix any rates except the charge which might be made against the city for street lights. What the holding of the court would be in an action by the company to recover such charges or for refusal to use the number of lights called for is left to conjecture. It seems probable that this particular contract might be sustained under the general powers of the city to contract for supplies, the same as a contract for the purchase of stationery, for example, without the necessity of considering the question we are discussing. The case, therefore, is authority only upon the general proposition that a municipal corporation has no authority to exercise the governmental function of regulating rates to be charged by a public utility corporation unless expressly author-

ized by the legislature, and the question there decided differs essentially from the one under discussion, which does not involve the regulation of rates under a franchise already in operation, but involves the question of the power of the city to *agree upon* the charge to be made for the service for a reasonable period as a consideration for the granting of the franchise. If the city of Wymore had fixed a maximum rate in the ordinance granting the franchise and the company had accepted it, thereby making a contract, it would have been necessary for the court to construe the city charter granting the right "to make contracts with * * * any person or company * * * to erect gas or electric light works." Comp. St. 1901, sec. 1399. Counsel quote this statute and the one under consideration with the comment, "There is very little difference in the wording," which is true; but there is a wide difference between what was attempted to be done under the respective statutes—in the one case to make a contract, in the other to regulate rates; and while the different acts relate to the same subject, their divergent character calls for some discrimination in determining the existence of power to do those acts.

The next case cited is *City of Winchester v. Winchester Water Works Co.*, 251 U. S. 192. It appears that the company had a contract with the city which expired in 1916 (the terms of which contract are not disclosed), and thereafter the ordinance in controversy was passed, seeking to fix rates at which water should be furnished the inhabitants. The statute of Kentucky provided: "The board of council may grant the right of way over the public streets or public grounds of the city to any railroad company or street railroad company, on such conditions as to them may seem proper, and shall have a supervising control over the use of same, and shall regulate the speed of cars and signals and fare on street cars; and under like condition and supervision may grant

the right of way that may be necessary to * * * water companies." It was held that this statute gave the right to fix street car fares, but not to regulate water rates. In this case, as in the Nebraska case above cited, there was no question of contract, the same having expired at the time of the passage of the ordinance. In *Lewisville Natural Gas Co. v. State,* 135 Ind. 49, it was held that, under "power to provide by ordinance reasonable regulations for the safe supply, distribution and consumption of natural gas within the respective limits of such towns and cities," the power to regulate rates had not been delegated, but only to make regulations appropriate to the use of natural gas as related to the safety of the inhabitants. *Tacoma Gas & Electric Light Co. v. City of Tacoma,* 14 Wash. 288, was another case where the city was given power "to regulate and control the use and price of the water so supplied," but with reference to gas, the one in question, the only power conferred was "to regulate and control the use thereof," and it was held that no power to regulate the price of gas was delegated.

Farmer v. Columbiana County Telephone Co., 72 Ohio St. 526, is cited. The statute of Ohio under construction in that case provided: "When any lands authorized to be appropriated to the use of a company are subject to the easement of a street, alley, public way, or other public use, within the limits of any city or village, the mode of use shall be such as shall be agreed upon between the municipal authorities of the city or village and the company; * * * but nothing in this section shall be so construed as to authorize any municipal corporation to demand or receive any compensation for the use of a street, alley, or public way, beyond what may be necessary to restore the pavement to its former state of usefulness." The ordinance granting the right to the telephone company to occupy the streets of the city contained a number of provisions as to rates, which, as in the case under review, were inserted at the suggestion

and with the consent of those seeking a franchise; but the court held that under the statute in question the city had power only "to agree with such companies as to the mode of use, and upon compensation for such use, but not beyond what may be necessary to restore the streets to former state of usefulness," and that, therefore, the provisions with regard to the rates were not authorized.

Home T. & T. Co. v. City of Los Angeles, 211 U. S. 265, was a case where the power to regulate telephone rates had already been delegated to the city before the passage of the ordinance granting to the telephone company a franchise to erect or lay telephone wires upon the streets for a term of 50 years, and containing provisions that the charges for service shall not exceed specified amount. The action was to enjoin the enforcement of an ordinance fixing the rates to be charged by the company at a figure lower than those prescribed by the ordinance granting the franchise, the claim being that such latter ordinance was a contract, and that to permit the city to subsequently change the rates would impair its obligation. The court held that a power to fix and determine rates did "not authorize the municipality to abandon the power, and to irrevocably establish rates for the entire period of a franchise." The term, "fix and determine rates," was construed as a grant of strictly governmental power—it authorizes command, but not agreement—and that no power to contract with reference thereto could be implied from such language, and that the intention to abandon the power "must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power." It was held, however, that, where the power to contract is established, rates might be fixed "for a definite term, not grossly unreasonable in point of time." It further appeared in that case that the franchise was to be granted upon the conditions prescribed in the act, "and not otherwise," and the subject of rates was not mentioned.

Appellant also cites *Knoxville Gas Co. v. City of Knoxville,* 261 Fed. 283, upon the proposition, as stated in the brief, that "if the city had no power to regulate gas rates it had no power to contract with reference to them, and the contract alleged in plaintiff's petition is void." The gas company was formed under a Tennessee statute containing a provision that the streets and alleys should not be "entered upon or used * * * for laying pipes or conductors * * * until the consent of the municipal authorities shall have been first obtained, and an ordinance shall have been passed prescribing the terms on which the same may be done." The city charter contained only general authority to make appropriations "for lighting the streets" and to "grant right of way through the streets." It was held that the provision of an ordinance consenting to the use of the streets by the gas company, attempting to fix a maximum price to be charged for gas, was void, as the provisions of the statute and the charter conferred no power upon the city to fix the rates by contract or regulation. The most that can be claimed for this case, favorable to appellant, is the classification as governmental of the power to contract with that to regulate; as stated by Warrington, circuit judge: "The power to establish prices to be charged by public service corporations, whether it is to be exercised by regulation or by *contract,* resides primarily in the state," and "the settled federal rule in respect of both these features is exacting, and need not be misunderstood; it requires that the intent of the state so to give up a portion of its power must appear in explicit and convincing terms—in plain words—and that doubtful expressions shall be resolved in favor of the state." It is manifest that no such power can be inferred or implied from the language used in the statute or charter, under the most liberal rules of construction; but, as was said by Moody, J., in *Home T. & T. Co. v. City of Los Angeles, supra*: "It is obvious that no case, unless it is identical in its facts, can serve as a controlling pre-

cedent for another, for differences, slight in themselves, may, through their relation with other facts, turn the balance one way or the other." In the *Knoxville* case there was no such word as *contract,* and the court said "the claim of power in the city to agree upon a price * * * must at last rest on the right created in the city in general language to impose terms and conditions of its consent to use the highways, rather than upon language specifically authorizing it either to regulate prices or to agree upon a price," which proposition it seems is opposed by *Omaha Water Co. v. City of Omaha,* and *City of Cleveland v. Cleveland City R. Co., supra.* Neither of these cases is conclusive of the questions presented in the case under review, and we conclude that the contract in question is valid, in view of which holding it is unnecessary to discuss the question of estoppel presented by the city.

AFFIRMED.

LESLIE G. HURD ET AL., APPELLEES, V. SANITARY SEWER DISTRICT ET AL., APPELLANTS.

FILED DECEMBER 8, 1922. No. 22532.

1. **Municipal Corporations:** SEWERS: SPECIAL ASSESSMENTS. The erection of a sewage disposal plant is a general improvement the cost of which cannot be levied upon real estate by special assessment for benefits.

2. ———: ———: TAXATION. The cost of main sewers in excess of special benefits can only be paid for by means of general taxation.

3. **Taxation.** All taxes for general purposes must be levied by valuation uniformly and proportionately.

4. **Municipal Corporations:** SEWERS: SPECIAL ASSESSMENTS. Special assessments for construction of sewers should be confined to abutting property.

5. ———: ———: ———: INCIDENTAL COSTS. Incidental costs of the improvement may be included in the assessment, as well as interest upon the amount due.

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

H. G. Wellensiek, F. E. Edgerton and *F. C. Foster,* for appellants.

Harry S. Dungan, contra.

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

REDICK, District Judge.

Proceedings were instituted by the mayor and city council of the city of Harvard under the provisions of chapter 189, Laws 1919 (Comp. St. 1922, secs. 4337-4350), for the purpose of providing a sanitary sewer system for such city; the system has been constructed, and the present proceeding involves the validity of the special assessments levied to pay for the same.

There being no natural outlet for sewage, it was necessary to provide a disposal plant; the project, therefore, involved the construction of main sewers, district and laterals, and a disposal plant. The cost of main sewers and disposal plant was $32,150.08, and of the laterals $31,631.99. For the purpose of this project the city as a whole was designated as sewer district No. 1, consisting of substantially all of the real estate within its boundaries. The method pursued in laying the assessments was as follows:

(1) To pay for the laterals, all real estate abutting thereon and which could directly connect therewith was assessed according to foot frontage, but business lots were assessed twice as much as residence lots, or in that proportion; also, many of the lots of plaintiffs were assessed which did not abut upon the sewer, but were in such proximity to it that connection could be made by a circuitous route; lots abutting on mains were assessed the same as those on laterals.

(2) To pay for the mains and disposal plant, all the real estate in the city limits was assessed according to

superficial area. As a result of this method nearly all the lots were specially assessed both for mains and laterals and disposal plant; for example, lot 193, located only on a lateral, was assessed $16.08 for mains and $41.63 for lateral.

Appeal was taken by plaintiffs, appellees, from the proceedings of the mayor and council, to the district court, which rendered judgment setting aside the assessments, and the city appeals. The assessments are attacked for numerous reasons, among which are:

(1) That the act in question is unconstitutional because its subject is not clearly expressed in its title; (2) that the body of the act is broader than its title; (3) that the main sewer and disposal plant is a general as distinguished from a local improvement, and its cost cannot be assessed by any scheme of special assessment, but that it is a general benefit to all property in the city and must be recovered by taxation on the basis of valuation.

The title of the act is: "An act relating to sewer districts in cities of the second class and villages and to repeal sections 5162 and 5163 of the Revised Statutes of Nebraska, 1913." The subject of this act manifestly is "sewer districts in cities of the second class." This necessarily contemplated all provisions appropriate to the general subject. As was said by Day, J., in *State v. Amsberry,* 104 Neb. 279, 287: "The constitutional limitation, that no bill shall contain more than one subject, which shall be clearly expressed in the title, does not require an enumeration in the title of all the different matters germane to that subject which must necessarily be covered in the body of the act. The title of the act is not intended to serve as an index to the contents, but only as an indication of the general object sought, and it is implied that matters incidental to that object will necessarily be covered."

"The object may be very comprehensive and still be without objection. * * * All that can reasonably

be required is that the title shall not be made to cover legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection." *People v. State Ins. Co.,* 19 Mich. 392. See, also, *State v. Cox,* 105 Neb. 75, and cases cited at page 82.

The title is sufficient.

That the act is broader than its title: This objection would be rather difficult to establish, and appellee has failed in that regard. Briefly, the act covers the formation of sewer districts, contracts for sewer construction, the levy of special assessments to pay therefor, notice, the issue of bonds based on such assessments, the payment of any excess out of the general fund, etc. Certainly, all these matters "relate to sewer districts" and are within the title. Our attention has not been called to any provision, and we find none, which is beyond the scope of the general subject revealed by the title.

This objection presents a more serious question. Section 1 of the act seems to contemplate the assessment of the entire cost of the project, including the cost of main sewers and disposal plant, as a special assessment according to benefits. And section 12 provides: "Any property benefited and to the extent of the benefits so conferred, may be assessed as hereinbefore provided, for the cost of building or reconstruction of outlet or main sewer systems, or for the cost of building or reconstruction of sewage disposal plants, * * * payable in equal annual instalments throughout a period not exceeding twenty years." Under the Constitution of this state taxes are divided into two classes—general and special. General taxes are required to be levied "by valuation uniformly and proportionately" (art. VIII, sec. 1), and special taxes by special assessment upon property benefited (art. VIII, sec. 6), having special reference to local improvements by cities. Special assessments can only be levied upon property specially benefited, and only to the extent of such benefit. They may not be based upon

a general benefit which results from a public improvement; such benefit is a proper basis for general, but not special, taxation. "The distinction in principle underlying the levy of a general tax and the levy of special assessments is lost sight of when the improvement proposed is of such a character and of such general benefit to the entire city that all the property in the city must be included within a single taxation district so as to make it possible that the special assessment may be made." Flansburg, J., in *Futscher v. City of Rulo,* 107 Neb. 521.

The main sewers and disposal plant in question are general improvements conferring general benefits upon all property in the city—the disposal plant because it benefits all property in the city alike; the main sewers, for the same reason, to the extent that they serve the public generally as distinguished from the special service to abutting owners. "A local improvement, within the meaning of the statute, is a public improvement which, by reason of its being confined to a locality, enhances the value of adjacent property, as distinguished from benefits diffused by it through the municipality." *City of Chicago v. Blair,* 149 Ill. 310. A valuable discussion of the difference between general and local improvements will be found in *City of Waukegan v. DeWolf,* 258 Ill. 374.

We are constrained to hold that, in so far as the act in question attempts to authorize the levy of special assessments for the cost of the disposal plant, and for main sewers beyond the special benefits which may be thereby conferred, it contravenes the provision of the Constitution with reference to special assessments, and is void. *Norwood v. Baker,* 172 U. S. 269; *Futscher v. City of Rulo, supra.* This holding does not affect other portions of the act. Ample power to construct sewers is conferred by this and other sections of the statutes governing cities of the second class; but the cost thereof, beyond the special benefits conferred, must be raised by

general taxes upon all the taxable property of the city, real and personal, on the basis of valuation. Comp. St. 1922, sec. 4351.

A great many other questions are presented by the briefs, both of which are unnecessarily voluminous, discussing at great length questions long settled in this state. Some of them require notice, in view of subsequent proceedings by the city to pay for the improvement. (1) While it appears that the city attempted to make assessments according to benefits, there was no finding by the board that the several lots were benefited to the extent of the assessment. This is necessary. *Morse v. City of Omaha,* 67 Neb. 426. And if the foot-frontage rule is adopted there should be a finding that the benefits are equal and unifo (2) We see no good reason for assessing a busines. ot twice as much as a residence lot. The true basis is the use which *may* be made of the improvement, not that which for the moment exists, for the use is subject to change. The logic of the rule adopted in this assessment would exempt a vacant lot entirely; and, if on the residence lot there were an apartment house with 20 connections to the sewer, the *use* might be many times as great as that of a business lot. Furthermore, business buildings are not always continuous, and the rule adopted might result in adjoining lots of same frontage being assessed in the ratio of two to one. (3) The assessments for laterals have been extended beyond the limits of the improvement. We think a sewer assessment should be confined to lots abutting upon the improvement. See *Shannon v. City of Omaha,* 73 Neb. 507; *Bickerdike v. Chicago,* 185 Ill. 280. When extensions of the sewer are made will be time enough to charge the property thereby benefited. "The improvement district is the foundation of all other proceedings"; and no taxes can be levied outside the district. *McCaffrey v. City of Omaha,* 91 Neb. 184. The authority to "state the outside boundaries of the district in which it is proposed to assess" con-

ferred by section 1, ch. 189, Laws 1919, did not justify enlarging the taxing district beyond the limits of the improvement.

From the above considerations it will be proper for the city to make new levies in accordance with the views herein expressed, by special assessment of property benefited, but not in excess of benefits, and by general levy of any excess of cost upon the basis of valuation, to pay principal and interest of bonds which may be issued by the city according to law to cover such excess or such part as may be needed; the incidental costs connected with the making of the improvement may be included; also, interest to the date of the assessment. *Butler v. Toledo*, 5 Ohio St. 225.

The assessments were illegal and were properly set aside. Judgment

AFFIRMED.

HIPPODROME AMUSEMENT COMPANY, APPELLEE, V. OAK C. REDICK, APPELLANT.

FILED DECEMBER 8, 1922. No. 22126.

1. **Chattel Mortgages:** CONVERSION. A bill of sale absolute upon its face, if given as security for a debt, will be regarded as a chattel mortgage; and if the grantee converts the property conveyed and refuses to account for it, the grantor may recover its fair market value, less the amount due the grantee.

2. ———: ———: DEMAND. In such case, if the grantee by clear and unequivocal act and word claims the property as his own and denies that the grantor has any interest in it and wholly refuses to confer further in regard to it, no demand on the part of said grantor is necessary as a matter precedent to the bringing of his suit, nor is he required to first tender the amount due on his debt.

3. ———: ———: EQUITY. One who gives a bill of sale to another to secure his debt upon the agreement that the latter shall sell the property described therein, pay himself, pay a third party, and return the surplus, must resort to equity for

his remedy if his grantee repudiates the agreement and treats the property as his own, particularly if, as in this case, the grantee thereby incurs an obligation to a third party.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Reversed.*

Brogan, Ellick & Raymond and *E. W. Simeral,* for appellant.

Macfarland & Macfarland and *Gray & Brumbaugh, contra.*

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

SHEPHERD, District Judge.

Plaintiff and appellee sued the defendant and appellant for $10,000 alleging that it had given the latter a bill of sale to personal property of the value of $8,415.47, upon the agreement that he would sell the same for not less than $3,500, pay himself about $300 of rent due from the plaintiff, pay a party by the name of Schlank $650 due him, and turn the balance over to the plaintiff; also, that defendant had denied that there was any such agreement, and had converted the property and refused to account for the same, to plaintiff's damage in the sum stated. Defendant admitted the giving of said bill of sale, but averred that it was absolute, as on its face appeared, and that it was executed and delivered to him, together with the property described, in payment of the plaintiff's indebtedness to him for rent. And he further pleaded that, about the time that the bill of sale was given, the said Schlank sued both him and the plaintiff, claiming a lien upon all of the property described, praying that defendant be enjoined from disposing of any part of the same, and demanding a judgment for $650, interest and costs. He denied all else in the petition. The plaintiff by reply denied defendant's answer, except as it admitted the averments of the petition. Trial was had to a jury over the objection of

the defendant, and resulted in a verdict for the plaintiff in more than the sum of $5,000.

There was abundant testimony from which the jury could find that the bill of sale was given subject to the agreement alleged in the petition. But the defendant contends that, according to plaintiff's petition, it was a conveyance in trust for the benefit of creditors, Schlank as well as the defendant, and that accordingly an action in conversion did not lie. He raised the point repeatedly below, and, being overruled by the district court, he assigns such ruling as error. He consistently urged in the lower court, as in this court, that the plaintiff's remedy, if any, was in equity, and not in law. This contention will be first considered.

The bill of sale in question is absolute in its terms, and was formally made and delivered. It purported to convey from the plaintiff to the defendant without any defeasance whatever. But the plaintiff seeks in his action to attach to it a trust agreement in parol, whereby defendant was to handle the property as a trustee, sell it, apply the proceeds to the claims of certain creditors, and return the balance to the grantor. May this be done elsewhere than in equity?

It is true that plaintiff declares in trover for conversion, not directly asking for any reformation, modification or extension of the written contract of conveyance. But the trouble is that reformation, modification or extension seems to be necessarily involved, and plaintiff's dependence upon his plea of conversion does not appear to be well placed.

Herrick v. Humphrey Hardware Co., 73 Neb. 809, is a case in which Mrs. Herrick had title to the stock. She owned it, but the company refused to transfer it on its books and refused to issue her a certificate for it. The court held her title good, and that the company by refusing to so transfer and issue deprived her of the use of said stock and had thereby converted it.

In *State v. Omaha Nat. Bank*, 59 Neb. 488, the state

owned the money and had it on deposit in the bank. Bartley, the Chemical National Bank of New York, and the Omaha National Bank, got hold of it by means of a warrant issued without authority of law and manifestly invalid on its face. The state had title, the bank refused to account, and the court entertained an action in trover on account of the conversion.

Marseilles Mfg. Co. v. Perry, 62 Neb. 715, was an action in which Perry had title and recovered on it for conversion when the defendant took the property under chattel mortgage and held it too long, thus converting it.

The mere statement of the facts in connection with these cases distinguishes them from the case at bar and makes them out of point to sustain the plaintiff's contention. One Nebraska case alone of those depended upon by plaintiff, and cited in its brief, is in point on the facts. *Weber v. Towle,* 79 Neb. 233. But that case loses value as an authority applicable to this case because the question involved here was neither raised nor considered.

One who sues in trover for conversion must have title to the property involved, or a right of possession to it. *Holmes v. Bailey,* 16 Neb. 300; *Locke, Huleatt & Co. v. Shreck,* 54 Neb. 472; *Raymond Bros. & Co. v. Miller,* 50 Neb. 506; *Thompson & Sons Mfg. Co. v. Nicholls,* 52 Neb. 312; *Coulter v. Cummings,* 93 Neb. 646. Plaintiff had neither. It had, as it pleads in the petition, conveyed the property to the defendant in trust that the latter might use the proceeds upon sale to pay himself and Schlank, another creditor, and then return the surplus to it. The fact that the defendant failed and refused to perform his trust did not reinvest the plaintiff with title to the property. The legal title and right of possession still remained with defendant, and will so remain with him, until, by action in equity, the bill of sale is impressed with the conditions of the oral contract which plaintiff says accompanied it. Plaintiff retained an equitable right, if his pleading as to the oral agreement be true.

It had no more when the defendant declared the property his and refused to go further, and its remedy was purely equitable.

Regardless of whether the primary right to be redressed or enforced is equitable rather than legal, and we think that such is its nature for the reasons above set forth, it is certain that the remedy lies exclusively in equity. "Cases in which the remedy sought and obtained is one which equity courts alone are able to confer must, upon any consistent system of classification, belong to the *exclusive* jurisdiction of equity, even though the primary right, estate, or interest of the party is one which courts of law recognize, and for the violation of which they give some remedy." 1 Pomeroy, Equity Jurisprudence (4th. ed.) sec. 138.

Particularly is this manifest in the case at bar, since it appears that, by the acceptance of the bill of sale and by taking possession of the property, the defendant bound himself, if there was an oral agreement of the kind as pleaded by the plaintiff, to pay Schlank, and become liable to him. Action in conversion proceeds upon the assumption that there is presented in it no equitable ground for relief or for defense. *Alter v. Bank of Stockham,* 51 Neb. 797. But in this case the petition itself discloses equitable ground for the relief of the plaintiff in the necessity for reconstruction of the contract of conveyance, and equitable ground for the defense of the defendant in the obligation to pay Schlank imposed upon him. The verdict rendered includes the amount which the defendant was to pay Schlank, or to hold in escrow for him. If it stands and Schlank recovers from the defendant also, a double recovery will result. The remedy at law is not adequate. These conflicting rights can only be adjusted in equity. *Edwards v. Hatfield,* 93 Neb. 712; *Nodine v. Wright,* 37 Or. 411; *Schutz v. Burges,* 50 Tex. Civ. App. 249.

A portion of plaintiff's brief is devoted to the consideration of the bill of sale as a chattel mortgage. If

such it was, the remedy of the plaintiff was the more certainly on the equity side. After stating the rule that a conveyance absolute on its face may be adjudged a mortgage, Dr. Pomeroy declares this to be a function of equity, and says that the underlying doctrine is the fruitful source of many other equitable rules. "The presumption," he says, "of course, arises that the instrument is what it purports on its face to be, an absolute conveyance of the land; to overcome this presumption, and to establish its character as a mortgage, the cases all agree that the evidence must be clear, unequivocal, and convincing, for otherwise the natural presumption will prevail. Whenever a deed absolute on its face is thus treated as a mortgage, the parties are clothed with all the rights, are subject to all the liabilities, and are entitled to all the remedies of ordinary mortgagors and mortgagees. The grantee may maintain an action for the foreclosure of the grantor's equity of redemption; the grantor may maintain an action to redeem and to compel a reconveyance upon his payment of the debt secured." 3 Pomeroy, Equity Jurisprudence (4th ed.) sec. 1196.

There are numberless cases in which creditors have proceeded in attachment to subject to the payment of their claims personal property conveyed by their debtors to favored grantees by bills of sale absolute in terms. In such cases replevin is common on the part of such grantees to recover possession from the sheriff who has taken in attachment. But such cases are on ground of fraud or directly as provided by statute, and are not commonly between the grantor and grantee as plaintiff and defendant. Other cases are numerous in which the true character of such bills of sale is set up as a defense, which is permissible under our statute providing that a defendant may plead all of his defenses, equitable as well as legal, so far as they are not inconsistent. Plaintiff cites several cases of the kind above referred to, but they are

not persuasive to the proposition that conversion is a proper remedy in this controversy.

Either in equity or in law, the court is constrained to believe and to hold that the fact that no demand was made for the return of the property does not abate the action or prevent a recovery. Fundamentally, demand and refusal are only evidential of the character of the holding. So, if it clearly appears from other evidence that the defendant would not return the goods, no demand need be made. It so appears here. Demand was unnecessary. *Wright v. Greenwood Warehouse Co.*, 7 Neb. 435; *Gross v. Scheel*, 67 Neb. 223.

Likewise, it was unnecessary for the plaintiff to tender the amount due the defendant before beginning action against him. The value of the property was ten times as great as the amount due the defendant. The defendant expressly refused to do anything further with the property. He claimed to own it. No tender need be made where it is obvious that it will not be accepted. The law requires no vain thing. 26 R. C. L. 624, sec. 3.

For the reasons above stated, the decision of the lower court must be reversed and the case remanded for proceedings in accordance with this opinion.

REVERSED.

ARTHUR C. WAKELEY, APPELLEE, V. DOUGLAS COUNTY, APPELLANT.

FILED DECEMBER 8, 1922. No. 22960.

1. **Statutes:** VALIDITY. The absence of any definition of the word "mob" in chapter 118, Laws 1921, is not enough to invalidate the enactment.

2. ———: CLASSIFICATION. "The power of classification rests with the legislature, and this power cannot be interfered with by the courts, unless it is clearly apparent that the legislature has by an artificial and baseless classification attempted to avoid and violate the provisions of the Constitution prohibiting local and special legislation." *Allan v. Kennard*, 81 Neb. 289.

3. **Constitutional Law:** RETROACTIVE LAWS. Retroactive legislation which is not merely curative or remedial, and which is not in response to any existing moral obligation, but which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions already passed, is unconstitutional and void. *Held*, that the statute here in question, chapter 118, Laws 1921, falls within the condemnation of the rule herein stated.

4. **Counties:** LIABILITY. In the absence of statutory enactment and under the common law, no recovery from the county can be had by a citizen on account of the destruction of his property at the hands of a riotous mob.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Reversed and dismissed.*

A. V. Shotwell and *W. W. Slabaugh,* for appellant.

Baldrige & Saxton, contra.

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

SHEPHERD, District Judge.

Two questions are involved, the constitutionality of chapter 118, Laws 1921, and the right of a citizen to recover, irrespective of statute, for the destruction of his property by a mob.

These questions arise in the suit of Arthur C. Wakeley, the appellee and plaintiff, against Douglas county, appellant and defendant, in which the former sued the latter, alleging that a riotous mob had taken possession of the courthouse and burned his library therein kept and used in his work as a judge of the district court. There was a denial of the petition, following the filing and overruling of a demurrer thereto, a trial to the court, and a finding and judgment in favor of the plaintiff.

The statute in question was passed after the described burning and within two years of the time when it occurred, and reads as follows:

"That the county commissioners or board of any county

in this state having more than 100,000 population and wherein any public building of any such county has been subjected to mob violence and the personal property of any state or county officer being situated and contained in such building at the time of such mob violence was injured or destroyed by reason thereof within two years' time prior to the passage of this act, said commissioners or board are hereby authorized and empowered and as such commissioners or board shall reimburse such persons losing such property, according to the fair and reasonable value of the damage done, from the general funds of any such county."

Whether this statute is unconstitutional is first to be considered. The defendant contends that it is, (1) as local and special legislation, (2) as unreasonably classifying its beneficiaries, (3) as retroactive, and (4) as not defining the term "mob" therein used.

While authorities are cited by the defendant which tend to sustain its point that, since the word "mob" is not defined in the statute, it should be held unconstitutional, the reasoning of such cases is not persuasive. We approve the rule of construction holding that the meaning of a word used in a statute may be determined upon judicial inquiry if any doubt arises in regard thereto. This has been generaly recognized. Illustrations may be found in *Spencer v. Looney,* 116 Va. 767; *Cole v. District Board,* 32 Okla. 692; and in the note to *Butte Miners Union v. Butte* (58 Mont. 391) found in 13 A. L. R. 746, 770, cited by the defendant itself. The finding of the trial court upon the averment of the petition that the mob was a riotous mob disposes of this contention.

We are not prepared to say that there is an unreasonable or illegal classification as to beneficiaries in the statute under consideration. "The power of classification rests with the legislature, and this power cannot be interfered with by the courts, unless it is clearly apparent that the legislature has by an artificial and baseless classification attempted to avoid and violate the pro-

visions of the Constitution prohibiting local and special legislation." *Allan v. Kennard,* 81 Neb. 289.

But conceding that retroactive operation is not always fatal to legislative enactment, there is a clear distinction between that which is harmless or merely curative and that which imposes new obligations or takes away vested rights. The latter class has always been condemned, and should be. In the case of *Society v. Wheeler,* 22 Fed. Cas. 756, 767, No. 13156, Judge Story gave the following definition of retroactive legislation which falls within the constitutional inhibition: "Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." This definition has been approved and adopted in *Sturges v. Carter,* 114 U. S. 511, and in *Commissioners v. Rosche Bros.,* 50 Ohio St. 103. See, also, note to *Mills v. Geer,* 52 L. R. A. 934 (111 Ga. 275).

Exception to the rule has been recognized in cases where the retroactive law is based upon the moral right of the class benefited to the remedy given, or where, as in the case of *Commissioners of Sedgwick County v. Bunker,* 16 Kan. 498, there is an existing moral obligation to do or perform the act or duty prescribed thereby. In such category falls all, or most, of the cases, except those dealing with curative legislation, referred to in appellee's brief. "And therefore," said the Kansas court, "the legislature may in many cases pass retrospective laws to enforce previously existing moral obligations. And we think that we have already shown that this is one of such cases." See *Bennett v. Fisher,* 26 Ia. 497.

But wherein was the county of Douglas under any existing moral obligation to make good the losses of the plaintiff—appellee? From the begining of jurisprudence, and in practically all the jurisdictions of the United States, it has been generally regarded that the govern-

mental agency is under no duty to make good to the citizen the damage done by the mob, even if the same be due to the omission of such agency to properly govern. *Butte Miners Union v. Butte, supra,* and note. The moral obligation attaches when a law is passed notifying and warning the taxpayer and the citizen generally that the state or municipality will undertake the burden of such damages.

Looking at it from another point of view, why, if a moral duty rested upon Douglas county to make good the ravages of the mob, did not the legislature consider the losses of others in the courthouse, the burned clothing and implements of the janitors, the destroyed private property of clerks who could ill afford to lose? It is quite clear that the legislature did not legislate upon the ground of existing moral obligation.

Of course, if a right of the plaintiff to recover existed by the common law, or independently of the statute in question, it might be said that such statute is simply declaratory of the common law, and that accordingly it should be upheld. But the plaintiff does not argue such a right under the common law, and from our own examination we are forced to conclude that none existed.

It seems to the court also that the statute is special in its nature, and as such repugnant to section 18, art. III of the Constitution. But this we neither discuss nor decide, as, for the reason already stated, the judgment of the district court must be reversed and the cause dismissed.

REVERSED AND DISMISSED.

JOHN L. FOWLER V. STATE OF NEBRASKA.

FILED DECEMBER 30, 1922. No. 22813.

1. **False Pretenses: VERDICT: VALUE OF PROPERTY. "In a prosecution for obtaining property under false pretenses, it is manda-**

tory that the jury on conviction shall declare in their verdict the value of the property falsely obtained, as provided in section 9129, Rev. St. 1913." *Hennig v. State*, 102 Neb. 271.

2. ———: ———: ———. "Where on conviction in such case the jury has failed to declare in the verdict the value of the property unlawfully obtained, the court is without jurisdiction to pronounce sentence, and a judgment based thereon is erroneous." *Hennig v. State*, 102 Neb. 271.

3. ———: ———: ———: SENTENCE. "Upon conviction in such case, the court should look to the verdict for the value of the property to determine the sentence to be imposed." *Hennig v. State*, 102 Neb. 271.

ERROR to the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Reversed.*

Bartos & Bartos, for plaintiff in error.

Clarence A. Davis, Attorney General, and *Mason Wheeler, contra.*

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

PER CURIAM.

Defendant was convicted in the district court for Lancaster county on an information which charged him with the violation of section 9892, Comp. St. 1922, in that by false and fraudulent pretenses he procured the signature of one Alexander F. Francke to three promissory notes each in the sum of $1,000. The verdict returned is in the following form: "We, the jury, duly impaneled and sworn in the above entitled cause, do find the defendant guilty as charged in the information." The verdict is silent as to the value of the notes.

The statute provides that, if the value of the property or promissory note fraudulently obtained is of the amount of $35 or upwards, the penalty shall be imprisonment in the penitentiary not more than five years nor less than one year; but, if the value be less than $35, the penalty is fixed at a fine not exceeding $100 or imprisonment in the county jail not exceeding 30 days, and lia-

bility to the party injured in the amount of the damage sustained. The sentence imposed by the trial court directed the imprisonment and confinement of defendant in the penitentiary for a period of not less than one year nor more than five years. Section 10154, Comp. St. 1922, reads: "When the indictment charges an offense against the property of another by larceny, embezzlement or obtaining under false pretenses, the jury, on conviction, shall ascertain and declare in their verdict the value of the property stolen, embezzled or falsely obtained." The question here presented was before this court in *Hennig v. State,* 102 Neb. 271, and it was there held that the provisions of the statute last quoted were mandatory, and that where, as in the instant case, the jury fail to declare in their verdict the value of the property involved the court was without jurisdiction to pronounce judgment and that a judgment based upon such verdict was void; that the court should look to the verdict for the value of the property to determine the sentence to be imposed. We adhere to the rule therein announced.

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

REVERSED.

WESLEY DILL V. STATE OF NEBRASKA.

FILED DECEMBER 30, 1922. No. 22894.

False Pretenses. Obtaining by fraud an extension of time for the payment of a preexisting debt honestly incurred by purchasing merchandise on credit is not a violation of the statute condemning the obtaining of credit by false pretenses. Comp. St. 1922, sec. 9892.

ERROR to the district court for Burt county: CHARLES A. GOSS, JUDGE. *Reversed and dismissed.*

B. C. Enyart, for plaintiff in error.

Clarence A. Davis, Attorney General, and *Jackson B. Chase, contra.*

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

PER CURIAM.

In a prosecution by the state in the district court for Burt county, Wesley Dill, defendant, was found guilty under a complaint charging that he obtained an "extension of credit" by false pretenses. He was sentenced to serve in the state reformatory a term of one to five years. As plaintiff in error he presents for review the record of his sentence and insists that there is no evidence that he violated the statute under which he was prosecuted.

The judgment cannot be permitted to stand. The statute provides for the punishment of any one who by false pretenses obtains credit with intent to cheat the person wronged. Comp. St. 1922, sec. 9892. It is only for a criminal act condemned by the statute that a conviction can be sustained. The jury found that defendant by means of false pretenses procured from H. M. Metzler an extension of credit for $104.48. For that sum defendant was indebted to Metzler, a general merchant, for groceries and other merchandise. Defendant bought the goods on credit. In connection with the original transactions resulting in the purchase and the credit, there is no evidence of false pretenses or other fraud in any form on the part of defendant. After the credit had been obtained by defendant, he evidenced the indebtedness by a note for $104.48, and to secure it he gave a chattel mortgage on a bay horse, a black mare and a set of harness. Alleged false pretenses in regard to the chattels described is the basis of the prosecution and conviction. The evidence is undisputed that what defendant obtained by the note and the chattel mortgage was a mere extension of time for the payment of a preexisting debt. This was not the obtaining of a credit and was not a violation of the statute under which defendant was prosecuted. *Mason v. State,* 99 Neb. 221.

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

REVERSED AND DISMISSED.

BEN FIDLER, APPELLANT, V. HARRY H. ADAIR, APPELLEE.

FILED DECEMBER 30, 1922. No. 22196.

1. **Justice of the Peace:** TRIAL OF RIGHT OF PROPERTY: JUDGMENT. In proceedings under sections 9003-9005, Comp. St. 1922, the only judgment a justice of the peace is authorized to render is a judgment for costs, and the order therein provided of the justice to the officer, directing restoration of the property, is not a judicial order, but merely the means of apprising the officer of the result of the inquisition.
2. **Demurrer.** *Held*, that the court did not err in sustaining the demurrer to the petition.
3. **Pleading:** AMENDMENT: DISCRETION OF COURT. An application to amend a pleading is always addressed to the sound legal discretion of the court, and, as it is essential to the exercise of that discretion that the court be informed of the nature and purpose of the proposed amendment, before error can be predicated upon the refusal of the court to permit an amendment the record must show that under the circumstances the ruling of the court was an abuse of discretion.
4. **Dismissal.** *Held*, that the court did not err in entering a dismissal of plaintiff's petition.

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

Charles Lockie, Evans & Evans and *F. G. Iddings*, for appellant.

Snyder, Gleysteen, Purdy & Harper, George W. Leamer, Vail E. Purdy and *Fred H. Free, contra.*

Heard before MORRISSEY, C. J., ROSE and FLANSBURG, JJ., REDICK and SHEPHERD, District Judges.

MORRISSEY, C. J.

Plaintiff, as the assignee of one W. H. Werner, filed

his petition in the district court for Dakota county, alleging that, in August, 1915, the sheriff of Dakota county levied an order of attachment upon certain personal property belonging to plaintiff's assignor, which order of attachment had been issued at the suit of William Tackaberry Company, C. Shenkberg Company, and R. Hurni Packing Company, against Anna C. Bailey and S. F. Bailey.

It is alleged that Werner served notice of ownership of the property attached upon the sheriff, whereupon the proceedings provided for by sections 9003-9005, Comp. St. 1922, were had before a justice of the peace within and for Dakota county; that the jury summoned by the justice found Werner to be the owner of the property and fixed its value at $650, "and judgment thereon was duly entered by the said justice of the peace. * * * Plaintiff further states that after said verdict was awarded and said judgment entered, as provided by statute, the said Wm. Tackaberry Company, C. Shenkberg Company and R. Hurni Packing Company executed and delivered to the said W. H. Werner a bond in the penal sum of $1,300, and that Harry Adair signed said bond as surety thereon." A copy of the bond is attached to the petition and made a part thereof. The petition further alleges that the sheriff retained possession of the property and sold the same on execution; that Werner was thereby damaged in the sum of $682, and that no part thereof has been paid to Werner or plaintiff, his assignee. There is a suitable allegation of the assignment of the cause of action by Werner to plaintiff, and an allegation that there is due and owing to plaintiff the amount of the alleged damage, and a prayer for judgment. To this petition defendant filed a general demurrer. The demurrer was sustained by the trial court November 6, 1919. Plaintiff excepted to the ruling and filed a transcript on appeal in the supreme court. Subsequently plaintiff dismissed his appeal and the cause was remanded to the district court. Thereafter the following record is

made: "Now on this 28th day of March, A. D. 1921, to-wit: This cause came on for hearing, when an application of plaintiff to amend his petition was denied, to which plaintiff excepts. Case is dismissed at cost of plaintiff."

On this appeal it is urged that the court erred in sustaining the demurrer to the petition; in refusing to allow plaintiff to amend his petition, and in entering a judgment of dismissal. In support of the first assignment it is claimed that the judgment entered by the justice of the peace was conclusive as to the right of property, but, even though this court should not so hold, plaintiff has the right to bring this suit on the bond for its wrongful sale. It may be noted that the property was found to be in an amount in excess of that over which a justice of the peace has jurisdiction under our Constitution. If the statute were to be given the construction contended for by appellant, it could not be upheld because of the constitutional limitation. It has, however, never been so construed. It was first before this court in *Storms v. Eaton,* 5 Neb. 453. Its history is there reviewed. The precise point here presented was not there directly involved, but the court pointed out the purpose of the statute. And in the discussion it is shown that, if the finding of the jury be in favor of the claimant, the attaching creditors may tender the undertaking and require the officer to proceed, thus giving claimant the right to maintain an action upon the undertaking rather than against the officer. This theory of the statute has been followed without interruption, and in *McCormick Harvesting Machine Co. v. Scott,* 66 Neb. 481, it is expressly announced: "The only judgment a justice is authorized to render is a judgment for costs." And it is further held: "The order therein provided of the justice of the peace to the officer, directing restoration of the property, is not a judicial order, but merely the means of apprising the officer of the result of the inquisition."

It will thus be seen that the proceedings had before the justice of the peace did not constitute a final adjudication of the rights of plaintiff in the property attached. The bond on which the suit is brought created a liability against defendants only "in the event that the right of property in and to said goods shall finally be adjudged to be in said claimant." The petition fails to state facts showing that such final adjudication has been made and the demurrer was therefore properly sustained.

Did the court err in denying plaintiff's application to amend his petition? By section 8656, Comp. St. 1922, an application to amend a pleading is always addressed to the sound legal discretion of the court. And it is essential to the exercise of that discretion that the court be informed of the nature and purpose of the proposed amendment. This was not done. The amendment, if allowed, might have been frivolous or it might have stated an entirely new and different cause of action. Before a pleader can predicate error upon the refusal of the court to permit an amendment to his pleading the record must show that under the circumstances disclosed the action of the court amounted to an abuse of discretion. *Hurlbut v. Proctor*, 88 Neb. 491.

The case had been upon the docket many years, but there was no pleading on file that stated a cause of action, and the court did not err in entering a dismissal at the costs of plaintiff.

AFFIRMED.

MERCHANTS NATIONAL BANK, APPELLEE, V. NOAH PETERSON, APPELLANT.

FILED DECEMBER 30, 1922. No. 22202.

1. **Notes:** ACTION BY INDORSEE: GOOD FAITH: PROOF. Where fraud in the inception of a note is pleaded as a defense and supported by proof, in an action by a bank, the indorsee, against the maker, the burden is on the bank to show that it is a *bona fide* holder, but in order to sustain this burden it is not necessary

in every case that the *bona fides* of the transaction be proved by the testimony of each and every officer or agent of the bank who has had some part in the acquisition of the note.

2. ———: ———: ———: ———. The good faith, or lack of good faith, of the holder of negotiable paper, like any other question of fact, may be susceptible of proof in a variety of ways. These include books of account, the oral testimony of witnesses and all pertinent facts and circumstances surrounding the transaction.

3. **Case Distinguished.** Paragraph 2 of syllabus in *Riverton State Bank v. Walker*, 107 Neb. 672, distinguished.

4. **Rulings** of the court on the exclusion of certain evidence offered by defendant *held* free from error.

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

North & Donovan, for appellant.

I. J. Dunn, contra.

Heard before MORRISSEY, C. J., LETTON, DEAN and FLANSBURG, JJ., REDICK and SHEPHERD, District Judges.

MORRISSEY, C. J.

This is an action brought to recover judgment against defendant on a promissory note for $6,000, executed and delivered by defendant to the Industrial Chemical Supply Company, a corporation, and by that company indorsed and delivered to plaintiff, before maturity, as collateral security for a loan. The petition is in the usual form. By answer defendant alleged that the note in suit had been procured by the payee by means of fraud, and that plaintiff had notice of the fraud, or was chargeable with notice, at the time of the acceptance of the note from the payee. The reply denied the allegations of fraud; denied that plaintiff had any notice of fraud having been practiced by the payee upon the maker of the note, or that plaintiff was in possession of any facts sufficient to suggest that the payee had practiced any fraud or deception on the maker of the note whereby he was induced to execute the note. There was the further allegation

that defendant failed to take any steps to rescind his contract and recover his note upon the discovery of the fraud, if any there was, until after the payee had become insolvent.

A jury was impaneled to try the issues presented. After a trial, which lasted several days, both sides rested. Defendant moved the court to instruct the jury to return a verdict in his favor. Plaintiff moved the court to direct the jury to return a verdict in its favor or to discharge the jury and enter judgment in favor of plaintiff against defendant for the amount prayed. Defendant's motion was denied. Plaintiff's motion was sustained and judgment entered in favor of plaintiff.

Defendant has appealed. The assignments of error are: The court erred in sustaining plaintiff's motion to discharge the jury and enter a judgment in its favor; and the court erred in excluding certain testimony offered by defendant.

The point which seems to be urged with greatest force is that the president of the bank, who was the directing head of the institution at the time the note was accepted as collateral, although having some knowledge of the transaction, was not put upon the witness-stand to testify in behalf of plaintiff, and thereby show directly that he as well as all other officers or agents of the bank who had taken part in the negotiations for the acquisition of the note did so in good faith and without notice of any defense to or infirmity in the note. This contention is based upon the language of the court in *Riverton State Bank v. Walker,* 107 Neb. 672, wherein it is said: "In an action by a bank against the maker, upon a promissory note, when it is shown that the note for which the note in suit was given in renewal was obtained by fraud practiced upon the maker, the bank, in order to recover, must prove that all the officers or agents of the bank who took part in negotiations for the purchase of the original note did so in good faith, without notice of any defense or infirmity in the note."

Prior to the trial the president of plaintiff was in failing health, but his illness was not of such a character as to prevent his attendance from day to day for a few hours at the banking house of plaintiff until after the trial had begun, when his condition became more serious. Then by the direction of his physician he remained at his home and in bed. Defendant asked that he be brought into court as a witness. Plaintiff's counsel asked that his testimony be taken at his home. The court consented to accompany the court reporter and respective counsel to the home of the desired witness and attend the taking of his testimony. Defendant's counsel declined to go to the home of the witness or to attend the taking of his testimony. His testimony was taken by the court reporter and offered in evidence, but, on objection of defendant's counsel, was excluded from the record.

As appellant's counsel read the language quoted from *Riverton State Bank v. Walker, supra,* it would have been incumbent upon plaintiff to prove by the testimony of each and every officer or agent of the bank who was in any way connected with the acquisition of the note in suit that whatever he did in that regard he did in good faith and without notice of any defense to or infirmity in the note. Perhaps the language quoted, when standing alone, is susceptible of the construction given it by counsel for appellant, but it ought to be read in connection with that paragraph of the opinion wherein the rule is incorporated. There was there presented a different state of facts from that presented here. The true rule is: "Where fraud in the inception of a note is pleaded as a defense and supported by proof, in an action by an indorsee against the maker, the burden is on plaintiff to show he is a *bona fide* holder." *Central Nat. Bank v. Ericson,* 92 Neb. 396. See *Peoples Trust & Savings Bank v. Rork,* 96 Neb. 415; *Union Nat. Bank v. Moomaw,* 106 Neb. 388; *Auld v. Walker,* 107 Neb. 676. But it is not necessary in every instance where the defense of

fraud is made, as in the instant case, that the holder of the note make this proof out of the mouth of each and every employee or agent who has had some part in the taking of the note. The good faith, or lack of good faith, of the holder of negotiable paper, like any other question of fact, may be susceptible of proof in a variety of ways. These include books of account, the oral testimony of witnesses and all pertinent facts and circumstances surrounding the transaction. Cases may frequently arise where an officer or agent of a bank may be unable to testify because of sickness; he may be absent from the jurisdiction of the court and his whereabouts be unknown, or his lips may be sealed in death. The rule invoked by appellant would defeat justice and we cannot adopt it as the law of this state.

As to the second assignment, it may be said that an examination of the record, so far as it pertains to the evidence excluded, discloses that its chief purpose was to show the fraud practiced by the payee upon the maker of the note. Since each party elected by his motion to dispense with the jury and submit to the court the disputed questions of fact, we cannot say that the court's ruling on this evidence would be prejudicial error in any event. The court may have reached the conclusion that fraud had been practiced by the payee in securing the note. The evidence would support such a finding. But, even had the evidence excluded been received, it would not support a finding that plaintiff was a party to the fraud or had notice of any deception having been practiced upon defendant at the time he made the note. Some of the evidence offered and excluded was merely hearsay; other portions of such evidence were merely cumulative.

No prejudicial error is found in the record, and the judgment is

AFFIRMED.

WILLIAM MORRIS V. STATE OF NEBRASKA.

FILED DECEMBER 30, 1922. No. 22490.

1. **Homicide:** CORPUS DELICTI: PROOF. When on a trial for murder the fact of death is established and the state has proved a chain of circumstances sufficient to convince the jury beyond a reasonable doubt that the death resulted from the criminal acts or agency of defendant, the *corpus delicti* has been sufficiently proved.
2. ———: INFORMATION. In an information for murder, it is not necessary to specify the portion of the body on which a wound is inflicted; the words "upon the body" are a sufficient averment of the location.
3. **Information.** The technical rules of the common law as to informations are relaxed under the provisions of section 10074, Comp. St. 1922. See *Nichols v. State, ante,* p. 335.
4. **Criminal Law:** TRIAL: OPENING STATEMENT. The opening statement of the county attorney, as set out in the bill of exceptions, *held* a sufficient compliance with the provisions of section 10144, Comp. St. 1922.
5. **Rulings** on the admission of evidence *held* to fall within the judicial discretion vested in the trial court, and are found free from error.
6. **Instructions.** The rulings of the court on instructions to the jury are approved.

ERROR to the district court for McPherson county: J. LEONARD TEWELL, JUDGE. *Affirmed.*

J. A. McGraw and *Beeler, Crosby & Baskins,* for plaintiff in error.

Clarence A. Davis, Attorney General, and *Jackson B. Chase, contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE, ALDRICH, DAY and FLANSBURG, JJ., SHEPHERD, District Judge.

MORRISSEY, C. J.

Defendant prosecutes error from a conviction of murder in the second degree under which he was sentenced to the penitentiary for the term of his natural life.

Defendant with his wife and six children resided upon a ranch owned by one Smith in McPherson county. The ranch consisted of a section of land on which was situated a small one-roomed house and meager outbuildings, and another section of land situated a mile distant therefrom. Defendant's father-in-law, a man advanced in years, was temporarily residing with defendant. April 10, 1921, defendant and his wife left their residence for the avowed purpose of gathering up live stock which was in their charge and putting it into the pasture, being the section mentioned as lying a mile west of their home. Defendant rode a bay horse apparently well broken to saddle and his wife rode a gray horse which was young, active and high-spirited, but which had been used to a considerable extent as a saddle horse and which she had theretofore ridden on numerous occasions. Neither returned to their home during the afternoon or evening, but about 1 o'clock on the following morning defendant returned to his home, aroused his father-in-law and informed him that Mrs. Morris had been thrown from her horse in the pasture; that upon being thrown she had become entangled in the lariat rope attached to her saddle; that he had endeavored to catch her horse and free her from the rope but that his efforts had been fruitless. He stated that he had followed his wife and the horse throughout the early hours of the night, until finally, owing to the darkness, he was unable to follow them longer; that he would then take a lantern and return again to the pasture and renew his efforts to rescue his wife. He directed the father-in-law to send one of the children to a neighbor's as soon as it became daylight with the request that the neighbor come and give assistance.

Defendant then departed from his house. He was next seen about daylight when he called at the home of a neighbor living midway between defendant's home and the pasture. Defendant told this neighbor the same story he had related to his father-in-law, with the ad-

dition of certain details. With the coming of morning one of defendant's children was sent for help; a number of neighbors were advised of defendant's story and they went to the designated pasture to render assistance. The first person to arrive was a Mr. Pierce, who upon being informed of the situation went first to defendant's home, but learning that the search for Mrs. Morris was being made in the pasture traveled thence on foot over the road and entered at the gate on the east side of the pasture. He there saw the gray horse which had been ridden the evening before by Mrs. Morris fully saddled with a tie-rope around its neck, but without a bridle, standing close to the east line of fence. Looking westward he saw defendant coming toward him leading his bay saddle horse. When defendant came up the two men caught the gray horse without difficulty. Defendant in reciting the incidents of the evening before stated that while Mrs. Morris was riding the gray horse he appeared to stumble and threw her to the ground; that she arose and, together with defendant, went to a straw stack which was standing in the southwestern part of the pasture; that defendant advised her not to again ride the horse and left her and her horse at the straw stack while he went to drive in some live stock; that when some distance from the stack his attention was attracted that way and he saw that Mrs. Morris had attempted to mount the horse; that she was clinging to his neck and he was running around the stack; that defendant hurried to her assistance; that upon his arrival he found that his wife had fallen from the horse, but that she was entangled in the lariat rope attached to her saddle and was being dragged by her horse; that defendant dismounted and attempted to catch the gray horse; that at one time he succeeded in grabbing the bridle reins, but the bridle broke; that his wife called to him to cut the rope; that he got so close as to take hold of his wife, but could not stop the horse or disentangle her from the rope; that the horse traveled off across the pasture and the de-

fendant followed, but was unable to overtake the horse or give assistance; that he thus followed from shortly after sundown until about midnight when he went to his home to get a lantern and then returned to the pasture again. He stated that the horse had dragged the body of his wife to the north side of the pasture, that is, to that portion lying north of the road which traversed the pasture from east to west, and indicated that the search for her body ought to be made north of this road.

As other neighbors assembled the search for the body covered the entire pasture, and at 8 o'clock in the morning her dead body was found on the top of a sandy hill almost devoid of vegetation close to the southern line of the pasture. Defendant had complained early in the morning of sickness and after the body was found the neighbors suggested that he return to his home. They procured a conveyance and took the body to the home, where it was washed by a number of neighbor women. A messenger was sent to notify the coroner, and in the afternoon defendant and a neighbor went to town and arranged with an undertaker for the burial and sent word of the death to relatives and friends.

Suspicion of uxorcide does not appear to have arisen until after the funeral when neighbors went to the pasture and examined the trail over which the body had been dragged. It was found that the trail did not cross the road which runs across the pasture, but, on the contrary, the horse seemed to have started at the straw stack and remained on the southern half of the pasture. The tracks also indicated that the horse had walked practically all the time while dragging the body, and, although the trail led for the greater part over sandy land scantily covered with vegetation, no human tracks along the trail were visible. The suspicions aroused resulted in the calling of two surgeons to make a *post-mortem* examination of the body. The testimony of these doctors shows that the body was mutilated and worn away on the front of the abdomen, the front of the left thigh, the

breasts and chest, the right side of the face, portions of the elbows, the inner side of the right leg and the thigh. There were discolorations on either side of the neck immediately below the jaw. There was a wound or contusion extending across the right side of the face from the side of the nose across the eye to a point near the ear. This contusion was shallow, but the tissue underneath, between the surface and the bone, was infiltrated with blood. The witnesses testified that this wound was produced by a hard blow. But they did not undertake to designate the weapon used. The witnesses described the discolorations on the neck and stated that they corresponded to the limitations of a human hand; that they were produced by external pressure which, if applied for sufficient time, might have caused the death. And each of these witnesses expressed the opinion that the wound upon the face and the contusions on the neck were *antemortem* in character. The mutilations of the body evidently produced by being dragged over the rough surface of the earth were also described by the state's medical witnesses and scientific reasons given for the conclusion that these wounds or mutilations were produced after the death. No cuts or bruises of any kind were found upon the palms of the hands nor upon the posterior of the body. Each of these witnesses testified that in his opinion the woman was dead at the time the dragging began. To set out the reasons on which the conclusions of these experts are based would serve no useful purpose, but, when read by a layman, they appear conclusive. Although defendant called medical experts to testify, there is no direct contradiction of the state's witnesses or substantial dispute as to the conclusions they reached. The most that can be said is that, according to the experts who testified as witnesses for defendant, the expert witnesses for the state did not make such a thorough and exhaustive autopsy as defendant's witnesses thought necessary in order to enable the state's witnesses to form sound conclusions in regard to the character of the

wounds and the cause of death. It is the theory of the state that defendant inflicted the wound upon the face and the wounds upon the neck heretofore described and thereby caused the death of his wife; that having taken her life he attached her dead body to a saddle horse by means of a rope and dragged it over the prairie for the purpose of disguising the true cause of death, and to make it appear that she was thrown from her horse and, becoming entangled in her lariat rope, was dragged to death.

Numerous assignments of error are made, but the one which to us appears most substantial will be dealt with first, although it is not first in the order of the assignments made. It is earnestly urged that the proof on behalf of the state is insufficient to prove the *corpus delicti.*

The term means the body of the offense, the substance of the crime. In the instant case it has two component elements—the fact of death, and the criminal agency of defendant as to the cause of death. The fact of death is shown beyond question. Was the death occasioned by the criminal act of defendant? The last time this woman was seen alive she was apparently in vigorous health and was in the company of defendant. This was shortly before sundown on the evening of April 10, 1921. The following morning her dead body was found upon the prairie. Prior to the finding of the body defendant had stated to a number of persons that he saw her in this pasture clinging to the neck of her horse and later being dragged behind her horse by a rope which was entangled about one of her legs; that she called to him to cut the rope; that he endeavored to rescue her and in his efforts in that behalf followed her and the horse which was dragging her, on foot, from about sundown until nearly midnight. The trail over which the body was dragged, when examined soon thereafter by disinterested witnesses, failed to disclose any human tracks, although the surface of the earth was not entirely covered with vegetation. The soil was sandy and in all human prob-

ability such tracks would have been apparent had defendant followed this horse as he related to his neighbors he had done. When he went to the home of his neighbor, Mr. Buck, and informed him of the alleged accident to his wife, he stated that in attempting to mount the horse "she got up with both feet and legs on the same side of the horse, and the horse gave a buck or two and throwed her off, and her feet got in the rope." The evidence shows that she was accustomed to outdoor life, to riding after live stock, and prided herself upon her ability as a horsewoman. The saddle she used was not a side-saddle, but the standard cross-saddle such as is used by men. She was not wearing skirts, but was clad in overalls, so there was no occasion to take a side seat upon the saddle, and, when the testimony as to her habits in riding is considered in connection with the saddle which is in evidence, a jury might well disbelieve defendant's story as to her having mounted in the manner he described. This is especially true in view of defendant's statement that shortly before this incident she had been thrown by this horse. The evidence also shows that the horse did not travel for any considerable distance at a gait faster than a walk while dragging this body. The condition of the body showed also that it did not turn over during the dragging but was dragged the entire time face downward. Although the abdomen, the breasts, one side of the face, the lower side of the arms, as they were extended beyond the head, were cut, torn and worn away, the palms of the hands and fingers were unscratched.

It is doubtful if this body, either in life or in death, could be dragged at a high rate of speed, over the rough, undulating prairie that is described, without turning over, yet the evidence seems to be conclusive that at no time was this body upon its back or upon either side. The conduct of defendant upon the night of the tragedy is at least peculiar. He is shown to have been an experienced horseman accustomed to the work in which he and his

wife were engaged. He did not testify as a witness, but he stated to his neighbors that when he saw his wife in trouble he was on horseback and hurried to her assistance. But, in place of remaining upon his horse and riding up to and catching the horse which was dragging his wife, he dismounted. According to this story he abandoned his saddle horse and attempted to do that which to a man of his experience ought to have appeared improbable, if not impossible, of accomplishment, namely, to catch, without the aid of his horse, this frightened, high-spirited, young animal. It is true of course that in the excitement of the moment he might have made an error of judgment and this conduct would not be sufficient to brand his whole story as untrue, but, in addition to this, he appears to have gone home during the night and, in doing so, to have passed by the home of a neighbor without arousing him and calling for help. Although he told some of his neighbors that his saddle horse left him when he dismounted to go to the aid of his wife and that he had traveled on foot, nevertheless the first time he is seen in the morning is at the home of a neighbor, and at that time he had his saddle horse with him. He has never explained when, how, or where he caught this horse. To every neighbor to whom he talked he said that the body had been dragged over the northern part of the pasture, but no trail was found in that part of the pasture. The record fails to disclose the age of either husband or wife, but it shows that they had been married 14 or 15 years; that they were the parents of six children; that the wife lead an active, outdoor life, doing work that ordinarily falls to the lot of the husband; that she was accustomed to ride horses and that she enjoyed riding the gray horse that has been mentioned because of his fine spirit. The testimony indicates that defendant was suffering from some form of stomach trouble and that he was emaciated and under-weight.

As a possible motive for the commission of the crime charged, the state showed that in 1918, while defendant

and his family were residents of Dawson county, complaint had been filed charging defendant with failure to support his family, and that he had been arrested under this complaint but the proof shows that following the filing of this complaint these parties lived together as husband and wife and that up to the very day of the tragedy they had been almost constantly in one another's company, and we cannot attach much importance to the difficulties disclosed by the proceedings mentioned. There is, however, other testimony of a more serious character. There is the testimony of a sewing-machine agent, that only a few weeks before the death of the wife he called at defendant's home to make a collection, and that after seeing the wife and securing her promise to make a payment on April 15, 1921, he saw defendant and told him of the wife's promise to make the payment; that during this conversation defendant told the witness that his wife would not make the payment promised, and, in addition thereto, he made remarks, which we refrain from setting out in this opinion, reflecting upon the character of the wife; accused her of having squandered his money; told the witness he had been tempted to kill her, and said: "I will have to do it yet sometime, and I will guarantee you she will never make that payment on the 15th of April."

By other testimony it is shown that upon several occasions he had made statements seriously reflecting upon the character of his wife and charging her with having wasted his substance. About ten days before the tragedy defendant was in the city of Ogallala and sought a loan from a friend for the avowed purpose of procuring a divorce; the friend advised him to go home and take care of his children, whereupon defendant, in the roughest of language, accused his wife of intimacy with another man. There is other testimony indicating that defendant was jealous of his wife. Whether with, or without, reason is immaterial, but, so far as the record discloses, his jealously was the creature of his own imagination. The

evidence is of such a character that the jury might well have reached the conclusion that this woman did not die as the result of the dragging, but, on the contrary, her death was due to violence criminally inflicted by defendant. The *corpus delicti* is sufficiently established.

The information charged the crime to have been committed by the use of instruments and other means unknown to the county attorney; and that the wounds were inflicted "in and upon the parts of the body" unknown to the county attorney. Defendant filed a motion to quash the information. The motion was overruled, and this ruling is here urged as error. Defendant's contention is that, when the information states, as in this case, that defendant with instruments or weapons and other means unknown to the prosecuting attorney did strike, penetrate and wound the deceased, he could as positively state the parts of the body thus struck, penetrated and wounded. This is generally true, but it is not always so. "And the trend of modern authority is in favor of dispensing with any allegation whatsoever respecting the location of the wound or bruise." 13 R. C. L. 900, sec. 206.

Wharton on Homicide (3d ed.) 859, states the rule to be that it is not necessary to specify the portion of the body on which a wound is inflicted, the words "upon the body" being a sufficient averment of their location.

The technical rules of the common law as to informations are relaxed under the provisions of section 10074, Comp. St. 1922. *Nichols v. State, ante,* p. 335.

Complaint is also made that the county attorney in his opening statement failed to comply with the provisions of section 10144 Comp. St. 1922, in that he did not fully disclose the evidence upon which the state relied for a conviction. The statute contemplates only a brief and general statement of the state's case. The statement of the county attorney is preserved in the bill of exceptions and we are convinced that it fully meets the requirements of the statute.

Exceptions were taken to the admission in evidence of the transcript of the proceedings in Dawson county wherein defendant had been charged with failure to support his family. These proceedings were had nearly three years prior to the death of defendant's wife. It is said that this evidence was too remote, and, in connection with this assignment, exception is taken to the rulings of the court in excluding certain correspondence had between defendant and his wife at or about the time the proceedings were pending. As heretofore remarked, the evidence of this difficulty had little, if any, probative force. The court might well have excluded it, but we cannot say that its failure to do so could work to the prejudice of defendant. The correspondence excluded had no bearing on the case aside from these proceedings. The rulings on these matters, as well as the other rulings on evidence, fall within the judicial discretion vested in the trial court and are free from error.

Criticisms are made of the rulings of the court on its failure to give instructions requested by defendant and for the giving of certain instructions on the court's own motion. These criticisms have been carefully examined, but the court finds that whenever an instruction requested correctly stated the law applicable to the facts its substance was given by the court. And the instructions given on the court's own motion are found to be free from error.

The record shows that the case was carefully tried; that defendant was ably defended; and that there is no prejudicial error in the record. The judgment of the trial court is

AFFIRMED.

MARK BRIGHTENBURG, APPELLEE, V. WILLIAM MULCAHY, APPELLANT.

FILED DECEMBER 30, 1922. No. 22526.

Appeal: LAW OF THE CASE. "A question once determined in the appellate court will not ordinarily be reexamined there on a second appeal in the same case." *State v. Farmers State Bank*, 106 Neb. 387.

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

Wear & Moriarty, for appellant.

John O. Yeiser and *John O. Yeiser, Jr.*, *contra.*

Heard before MORRISSEY, C. J., ALDRICH, DAY and FLANSBURG, JJ.

MORRISSEY, C. J.

This action was brought by plaintiff, as next friend, for his minor son, Fred F. Brightenburg, to recover damages for personal injuries received, while coasting upon a public street in the city of Omaha, by reason of colliding with a fence maintained by defendant in front of his premises, which fence projected across the lot line into the park space of the public highway. In a former opinion, *Brightenburg v. Mulcahy*, 104 Neb. 794, plaintiff's petition, which contains a full statement of the facts, is set out at length, and it was there held that it stated a cause of action. On the second trial plaintiff recovered judgment for $500, and the defendant has appealed.

The sole assignment of error is to the effect that the court erred in refusing to sustain defendant's motion to direct a verdict in favor of defendant. The argument made in support of this assignment raises substantially the same questions that were urged upon the court in the former appeal and were there decided adversely to appellant. "A question once determined in the appellate court will not ordinarily be reexamined there on a second appeal in the same case." *State v. Farmers State*

Bank, 106 Neb. 387. No complaint is made of the amount of the recovery, and the judgment is

AFFIRMED.

HELEN M. SHIMONEK, APPELLEE, V. NEBRASKA BUILDING & INVESTMENT COMPANY, APPELLANT.

FILED DECEMBER 30, 1922. No. 22150.

1. **Principal and Agent:** CONTRACTS: RATIFICATION. Where the unauthorized contract of an agent is ratified by the principal, the effect is the same as if the agent had been originally possessed of authority to make the contract.
2. ———: ———: ———. An agent engaged in selling corporate stock of defendant corporation had no authority to agree that the purchase money should be refunded to the purchaser upon 30 days' notice. He made a parol contract of this nature with a buyer. Full knowledge of this contract was afterwards communicated to the corporation, but, while denying the authority of the agent, it carried out the provisions of the contract made by the agent by making a series of payments to the purchaser, extending over a year, and reducing the amount due from $4,300 to about $1,100. *Held,* that by making such payments upon the parol contract, with full knowledge of the facts, the corporation ratified the unauthorized act of the agent and adopted it as its own.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Doyle & Halligan and *Good & Good,* for appellant.

R. J. Greene and *H. C. Wilson, contra.*

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

LETTON, J.

This action is brought to recover a balance due upon an oral contract by defendant to repurchase stock. Plaintiff recovered judgment, and defendant appeals.

The defense is that the stock was sold under a written contract which provided, among other things, that no

conditions, agreements or representations other than the provisions printed on the reverse side of the application shall bind the company; and that the agent had no authority to bind the company by an oral agreement such as the petition alleges.

The reply alleges ratification of the parol contract made by the agent, and restitution of a large part of the money obtained from the plaintiff.

The evidence shows that the plaintiff, who was then about 18 years of age, inherited some money in the latter part of the year 1918. An agent of the defendant calle upon her at her home, and stated that he had read in the papers that the estate was now settled. He made a number of representations with regard to the financial standing and responsibility of the defendant, and agreed that if at any time the plaintiff wanted her money back she should have it upon 30 days' notice. The plaintiff then gave him a check for $4,300, and he afterwards sent her a certificate of stock in defendant company. The conversation only occupied about 30 minutes. A few months afterwards plaintiff called upon the president of the company at his office, told him of the contract, and requested a payment. He told her that the agent had been discharged because he had exceeded his authority. He, however, gave her a check for $500 at that time, and checks in May, June, and August, 1919, at which latter time he gave her another certificate of stock reciting that she was the owner of 27 shares of preferred stock of the value of $110.50 each. About two months afterwards defendant paid her $500, and made other payments up to July 1, 1920.

Under the decision in *Schuster v. North American Hotel Co.*, 106 Neb. 679, it is clear that the representations made by the agent as to the return of the plaintiff's money were unauthorized by the defendant. It is equally clear that, after the facts as to the making of such oral contract by the agent had been fully communicated to the defendant company, it adopted and ratified the contract

as its own by making a series of payments according to such contract, whereby the amount remaining due was reduced to $1,131.87. This ratification had the same effect as an express authorization to make the contract. *Oberne v. Burke*, 50 Neb. 764.

AFFIRMED.

GEORGE CORNFORTH, APPELLEE, V. GRAHAM ICE CREAM COMPANY, APPELLANT.

FILED DECEMBER 30, 1922. No. 22156.

1. **Trial:** INSTRUCTIONS. Instructions given to the jury by the court must be considered as a whole, and the mere fact that a separate paragraph of the instructions (which states the elements necessary to allow plaintiff to recover) does not inform the jury that the defense of the contributory negligence of plaintiff was made by the defendant, nor state the law governing such defense, is not prejudicially erroneous, where the fact of such defense and the rules of law applicable thereto are stated in other paragraphs of the charge.

2. ———: ———. If the charge of the court as a whole contains no erroneous statements of law prejudicial to the rights of the defendant, and fairly presents the issues to the jury, a judgment will not be reversed merely because the order of arrangement of the different propositions of law might be improved upon.

3. ———: ———. Where a party is of the opinion that the instructions given by the court are not explicit enough upon certain points, other and fuller instructions should have been tendered by the complaining party.

4. **Damages.** Where a pedestrian was struck by an automobile truck in such a manner that two of his cervical vertebræ were broken and crushed, with the result that he became almost wholly paralyzed, was in a hospital for seven weeks, lying on his back for three weeks partly suspended in bed by a halter or harness, afterwards the upper part of his spine was encased in a plaster cast for about three weeks, and his right arm and right leg are still partially paralyzed, and will permanently remain weakened and disabled, a verdict of $8,500 will not be set aside on the ground that it is excessive, and the result of passion or prejudice on the part of the jury.

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

Jefferis, Tunison & Wilson, J. E. Von Dorn and *James C. Kinsler,* for appellant.

Smith, Schall & Howell and *Howard & Sheehan, contra.*

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

LETTON, J.

On the morning of April 23, 1920, about 6:30 o'clock, plaintiff was in the act of crossing Farnam street at the intersection of Twentieth street, in the city of Omaha, and was proceeding in a direct line north from the southeast corner of Twentieth street. He had reached a point about 15 feet north of the south curb line on Farnam street, when he was struck by a six-ton automobile delivery truck, used in the service of the defendant by one of its employees. Plaintiff alleges that the employee in charge of the truck was at that time operating it in a negligent and unlawful manner; that it was being driven at an excessive rate of speed; and that no warning was given plaintiff of its approach. Defendant denies any negligence on its part, and alleges that the plaintiff himself was guilty of contributory negligence. Plaintiff recovered judgment for $8,500. Defendant appeals.

It is complained that the evidence is not sufficient to sustain a verdict in favor of plaintiff; that the court erred in giving certain instructions and refusing others; that there was misconduct on the part of the jury; and that the damages awarded were excessive. The latter two assignments are not supported by the proofs.

The evidence on behalf of plaintiff shows that he was at that time about 45 years of age; that, when he was about to cross Farnam street on the morning mentioned, he looked toward the west and saw some automobiles and the truck about three-fourths of a block, or a block, away.

Believing that he could safely cross before the truck reached him, he started across the street, walking at an ordinary rate of speed. When he was about two-thirds of the distance to the south rail of the street car track, he heard the rumbling of the truck as it crossed the street car track on Twentieth street going eastward. He looked up, saw the truck close by, and also heard a horn. He tried to hasten, but was knocked down by the truck, and when he realized where he was, he found himself lying under it. He was paralyzed to a large extent when removed. After the accident he was taken to the hospital and remained there about seven weeks. For three years before the accident he had earned on an average about $100 a month, but he has not been able to work since. He had formerly worked as a barkeeper, but had been working as a cement worker and landscape gardener for several years.

At the hospital an X-ray picture was taken, and it was found that his third and fourth cervical vertebræ were broken and partly crushed, and that blood had oozed into the spinal canal. He was placed under traction of the spine, by means of a halter on his neck, for about three weeks, and afterwards the upper portion of the spine was placed in a plaster cast for about the same length of time. There has been a gradual improvement from the paralysis, but there still is partial paralysis of the right arm and right leg, and it is undisputed that he will continue to be partially paralyzed. His expectancy of life is 24.46 years. He is at present able to do light work of some kinds, but is not strong and vigorous.

The evidence given for the defendant by the driver of the truck was substantially to the effect that, as he reached the intersection, he saw the plaintiff start to walk north across Farnam street; that he proceeded far enough to clear the truck, when he turned and walked rapidly, or ran, to the south far enough to again clear the truck; that he then turned and came north again to about the center of the machine, then he turned his back to the

truck and seemed to sit down on the bumper, or guard, in front of the truck, the radiator striking his back. He then fell forward partly under the machine.

This testimony is to some extent corroborated. On the other hand, there is some inconsistency in the evidence on behalf of defendant which was doubtless in the minds of the jury when they elected to adopt plaintiff's version of the accident. There being sufficient evidence to justify a verdict for either of the parties, the court will not be justified in interfering with the verdict.

The fourth instruction given by the court is complained of. It is said that this instruction undertakes to set out fully and completely a state of facts and authorizes a verdict upon a finding regarding these facts, and that the court neglected to make any reference to the defense that the plaintiff was injured through his own negligence, and that the instruction withdrew from the consideration of the jury this defense. The case cited to sustain this proposition (*Standard Distilling & Distributing Co. v. Harris,* 75 Neb. 480) is not a parallel case. The action was based on negligence. The court said: "Negligence is the gist of plaintiff's action, and one of the principal issues presented by the pleadings, but the instruction in question wholly ignores that issue." This was clearly erroneous. There was no question of contributory negligence involved. Plaintiff would be entitled to complain in this case if the issue of contributory negligence on plaintiff's part were wholly ignored, but this is not the case.

It is also said that the court, in giving the fourth instruction, that if certain elements were established by the evidence they should find for the plaintiff, erred, because it did not in the same paragraph qualify it by stating the rule as to the duty of the plaintiff in crossing the street, did not define contributory negligence, state the rule as to comparative negligence, and inform the jury that negligence on the part of plaintiff was at least a partial defense. Instruction No. 4 was a general instruction

treating alone of the liability of defendant for negligence in the operation of its automobile, but instruction No. 5 told the jury that the rights and duties of both parties to the use of the street were reciprocal, and that the law imposed upon both the duty of observing ordinary and reasonable care to avoid accidents, and that the particular care or precaution that meets the legal standard of ordinary care depends upon the degree of apparent or probable danger, and is what a person of ordinary prudence would do in the particular situation and circumstances.

Instruction No. 7 told the jury that a pedestrian is bound to know that an automobile cannot be suddenly stopped, and that he must so conduct himself as not to unnecessarily get himself into a place of danger, and that it would be negligence for a pedestrian to walk out into and across a thoroughfare without looking and using care to determine whether it is safe for him to do so. In instruction No. 10 negligence was defined, and the jury were told that "By contributory negligence is meant any negligence of plaintiff directly contributing to the accident." Ordinary care was also defined. Instruction No. 12 stated the rule as to comparative negligence substantially in the language of the statute. It is evident that the defense of contributory negligence and the rule as to comparative negligence were both properly stated to the jury.

It is said that the case of *Bauer & Johnson Co. v. National Roofing Co.*, 107 Neb. 831, is controlling of this and necessitates a reversal. There is not such similarity between the facts and instructions in that case and in this case as to require this. In *Brailey v. Omaha & C. B. Street R. Co.*, 105 Neb. 201, which was an automobile collision case, the instructions were much the same as in this case. It was said in that case that instruction No. 4, standing alone, would possess the vice attributed to it by defendant. It would have been better to qualify it by the further statement "subject, however, to the defense of contributory negligence, which is hereinafter ex-

plained," or other language conveying the same idea, but to omit this is not reversible error.

It is impossible to state all the propositions of law in such a case as this in a single instruction, and it is easy to detach each paragraph from its context and from the charge as a whole, and insist that it omits some necessary element. If the charge as a whole contains no erroneous statements of law prejudicial to the rights of the defendant and fairly presents the issues to the jury, a judgment will not be reversed because the order of arrangement of the different propositions of law might be improved upon. Also, if other and more explicit instructions were desired upon points which it is said were not made clear enough by the charge of the court, they should have been tendered.

The most vital question in this case is, who was to blame for the accident, and in what degree, if both the driver and the plaintiff were at fault. Considering the amount of the verdict, the very serious and permanent character of the injuries sustained, it seems apparent that the jury must have given effect to the instruction of the court as to contributory negligence on the part of plaintiff, and reduced the recovery to some extent on that account.

As intimated, a few slight changes in the charge would improve it, but, taken as it is, it is not erroneous.

AFFIRMED.

IN RE ESTATE OF LEWIS O. SECREST.
JOHN HENRY SECREST ET AL., APPELLANTS, V. ELMO B. ROPER, ADMINISTRATOR, ET AL., APPELLEES.

FILED DECEMBER 30, 1922. No. 22186.

1. **Charities: WILLS: BEQUEST: CONSTRUCTION.** A will directed the executor to sell the real estate of the testator and from the proceeds thereof to carry out the terms and provisions of the will, which provided for a number of specific legacies, and

further provided: "I give and bequeath all the rest and residue of my estate and property, wherever the same may be found or located, for the purpose of building and maintaining a public library in the city of Hebron, Nebraska, and I hereby order and direct * * * that all of the rest and residue of my estate and property be placed in a trust fund, by my executor, and paid to the proper city officials, or the proper officers and directors of a city public library association of Hebron, Nebraska, if such an organization should hereafter be formed," etc. These provisions had the effect to vest the title to the property in the executor, or administrator, for the purpose of sale; to convert the real estate into personal property; and to constitute the executor, or administrator, a trustee of the fund until paid over as directed. Under such provisions the power of alienation was at no time suspended.

2. ———: ———: ———: VALIDITY. Where a bequest of a trust fund is made to an executor, or administrator, to be paid over to a public charity not yet in being, but whose existence is provided for by the terms of the will, such a bequest is not void for uncertainty.

3. ———: ———: ———: CONDITIONS. Where a will provides that a bequest is not to be paid "until the contract is let and work actually commenced, or a site purchased for said building," if either of such conditions is complied with before the money is paid over, it is sufficient.

4. ———: ———: ———: ———. The clause, "I hereby desire that said building be commenced within two years from my death," is not a condition precedent to the vesting of the bequest, and the word "desire" in this connection must be considered as precatory.

5. ———: ———: ———. A clause in a will whereby the rest and residue of the testator's estate was placed in a trust fund to be paid to city officials, or the officers of a city public library association, for the purpose of establishing a free public library, constitutes a bequest for a public charity, which is a favorite of the courts, and the beneficent intention and desire of the testator will not be defeated unless the courts are compelled to do so by manifest defects in the will, or illegality in its execution.

APPEAL from the district court for Thayer county: RALPH D. BROWN, JUDGE. *Affirmed.*

J. T. McCuistion and *J. P. Baldwin*, for appellants.

Richards & Richards and *Harvey W. Hess, contra.*

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

LETTON, J.

Lewis O. Secrest died, leaving a will which was duly probated. By the final decree of distribution of the estate, the county court ordered that the property devised and bequeathed to the library board of the city of Hebron be distributed to that body by the administrator with the will annexed. An appeal was taken to the district court and a decree of like nature rendered by that court. That portion of the decree involving the bequest to the library board has been brought here for review by the children of the deceased.

The will, after making a number of specific bequests, some small bequests to his children being among them, provides:

"Fourth. After the foregoing paragraphs of this my last will and testament have been complied with I give and bequeath all the rest and residue of my estate and property, wherever the same may be found or located, for the purpose of building and maintaining a public library in the city of Hebron, Nebraska, and I hereby order and direct, that so soon as all of the foregoing paragraphs of this my last will and testament have been complied with, that all of the rest and residue of my estate and property be placed in a trust fund, by my executor, and paid to the proper city officials, or the proper officers and directors of a city public library association of Hebron, Nebraska, if such an organization should hereafter be formed; said payment to be made as needed for the erection and equipment of said public library and none of said amount to be paid until the contract is let and work actually commenced, or a site purchased for said building, and I hereby desire that said building be commenced within two years from my death.

"Fifth. For the purpose of carrying out the terms and

provisions of this my last will and testament, I hereby authorize, direct and empower my executor, hereinafter named (and in case of his death or inability to act, I so empower any administrator who may be appointed for my estate), to sell any or all of my real estate, either at public or private sale, as to him may seem best, and to transfer and convey to the purchaser by good and sufficient deeds any property sold, and from the proceeds thereof to carry out the terms and provisions of this my last will and testament and pay the bequests and legacies as nearly in the same order they are named in my will as it is possible for him to do."

The district court found that the residue of the estate and funds in the hands of the administrator, with the will annexed, constitute a trust fund; that the city council of the city of Hebron has elected and appointed a library board, which is a legally organized existing and acting board, and that it has purchased and paid for a suitable site in the city of Hebron for the erection of a library building thereon. The administrator, *c. t. a.*, was directed to pay the fund then in his hands, and any other sum arising from the estate that may come into his hands, to the proper officers of the library board.

The appellants insist that the fourth and fifth paragraphs of the will are void, and that they are entitled to the fund in the hands of the administrator for the reasons: (1) That the Hebron public library board was not in existence at the time of the death of the testator, and the bequest is void as it involves an illegal suspension of ownership; (2) that it is a condition precedent that none of the fund be paid "until the contract is let and work actually commenced, or a site purchased for said building;" (3) that the word "desire" in the clause, "I hereby desire that said building be commenced within two years from my death," is peremptory, and, unless the conditions following the word "desire" are complied with absolutely, the legacy lapsed.

The evidence shows that the deceased, prior to 1889,

was a resident of Iowa, having removed there from Ohio; that, before he removed to Nebraska, he had been married, and there had been borne to him three children, who are the appellants in this case; that a decree of divorce was granted his wife in Iowa, and that he removed to Nebraska afterwards, in the year 1882 or 1883. At the time of his death he owned certain lands in Nebraska, and in the state of Oregon, and some personal property. He never remarried. The will was made on April 14, 1915. He died February 3, 1917.

The city of Hebron passed an ordinance on August 12, 1918, establishing a free public library in the city of Hebron, providing that a tax not exceeding three mills should be levied annually for the support thereof, creating a library board of nine members and giving the board such powers as were conferred by statute. The ordinance went into effect August 30, 1918. A deed conveying one and a half lots in the city of Hebron to the Hebron public library association was also introduced in evidence. The library board organized and purchased the real estate mentioned, paying $800 for the property, and this board and its successor has been in control and possession of the lots ever since December 10, 1918. At the time of the trial no buildings had been erected, no contract had been made for the erection of a building, and no building materials purchased.

1. It will be seen that the will provides that, after the debts and specific bequests are provided for, the residue of the estate shall "be placed in a trust fund, by my executor, and paid to the proper city officials, or the proper officers and directors," etc. The executor, and, in case of his death or inability to act, an administrator who may be appointed, is directed and empowered to sell the real estate, and from the proceeds to pay the bequests and legacies and carry out the provisions of the will. These provisions had the effect to carry the title to the property to the executor, or administrator, for the purpose of sale; to convert the real estate into personal

property; and to constitute the executor or administrator trustee. The objection that there was no person to take at the testator's death is therefore without foundation. *Chick v. Ives,* 2 Neb. (Unof.) 879, and cases cited therein; *Gotchall v. Gotchall,* 98 Neb. 730; *Coyne v. Davis,* 98 Neb. 763; *Stalder v. Stalder,* 105 Neb. 367; *Maxwell v. Maxwell,* 106 Neb. 689. The power of alienation was at no time suspended and the authorities relied upon to support the doctrine invoked by the appellants are not in point.

2. It is not unusual that trust funds are created and placed in the hands of executors or trustees to be paid to some charitable institution not yet in being, but whose existence is provided for and looked forward to by the terms of the will. *In re Estate of Creighton,* 91 Neb. 654. A large number of cases are cited to this effect in 11 C. J. 335, sec. 53, note 88.

The city authorities acted with promptitude, and a city public library association was formed according to the wish of the testator, which is now competent to receive the fund when paid over by the administrator.

The succeeding clause provided that the money is not to be paid over by the trustee "until the contract is let and work actually commenced, or a site purchased for said building." These conditions are in the disjunctive. A site has been purchased for the building. One of the conditions has therefore been fulfilled, which is all that is required before the trustee is authorized to pay the money.

3. The next clause, "I hereby desire that said building be commenced within two years from my death," in no wise affected the vesting of the legacy in the executor as trustee. It would be unreasonable to hold that the building must be commenced before the money could be realized with which to build it, under penalty of losing the bequest, and it would be an easy accomplishment to hinder and delay the payment of the fund by the administrator, by appealing from the decree of final distri-

bution from one court to another until more than two years had elapsed from the time of the death of the testator. The word "desire" in this connection must be considered as precatory, and not as a condition precedent to the vesting of the legacy.

It was the intention of the testator that the larger portion of his estate should be placed in trust for the purpose of establishing a public library for the benefit of the citizens of Hebron. Such an institution falls within the class of public charities, which are favorites of the court. *St. James Orphan Asylum v. Shelby,* 60 Neb. 796; *In Re Estate of Nilson,* 81 Neb. 809; *Heywood v. Heywood,* 92 Neb. 72. To hold otherwise would defeat the beneficent intention and desire of the maker of the will. This we will not do unless compelled thereto by manifest defects in the will, or illegality in its execution.

AFFIRMED.

ANTON BARTUNEK, APPELLEE, V. IDA N. BARTUNEK, APPELLANT.

FILED DECEMBER 30, 1922. No. 22200.

Divorce: ALIMONY. "Alimony, as that term is technically understood, may not be allowed to the husband out of the wife's separate property, in an action for dissolution of the marriage; but where it is shown that the accumulated property in the name of the wife is the result of the joint earnings of the parties, the court will inquire as to the source of the accumulated property, and, in the exercise of a reasonable discretion, will divide the property between the parties, awarding to the husband his equitable portion thereof, and may enter a judgment in favor of the husband for the equitable amount found to be due him." *Bristol v. Bristol,* 107 Neb. 321.

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

Doyle, Halligan & Doyle and *Burkett, Wilson, Brown & Wilson,* for appellant.

Davis & Davis and *Prince & Prince, contra.*

Heard before MORRISSEY, C. J., LETTON, FLANSBURG and DEAN, JJ., REDICK and SHEPHERD, District Judges.

LETTON, J.

Plaintiff began an action for divorce on the ground of cruelty. Defendant denied such misconduct, and by a cross-petition sought to be divorced from plaintiff on ground of misconduct and cruelty on his part. The court denied the petition of plaintiff and granted a decree on the cross-petition of defendant. The court also made certain orders in settling the property rights of the parties. No question is made here as to the divorce, but from that portion of the decree relating to the property, the wife has appealed.

In the petition it is alleged that the plaintiff conveyed the homestead, consisting of 160 acres in Valley county, to the defendant without consideration except the affection then entertained for her by him, that the land is family property, and that defendant holds the title in trust for plaintiff.

The answer alleges that the land was conveyed to the wife with the express understanding that it was to be her separate property, and that she helped raise the money to pay for the farm.

The acquisition of the farm, as well as of the other property of the husband, was largely the result of the joint efforts of both husband and wife. There are two children; both became of full age a few months after the date of the decree.

It appears that in 1914 Mrs. Bartunek was concerned about the debts which her husband had become obligated to pay. She was afraid that the homestead might be lost, and, according to her own testimony, suggested to him that the title be placed in the name of the children so that she and they could always have a home. Plaintiff testified that he was reluctant to make this transfer, but, due to her insistence, he, finding that the children,

being minors, would make it inconvenient to renew loans, etc., finally made a deed to her without consideration. The consideration recited in the deed is $5 and love and affection. Defendant herself testified that the only purpose of the deed was to protect the children.

After the conveyance, the business of the farm was conducted as before up until August, 1919, when she, with the children, left the home and went to Lincoln in order to complete their education, where she has since resided. She took some of the furniture with her. Most of the remainder was sold and part of the proceeds used for the support of her and the children. At the time of the conveyance there was $7,500 incumbrance on the farm. This has been partially paid off. There is now a mortgage of $6,000 upon it, and a second mortgage of $4,000 to secure a debt of the husband to the First National Bank. The wife, however, would not sign the latter mortgage unless the husband would give her a mortgage of the same amount on the 80 acres of land which he owned in Hall county in order to indemnify her for any loss in signing the $4,000 mortgage.

The husband owns 760 acres of land in Garfield county, worth $10 an acre, incumbered for $3,500, and the 80 acres in Hall county, estimated to be worth from $60 to $75 an acre, which is incumbered for $4,200 and interest, under process of foreclosure. There has been purchased war saving stamps for $50, and $700 in liberty bonds, of which one bond for $400 is registered in Mrs. Bartunek's name. She paid $40 upon the bond, the remainder being paid by the husband.

The district court found that Mrs. Bartunek was the owner of the home farm in Valley county; that she should pay the incumbrances appearing of record upon the land, and also should pay to a number of the creditors of her husband, naming them, various sums amounting in all to about $2,916.50. The court quieted the title to the land in Hall county in the plaintiff and ordered the indemnity mortgage canceled; it also quieted the title to the 760

acres of land in Garfield county in him, subject to his paying certain indebtedness. Mrs. Bartunek was ordered to assign the registered $400 bond to plaintiff, and to deliver the $50 war saving stamps to him. The court also made a specific finding that the net value of the estate of both plaintiff and defendant was $10,433.40, and that this should be divided equally. This seems to be a fair estimate of the value of the property.

The main contentions of Mrs. Bartunek are that the court had no authority to charge specific debts of the husband upon her land nor to order the cancelation of the $400 indemnity mortgage, there being nothing in the pleadings to justify such action.

Under the authority of *Myers v. Myers,* 88 Neb. 656, and *Bristol v. Bristol,* 107 Neb. 321, the district court has power to consider all the property accumulated by the joint efforts of both husband and wife, and to adjust their respective property rights. By the voluntary conveyance of the home farm to the wife without consideration except love and affection, she has become vested with the legal title to the major portion of the joint accumulation; but the court will look behind this and decree according to the equities of the situation. The court had no power to require either the husband or wife to pay certain specific creditors, not parties to the suit, any sum of money, nor to make any of such debts specific charges upon any of the land. The decree is therefore modified to require her to pay to the plaintiff the sum of $2,916.50 required in the decree to be paid to the creditors of the plaintiff. This is not as alimony, but as the fair share of the husband in the property acquired during the marriage relation. *Bristol v. Bristol,* 107 Neb. 321. In all other respects the decree of the district court is affirmed; costs to be taxed to appellant.

AFFIRMED AS MODIFIED.