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NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD ET AL., APPELLEES, V. SAMUEL R. MCKELVIE ET AL., APPELLANTS.

FILED APRIL 19, 1922. No. 22424.

1. **Schools and School Districts:** FOREIGN LANGUAGE LAW: CONSTITUTIONALITY. The statute (Laws 1921, ch. 61), relating to the teaching of foreign languages, is a reasonable exercise of the police power and is not unconstitutional, as being in violation of either the state or federal Constitution.
2. ———: ———: ———. In its operation it does not deprive any person of life, liberty or property without due process of law, nor does it deny the equal protection of the law; nor is it invalid, as a restriction upon the freedom of religious worship, nor as an unwarranted interference with the giving of religious instruction.
3. ———: ———: ———. The title of the act, declaring that all school branches are to be taught in the English language, is sufficiently broad to cover provisions regulating and prohibiting the teaching of foreign languages. Such provisions are germane to the subject-matter expressed in the title and are reasonably calculated to aid in carrying out the expressed object.

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

Clarence A. Davis, Attorney General, Mason Wheeler, Charles S. Reed and *Otto F. Walter,* for appellants.

Sandall & Wray, A. F. Mullen and *Albert & Wagner, contra.*

Joseph T. Votava, Earl M. Cline, Guy C. Chambers, Pitzer, Cline & Tyler, Robert G. Simmons, Brogan, Ellick & Raymond, Fred W. Ashton, Sackett & Brewster, Edward P. McDermott, Holmes, Chambers & Mann, T. J. McGuire, Hastings, Ritchie, Mantz & Canaday, Spillman & Muffley and *Mothersead & York, amici curiæ.*

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

FLANSBURG, J.

This is an injunction proceeding brought to test the constitutionality of the statute (Laws 1921, ch. 61) relating to the teaching of foreign languages. Without passing upon the propriety of the form of action pursued, we find that the questions presented are largely controlled by the decision in *Meyer v. State,* 107 Neb. 657, upholding a similar statute enacted in 1919.

The 1921 statute, after declaring that the English language shall be the official language of the state and that the common school branches shall be taught in that language, provides:

"Section 2. No person, individually or as a teacher, shall, in any private, denominational, or parochial or public school, teach any subject to any person in any language other than the English language.

"Section 3. Languages other than the English language may be taught as languages only, after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county or the city superintendent of the city in which the child resides. Provided, that the provisions of this act shall not apply to schools held on Sunday or on some other day of the week, which those having the care and custody of the pupils attending same conscientiously observe as the Sabbath, where the object and purpose of such schools is the giving of religious instruction, but shall apply to all other schools and to schools held at all other times. Provided, that nothing in this act shall prohibit any person from teaching his own children in his own home any foreign language."

The law is not directed at the teaching of the German language only, but applies to all foreign languages. The so-called ancient or dead languages, not being, strictly speaking, foreign languages, obviously do not come within the spirit or the purpose of the act.

The objections raised resolve themselves into one question: Is the enactment a proper police regulation, reason-

ably calculated "to promote the health, peace, morals, education or good order of the people," and therefore a regulation excepted from the scope of the constitutional provisions, both state and federal, which prohibit the taking of life, liberty or property without due process of law, and which guarantee the equal protection of the law, and preserve the right of freedom in religious worship?

The reasons found by the legislature for this enactment, we believe, are set out in our opinions in *Nebraska District of Evangelical Lutheran Synod v. McKelvie,* 104 Neb. 93, and *Meyer v. State, supra.* The legislature intended that the English language should become the universal language of the state; that children of foreign parentage should be so reared and educated that English would come to be their natural language and the language which they would continue to use. Children of foreign parentage, first starting to school, are able to speak the language of their parents. That language is at that time the one naturally favored by them. The requirement, that children who have not passed the eighth grade shall in language study apply themselves exclusively to the English language, so that English shall be mastered and become the more favored one, we are not ready to say is a measure more stringent than is warranted, nor that the legislature has acted without reason and in a purely arbitrary manner. The law does not create an absolute prohibition against the learning of a foreign language. It only postpones and regulates that teaching. There is no curb on knowledge. Such children have a sufficient task to master English in what time and opportunity is available to them for language study. When the child becomes sufficiently versed in English, which, in the eyes of the law, is when he has passed the eighth grade, and has received the instruction in English which necessarily goes with that extent of education, when that language has become his language, then he is free to study whatsoever language he pleases. The statute was enacted in a jealous regard to further and assure the universal use of English, and, as

a means to that end, to curtail, so far as could reasonably be done, the rearing of children of foreign parentage in the language of their parents. As pointed out in the *Meyer* case, in operation the law will be recognized as a restraint almost entirely and alone by the foreign element of our population. It is true, in some instances, that there may be other persons who will desire to have their children instructed in a foreign language before the children have passed the eighth grade, but the reasonableness of the law is to be determined by the general class upon which it operates, and the general object and remedy sought to be attained, and individual rights must yield to the general public benefit.

The pleadings in this case show that both the intervener, as well as other parents of children of the schools, affected by this act, have a knowledge of the English language, as well as a knowledge of the language of their own country; that their knowledge of English, though sufficient for business transactions, is so limited that they are unable to impart religious instruction to their children, and are unable to conduct religious worship in English. This is the very condition the legislature seeks to change. The whole object and purport of the law is to the end that it will bring about a condition where the English language will be the favored one.

It is claimed that the law is discriminative. It applies, however, to all schools generally. It covers all of the schools where, it is well known, children now receive their education. It operates equally upon all children who have not had an eighth grade education and a knowledge of English which will be consequent therefrom. Private instruction by a hired tutor, whether within or without the scope of the law, is instruction which is negligible in its extent. In either event, the law operates in that matter without discrimination. The use and resulting knowledge of a foreign language in the home is not restricted, nor is instruction there prohibited. The exception of Sabbath schools from the law has been placed there with the evident pur-

pose of preventing interference with religious exercises. It is not essential to the validity of the law that it should be a complete and absolute prohibition against the teaching of foreign languages. It was not intended to be such. The law is a regulation of such teaching, and not a prohibition. The qualifications made are not without reasonable basis, and cannot be said to be purely arbitrary.

As was said in the case of *Wenham v. State,* 65 Neb. 394, 404: "The members of the legislature come from no particular class. They are elected from every portion of the state, and come from every avocation and from all the walks of life. They have observed the conditions with which they are surrounded, and know from experience what laws are necessary to be enacted for the welfare of the communities in which they reside. They determined that the law in question was necessary for the public good. * * * That question was one exclusively within their power and jurisdiction and their action should not be interfered with by the courts, unless their power has been improperly or oppressively exercised."

In the case of *Barbier v. Connolly,* 113 U. S. 27, in speaking with regard to the exercise of police power, the court, referring to the Fourteenth Amendment of the Constitution of the United States, said (p. 31): "But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people. * * * Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring

others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

It appears to us that the law is a reasonable exercise of the police power and is not unconstitutional, as in violation either of the state or of the federal Constitution. In its operation it does not deprive any person of life, liberty or property without due process of law, nor does it deny the equal protection of the law. It does not interfere with religious liberty nor with the giving of religious instruction.

It is claimed that the portion of the act which is quoted in this opinion is not embraced in the title. The title of the act reads as follows: "An act to declare the English language the official language of this state, and to require all official proceedings, records and publications to be in such language and all school branches to be taught in said language in public, private, denominational and parochial schools; and to prohibit discrimination against the use of the English language by social, religious or commercial organizations; to provide a penalty for a violation thereof; to repeal chapter 249 of the Session Laws of Nebraska for 1919, entitled 'An act relating to the teaching of foreign languages in the State of Nebraska' and to declare an emergency."

The title of the act is admittedly broad enough to cover a provision declaring that the English language cannot be taught by means of a foreign language, but plaintiffs contend that the title is not broad enough to cover a provision preventing the teaching of a foreign language in English. When we consider the object of the statute, the distinction is somewhat refined. It is the employment of a foreign language in school which is manifestly aimed at. A foreign language cannot be taught without, in some degree, employing that language in the teaching of it. The legislature could properly have defined language as a subject contemplated to be within the scope of the phrase "all school

branches." We cannot say that the legislature did not so use the phrase. The term "school branches" has no strictly limited meaning. Under the title of the act, no one denies but that it is proper to require that reading, writing and spelling shall be taught in English only. How, then, could a foreign language be taught, except in a very limited degree, without teaching reading, writing, and spelling in that language? The means of teaching a foreign language are so interrelated with the problem of requiring all school branches to be taught in English, only, that a provision in the statute, regulating the teaching of foreign languages, seems to us to be entirely consistent with the subject as expressed in the title, and a provision properly calculated to aid in carrying out the expressed object sought to be attained.

The judgment of the lower court is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

MORRISSEY, C. J., dissenting.

Chapter 61, Laws 1921, in the main, is calculated to prohibit and penalize the teaching, in a school, of languages other than English. The history of the ages dead and gone reveals that every forward step in science and philosophy met with opposition and oftentimes with persecution, but, notwithstanding this opposition, learning spread, the human mind expanded, and knowledge of the arts and sciences reached the multitude. We have been wont to look upon the proscriptions of the past with charity because of the age in which they occurred, but, now, in the twentieth century, the majority opinion sustains a statute as a reasonable exercise of the police power that proscribes the teaching of modern languages, in a school, although it sanctions the teaching of such languages if done by a private tutor, or a parent, in the home. If the teaching of such languages is vicious and harmful, it must be so when done by a private tutor, or by a parent, in the home. If not hurtful to the state when taught by a private tutor or by a parent, in the home, how can it be said to be harmful

to the state when taught in a school, when such teaching is not permitted to impair the work of the child in the common branches of learning. I cannot regard as a reasonable exercise of the police power a provision which arbitrarily forbids the acquisition of useful learning—learning that is not harmful in itself, learning that the well to do parent may employ a private tutor to impart to his child, or that the cultured parent may personally impart to his child, if not done in a school. The police power has never been held to extend to the prohibition of acts not injurious to society or which cannot reasonably be said to be harmful to the public welfare. It is an arbitrary classification which reason will not support. The provision declaring the English language to be the official language of the state and the provisions requiring the teaching of that language in all schools of the state are proper, and no person complains of them or questions their validity, but those provisions that prohibit the teaching of other languages, in a school, even though such teaching does not interfere with the school course prescribed by proper authority, in my judgment, violate the provisions of both the state and federal Constitutions. I, therefore, dissent from the holding announced and adhere to the opinion of this court in *Nebraska District of Evangelical Lutheran Synod v. McKelvie,* 104 Neb. 93, and to the dissenting opinion in *Meyer v. State,* 107 Neb. 657.

JAKE KAPLAN, APPELLANT, V. WILLIAM M. GASKILL, APPELLEE.

FILED APRIL 19, 1922. No. 22503.

1. **Master and Servant:** WORKMEN'S COMPENSATION ACT: CASUAL EMPLOYMENT. Where a person employed another to do some repair work and remodeling on his store building, which work it was contemplated would last ten days or two weeks, and when it was contemplated by the parties that the employee should continue working for such person in the repairing of a fence and building

of additional garages and in the erection of another building, which work it was expected would last throughout the summer, and where it was agreed that the employee should receive 75 cents an hour for seven and one-half hours a day, and should work five days a week, *held*, that such employment was not casual, within the meaning of that term as used in the workmen's compensation law.

2. ———: ———: APPLICATION. The workmen's compensation law does not, as is manifest from its express terms, cover all labor, but only such labor as is performed in the usual course of some regular trade, business, profession or occupation of the employer.

3. ———: ———: OCCUPATION. Where a person, engaged in the general business of buying and selling junk and dealing in second-hand automobiles, owns a small store building and two or three houses, which he rents to tenants, *held*, that the labor or services, which were required to be furnished or performed by him in the handling of and caring for those properties, does not amount to a regular business or occupation, within the meaning of the workmen's compensation law.

4. ———: ———: ———. The work rendered for such person by an employee in the repair of one of such buildings is not work which is within the usual course of any regular business or occupation of such person, and the employee, in the performance of that work, does not come within the operation of the statute mentioned.

5. ———: ———: ———. The business occupations, referred to in the act, are the habitual or regular occupations that a person is engaged in with a view to winning a livelihood or gain.

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

J. E. Von Dorn, for appellant.

R. B. Hasselquist, contra.

Heard before DEAN, ROSE, DAY and FLANSBURG, JJ.

FLANSBURG, J.

This was an action under the workmen's compensation law. An award was granted to the employee, Gaskill, both at the hearing before the compensation commissioner, and also in the proceeding, later instituted, in the district court. From the decree in the district court, the employer, Kaplan, appeals.

The questions of law presented are whether or not the employment was "casual," and whether or not it was an employment in the usual course of "the trade, business, profession or occupation" of the employer.

The evidence in behalf of the employee is to the effect that Kaplan, the employer, was engaged in the business of buying and selling junk and dealing in second-hand automobiles, and that he owned two or three houses and a small store building. His wife also owned one residence property. All of these properties, except one house, in which Kaplan and his wife lived, were occupied by tenants. In the middle of April, 1921, Mr. Kaplan employed Gaskill to work for him. He told Gaskill that he had some repair work and remodeling to do on the store building, and that he intended, later, to build or repair a fence, build some additional garages, and, should he be able to purchase a certain lot, expected to erect another store building. It was contemplated that the work which they were to immediately enter upon on the store building, being remodeling and repair work, would last ten days or two weeks. Mr. Gaskill, who was otherwise employed, in the early mornings, as a janitor, the testimony in his behalf shows, agreed to work for Kaplan at 75 cents an hour, seven and one-half hours a day and five days a week; Mr. Kaplan not desiring work done for him on Saturday, as that was the day which he observed as the Sabbath. Gaskill began work immediately, on April 19, and the work on the store building was practically completed on the 2d of May. On that day Kaplan asked that Gaskill should return the next day and assist in moving an ice box, saying that he wished Gaskill to bring some crowbars, and that he would call for him the next morning with his truck. The next morning they met, as arranged, and drove to the store building. The work of moving the refrigerator and of repairing damage to the floor, which occurred as a result of that work, lasted until noon. During that work, a splinter entered Gaskill's thumb. An infection later followed and caused a permanent injury.

The above testimony is not without conflict, but, since the evidence is sufficient to support such a state of facts, the judgment of the district court is decisive of those issues in favor of the employee, so far as the appeal in this case is concerned, for the judgment of the trial court has the same effect and binding force as the verdict of a jury.

The two legal defenses, that the employee was engaged in casual employment and was acting outside of the usual course of the business of his employer, are, under the statute as it stood prior to the 1921 amendment, defenses which are distinct and independent of one another, and must be considered separately. *Petrow & Giannou v. Shewan*, p. 466, *post*.

It does not appear that the employment was casual. That question is to be determined largely from the contract entered into between the parties. *Western Union Telegraph Co. v. Hickman*, 248 Fed. 899; *Oliphant v. Hawkinson*, 192 Ia. 1259. By that contract it was contemplated that the employee was to be employed continuously at a certain rate per hour, and for certain hours and days of the week, and for a period which might last practically the entire summer. The work was to be of a sufficient duration to make it entirely practicable for the employer to take out insurance to protect both himself and his employee, or to serve and post notices of an election, on his part, to be governed by part I of the workmen's compensation act. One of the reasons that the casual employee was excepted from the operation of the compensation law was because of the impracticability of requiring the employer to take out insurance, or to take the necessary steps to reject the act in each individual instance of such employment. Where it is contemplated by the parties, at the time of entering into their agreement, that the employment will last ten days or two weeks, and may and probably will continue several months, it certainly cannot be said to be a casual employment. In California the legislature has seen fit to declare that employment which continues for more than ten days shall not be considered casual. *Ford*

v. Industrial Accident Commission, 200 Pac. (Cal. App.) 667.

The decisions of this court and of other courts, under circumstances where the employment is one which is contemplated to continue, as it does in this case, have held such employments to be regular, and not casual. *Nedela v. Mares Auto Co.,* 106 Neb. 883; *Thompson v. Twiss,* 90 Conn. 444; *Scott v. Payne Bros.,* 85 N. J. Law, 446; *Schaeffer v. De Grottola,* 85 N. J. Law, 444.

The next question presented is whether or not the employment was in the usual course of the regular trade, business, profession, occupation or vocation of such employer. The statute provides that the act "shall apply * * * to every employer in this state employing one or more employees, in the *regular* trade, business, profession or vocation of such employer" (Laws 1917, ch. 85, sec. 1), and further provides that the act "shall not be construed to include any person whose employment * * * is not in the *usual* course of the trade, business, profession or occupation of his employer" (Laws 1917, ch. 85, sec. 4, subd. 3).

It is argued that the act must be given a liberal construction, and to this we readily accede. But, as said in *Ray v. School District of Lincoln,* 105 Neb. 456, 461: "We have repeatedly given the act, as to the classes of workers brought within it, a liberal construction, but the rule, allowing a liberal construction of a statute, does not warrant us in overriding its terms in order to widen the remedy or bring about objects or results not within its expressed intent."

The act by its terms is confined to employees in the various kinds of business occupations, whenever such employees are engaged in performing the usual services pertaining to that particular business or vocation.

The fact that the employer, in this instance, was engaged in the business of buying and selling junk and in dealing in second-hand automobiles has no controlling influence upon the question of whether or not he was engaged in the *regular business* or *vocation* of renting houses.

The act does not contemplate that a person can be engaged in only one regular business. He may be engaged in several. The question, then, of whether or not he was engaged in a regular business occupation in the holding and handling of the properties in question, and whether or not the employee was engaged in the usual course of the duties which were within the scope of that business, must be determined entirely aside from the question of whether or not the employer was engaged in any other kind or nature of business, as well as aside from the question of whether the employment was casual. The compensation act was not intended to impose a charge upon the individual employer, but upon the industry or business or vocation in which he was engaged, on the theory that the industry could bear the loss resulting from personal injuries to its employees, and that the burden could be passed on to the patrons of that industry by charging up such losses to operating expense. The law was not intended to cover all labor, but, as is manifest from its express terms, only labor performed in the *usual* course of some *regular* business calling. In determining what was meant by the terms, regular trade, business, profession or vocation, this underlying principle of the law should be kept in mind. The terms, trade, business, profession, vocation or occupation, all refer to business occupations, of one nature or another. It is not everything in which a person may happen to be employed, even though the undertaking may be carried on for profit, that may be said to be a business, vocation or occupation, within the meaning of the terms as used in the statute. Those terms imply a continuous or habitual course of dealing in certain transactions and a dealing to a sufficient extent as to so employ work and labor and service in the conducting of it that it can be said to be a regular occupation or business. As to what constitutes a regular business in any given case must of course depend upon the particular facts and circumstances in that case. No arbitrary or definite rule can be laid down which would describe the boundary between the doing of certain infre-

quent or isolated transactions for profit and the continuous and habitual carrying on of such transactions to such an extent as to amount to a regular business. In the interpretation of this statute it seems to us that we must take the common and ordinary meaning of those terms as being the sense in whch they were used by the legislature.

In the case of *Marsh v. Groner,* 258 Pa. St. 473, L. R. A. 1918F, 213, the court, referring to the meaning of the word "business," as used in the workmen's compensation law in that state, said (p. 477):

"What gives rise to the question is the indefiniteness and want of precision of meaning of the word 'business' as it occurs in the act. It is a word which embraces a wide variety of subjects, and being without a technical or precise meaning, excluding any other, it may convey an entirely different meaning in one connection from what it imports when used in another. In such cases when, as here, no help can be derived from the context, and none from the use of the same word in other sections of the act, the interpreter has no other recourse than to the presumption that the word was used in the popular sense, if that be found agreeable, that is, not contradictory to the object and intention of the lawmaker.

"Statutes are presumed to employ words in their popular sense, and when the words used are susceptible of more than one meaning, the popular meaning will prevail. Where the meaning involves no absurdity and is not in conflict with the other parts of the act, it is the only one that can be presumed to have been intended and there is no room for construction. Cooley, Constitutional Limitations, p. 68. There are few words more current in our speech than the word 'business'; few that include a greater variety of subjects and yet none which, in popular speech, has greater or more marked singleness in denotement. When one's business is the subject of common speech, no one can be in doubt as to the reference. It would be a very exceptional person—we do not know how to otherwise describe him—who would not understand that the reference

is to the habitual or regular occupation that the party was engaged in with a view to winning a livelihood or some gain. These objects are necessarily implied when one's business is spoken of. * * * What we have said as to the popular understanding of the word 'business' is just what Webster defines it: 'Some particular occupation or employment habitually engaged in for livelihood or gain.' "

Merely holding property and keeping it in order, though it is rented to another and renders an income, can hardly be said, without straining the meaning of the term, to constitute a regular business on the part of the owner. There are different characters of properties which are income-producing and which need more or less care and attention in their handling, and yet the mere holding of them, which does not require a substantial or continuous or habitual rendition of service, can hardly be said to constitute a business, as that term is used in the statute. Though the holding of a single property and renting it to another, so as to derive an income therefrom, would not constitute a business, still it is conceivable that a person may be so engaged in acquiring and holding numerous properties that the service required in handling and caring for them may become so substantial as to amount to a regular business.

Our compensation laws in this country have, to a large degree, been patterned after the compensation laws in England. There it is held that the maintaining and renting of several residence properties cannot be held to be a business within the contemplation of the compensation law. In the case of *Bargewell v. Daniel*, 98 L. T. R. (Eng.) 257, a woman managed eight houses. She owned five of them and for managing the other three received half of the rent. She had no regular business or vocation and supported herself on the income from these properties thus derived. She employed a person to mend the roof of one of the houses and in performing that work he was injured. It was conceded that he was a casual employee, but, under

the English act, the mere fact that he was a casual employee did not exclude him from the operation of the law, unless it further should be found that he was not employed in the course of the trade or business of the employer. It was held that he was not employed in connection with what is generally known as a trade or business. The court said that the act "provides that a workman within the act does not include a person whose employment is of a casual nature, and who is employed otherwise than for the purposes of the employer's trade or business. The intention was that the act should not apply in such a case to the ordinary owner of property who was not carrying on any trade or business." One of the other justices in that case in his opinion said: "I think the interest which the defendant had in this property was such that for the purposes of this case we must treat her as having all the rights of the owner of these houses, and under the circumstances of this case I think it would be putting an unnatural meaning on the act to say she was carrying on any trade or business."

In the case of *State v. District Court,* 138 Minn. 103, the defendant owned a farm, which he rented to a tenant. The barn on the farm had burned and it was necessary to provide temporary shelter for the tenant's live stock. The defendant employed a carpenter to build a shed upon the farm, and it was held that the employee engaged in that work was not engaged in the trade, profession or occupation of the defendant, the court saying (p. 105): "Assuming that the lease obligated defendant to erect a shelter for his tenant's stock, or that he had voluntarily agreed to do so, we may say, in a certain sense, that the erection became his business or duty. But that cannot be the meaning of the word 'business' in this statute. It must have the same general significance with respect to the work or calling of the employer as the words trade, profession, or occupation, hence must refer to the employer's ordinary vocation and not to every occasional, incidental, or insignificant work he may have to do. When we speak of a person's trade or profession we generally refer to that

branch of the world's activities wherein he expends his usual everyday efforts to gain a livelihood. There is no evidence that defendant made it a part of his calling to rent out farms or erect buildings, either temporary structures or permanent. For all that appears this was the only farm he owned, and it may have been of such small area and value that its renting and care could not properly be classified either as a business or occupation."

In a similar case, *Oliphant v. Hawkinson, supra,* the defendant was a retired farmer and had rented his farm to a tenant, who occupied and operated it. Defendant employed a carpenter to build a new corn-crib upon the premises. It was held that the carpenter so employed was not engaged in any trade or business of the employer, the court saying that the defendant "had no trade or business within the meaning of this act. Because he owned the farm and leased it did not bring him within the class contemplated by this statute as an employer."

In the case of *Lauzier v. Industrial Accident Commission,* 43 Cal. App. 725, the defendant owned four small frame houses which she rented to tenants. She employed a carpenter to repair the roof of one of the houses and during the performance of that work he was injured. The question was whether or not the owning and renting of the four houses constituted a "business," within the meaning of the workmen's compensation law, and it was held that it did not. In *Ford v. Industrial Accident Commission, supra,* it was held that an owner who lets his house for profit, and at irregular intervals, when demanded, has labor performed in repair thereof, is not engaged in the prosecution of a trade or business, within the meaning of the act.

It cannot be questioned that a person who is employed to repair or remodel the family residence of another is not, in that employment, engaged in the usual course of any regular business or occupation of the employer, within the meaning of those terms as used in such acts. See *Marsh v.*

Groner, supra, and, in general, extended note, 15 A. L. R. 735.

The purport of the decisions, above discussed, is that the mere owning of a house, maintaining it and keeping it in repair and renting it, so that it may produce an income, is not sufficient to constitute a business; nor does the fact that a person owns and rents more than one house necessarily constitute a business, but such transactions at most could only amount to a regular business, within the meaning of the law, when they are carried on to such an extent as to require a substantial and habitual devotion of time and labor to their management and operation. In the case of *Davis v. Industrial Commission,* 297 Ill. 29, 15 A. L. R. 732, where a person owned a three-story building, 45 feet high, which contained 15 separate living apartments, and, as well, owned other buildings, from all of which he derived an income, he was recognized as being, in that connection, engaged in business, within the meaning of the law.

In the case before us Kaplan owned a small store building and two or three houses. His wife owned a residence, and in one of these residences—it does not appear in which—the defendant and his wife resided. The fact that Kaplan kept these properties in repair, and the fact that he rented them, so that they might produce an income, does not, to our mind, show that he was so engaged in the acquiring and renting of properties, and in the furnishing or performance of labor in respect to them, as to be considered engaged in a regular business in that connection, within the meaning of the terms as used in the workmen's compensation law. His time was substantially employed in the business of handling junk and dealing in second-hand automobiles, and what he did with regard to the handling of and caring for the several private properties was purely incidental to his investment, and not sufficient in extent to constitute a regular business.

It is therefore our conclusion that the judgment of the

lower court must be reversed and the case dismissed.

REVERSED AND DISMISSED.

PETROW & GIANNOU ET AL., APPELLANTS, V. WILLIAM SHEWAN, APPELLEE.

FILED APRIL 19, 1922. No. 22523.

1. **Master and Servant:** "INDEPENDENT CONTRACTOR." An independent contractor is generally distinguished from an employee as being a workman who contracts to do a particular piece of work according to his own method, and is not subject to the control of his employer, except as to the results of the work.

2. ———: ———. A plumber who undertakes to install a floor drain and sink for a confectionery storekeeper, and agrees to procure and furnish the necessary materials, and has no specific agreement for compensation other than the understanding that he is to receive pay for the materials furnished and the usual plumber's charges, and when no hours of employment are agreed upon, and there appears to be no right to control the manner or method of his doing the work, is an independent contractor, and not an employee, within the meaning of the term "employee," as used in the workmen's compensation law.

3. ———: ———. The act of the employer in giving such directions as may be found necessary to secure compliance with the contract, according to the plan adopted by him and agreed upon between the parties, is not necessarily inconsistent with the existence of the status of his workman as an independent contractor.

4. ———: CASUAL EMPLOYMENT. The rendition of such service by a plumber, under circumstances constituting him an employee, would not bring him within the act, for his employment by a candy shopkeeper in such nature of work, which required for its completion only 20 hours, would constitute casual employment and be within the exception of the statutes (Rev. St. 1913, sec. 3656, as amended by Laws 1917, ch. 85, sec. 4), as it stood prior to the amendment of 1921.

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

Montgomery, Hall & Young, for appellants.

Robert A. Nelson and *W. H. Herdman, contra.*

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

FLANSBURG, J.

This was an action under the workmen's compensation law. The plaintiff, William Shewan, recovered an award before the compensation commissioner, and an appeal was taken to the district court, where the matter was tried, the award confirmed, and a decree entered in favor of the plaintiff. The defendants, Petrow & Giannou, have appealed to this court.

The first question presented is whether or not the plaintiff was an employee of the defendants, as distinguished from an independent contractor.

The evidence is substantially without conflict. The defendants conduct an ice cream, soda and candy shop on Farnam street in the city of Omaha. They planned to fit up a small adjoining room, to be used in conjunction with their business. The room was to have a cement floor, certain plumbing fixtures, a sink, and a floor drain. Defendant Giannou spoke to Mr. R. W. Shewan, the father of the plaintiff, who was the engineer of the building in which the candy shop was located, and asked him if he could not do the plumbing for them. He replied that he was not a member of the union, but that his son was a plumber and could do the work. Defendant Giannou then requested that he ask his son, the plaintiff, to do the work. No mention was made as to what the rate of pay would be, nor as to what would be the total cost. Mr. Shewan that evening delivered the message to plaintiff, and the next morning plaintiff appeared at the candy shop. He went with Mr. Shewan and the defendant Giannou to the room where the work was to be done, and what was wanted was explained to him. Defendant told him to go ahead and do the work and to secure whatever material was necessary and defendants would pay for it. Nothing was said about the wages to be paid the plaintiff, although defendant testified that

he expected to pay plumber's wages; nor was anything said about the work being done for a lump sum. Plaintiff worked during that day, and late in the afternoon sustained an injury to his eye. He went immediately with his father to a doctor. No report of the injury was made to the defendants for two or three days afterwards. At that time, having noticed that the work was not proceeding, they inquired of Mr. Shewan and were informed that plaintiff had sustained injury. They told Mr. Shewan that the work would have to go on, as they were in need of its being finished and ready for use. The plaintiff, being informed of this, thereupon sent another plumber to finish the job. This man went to the candy shop; he reported to no one, but immediately commenced upon the work, and after working a day and a half completed it. Only once during his work did he have any conversation with either of the defendants, and this conversation was when defendant Giannou entered the room and stated that the floor drain would have to be raised a little above the floor, for the reason that the floor was to be cemented. After the work was completed, the plaintiff rendered a bill, showing cost of materials of $24.50, and showing 20 hours' labor at $1.25 an hour, being according to the union scale of wages for plumbers. This included 8 hours' labor for himself, and 12 hours for his substitute. The bill, inclosed in an envelope, was delivered to the defendants by Mr. Shewan, the plaintiff's father, who testified that he did not look at the bill, nor know of its contents. The defendants drew a check in favor of plaintiff's father, he having stated that it was immaterial whether the check should be made out to him or to his son. The check was delivered by him to the plaintiff. The plaintiff paid the plumber who completed the work $15 for 12 hours' work.

The issue as to whether or not a workman is an employee, as distinguished from an independent contractor, is to be determined from all the facts in the case. There is no single test by which that determination can be made. An independent contractor is generally distinguished as being

a workman who is independent in his employment; one who contracts to do a particular piece of work according to his own method, and is not subject to the control of his employer, except as to the results of his work. He is not in such a case a servant of his employer; nor can he be controlled by the employer in the manner of doing the work, except to the extent that the employer has the right to give such directions as may be found necessary to insure compliance with the contract. *Barrett v. Selden-Breck Construction Co.*, 103 Neb. 850; *Knuffke v. Batholomew*, 106 Neb. 763; *Powley v. Vivian & Co.*, 154 N. Y. Supp. 426. As particularly applicable to the facts in this case, see *Roberts v. Industrial Accident Commission*, 197 Pac. (Cal. App.) 978; *Otmer v. Perry*, 94 N. J. Law, 73; *Matter of Litts v. Risley Lumber Co.*, 224 N. Y. 321; *Helton v. Tall Timber Lumber Co.*, 148 La. 180; *City of Groesbeck v. Pinson*, 21 Tex. Civ. App. 44.

The defendants in this case were not plumbers. They were not contractors nor builders, and did not understand the manner in which plumbing should be done. In no way did they attempt to control, nor did their agreement give them the right to control, the plaintiff as to the methods, means or procedure to be employed. The plaintiff was employed to do the specific work as an entirety. The question of the time which would be consumed in doing the work was not mentioned; nor was the total cost. The defendants quite evidently gave to him the right to conduct the work as he saw fit, according to his own methods. He was to procure the necessary materials, and the defendants were to pay for the materials and pay the reasonable plumber's charges for the work done. Though the defendants, as the testimony in their behalf shows, understood their contract to mean that the plaintiff was to receive pay at the rate of regular plumber's wages per hour, still the measure or method of payment, though often insignificant, is not a controlling criterion as to the relationship between the parties. It is significant that when the plaintiff was injured, he, himself, arranged for a substitute

to complete the work, and that his substitute worked apparently for him, and not for the defendants. The substitute did not report to the defendants before entering upon the work, nor did he render them a bill after he had finished. The plaintiff paid him for the time that he was employed, and rendered a statement to the defendants, covering the entire cost of materials, and of the labor contributed both by himself and by his substitute.

The parties construed their contract as one whereby the plaintiff agreed to perform the work according to plan. It was not material that he personally perform it, but, within the contemplation of the parties, that he should accomplish it in the manner he pleased, and employ a helper or a substitute, should he desire. After he sustained his injury and quit work, it was several days before the defendants made inquiry as to why the work was not progressing. It is evident from this that the plaintiff was recognized as having the right to control his own time in applying himself to the work. The defendants did not keep time over him, nor employ him for specific hours. He accepted the contract as an entirely and would not have been subject to discharge by the company because he did the plumbing work in one way, rather than in another, so long as the substantial results contemplated by the contract were attained by him.

It is argued that the defendants retained the right of control over the plaintiff, as is evidenced by the fact that one of the defendants at one time appeared in the room where the work was going on and directed that the floor drain would have to be raised a little above the floor, since the floor was to be cemented. The giving of such instructions by the defendant, however, would not be inconsistent with a relationship of the plaintiff toward them as an independent contractor, since, were he an independent contractor, the defendants would have had the right to instruct him as to what had to be done, so as to secure the fulfilment of their contract. This could be and was done in this case, without in any way interfering with the plain-

tiff's right to perform the contract in whatsoever manner or by what method he chose.

The facts in the case of *Knuffke v. Bartholomew, supra,* differ from the case at bar. In that case the applicant was employed to do plastering at $1.25 an hour. The employer expressly agreed to erect the scaffolding and to furnish a helper. To that extent at least he controlled and directed the method of doing the work. The work on the building was in charge of a general foreman, who, the court said, would have had supervision over the work to be done. The court construed that contract as one for labor at so much wages an hour, and not as a contract to do a specific piece of work as an entirety at so much compensation, measured by a specific rate per hour, and found it within the contemplation of the parties that the employer had retained the right to control the manner and method of doing the work, and to discharge the employee at will.

As has been pointed out, those elements do not exist in this case, and it is our opinion that the plaintiff here was an independent contractor, and therefore not an employee, within the meaning of that term as used in the workmen's compensation law.

The plaintiff's counsel further contends that the evidence is sufficient to show that Mr. Shewan, father of the plaintiff, was, himself, the independent contractor, and that the plaintiff was his employee, and that, therefore, as Mr. Shewan had not been required by the defendants to take out insurance to cover his employee, as is made necessary by the compensation law, the defendants' firm became, under the terms of the law (Rev. St. 1913, sec. 3657) an employer. The evidence, as we view it, however, is entirely insufficient to sustain that contention. It appears that Mr. Shewan only acted as the agent of the defendants in procuring his son to do the work. His own testimony shows that he had nothing whatsoever to do with the work or the direction of it; nor did he receive any pay. He did not agree to perform the work; in fact, he stated that he would not engage upon such an undertaking, as he did not desire to

court trouble with the plumbers' union. It clearly appears that all he did was to deliver the word to his son, so that his son might undertake the work himself.

For still another reason, as contended by the defendants, the plaintiff would not be entitled to recover under the compensation law, even though the relation of master and servant had been found to exist. Such an employment would have been casual, and therefore within the exception to the compensation law. The act, prior to the amendment of 1921 (Laws 1921, ch. 122) excluded from its operation "any person whose employment is casual, or not for the purpose of gain or profit by the employer, or which is not in the usual course of the trade, business, profession or occupation of his employer. The term 'casual' shall be construed to mean 'occasional; coming at certain times without regularity, in distinction from stated or regular.' " Rev. St. 1913, sec. 3656, as amended by Laws 1917, ch. 85. This section declares three specific and distinct exceptions to the act. One exception is where the employment is casual; another where it is not for the gain or profit of the employer; and another where the employment is not in the usual course of the trade, business, profession or occupation of the employer. Each exception, by the provision quoted, is independent unto itself, and it is unnecessary, in determining whether an employee comes within one exception, to determine the question as to how far he comes within the other exceptions. In determining whether or not the employment is casual, under that provision, it is, therefore, unnecessary to determine whether the employment, or service rendered, was in the usual course of the employer's business. It is proper, however, in determining whether the employment is casual, to consider the nature of the service to be rendered, as it has a distinct bearing upon the question of the regularity of the service in the particular business. In this case, the fitting up of an adjoining room to accommodate the business of the defendants was a service which, by its very nature, is one which could happen only on rare occasions. The employment of

the plaintiff to do that work would not connect him with any regular work of the employer, nor could he be considered a regular employee. Where a person enters the employment of another to render a particular service, that is not continuous or regular but only occasional or incidental to the business, the scope and purpose of the employment, as well as the fact that the employment is temporary and for the occasion only, are important considerations in determining the question as to whether the employment is casual.

Under our decisions, as well as the decisions in those states where the statutes were essentially similar to our statute as quoted, employments of a kind and duration, such as are shown in this case, have been quite generally held to be casual in their nature, and therefore excepted from the operation of the workmen's compensation laws. *Bridger v. Lincoln Feed & Fuel Co.*, 105 Neb. 222; *Gaynor's Case*, 217 Mass. 86; *Western Union Telegraph Co. v. Hickman*, 248 Fed. 899; *Aurora Brewing Co. v. Industrial Board*, 277 Ill. 142; *Porter v. Mapleton Electric Light Co.*, 191 Ia. 1031; *Oliphant v. Hawkinson*, 192 Ia. 1259; *Herbig v. Walton Auto Co.*, 191 Ia. 394; *Consumers Mutual Oil Producing Co. v. Industrial Commission*, 289 Ill. 423.

For the reasons given, we find it necessary that the judgment be reversed and the cause dismissed.

REVERSED AND DISMISSED.

HERMAN W. MULLER, APPELLEE, V. CLARK A. PRATT, APPELLANT.

FILED APRIL 19, 1922. No. 21973.

1. **Trial:** INSTRUCTIONS. The instructions of the trial court to the jury should be confined to those issues presented by the pleadings and supported by competent evidence.
2. **Evidence** examined, and *held* to support the verdict.

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

Drake & Drake, for appellant.

John A. Miller and *J. M. Fitzgerald, contra.*

Heard before LETTON, DEAN and FLANSBURG, JJ., DAY and GOOD, District Judges.

DAY (L. B.) District Judge.

This is a controversy between a landlord and his tenant. Muller, the tenant, was to farm a portion of the land for an agreed compensation, and a part for a share of the crop, according to an oral agreement with Pratt, the owner of the land. Muller sues on two causes of action: First, for the reasonable value of his services in fencing and otherwise improving Pratt's land; second, for the reasonable value of work and labor for putting up hay for Pratt. Pratt counterclaims, setting forth three causes of action: First, for the agreed price of pasturing stock; second, for the reasonable value of the use of eight acres on which Muller raised beets; third, for damages to a crop of potatoes which froze, due to the tenant's neglect in not digging said potatoes at the proper season. From a verdict and judgment in favor of Muller, Pratt appeals.

The appellant contends that the trial court erred in not submitting to the jury the second cause of action set out in his counterclaim. This was for the reasonable value of the use of eight acres upon which the tenant raised beets. The instruction of the trial court to the jury should be confined to those issues presented by the pleadings and supported by competent evidence. There is no competent evidence in the record to sustain this cause of action, and the trial court properly refused to submit it to the jury. *Frederick v. Kinzer,* 17 Neb. 366.

From a careful examination of the record it is apparent that the main dispute was relative to the appellant's claim for damages due to the negligence of the appellee in allowing the potatoes to freeze. The appellant complains of the interpretation of the contract by the trial court. Since this was an oral agreement, we must examine the evidence

and pleadings to determine its provisions. The appellant himself states that the agreement was, "whereby defendant (appellant) was to furnish the seed and receive one-half of the crop on the plowed land." It is the conclusion of this court that the words, "on the plowed land," do not refer to the place of delivery of the share of the landlord, and that, as established by the evidence, this contract is silent as to where the landlord's share of the potatoes was to be delivered. In this case the landlord was present on the land at the time when the potatoes were dug, and knew where they were being placed. His agent assisted in putting them in the pit, in the barn, and in the house. He himself received some of the potatoes on the land without objection as to the place of delivery. He never objected to the manner of handling them; but, in handling, sorting and selling these potatoes, he treated them as his own after they were dug. "It is the duty of the court to construe the contract as it was understood and acted upon by the parties." *School District v. Davis,* 76 Neb. 612. See, also, *Wilhoit v. Stevenson,* 96 Neb. 751; *Hale v. Sheehan,* 52 Neb. 184; *Cady v. Travelers Ins. Co.,* 93 Neb. 634. The record conclusively shows that the parties understood and acted upon this contract as though the landlord's share of the potatoes were to be delivered upon the land. The court instructed the jury in instruction No. 9 that the contract required the tenant to deliver the potatoes upon the land and was not responsible if they froze after that time, but was only responsible for one-half of such as froze through negligence. This instruction correctly states the law and is supported by the evidence in this case. Every other question was one of fact; each was properly submitted to the jury by the trial court; the verdict is supported by the evidence; and the findings of the jury should not be set aside.

AFFIRMED.

HENRY KISTER ET AL., APPELLANTS, V. CITY OF HASTINGS ET AL., APPELLEES.

FILED APRIL 19, 1922. No. 22054.

Municipal Corporations: STREET IMPROVEMENTS: SPECIAL ASSESSMENTS: ESTOPPEL. Taxpayers, who in a petition request the mayor and council to create a paving district, and while the work of constructing the paving improvement is in progress have knowledge that the paving is not being constructed strictly on the established grades, as required by ordinance, but stand idly by and do not protest nor appear before the mayor and council sitting as a board of equalization, are estopped and cannot maintain a suit in equity to enjoin the collection of special assessments levied to pay the cost of the improvement.

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

J. E. Willits, for appellants.

Bruckman & Paulson, contra.

Heard before MORRISSEY, C. J., ALDRICH, ROSE and FLANSBURG, JJ., DICKSON and STAUFFER, District Judges.

STAUFFER, District Judge.

This is an action to enjoin the collection of special assessments levied to pay the cost of paving improvement in paving district No. 93, city of Hastings, Nebraska. Twenty-six property owners within the paving district are named as plaintiffs. The city of Hastings, the mayor, councilmen, city clerk, city treasurer, county clerk, and the county treasurer of Adams county, Nebraska, are parties defendant. The district court dismissed the action. Plaintiffs appeal.

The plaintiffs and others petitioned the mayor and council to create a paving district. The district was regularly created. None of the property owners within the district protested. The paving ordinance provided that "Paving district No. 93 * * * be and the same is hereby ordered paved and curbed to the established grade."

The city engineers set stakes preparatory to the actual work of paving. Certain property owners in the district found fault and some of the stakes were changed. Thereupon various other property owners protested. An informal meeting of mayor, council and property owners was held. The matter was compromised by changing the position of some of the stakes. The work proceeded. Residents of the east end of the district then employed an engineer. He made a survey and reported variations from the established grades. The people from the east end again made objections to the mayor and council. They filed a written protest objecting to the grades and asked that the project be constructed on established grades. They did not claim their property would be damaged or that they would in any manner be inconvenienced. About $12,000 of work, grading and curbing had been done. The mayor and council proceeded to complete the work. Notice was then given that the mayor and council would sit as a board of equalization to assess benefits. The board sat and made a levy and special assessment against the property within the district. The plaintiffs did not appear at this meeting.

The variations from the established grade were necessary to take care of drainage. Hastings has no established system of storm sewers, drainage being provided by surface drainage. The elevations of the paving and curbing vary from the established grade from a few inches to 2½ feet. The removal of extra earth increased the cost of paving. The exact amount of the added cost could have been accurately ascertained.

The plaintiffs insist that, in varying from the established grade, ordinance No. 713 was not followed, and that the grades in this district were changed without complying with section 4914, Rev. St. 1913, and that, as a result thereof, the levy and special assessment are void, and, being void, a court of equity should enjoin the collection thereof.

Section 4914, Rev. St. 1913, provides the only manner in which grades can be established in cities the size of Hastings. Plaintiffs contend that defendants have changed

the grades in constructing the paving. As a matter of fact, the established grades of the city of Hastings have never been changed. In constructing the improvement the established grade has been varied from. This does not, in effect, change the grade. Varying from a grade established by ordinance does not change the grade. And we hold that the variation from the established grade in the instant case did not operate as a change of grade.

"The establishment of a grade means the passing of an ordinance, or other legislative action of the council of the city, prescribing and fixing grade lines to which the surface shall be brought when the streets shall be improved." *Kepple v. City of Keokuk,* 61 Ia. 653.

"The plaintiffs claim that the alteration in the surface of the street was a change in the established grade, and was unlawful, because no offer has been made to compensate them for their damages consequent upon the change of grade. We think there was no change of grade. While it is true that the surface of the street at the curb is a few inches lower than it was before the improvement, the new curb is on the same level as the old, and some of the plaintiffs testify, and the evidence altogether is to the effect, that the change is no injury to the property of the plaintiffs. Indeed, the preponderance of the evidence is that the change in the surface of the street is a positive benefit to the abutting property." *Coates v. City of Dubuque,* 68 Ia. 550.

A strict and literal compliance with ordinances and contracts permitting and prescribing the manner in which the public street improvement is to be made is not required as a condition to the acceptance of the work by the city, or to the validity of the tax bill for the cost thereof charged against the property of individuals.

"The fact that some changes are made in the character of the improvement from that required in the ordinance providing for the same is no defense to a special assessment to pay for the same. This objection, if tenable, is to be availed of by injunction before the work is com-

pleted." *Ricketts v. Village of Hyde Park,* 86 Ill. 110.

The variation from the established grade in making the permanent street improvement, not being substantial, was not a jurisdictional defect, so as to entitle a property owner to enjoin the assessment therefor. It was only an irregularity of which complaint should have been made before the city council and an appeal taken from its ruling if it was adverse. See *Shaver v. Turner Improvement Co.,* 155 Ia. 492.

"A special assessment will not be enjoined because the improvement is not made in conformity with the provisions of the ordinance, the remedy being by mandamus." *Lyman v. City of Chicago,* 211 Ill. 209.

In this particular instance the mayor and council had jurisdiction to make the improvement. Immaterial variations from the provisions of the ordinance, contract and specifications, and other similar irregularities in the performance of the work, will not oust the mayor and council of jurisdiction and therefore render void the levy of a special assessment. *Wilson v. City of Auburn,* 27 Neb. 435; *Dubbert v. City of Cedar Falls,* 149 Ia. 489; *Robinson v. City of Milwaukee,* 61 Wis. 585.

Section 4931, Rev. St. 1913, applicable to cities of the size of Hastings, provides: "No court shall entertain any complaint that the party was authorized to make and did not make to the city council, sitting as a board of equalization, nor any complaint not specified in said notice fully enough to advise the city of the exact nature thereof, nor any complaint that does not go to the ground work, equity and justness of such tax."

The failure of the property owner to file objections to an assessment because of defects in the execution of the work within the time noted in the published notice of hearing will estop him from raising the question thereafter. *New Whatcom v. Bellingham Bay Improvement Co.,* 16 Wash. 131.

Taxpayers, who in a petition request the mayor and council to create a paving district, and while the work of

constructing the paving improvement is in progress have knowledge that the paving is not being constructed strictly on the established grades, as required by ordinance, and do not protest nor appear before the mayor and council sitting as a board of equalization, are estopped and cannot maintain a suit in equity to enjoin the collection of special assessments levied to pay the cost of the improvement. *Darst v. Griffin,* 31 Neb. 668. See, also, *Moore v. City of Yonkers,* 235 Fed. 485; *Partee v. Cleveland Trinidad Paving Co.,* 172 Pac. (Okla.) 945; *Damron v. City of Huntington,* 82 W. Va. 401.

We are of the opinion that there was a substantial compliance with the ordinance. It was an irregularity, to be sure, for the city engineer to vary from the established grades. But, under the existing conditions, it was an irregularity going to the manner in which the work was performed. It did not go to the jurisdiction of the mayor and council to do the work, and did not invalidate any levy of special assessments. The plaintiffs requested the mayor and council to create the paving district and knew that the paving was not being constructed strictly on the established grades. Not having brought mandamus proceedings nor injunction proceedings, and not having appeared before the board of equalization, they are estopped to come into a court of equity and question the validity of the levy and special assessment.

"Streets are to be laid out, graded, paved, and lighted. The constabulary must be maintained to enforce peace and preserve order. Sewerage systems and water supplies must be provided. No one is entitled to enjoy these advantages, and to be permitted to successfully contend that the laws, ordinances, and resolutions under which such benefits and advantages are created, regulated, and controlled are invalid, and thereby escape the resultant burdens. The citizen of the modern municipality and property owner thereof take notice of such necessities. He owes his personal service to maintain order and promote the public good in his municipality, just as he owes to the nation his service

to protect against hostile encroachments and invasion." *Kerker v. Bocher*, 20 Okla. 729. See, also, *City of Bartlesville v. Holm*, 40 Okla. 467.

The decision of the lower court is right, and it is

AFFIRMED.

SARAH JOHNSON, ADMINISTRATRIX, APPELLEE, V. CITY OF OMAHA, APPELLANT.

FILED APRIL 19, 1922. No. 22046.

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, produced the injury, and without which the result would not have occurred." *Spratlen v. Ish*, 100 Neb. 844.

2. ———: ———: ———. "A party is only answerable for the natural, probable, reasonable, and proximate consequences of his acts; and where some new efficient cause intervenes, not set in motion by him, and not connected with, but independent of, his acts, not flowing therefrom, and not reasonably in the nature of things to be contemplated or foreseen by him, and produces the injury, it is the proximate and dominant cause." *Kitchen v. Carter*, 47 Neb. 776; *Merkouras v. Chicago, B. & Q. R. Co.*, 104 Neb. 491.

3. ———: COMPARATIVE NEGLIGENCE: QUESTION FOR COURT. When the facts in evidence, in an action for damages by reason of alleged negligence on the part of a defendant, clearly show contributory negligence on the part of the party injured, to such an extent that no reasonable mind can believe that such contributory negligence is slight and the negligence, if any, of defendant gross in comparison therewith, it is error to, by an instruction to the jury, authorize the jury to make such comparison and base its verdict thereon. In such case the jury should be instructed to find for such defendant.

4. ———: "LAST CLEAR CHANCE." Evidence examined, and *held* insufficient to authorize an instruction to a jury permitting it to return a verdict based on "the last clear chance" doctrine.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Reversed and dismissed.*

W. C. Lambert, for appellant.

B. S. Baker and *W. M. Giller, contra.*

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

WELCH, District Judge.

This is an action against the city of Omaha and one Ernest Moschel to recover damages because of certain alleged acts of negligence by an employee of the city in driving a motor fire truck upon Eighteenth street approaching Cass street in the city of Omaha, at 18 miles an hour, and failing to have said truck under proper control and management, and failing to slacken the speed of said truck as it approached the intersection of said streets, whereby said fire truck ran into an automobile driven by one Morris Johnson, which had been thrown into and against said fire truck by another automobile traveling on Cass street, driven by the defendant Ernest Moschel, coming into collision with the automobile of said Johnson, whereby said Johnson, by the collision with the said fire truck, was thrown from his automobile and killed.

The city denied each and all the acts of negligence alleged against it; alleged that the death of deceased was not due to any want of care on the part of its employees in charge of said fire truck, and that the same was not the proximate cause of the injury to the deceased. The city further alleged that the deceased came to his death solely as a result of negligence and want of care both on his part and upon the part of the codefendant, Moschel. It further alleged that the circumstances of the collision and throwing of deceased under the truck of the city were such, and occurred in such a manner, as to make it impossible for the city to prevent whatever injury the deceased may have sustained on account of collision with its fire truck. Trial was had to a jury resulting in a verdict of $6,800 against both the city and said Moschel. The city appeals from the judgment rendered against it thereon.

The fire truck was returning to its station from a repair shop. It was not answering an emergency call.

The occurrence of the accident resulting in the death of Johnson is best shown by the testimony of the witness Snyder, called by plaintiff. He was the only witness called by plaintiff who testified to seeing both collisions, and, in fact, the only witness she called who testified to seeing either of the collisions. His testimony was as follows: "Q. As I understand you, Mr. Snyder, you were at the northwest corner of Eighteenth and Cass streets? A. Yes, sir; by the time the fire truck stopped I was ready to step off the curbing. Q. Yes. Did you see the three cars involved in this accident? A. Well, I seen the two of them; I seen Mr. Moschel hit Johnson's car and swerve it into the fire truck; of course, that obstructed my view of the fire truck when the other car was thrown into the fire truck. Q. Did you see the fire truck coming north on Eighteenth street? A. Yes, sir. Q. And you saw the Moschel car going east on Cass street? A. Yes, sir. Q. And you saw the Johnson car going south on Eighteenth street? A. Yes, sir. Q. The Johnson car going south was—which side of Eighteenth street was he driving on? A. He was on the west side, on the right-hand side of the street. * * * Q. When did you see the fire truck first? How far away was it? A. Well, I noticed the fire truck at the other crossing about the south end of the block as I was coming up the street. Q. It was going— A. It was going north. * * * Q. Now, you may tell us, Mr. Snyder, what was the approximate speed of that fire truck as it was going north. A. Well, to my decision it was about 18 miles an hour, and which I also heard Mr. Duda to say that the speed indicator stopped on 18 miles. * * * Q. Did you see the Moschel car? A. Yes, sir. * * * Q. Tell the court and jury if you observed the speed of that car? A. Well, Mr. Moschel, to my estimation, was traveling about 25 miles an hour. Q. Yes. When he came to the crossing, or to the Johnson car, did he swerve his car or do anything with reference to stopping the car? A. Not a thing. * * * Q. When the Moschel car, or the Liberty car, struck the Johnson car, tell the court and jury what part of the Johnson

car was struck by the Moschel car. A. When the—when the man Moschel's car hit the Johnson car, it hit it back of the hub on the rear, on the right hand, Mr. Moschel's right front wheel hit the Johnson car, swerving it around. * * * Q. Then what happened to the Johnson car? A. The Johnson car was thrown directly in front of the fire truck. * * * Q. I mean the Johnson car, what part of the Johnson car did it hit? A. It hit the rear end of the Johnson car also. Q. And did that cause the Johnson car to rebound? A. Yes, sir. Q. So that it was facing south? A. The Johnson car, when it stopped, after the truck had hit it, was facing the same way that Mr. Johnson was traveling; it was straight south. Q. Now, what happened to the two men in the Johnson car? A. The two men were both thrown out of the car. * * * Q. What happened then to Johnson, as to whether or not the rear wheel of the fire truck ran against him? A. Well, when Mr. Johnson landed on the paving, the fire truck was coming straight, and it appeared that Mr. Johnson was stunned and the fire truck ran onto his head, not passing over his head, but crushed his head. Q. Yes. A. So that his head was not over, I would say, three inches in thickness, but when the fire truck stopped at the center of the intersection, after sliding about ten feet or so after the brakes had been set, it drug the body of Mr. Johnson for ten feet before the truck stopped."

On cross-examination he testified as follows: "Q. I believe you stated a moment ago you were just a little to the north of the north line of Cass street on the west? A. Well, I was about five or six feet from the edge of the curbing. * * * Q. You were going south? A. South. * * * Q. In your judgment, what was the rate of speed of the Ford car? A. About 18 to 20 miles an hour. Q. The Ford car passed you immediately to your left? A. Yes, sir. Q. How far away from the west curb of Eighteenth street? A. Well, I should judge that he was not over 3½ feet away from the curbing. * * * Q. Who got onto the intersection first, Moschel, or the Ford car? A. Mr. Johnson—the

Ford car. * * * Q. How far had you observed the Moschel car coming? A. Up past the driveway into the filling station. Q. Could you give the jury an estimate in feet? A. Well, I should judge it would be about 60 or 75 feet. Q. From the west side of the intersection? A. The west side of Eighteenth street. * * * Q. But where had Johnson gotten in the intersection when he was hit; how far to the south had he gotten? A. Well, he was about ready to leave the intersection. * * * Q. And did the Moschel car go in a direct easterly course? A. Yes, sir. Q. Did Mr. Johnson go on in a direct southerly course? A. No; Johnson's car was throwed around. Q. No; I mean before he was hit? A. Oh; yes, sir. * * * Q. And went directly south, and the other went directly east? A. Yes, sir. * * * Q. Well, you figured there would be a collision? A. I think there would be; yes, sir. Q. And so your attention was riveted on the situation? A. Yes, sir. * * * Q. In your judgment, had Johnson's front wheel reached the south side of the intersection at the point of the collision? A. Yes, sir. * * * Q. Before you noticed, or at about the time you noticed, the Moschel car and saw Johnson's car pull up even with you, you observed the approach of the fire truck? A. Yes, sir. * * * Q. Well, within the block? A. Within the block, about half ways in the block, about, at that time. * * * Q. It was on the east side of the street? A. Well, it was—there was some cars parked, if I ain't mistaken, some cars parked on the east side of the street, and it naturally had to get away to clear them cars. Q. But it was nearer the east side than it was the west side? A. Oh, yes. Q. Now, when the crash or collision came, the Johnson car was thrown to the east? A. Yes, sir. Q. In your judgment, how many feet out of the line that it was traveling was it thrown east? A. It was thrown east so quick that I don't hardly think that the front end traveled over two feet after it was hit; of course, in the motion it was lunged over and then pounded right back. * * * Q. Now, Moschel went right on? A. Yes, sir; Moschel went right on and stopped after he got past the intersection 15 or 20 feet.

* * * Q. So that, when Johnson's car and Moschel's car collided, the fire truck was far enough away so that Moschel went right on in a direct course and cleared that fire truck, didn't he? A. No. Q. How? A. He lunged right into the fire truck. Q. No; I am speaking of Moschel. A. Oh, Moschel, yes, he cleared all of it. Q. Yes, Moschel went directly east? A. Yes. Q. He did not change his course? A. No, sir. * * * Q. So that the fire truck must have been some little distance south of the point of collision? A. Well, I should judge—of course, when the collision come, it kind of happened right away from the truck a little bit, but the truck traveling to the north there, and the other one to the south, I imagine it was a car length back. * * * Q. Now, Mr. Snyder, the collision between the fire truck and the Ford was at the front end or middle of the fire truck? A. It was at the front end of the fire truck. Q. You are sure of that? A. The left front wheel. * * * Q. When the Johnson car collided with the fire truck, did it tip it over? A. No, sir. Q. In your judgment it was at that time that Johnson went out of the car? A. That is, at the rebound when the truck hit it back, because that was what pushed the two men out of the car. * * * Q. So the collision between the Ford car and the fire truck, according to your statement, would be somewhat south of the intersecting line of Eighteenth and Cass? A. Well, I should say that it was about three or four feet south of the curbing line on the south side of Cass street. * * * Q. Then, Mr. Snyder, calling your attention to the Ford car and the Moschel car coming together, at the rate of speed that you have mentioned, neither slackened their rate of speed that you could tell, did they? A. No, sir. * * * Q. So the other car hit it; and how far would you say that it knocked the hind end east; as far as the center of Eighteenth street? A. Yes, sir. Q. Or, farther? A. Well, not much farther, not over a foot past the center. * * * Q. And it was there where it came in contact with the fire truck? A. Yes, sir; with the left side of the fire truck."

No other witness called by plaintiff testified to the manner in which either of the collisions occurred. They testified that they heard a crash, and to the location of Johnson's body, and of Johnson's automobile and the fire truck, after they had stopped. The evidence shows that the pavement of Eighteenth street is 60 feet wide and that of Cass street 40 feet wide, each street being 100 feet in width. On the west side of Eighteenth street was a four-story brick building standing about 40 feet north of the north line of Cass street and about 20 feet back from the west line of Eighteenth street. The 40 feet between Cass street and said Eighteenth street was unoccupied, but surrounded by a board fence six feet high. On the south side of Cass street and west side of Eighteenth street was a gasoline filling station, the driveway thereto coming on each street to within about 20 feet of the corner, and was about 30 and 35 feet in width at the curb line. This driveway passed on each side of the building occupied by the filling station. The distance from the south line of Cass street to the north line of the street south thereof was 284 feet. The driver of the fire truck and the party with him testified that at about the middle of the block south of Cass street he was going about 18 miles an hour, and was slowing down to cross Cass street when the Moschel car hit the Johnson car and threw it directly against the front end of the fire truck on the left side; that the brakes of the fire truck were immediately put on. The driver of the fire truck also testified that he saw the Johnson car coming south, when it was north of Cass street, at about 18 miles an hour, and that when the fire truck was about the middle of the block and just north of the alley he saw the Moschel car about 150 feet from the west line of Eighteenth street coming from the west at about 25 miles an hour, and that he had no idea that there would be a collision between the Moschel car and Johnson's automobile. He also testified that, had the Johnson car continued in the course it was going, he would have passed it when they met, with six feet clear between them.

There is practically no contradiction of any of the foregoing testimony. The only dispute or difference, in the testimony of the witnesses, is as to the location of the Johnson car, with reference to the south curb line of Cass street extended across Eighteenth street, at the time of its collision with the fire truck. The witnesses for the plaintiff testify that it was within a few feet, three to ten feet south of the curb line, while the city's witnesses put it on the curb line or a little north thereof. All the witnesses agree that Johnson's body, when the truck stopped, was just a few feet south of the street intersection about on the center line of Eighteenth street.

Appellant's assignments of error Nos. 3 and 7 complain of the withdrawal from consideration by the jury, by instruction of the court on its own motion, of the entire testimony of a witness called by plaintiff. The plaintiff, during the trial of the case, moved the court to withdraw the testimony of this witness. There was nothing in his testimony favorable to the defendants or either of them. If it was favorable to any party to the suit it was to the plaintiff. But it varied so from the other testimony of plaintiff's witnesses that it was unreliable. If it was error to strike out the testimony of this witness and instruct the jury to disregard the same, it was error without prejudice.

The other assignments of error relate to the giving of instructions by the court on its own motion and refusal to give instructions requested by the city. The court on its own motion instructed the jury on the doctrine of "the last clear chance," permitting the jury to base a verdict for plaintiff thereon. The court also gave to the jury an instruction authorizing a verdict against the city on the basis of our comparative negligence statute. The court refused to give an instruction requested by the city telling the jury that there was no question to submit to them under the doctrine of "the last clear chance." It also refused an instruction requested by the city telling the jury that no recovery could be had against the city on the basis of comparative negligence between the deceased and the driver

of said fire truck. The court also refused to instruct the jury, on the motion of the city, to return a verdict for the city.

The assignments of error relating to the giving and refusing of the foregoing instructions, together with the assignment that the verdict is not supported by the evidence, require the same consideration and discussion of the evidence.

One question to be determined is whether there is evidence of negligence on the part of the driver of the truck which was the proximate cause of the collision of the truck with the Johnson automobile. The negligence on the part of the driver of the truck, and the only negligence relied on in the brief of appellee, is, he "drove said truck at a high and dangerous rate of speed, and beyond the ordinance limit, and contrary to the statute of the state of Nebraska, * * to wit, 18 miles an hour;" that he "negligently and carelessly failed to have said truck under proper control and management at said crossing, and negligently and carelessly failed to keep a proper lookout for other vehicles using said crossing, and negligently and carelessly failed to slacken the speed of said truck as it approached said crossing, and negligently and carelessly failed to stop said truck before it ran over and killed the said Morris Johnson." The only evidence offered in support of said allegation of the petition was that relating to the speed of the fire truck and the distance it traveled after hitting the Johnson car. Appellee in her brief says: "The proximate cause of Johnson's death was the unlawful speed of the fire truck." The accident happened October 25, 1919. The statute (Laws 1919, ch. 222, sec. 28) in force at that time did not prescribe the rate of speed on approaching or crossing the intersection of streets in a city. It provided: "Within any city or village no motor vehicle shall be operated at a rate of speed greater than is reasonable and proper, having regard of the traffic and use of the road and the condition of the road, nor at a rate of speed such as to endanger the life or limb of any person." The ordinance

of the city of Omaha contained the same provision as the above statute, and further provided that driving in excess of 12 miles an hour at all intersections and at 20 miles an hour at other points not within the congested district should be presumptive evidence of driving at a rate of speed which is not reasonable, safe, or proper. The intersection of Cass and Eighteenth streets is not shown to be within said congested district. The rate of 18 miles an hour between the street intersection is not, therefore, contrary to the statute, nor to the ordinance, unless it was greater than was reasonable and proper, having regard of the traffic and use and condition of the road. Even if the rate of speed of the fire truck exceeded the limit provided by statute or ordinance, it would not be negligence *per se.*

"When a driver of a motor vehicle exceeds the speed limit provided by statute, such driving is not negligence *per se,* but is to be considered by the jury with all of the evidence and circumstances of the case in passing on the question of negligence." *Lady v. Douglass,* 105 Neb. 489.

It is also held that a rate of speed so forbidden affords reasonable grounds for inferring negligence. *Stevens v. Luther,* 105 Neb. 184; *Omaha Street R. Co. v. Duvall,* 40 Neb. 29. The speed of the fire truck did not constitute negligence *per se.* The condition of the traffic and road and the facts and circumstances connected with and accompanying the accident must, therefore, be shown by the evidence to be such as to constitute the speed of 18 miles an hour, under such circumstances and conditions, negligence, before it can be found that such speed of the fire truck was negligence on the part of the driver thereof. The facts and circumstances and condition of the traffic shown by the uncontradicted evidence in this case are; that the deceased was driving his automobile south on the right-hand side of Eighteenth street at about 18 miles an hour; the fire truck running north on the opposite side of said Eighteenth street at 18 miles an hour, in the block south of where the deceased was driving his car, the fire truck running just east of the center of the street on account of

automobiles parked against the east curb of said street; the Moschel car coming east from the west side of Eighteenth street, on the south side of Cass street, about 175 feet west of the west curb of Eighteenth street, running about 25 miles an hour, at the time that the fire truck was about 150 feet south of the south curb of Cass street. This condition of the traffic and road would in no way tend to make it negligence for the fire truck to be there driven at 18 miles an hour. No reasonable mind could come to that conclusion. The uncontradicted evidence further shows that Johnson drove his automobile south across Cass street at 18 miles an hour, and after the front end of his automobile passed the south curb of Cass street the Moschel car struck the right hind wheel of Johnson's car, throwing the car to the east and slightly south, so that the rear end of Johnson's car went a foot or so to the east of the center of Eighteenth street, where it struck the left front end of the fire truck, or the fire truck ran against it, as the fire truck was approaching the intersection at Cass street. We consider that the question as to where the Johnson car was hit by the fire truck is determined to be at the place claimed by plaintiff, i. e., three to six feet south of the south curb line of Cass street extended across Eighteenth street. The collision between the fire truck and the Johnson car threw Johnson out of his car and threw the car around so that it stood with the front to the south. Johnson fell out so that his head was caught under the left hind wheel of the fire truck; the brakes of the truck being set, the wheel slipped and did not roll over Johnson's head, but dragged Johnson's body along the pavement for about 10 feet, to a point a few feet south of the center of the street intersection, which center was 20 feet north of the south curb line of Cass street. The collision with the fire truck must have followed immediately after that with the Moschel car, and as soon as the Johnson car reached the point to the east to which it had been thrown by the impact with Moschel's car. This fact is shown, not only by the testimony of Snyder and the occupants of the fire truck, but also by the

fact that Johnson had not yet gotten out of his car, presumably from lack of time, to examine the damage to it caused by the collision with the Moschel car whereby the right rear wheel was broken. The witness, May K. Lawrence, called by plaintiff, testifies that she was going north on the east side of Eighteenth street, and that before crossing Cass street she heard a noise behind her, looked around, and saw the fire truck coming about half way back to the other crossing; that she took a few steps north, wondered if the truck was going straight ahead or was going to cross the street in front of her; that she was very close to the corner when the collision occurred, that is, to the south curb of Cass street; that she could not see just where the Johnson car was when the truck struck it, because the truck was between her and the car. She also testifies that she did not see or hear the collision between the Moschel car and the Johnson car. Other witnesses also testify to hearing the crash between the fire truck and the Johnson car, but that they did not hear the collision between the Moschel car and the Johnson car. This would indicate that the two collisions were so near each other in point of time as to be considered the same crash. If the Moschel car traveled at 25 miles an hour, it would travel the 175 feet from where the driver of the fire truck saw it approaching to where it struck the Johnson car in a little less than 5 seconds. The fire truck, if traveling 18 miles an hour, would travel the 144 feet to the point 3 feet south of the south curb line of Cass street in 5½ seconds. The two collisions must have happened, then, within a second of each other, and the Johnson car thrown into the course of or against the fire truck not more than a second before the collision with it. While the evidence of the speed of the vehicles and distances as to their relative positions are matters of opinion or estimate, and not actual measurements, the witnesses testifying to the speed all agree as to that of each of the three cars, and the same witnesses testify as to the distance of the cars from the streets. If not exact as to speed and distance, the variation would apply alike to

each, and the relative position of the cars when the Moschel car hit the Johnson car would be the same. No reasonable mind could believe, under the conditions thus shown, that the driver of the fire truck did see, in time to have avoided a collision with the Johnson car, that said car was in his course, or that he should have seen or anticipated that the Johnson car was, or would be, thrown into his truck. There was no evidence, therefore, to authorize an instruction to the jury that it could return a verdict against the city based on "the last clear chance" doctrine. The court, therefore, erred in giving such instruction, and in refusing to give the instruction requested by the city telling the jury that there was no question to submit to them under the doctrine of "the last clear chance."

Appellee argues that, had the fire truck been going slower, it would have been far enough away from the Johnson car after it had been thrown into its course for the fire truck to have been stopped and avoid the collision. It may likewise be said that, had Johnson been traveling slower and not crossed the intersection of Cass street at a speed exceeding 12 miles an hour—the ordinance rate—he would not have reached the south side of Cass street in time to have been hit by Moschel's car. If the speed of the fire truck was negligent, that of the Johnson car was equally negligent. Furthermore, if Johnson, on approaching Cass street, had looked to the west and kept a lookout for cars going east thereon, he would have seen Moschel's car coming at a rapid rate. The plat introduced in evidence shows that he could have seen from a point 100 feet north of the south curb of Cass street for a distance of at least 100 feet to the west of the west intersection line of Eighteenth street, had looked to the west and kept a lookout for cars going east thereon, he would have seen Moschel's car coming at a rapid rate. The plat introduced in evidence shows and saw Moschel's car, he was also negligent in crossing Cass street. These acts of negligence on Johnson's part contributed to cause the collision with the fire truck. No reasonable mind would say that the negligence of Johnson

in the speed of his car, and in crossing Cass street, was slight when compared with the negligence, if any, of the driver of the fire truck, and that negligence of the driver of the fire truck was gross.

"If, on the trial of an action 'brought to recover damages for injuries to a person or to his property caused by the negligence of another,' plaintiff is found to be guilty of negligence directly contributing to the injury complained of, he cannot recover, even though defendant was negligent, unless the contributory negligence of plaintiff was slight and the negligence of defendant was gross in comparison therewith; and if, in comparing the negligence of the parties, the contributory negligence of the plaintiff is found to exceed in any degree that which, under the circumstances, amounts to slight negligence, or if the negligence of defendant falls in any degree short of gross negligence under the circumstances, the contributory negligence of plaintiff, however slight, will defeat a recovery." *Morrison v. Scotts Bluff County,* 104 Neb. 254.

There were no conditions shown by the evidence which would warrant a comparison by the jury of negligence between the deceased and the driver of the fire truck. The court erred in giving its instruction allowing the jury to make such a comparison. It also erred in refusing to give the instruction requested by the city that no recovery could be had against the city on the basis of comparative negligence.

Unless there was evidence tending to show, and from which reasonable minds might believe, that the speed of the fire truck was the proximate cause of the death of Johnson, the verdict of the jury is not sustained by the evidence and the court erred in refusing to direct a verdict for the city.

"A party is only answerable for the natural, probable, reasonable, and proximate consequences of his acts; and where some new efficient cause intervenes, not set in motion by him, and not connected with, but independent of, his acts, not flowing therefrom, and not reasonably in the

nature of things to be contemplated or foreseen by him, and produces the injury, it is the proximate and dominant cause." *Kitchen v. Carter*, 47 Neb. 776; *Merkouras v. Chicago, B. & Q. R. Co.*, 104 Neb. 491.

"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." *Chicago, St. P., M. & O. R. Co. v. Elliott*, 5 C. C. A. 347.

"The concurring negligence of another cannot transform an act of negligence which is so remote a cause of an injury that it is not actionable into a cause so proximate that an action can be maintained upon it. It cannot create a liability against one who does not legally cause it, or make an injury the natural and probable result of a prior act of negligence which was not, or would not have been, such a result in its absence." *Cole v. German Savings & Loan Society*, 59 C. C. A. 593. The last two cases are cited with approval in *Spratlen v. Ish*, 100 Neb. 844.

Applying the foregoing rules of law to the facts uncontrovertedly established in this case, was the death of deceased the natural, probable, reasonable and proximate consequence, under the circumstances of this accident, of the speed of the city's fire truck? A new and efficient cause, not set in motion by the driver of the fire truck, and not connected with, but independent of, his acts, not flowing therefrom, is shown by the evidence to have intervened. Such intervening cause could not reasonably in the nature of things be contemplated or foreseen by the driver of the fire truck. The casting of Johnson in his automobile directly in the course of, or against, the fire truck by the said Moschel's car was that new and efficient intervening cause. No reasonable mind could arrive at the conclusion that the driver of the fire truck, observing the said approach of said cars, could anticipate or foresee

that one car approaching would or might cast the other car into his course so near him that he could not stop and avoid a collision, nor, in fact, that he could foresee or anticipate that it would be cast into his course at any point whatever, nor that he could anticipate or foresee that there would be a collision between the other two cars at the street intersection. The collision of the Moschel car with Johnson's car, thereby casting the latter car against the fire truck or into its course, was the proximate cause of the death of Johnson. The distance which the fire truck traveled after coming into contact with the Johnson car might aid in determining the rate of speed of the truck. If, however, the speed of the truck was not the proximate cause of the accident, that distance of travel could not make the speed the proximate cause. Negligence could not be inferred from the distance of travel, for the evidence showed, without contradiction, that the driver of the truck, on seeing there was to be the collision, did everything that could be done to stop the truck. The brakes were set and the wheels sliding from the time of the accident. The evidence does not tend to show, and does not show, that any negligence on the part of the driver of the city's fire truck was the proximate cause of the death of Morris Johnson. The verdict of the jury is not sustained by the evidence. The court erred in refusing to direct a verdict for the city.

The judgment against the city, appellant herein, is reversed and vacated, and this cause, as to the city of Omaha, is dismissed.

REVERSED AND DISMISSED.

MARGARET MCDONOUGH, APPELLANT, V. ADELAIDE MEANY ET AL., APPELLEES.

FILED MAY 6, 1922. No. 21970.

Easements. The owner of real estate made simultaneous deeds therefor whereby she conveyed the fee to one party and conveyed an

easement for a right of way across a portion of the ground to another. Neither deed made reference to the other, but the taker of the fee had notice that the taker of the easement had been, and then was, enjoying the use of the right of way, and claimed the right thereto, and that such right was recognized by their common grantor. Subsequently she conveyed the real estate to another, who likewise had notice of the existence of the right of way deed and the use of the ground by the grantee named therein. *Held*, that the grantee took the fee title subject to the easement of the right of way.

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

Murphy & Winters, for appellant.

Jamieson, O'Sullivan & Southard, contra.

Heard before MORRISSEY, C. J., ROSE and ALDRICH, JJ., RAPER and STEWART, District Judges.

MORRISSEY, C. J.

Plaintiff brought suit in the district court for Douglas county to have the title quieted and confirmed in her to a right of way across the south 10 feet of the west 40 feet of lot 1, block 22, of the original plat of the city of South Omaha, Douglas county, Nebraska. From a judgment in favor of defendants, plaintiff appeals.

Originally one Mary Fitzgerald owned a plot of land at the corner of Twenty-fourth and C streets with a frontage on Twenty-fourth street of 60 feet and a frontage on C street of 150 feet. She sold and conveyed by warranty deed to plaintiff the south 30 feet of the east 110 feet of this tract of land, and the deed of conveyance was placed of record and plaintiff went into possession of the premises and has continuously since that time occupied it as her home. Subsequently one Katharine Novak and her husband purchased the remainder of the tract of ground, and on May 27, 1914, Miss Fitzgerald conveyed the premises by warranty deed to Katharine Novak. On the same day Miss Fitzgerald executed and delivered a right of way deed to plaintiff for the ground in controversy. The record

does not show whether the warranty deed to Mrs. Novak or the right of way deed to plaintiff was first executed, but the deed to Mrs. Novak was first placed of record. May 14, 1919, Mrs. Novak and her husband conveyed to defendants by warranty deed a parcel of the ground theretofore purchased, including the ground covered by plaintiff's right of way deed. Defendants at once went into possession, and subsequently erected a gate across the so-called right of way and have excluded plaintiff from its use.

Defendants claim to be the absolute owners of the ground in controversy by virtue of their deed from Katharine Novak and her husband. The evidence shows that at the time plaintiff purchased the ground whereon she lives it was agreed between her and her grantor that an alley should be laid out beginning at the southwest corner of the tract where this claimed right of way begins and extending east 40 feet to the property purchased by plaintiff, then extending north to C street, thus giving the property purchased by plaintiff access to the public alley and to C street, as well as to Twenty-fourth street whereon the property fronted. Subsequently the plan to extend the alley to C street seems to have been abandoned. Plaintiff moved on to her premises in May, 1914. There was then no house on the ground now owned and occupied by defendants, but there was a house on the ground lying between plaintiff's property and C street. The evidence shows that, following plaintiff's establishment of a residence on her property, coal was hauled to her house over the so-called "L-shaped" alley. Trucks were driven in from C street and driven out over the right of way now in controversy, or they were driven in over the right of way from the public alley and were driven out by way of C street, or were driven in over the right of way in suit and driven out over the same route, until after defendants received their deed in 1919. Appellant contends that it is immaterial as to whether the deed from the original owner to the Novaks or the right of way deed to plaintiff was first recorded, if the

Novaks had actual knowledge of plaintiff's claim before making the purchase. It is said the defendants have no greater rights than their grantors would have if still the owners of the property; that plaintiff was in possession and was using the ground in controversy when the Novaks bought, and that the burden is on defendants to show that when their grantors purchased they had no actual knowledge of plaintiff's easement or had no knowledge of facts which would put a prudent person upon inquiry; that it is for them to show that they became *bona fide* purchasers for value without notice of plaintiff's claim.

Appellant's attorneys have made numerous assignments of error, but as the case is to be tried *de novo* in this court we shall not undertake to discuss these assignments, but shall consider the case on its merits and determine the controversy according to our view of the record. Without this right of way there is no means of ingress or egress to the rear end of plaintiff's lot; the lot fronts on Twenty-fourth street and is terraced up several feet above the street; deprived of the use of the right of way, coal and all other material used at the home must be carried up this terrace and across the lawn by the side of the house. Ashes and other waste matter must be carried out over the same route. The evidence sufficiently shows that prior to the purchase of defendants' grantors this had never been done, but such use had been made of the ground in controversy as was necessary in bringing coal and other material to plaintiff's house. This use, to be sure, did not call for any considerable use of the ground, but it was sufficient to show that it was so used. The testimony on behalf of plaintiff so shows, and in addition thereto, from the testimony of Mr. and Mrs. Novak, given on behalf of defendants, it appears that they had knowledge of such use of the ground by plaintiff before they purchased, but they testified that they were assured by their grantor that plaintiff was without legal right to the use of the premises and that her use thereof was permissive only. Their testimony shows also that before they took their deed Mrs. Novak and plaintiff

had a telephone conversation regarding this right of way. There is some conflict in the testimony of these two witnesses as to that conversation. Plaintiff testified that Mrs. Novak called her up and asked "If we had a driveway there. * * * I said, 'Yes.'" Continuing, she testified that Mrs. Novak told her that the record did not so show. Plaintiff testified that, immediately upon being informed by Mrs. Novak that her deed did not cover the right of way, plaintiff went to her attorney, who drafted a right of way deed for the ground, and she took it to her original grantor, who accompanied her to the office of the same notary public, who on the same day took the acknowledgement to the deed conveying the ground in question to Mrs. Novak, and there it was in his presence executed, acknowledged and delivered to plaintiff; that subsequently, and before the Novaks sold the property to defendant, plaintiff had a conversation with the Novaks wherein they sought to effect an exchange of other ground for the driveway in controversy.

In reaching a conclusion as to the rights of the respective parties, we are not bound by their oral testimony alone, but may in determining the weight to be given to the testimony consider the surrounding circumstances and the conduct of the parties. Soon after the Novaks secured their deed they had a wall erected from the northwest corner of plaintiff's lot south along the line between her property and that of plaintiff for 20 feet. It is significant that this wall was not extended to the south line of the lot, but only to the point where it touched this right of way. If the Novaks did not then understand that plaintiff had a right to use this strip of ground, why did they not continue this wall the remaining ten feet to the lot line? The contractor who erected the wall testified that he had directions from Mr. Novak to leave this ten feet unobstructed; that Mr. Novak said "there was a driveway on that ten feet and that it had to be left clear for them to drive through." This witness testified further that, in a conversation had with Mr. and Mrs. Novak with regard to the location of the house they were about to build on the

premises soon after their purchase, "they said that, in preparing the plans, we would have to leave that ten foot along there * * * for a driveway." A woman who was living in the house on the property at the time of its purchase by the Novaks testified that Mr. and Mrs. Novak called at her house to inspect the property, and that she had a conversation with them with reference to any right of way that might be on the premises. Her testimony in part is as follows: "Q. What was said by you and by them there as nearly as you can remember? A. Well, as nearly as I can remember, Mr. Novak asked if the lot extended to the terrace there, that would be to that vacant lot, and Miss Fitzgerald had told me to tell any prospective buyers that there was a ten-foot road there or driveway that belonged to Mrs. McDonough next door. Q. Did you tell the Novaks that? A. Yes, sir." This witness testified that Mrs. McDonough had told her that she owned the driveway, and, further, that Mrs. McDonough used the driveway. She testified also that, when Mr. and Mrs. Novak put what the witness designates as the large house (the house now owned by defendants) on the lot, Mrs. Novak said to the witness that she wanted Mrs. McDonough to exchange her ten feet back of the new house (the right of way) for another right of way because the right of way made the lot too short. This witness testified further that the driveway had been surveyed and that the surveyor's stakes were there before the Novaks purchased. The notary public who drew the deeds executed by Miss Fitzgerald showed the property to Mr. and Mrs. Novak before they made the purchase, and he testified that they were informed that there was to be a driveway from C street to give access to the lot owned by Mrs. McDonough, but at the time of the consummation of the sale it was then agreed to change the driveway from the north entrance to the west entrance; and that this conversation was had before the delivery of the deed.

The original owner of all the property had deceased before the controversy arose. Mr. and Mrs. Novak had left

Nebraska, but their depositions were taken and form part of the record. These witnesses testified that while negotiating for the property the owner assured them that plaintiff had no deed to the right of way and had oral permission only for its use. They denied having knowledge at the time of purchase of plaintiff's right of way deed; denied that they ever recognized any right in plaintiff to the right of way.

There is a strong showing as to the damage and inconvenience to defendants in case plaintiff prevails in this litigation; however, that is a matter we are not free to consider. In view of all the evidence, direct and circumstantial, we reach the conclusion that when the Novaks purchased they knew that plaintiff had the right to use this strip of ground as a right of way. They continued to recognize plaintiff's right until the opportunity was presented of making a sale, when, without any reservation in their deed, they conveyed the property to defendants. Defendants, like their grantors, purchased with knowledge of plaintiff's claim to the land, for, in addition to her use of the ground, her deed was of record. They took title subject to plaintiff's easement. See *McParland v. Peters*, 87 Neb. 829, and authorities there cited.

There is testimony which indicates that plaintiff has undertaken to use this ground for purposes other than as a mere right of way. She has no such right. Her right consists only in the reasonable use of the premises for the necessary ingress and egress to her lot. Defendants' house is said to encroach six inches upon the right of way, but this is not such an encroachment as to inconvenience the plaintiff, and while the present building stands defendants will not be disturbed in their use of the ground on which this part of the house is situated. The judgment of the district court is reversed and set aside and the cause remanded, with directions to enter a decree in harmony with this opinion.

REVERSED.

FRANK HAJEK, JR., APPELLEE, V. MARY HAJEK ET AL., DEFENDANTS: ALICE FULLER ET AL., APPELLANTS.

FILED MAY 6, 1922. No. 22075.

Specific Performance: ORAL CONTRACT: EVIDENCE: PART PERFORMANCE. In an action for specific performance of an oral agreement with a person now deceased to convey land, the terms of the contract must be established by evidence that is clear, convincing and satisfactory; but in a case where there is direct testimony to the making of the contract, and also clear and undisputed testimony as to part performance by the person to whom the property was to be conveyed, a court of equity may properly enforce the contract to convey.

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

Hoagland & Carr and *P. W. Scott,* for appellants.

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

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

LETTON, J.

The purpose of this suit is to procure specific performance of a contract which plaintiff alleges his father, Frank Hajek, now deceased, made with him, upon a valid consideration, to convey to him a certain tract of land. Defendants are the widow, the administrator, and the other heirs of deceased. The court awarded specific performance. Defendants appeal.

The evidence shows that in September, 1913, when plaintiff was over 21 years old, a contract of purchase and sale was made between one Karre and Frank Hajek, deceased, for the purchase of a section of land in Hayes county. The price was $13,000; $1,000 was paid in cash, and the balance was to be paid in annual payments, the last falling due on April 1, 1919. The scrivener, who drew the contract, testified that the purchaser, Hajek, Sr., desired the mortgage

to secure the deferred purchase money drawn so as to cover only one-half section of the land, saying that "he wanted the east half of it for Frank, his son, and he did not want the contract made so that it would be all to him." Mr. Karre testified that the first conversation about the land was at a sale when Frank Hajek, Sr., wished to purchase from him the east half of section 14; that he said, "I will buy that for Frank;" that he told Hajek he would not sell a half section, and Hajek then bought the whole of section 14; that afterwards Hajek wanted two separate deeds made, one conveying the east half of the section to plaintiff, and the other the west half to himself, and wanted the mortgage made upon the west half section; that Hajek said the boy had earned the land, but witness told him he had to protect himself, and that he refused to accept a mortgage on the half section alone as security. It seems that during the war there was a rumor that the son had been killed, and Hajek then told the witness he had bought the land on purpose for his son, and that now he was killed and everything was gone. Testimony is given, as to these and other statements and declarations of deceased, by other witnesses having no interest in the controversy. The east half of the section was spoken of by deceased and by other members of the family as "Frank's land." One who wished to rent the house on the land was told by the father to see Frank, that he owned it. He also told the assessor that the land belonged to Frank. It is admitted that $490 of the compensation to plaintiff from the government for military services was received by the father and applied upon the purchase price.

The most direct and definite testimony as to the contract is that of Mrs. Hajek, the widow of deceased, who testified that, when the father found he would have to buy the whole section in order to obtain the east half, he came home, and an agreement was then made between Frank and his father that Frank should stay at home and help him pay for this land, and that when it was paid for he would deed it to Frank; that Frank did stay until he was

called to service, and has been home ever since.

It is admitted that certain other witnesses would testify, if present, that they heard the father state that the land in controversy was bought for the son, Frank, had been earned by him, and had been designated as his.

The testimony on the part of the defense does not militate very strongly against that produced by the plaintiff; in fact, some of it corroborates that of plaintiff's witnesses. The fact was elicited that after the plaintiff came home from France he worked for his brother-in-law, Fuller, upon this particular tract of land for two months for wages, but it is shown that Fuller had become a tenant of it in plaintiff's absence, and that plaintiff is now in possession, cultivating the land.

A direct and distinct agreement was made that if the son, an adult person, would remain upon the farm, and apply his earnings to the payment of the mortgage debt, the father would convey the land to him when the mortgage was paid. The undisputed evidence shows that the father intended to have the conveyance made to plaintiff by Mr. Karre at the time the deed and mortgage were executed, but that this was not done on account of the refusal of Karre to accept a mortgage upon one-half of the section of land purchased. The plaintiff carried out his portion of the contract by contributing his services, remaining upon the land until he went into the service of the United States, and devoting what appears to be the greater part of his compensation while in the service to the purpose of carrying out his contract. When he returned he resumed performance.

These facts bring the case within the rule of *Kofka v. Rosicky,* 41 Neb. 328; *Peterson v. Estate of Bauer,* 76 Neb. 661; *Harrison v. Harrison,* 80 Neb. 103; *Rine v. Rine,* 100 Neb. 225; *Warnick v. Warnick,* 107 Neb. 747. It is not clear from the evidence that the mortgage has been paid in full. The petition prays for specific performance of the contract to convey the land free and clear of all incumbrances. The decree makes no reference to the incumbrance,

and hence plaintiff takes the land subject to whatever liens there may exist upon it. He makes no complaint of this.

Complaint is made with respect to the competency of some of the witnesses. It is said Mrs. Hajek was incompetent as a witness, under section 7894, Rev. St. 1913, relating to transactions with a person now deceased. Mrs. Hajek did not testify to any transaction that she had with the deceased, but merely related a conversation, which she heard, in which she took no part. This is not prohibited by the statute. *Kroh v. Heins*, 48 Neb. 691; *In re Estate of Powers*, 79 Neb. 680; *McNea v. Moran*, 101 Neb. 476. There was no error in the reception of this testimony; nor was there error in the reception of the testimony of the other witnesses who, it is argued, were not competent to testify.

We adhere to the views expressed in *Remaly v. Sweet*, 106 Neb. 327, and *Overlander v. Ware*, 102 Neb. 216, that such an alleged contract must possess the element of certainty, and the proof to establish it must be clear and satisfactory; but, when all the evidence in this case is taken into consideration, these requisites have been supplied, and the decree, so far as it awards specific performance, is affirmed.

Complaint is made that the decree as to costs operates to compel the adult defendants to pay the fee of $50, allowed to the guardian *ad litem* of the infant defendants. The decree in respect to costs is as follows: "That the plaintiff recover from the defendants Alice Fuller and Agnes Viersen their costs herein expended, taxed at $——; that there be and hereby is allowed an attorney's fee for the guardian *ad litem*, in the sum of $50, to be taxed as a part of the costs of this proceeding."

We do not understand this to mean that the costs of the infant defendants are taxed to the adult defendants. The decree provides that plaintiff shall recover from the adult defendants "their costs." It should be corrected to read as follows: "That the plaintiff recover from the adult defendants, except guardian *ad litem* fees, *his* costs herein

expended, taxed at $———." The theory of the taxation of costs is that each party pays his own costs as they are incurred, and that the successful party recover his costs from the unsuccessful party. He is not entitled to a judgment for the defendants' costs, but only for his own. The guardian *ad litem* fees in this case may properly be said to be costs of the plaintiff and should be paid by him. These costs were not necessitated by the adult defendants, nor could they have been obviated by them.

It is therefore ordered that the plaintiff pay the guardian *ad litem* fees and that he shall not be allowed to recover such fees from the defendants.

The decree as to costs is modified, and otherwise is affirmed.

AFFIRMED AS MODIFIED.

WILLOE C. GREGORY, APPELLEE, V. AMERICAN BANK BUILDING COMPANY ET AL., APPELLEES: GEORGE C. FLACK, INTERVENER, APPELLANT.

FILED MAY 6, 1922. No. 22460.

1. **Lease:** ASSIGNMENT: PAROL EVIDENCE. It is competent to prove by parol evidence that the parties to an assignment of a lease of real estate, though absolute in form, intended it as collateral security for a debt.
2. ———: ASSIGNMENT AS COLLATERAL. An assignment of a lease of real estate and a separate option permitting the assignor to repurchase the lease may be treated as security for a debt, if the parties so intended.
3. **Attachment:** INTERESTS OF LESSEE. The interests of lessee in a lease of real estate may in a proper case be attached by his creditors.

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

William Baird & Sons and *T. F. Wiles*, for appellant.

Hastings, Ritchie & Canaday, Palmer, Taylor & Palmer and *Smith, Schall & Howell, contra.*

Heard before DAY, DEAN, FLANSBURG and ROSE, JJ.

ROSE, J.

This is a controversy over the nature of an assignment of a lease. The attitude of the assignee is that the assignment transferred to him the indefeasible title of the assignor. The other litigants take the position that the assignment is collateral security for debts.

The facts out of which the controversy arose are somewhat complicated. The leased property is used for rental purposes and consists of a lot and a building thereon at the southwest corner of Nineteenth and Farnam streets in Omaha. Harold Gifford, Willson O. Bridges and Wilson T. Graham owned the fee and leased the property to Marion F. Shafer, Ward E. Shafer and Lee M. Swindler May 1, 1919, for a term of 99 years at an annual rental of $16,000, payable in quarterly instalments of $4,000 each. The lessees transferred the lease November 4, 1919, to the American Bank Building Company, hereinafter called the "Building Company." The litigation was commenced by Willoe C. Gregory, plaintiff, December 23, 1920, against the Building Company to recover damages for false representations in the sale of stock. The Building Company assigned the lease to George C. Flack February 8, 1921, but he did not have it filed for record until March 11, 1921. In the meantime plaintiff attached the leasehold March 2, 1921, and later garnished the rents in the hands of the tenants. Flack intervened in plaintiff's action June 10, 1921, and pleaded his interests as an assignee or as an innocent purchaser of the lease. Judgment was rendered against the Building Company in favor of plaintiff July 16, 1921, for $2,690.33. Judgment was also rendered against the Building Company September 6, 1921, for $2,193.30 on a similar cause of action in favor of Louise Schoepflin, an intervening defendant. September 14, 1921, Stanley P. Bostwick was appointed receiver of the Building Company with authority to collect the rents from the tenants occupying the leased premises. On is-

sues raised by the pleas of Flack and the other litigants, including the Building Company, the trial court decreed, among other things, that Flack's assignment is collateral security for debts owing by the Building Company to him in the sum of $17,777.50; that plaintiff has a prior lien for $2,487.31 on the funds in the hands of the receiver, and that intervener Schoepflin has also a lien thereon for $2,198.30, which is inferior to plaintiff's but superior to Flack's. From this decree Flack has appealed.

It is argued on behalf of Flack that he is the absolute owner of the lease under a written assignment or contract of purchase which cannot be contradicted or varied by parol evidence. The negotiations between Flack and the Building Company resulted in the execution of two instruments. One was the assignment, absolute in form; the other was an option permitting the Building Company to repurchase the lease by August 1, 1921. The option was not exercised within the time limited, and it is insisted that the contract was a conditional sale which became absolute on the date mentioned. The position thus taken seems to be untenable. It is competent to prove by parol evidence that the parties to an assignment of a lease of real estate, though absolute in form, intended it as security for a debt. The two instruments in question are subject to that rule.

It is contended, however, that the evidence is insufficient to sustain a finding that the lease was assigned to Flack as collateral security for the debts of the Building Company. This does not seem to be the proper view of the record. There is proof that the parties to the assignment intended it to be collateral security. Circumstances confirm that conclusion. There is testimony to show the following facts: Part of the original consideration for the lease was $40,000 paid in cash. The Building Company was embarrassed by litigation and debts and applied to Flack for a loan. Representatives of the Building Company were called to the office of Flack and there found that the lease and the option had already been drawn. The

nature and the purpose of the instruments were discussed. Owing to the character of the property or leasehold, an assignment was demanded instead of a mortgage. An agent was selected to collect the rents for the benefit of the Building Company. The giving of notes was mentioned, but the amount of money needed by the Building Company was not definitely known and Flack's attorney said that notes were not to be given. Flack was to advance at the time $4,000 and additional sums to protect the lease. He did not take possession of the leased premises or collect the rents from the tenants—rights accruing under an absolute assignment. In his behalf there is proof of a different import, but the more convincing evidence leads to the conclusion that the assignment was in fact collateral security for money which Flack agreed to advance to creditors of the Building Company. The latter's interests in the lease were subject to the attachment which was levied before Flack filed his assignment. In this view of the facts and the law, there does not seem to be any error in the decree of the district court.

AFFIRMED.

WALTER K. BEAUCHAMP, APPELLEE, V. DORSEY LEYPOLDT ET AL., APPELLANTS.

FILED MAY 6, 1922. No. 21939.

1. **Trial:** INSTRUCTIONS. A party to an action is entitled to have the jury instructed with reference to his theory of the case, when such theory is pleaded and supported by competent evidence.

2. **Bailment:** GRATUITOUS BAILEE: DUTIES. Where a tenant at the expiration of his tenancy leaves upon the premises a harvested crop in the field, in the absence of some undertaking or permission on the part of the incoming tenant, the incoming tenant owes no duty to protect such property, except to refrain from wanton, reckless, or wilful acts which would injure or destroy such property.

3. ———: ———: ———. In such case, where the incoming tenant gives permission to the outgoing tenant to leave his property on the premises, with the assurance that it will be protected, the

incoming tenant thereby becomes a gratuitous bailee for the benefit of the outgoing tenant, and is liable for any injury or damage to the property occasioned by his gross negligence or bad faith.

APPEAL from the district court for Lincoln county: HANSON M. GRIMES, JUDGE. *Reversed.*

Hoagland & Carr, for appellants.

Halligan, Beatty & Halligan, contra.

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

DAY, J.

Action for damages against defendants for negligently permitting their cattle to destroy a quantity of cane belonging to the plaintiff. The trial resulted in a verdict for the plaintiff for $474.58, upon which judgment was rendered. Defendants appeal.

The principal errors relate to the failure of the trial court to properly instruct the jury.

It appears from the record that the plaintiff had leased from the owner a certain quarter section of land for the year ending March 1, 1919, upon which he had put up a number of tons of hay, and also grew and harvested in 1918 about 20 acres of cane. On March 1, 1919, two-thirds of this cane was in the shock, and the remainder lay in bundles upon the ground as it fell from the machine. At the expiration of the lease this cane and about 15 tons of hay in the stack were still upon the premises. The land leased by the plaintiff was a part of a large ranch of some 4,800 acres. This ranch, including the land occupied by the plaintiff, was leased by the owner to the defendants for ranching purposes for a period of years commencing March 1, 1919. At the commencement of their lease the defendants placed upon the ranch 540 head of cattle, placing them in charge of a herder, and in the first instance kept them north of the premises upon which the plaintiff's property was located. There was a fence along the north

side of the half section between the cattle and the plaintiff's property. The cattle were turned in upon this half section about March 6. After the cattle were turned in upon this half section, a slough and a ditch lay between them and the plaintiff's cane field. The cattle drifted toward the cane field, and on the morning of March 16 crossed the ditch and slough, entered upon the field, and completely destroyed the plaintiff's cane. The plaintiff testified that on March 5 or 6, he had a conversation with Mr. Moore, one of the joint defendants, concerning his field of cane, in which Moore told plaintiff not to worry about the cane; that the defendants would not harm it. Plaintiff also testified to a conversation on March 13 as follows: "On Friday I called Mr. Moore at Hershey, and told him I was afraid these cattle would get in on me. He told me not to worry; he had a man to look after the cattle, and would see that they did not get in on me." Replying to these conversations, Moore testified that on March 5 he told the plaintiff that the defendants had bought the "tops and bottoms" on the land occupied by the plaintiff, and were going to put the cattle thereon, and whatever feed plaintiff had there, to get it out, and that plaintiff replied that he would do so as quickly as he could. He was then asked specifically, "What, if anything, was said by you he was not to worry about?" and answered, "Never said nothing about worrying. I told him to move it. We wanted to feed there." The plaintiff's testimony further tends to show that after the expiration of his lease he was engaged in removing the hay, and had just finished the day before the cattle entered upon the cane. It is undisputed that the cane field was very soft and muddy, and the ground in such condition that a team could not drive upon it without great difficulty; that the horses would sink to their knees. It is further shown that defendants' cattle were in charge of a herder in the daytime, but were not under any restraint during the nighttime.

One of the errors assigned is that the court erred in failing to instruct the jury upon the issue of abandonment

by the plaintiff of his cane. This issue was properly pleaded as a defense, and there was evidence which tended to support it. The defendant Moore testified that about March 10 or 11, he called up the plaintiff and told him that their man had called up and said he could not keep the cattle back longer, and that he (plaintiff) must get his feed out, and that the plaintiff replied "that there was only a little feed left, and to let them go." This conversation was denied by the plaintiff. We think the court erred in failing to submit this issue to the jury. The rule is well settled that a party to an action is entitled to have the jury instructed with reference to his theory of the case, when such theory is pleaded and supported by competent evidence. *Hauber v. Leibold,* 76 Neb. 706.

Defendants also urge that the court erred in giving instruction No. 4. This instruction in effect told the jury that there was no dispute but that the plaintiff was the owner of the cane in question; that defendants' cattle destroyed it; and that the only question to be determined by the jury from the evidence was the value of the cane destroyed. Defendants contend that this instruction withdrew from the consideration of the jury the issue of defendants' negligence. We are inclined to agree with this contention. If, as claimed by the plaintiff, his cane was upon the premises by the permission of the defendants, with the assurance on their part that it would be protected, then defendants thereby assumed the obligations of gratuitous bailees for the benefit of the bailor, and would be liable to the plaintiff for injury to the property arising out of their gross negligence or bad faith. *Burk v. Dempster,* 34 Neb. 426. If, as claimed by the defendants, they gave no permission to the plaintiff to leave his property on the premises, and gave no assurance that it would not be harmed by their cattle, then we think the defendants owed no duty to the plaintiff to protect his property, except to refrain from wanton, reckless, or wilful conduct which would injure or destroy the property. Under the issues and evidence in the case, we think the instruction as

given was erroneous. In any view which may be taken, we think the court should have submitted to the jury under appropriate instructions the question of negligence on the part of the defendants.

A number of other errors are assigned, but as they are not likely to occur upon a retrial we deem it unnecessary to consider them.

For the errors pointed out, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

BROWN REAL ESTATE COMPANY ET AL., APPELLANTS, V. LANCASTER COUNTY ET AL., APPELLEES.

FILED MAY 6, 1922. No. 22212.

1. **Highways**: PAVING: PETITION: SIGNING: STATE OFFICERS. Under section 1, ch. 215, Laws 1919, wherever a paving district is created by the board of county commissioners which includes property belonging to the state, the officers having in charge state institutions are authorized to sign a petition requesting the board to proceed with the improvement.

2. ———: ———: ———: ———: ———. In such case, a petition signed, "Board of Commissioners of State Institutions, by Henry Gerdes, Chairman," requesting the improvement to be made, is a sufficient compliance with the law to authorize the board of county commissioners to count the state's property as favoring the improvement.

3. ———: ———: ———: ———: ———. The board of commissioners of state institutions are the officials in charge of state institutions as contemplated by section 1, ch. 215, Laws 1919.

4. ———: ———: ———: IMPROVEMENT DISTRICT. Where a paving improvement is proposed under chapter 152, Laws 1917, there is no legal objection to including in the petition for the improvement more than one road, where the improvement contemplates one connected system or unit of paving.

5. ———: ———: ASSESSMENTS: RECOVERY. Section 4, ch. 200, Laws 1915, gives to an aggrieved party a right to maintain a civil action to recover so much of a special assessment paid as such party shows to be illegal, inequitable and unjust, provided

he has complied with the conditions precedent as set forth in said section, and not otherwise.

6. ——: ——: ——: ——: PLEADING. A petition to recover so much of a special assessment as is illegal, inequitable and unjust, based upon the provisions of section 4, ch. 200, Laws 1915, which fails to allege that the aggrieved party made complaint to the county board sitting as a board of equalization, does not state a cause of action.

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

Field, Ricketts & Ricketts, for appellants.

Charles E. Matson, Harry R. Ankeny, Max G. Towle and *Cosgrave & Campbell, contra.*

Peterson & Devoe and *W. B. Comstock, amici curiæ.*

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

DAY, J.

This action was brought by several parties plaintiff, who were similarly situated, against the county of Lancaster, to cancel and set aside a certain special assessment levied upon their respective properties, lying and being within paving district No. 38 of Lancaster county, also to recover the amount of the first instalment of said assessment paid by the respective parties under protest, and to quiet the title of said respective parties in their lands as against the record lien of said special assessment. The petition was based upon the theory that the board of county commissioners had no authority or jurisdiction to order the improvement made, and were consequently without power when sitting as a board of equalization to levy an assessment upon the property within the district to pay for the same. The trial court sustained a demurrer to the petition, and entered judgment dismissing the action. Plaintiffs appeal.

The main question raised by the demurrer goes to the sufficiency of the petition to state a cause of action. The

petition is too voluminous to be set out in an opinion, but we think the contentions of the parties will be understood from the following discussion:

It appears that on May 19, 1919, the board of commissioners of the county of Lancaster, hereinafter referred to as the board, acting under the provisions of chapter 152, Laws 1917, duly passed a resolution creating and establishing paving district No. 38. The resolution specifically described the roads to be paved, the territory to be embraced within the district, and recited that the county would aid in the improvement out of the county paving fund to the extent of $10,000 a mile, and that the balance of the cost, less any state or federal aid which might be extended, should be assessed against the property within the district in proportion to the benefits derived from the improvement. The paving within the district embraced approximately 3,000 acres, of which about 900 acres were owned by the state of Nebraska, and comprised the grounds upon which the hospital for the insane and the state penitentiary are located. The paving district in question lies immediately adjacent to the city of Lincoln, and the roads included within the improvement are so situated with reference to each other and with certain paved streets of the city of Lincoln as to form a "loop" passing the two state institutions above named. From this loop the paving extended a distance of half a mile further into the country along what is denominated Fourteenth street. In a general way the improvement may be described as follows:

Commencing at a point on the boundary of the city limits where Park boulevard intersects South street, the paving extends in a southwesterly direction along Park boulevard for a distance of approximately three-fourths of a mile to Van Dorn street, thence west on Van Dorn street one-half of a mile, thence south one mile, passing the State Hospital grounds, thence east one and one-half miles, passing the State Penitentiary, to the highway known as "Fourteenth street," from which point the improvement extends south one-half of a mile, passing the State Penitentiary, and also

north about one and one-half miles, connecting at the city limits with city paving.

Following the creation of the paving district certain property owners therein filed petitions with the board requesting that the roads designated in the resolution be paved. Among the petitions so filed was one representing the 900 acres owned by the state of Nebraska, which was signed, "Board of Commissioners of State Institutions, by Henry Gerdes, Chairman." Thereafter the board referred the petitions to the county surveyor to ascertain and determine the aggregate frontage of the roads designated for improvement, and the aggregate frontage of property the owners of which had petitioned the county board to proceed with said paving, and determine whether the necessary frontage chargeable with the cost of the proposed improvement had signed the necessary petitions. The surveyor reported that the frontage represented by petitioners for the paving was more than 50 per cent. of the total frontage chargeable with the cost of the proposed improvement, and the board, relying on the report, found accordingly, and thereupon ordered the roads designated for improvement to be paved. While the finding of the board was not, strictly speaking, a finding that the owners of a majority of the property within the district chargeable with the cost of the improvement had signed petitions requesting the work to be done, we will so treat it, as it was conceded upon the argument that, if the petition representing the state's lands be excluded, the owners of a majority of the property within the district had not petitioned for the improvement.

On behalf of the plaintiffs it is urged that the petition signed, "Board of Commissioners of State Institutions, by Henry Gerdes, Chairman," should not have been counted as favoring the improvement, for the reason that there is no authority in the law for the state to sign such a petition, and, assuming that there be such authority, that it was not properly exercised. On the other hand, the defendant contends that such authority has been given, and

that it was properly exercised. Both sides rely upon chapter 215, Laws 1919, to support their respective contentions. Section 1 of the act reads as follows:

"Wherever any paving district is created along or adjacent to any state institution or the state fair ground, the officers having in charge state institutions, or the fair grounds, are hereby authorized and empowered to sign petitions in the name of the state, to create paving districts."

Section 3 of the act is as follows: "That for the purpose of paying the state's share of the cost of such paving in paving districts which have been or shall hereafter be fully organized, * * * there is hereby appropriated from the general fund in the treasury, the sum of $100,000."

We are called upon to determine whether the provisions of the act above quoted are broad enough to authorize the officers named to sign a petition on behalf of the state requesting the county board to proceed with the improvement. In the interpretation of statutes the cardinal rule to be observed is the ascertainment of the legislative will, and the courts in seeking the intent of the lawgivers will consider the object which the legislature sought to obtain, the language used, as well as other laws *in pari materia,* and will, if possible, harmonize all of the law upon a given subject and give meaning to every part thereof.

The law in reference to the general subject of paving in this state has now become fairly well settled. The first step in the process is the creation or establishment of a paving district. As applied to the situation now before us, this is done by a resolution of the board of county commissioners, defining the territory embraced within the district, designating the roads to be improved, and containing other information for the benefit of property owners, such as the amount of aid which will be extended by the county. The power of the board to create a paving district is in no wise dependent upon a petition of the property owners, although it is not infrequent that the action of the board is prompted by the solicitation of property owners. The second step is a petition of the owners of a majority of the

property in the district, computed on the zone basis, which is chargeable with the cost of the improvement, requesting the board to proceed with the improvement.

Section 1, ch. 152, Laws 1917, after authorizing the board, in counties having a city of the first class, "to grade and pave, repave, gravel, or macadamize any road, highway or boulevard in said county outside the corporate limits of such city and other cities and villages," further authorizes such board to create suitable road improvement districts comprising lots, tracts, or parcels of land abutting on, or adjacent to, or in the vicinity of, such road, highway or boulevard, which are specially benefited by such improvement. The section further provides that the paving districts shall be created by resolution, which shall designate and fix the proportion of the total cost of the improvement which shall be paid out of the county paving fund, and that the remaining cost of the improvement shall be paid by a special assessment upon the lands in such district in proportion to the benefits from such improvement. The section then recites:

"Provided, however, no such work and improvements shall be finally ordered or constructed unless a petition shall be signed by the owners of a majority of the property chargeable with the cost of the improvement or part thereof, such majority to be computed on the following basis: The district shall be divided into six equal zones on each side of the road, highway or boulevard to be paved and improved, the same to run parallel with said road, highway or boulevard, and all property in the first zones directly abutting on said road, highway or boulevard, shall be computed on the basis of fifty per cent. of the total area space in said district, and all property in the second zones twenty-five per cent., in the third zones ten per cent., and the fourth, fifth and sixth zones five per cent. each, which petition shall be filed with said board. * * * Upon the filing of such petition it shall be mandatory upon said board to at once proceed with such work and improvements, if there shall be available in said county paving fund a sufficient

amount to pay the proportion of the cost payable from such fund."

It will be noted that a petition of the owners of a majority of the property chargeable with the cost of the improvement is necessary before the board is authorized to proceed with the work, and, when such a petition is filed, it is then the board's duty to proceed with the improvement, if there are funds available for that purpose.

What, then, did the legislature have in mind in enacting chapter 215, Laws 1919, which has been heretofore set out? Did it mean simply to authorize the officers therein named to sign a petition "to create paving districts?" We think such an interpretation is too narrow a view to give to the act. In the first place, as has heretofore been said, a petition addressed to the county board to create a paving district is entirely unnecessary; so that, if it were held that the act merely authorized the signing of a petition "to create paving districts," we would ascribe to the legislature the doing of a futile and unnecessary thing. Besides this, if the act be literally construed, we have the legislature saying that, whenever any paving district is created along or adjacent to any state institution, the officers named are authorized to sign a petition in the name of the state to create the district. We are not willing to believe the legislature intended such a futile and meaningless thing to be enacted into law. Construing the act of 1919 in connection with other laws *in pari materia,* it seems more reasonable and logical to believe that the legislature intended to authorize the officers named to sign petitions representing the state's property requesting that the improvement be made, and that the state's signature favoring the improvement should be counted the same as any other owner of a like amount of property.

It is true that an assessment could not be levied against the state's property, in the sense that if it were not paid the property could be sold to satisfy the assessment, but in the sense that the amount of special benefits to the state's property should be determined and paid was, we

think, clearly within the intendment of the legislature. This, we think, is shown by the fact that an appropriation was made amply sufficient to cover the amount of special benefits, which it might be determined the state's property received by the improvement.

We are, therefore, of the view that under section 1, ch. 215, Laws 1919, wherever a paving district is created by the board of county commissioners, which includes property belonging to the state, the officers having in charge state institutions are authorized to sign a petition requesting the board to proceed with the improvement.

Plaintiffs next contend that, if it be assumed that the officers named were authorized to sign petitions for the improvement in the name of the state, such power was not properly exercised. It is argued that a petition signed, "Board of Commissioners of State Institutions, by Henry Gerdes, Chairman," was not a signature of the state of Nebraska. We cannot agree with this contention. The spirit of the act was to permit the officers in charge of the state institutions to sign the petition for and on behalf of the state. A quite analogous question arose in *Eddy v. City of Omaha,* 72 Neb. 561. In that case the title to the property was in the school district. A paving petition in behalf of the school district was signed, "Board of Education, by Jonathan Edwards, President," and was held sufficient.

It is next argued by the plaintiffs that the proceedings of the board are void because more than one road is included in the improvement. While it appears that more than one road is included in the improvement, it also appears that the improvement, considered as a whole, constituted but a single unit, and forms a connected pavement. While the authority granted to the county board is to pave "any road, highway or boulevard," using the singular number, we think it too narrow a construction of the statute to hold that a separate and distinct petition of the property owners is required where two or more roads are joined in one improvement. If a neighborhood is bet-

ter accommodated by an improvement in the form of a cross or circle, or any other figure, than by a straight line, the law we are now considering does not forbid it. The present case is not analogous to those arising under the laws governing paving in cities, in which it has been held that separate streets cannot be included in a single improvement.

It seems clear, therefore, that the plaintiffs are not entitled to the relief prayed upon the ground that the board was without jurisdiction to proceed with the improvement, or to sit as a board of equalization and levy the assessment against the plaintiffs' property.

There is another theory suggested relating to that branch of the case wherein plaintiffs seek to recover the amount of special assessments paid under protest, which deserves consideration. Section 4, ch. 200, Laws 1915, gives to an aggrieved party a remedy in a direct action to recover so much of a special assessment paid by him as he shows to be illegal, inequitable and unjust. However, certain conditions precedent to the exercise of this right must be observed, among them, that the payment made by the aggrieved party should be under protest, with notice that he intends to sue to recover the same, in which notice he is required to state his grievance and the grounds therefor, and that the action must be brought within 60 days from the date of payment. This section further provides:

"No court shall entertain any complaint that such party was authorized to make and did not make to said board when sitting as a board of equalization, nor any complaint not specified in such notice fully enough to advise such board of the exact nature thereof, nor any complaint that does not go to the groundwork, equity and justice of such assessment."

The plaintiff's petition charged that the amount of the assessment upon their respective properties is illegal, unjust, and not in accordance with special benefits. The petition, however, does not charge that the plaintiffs made any complaint to the county board sitting as a board of

equalization. The remedy thus provided by the act of 1915 is made to depend upon certain prerequisite conditions which the plaintiffs have not complied with, and, therefore, this special remedy is not open to them. It has been repeatedly held by this court that a board of equalization when properly in session, with due notice given, acts judicially, and its action within its jurisdiction, where no fraud is shown, is not open to collateral attack. The remedy in such case is by error proceedings. *Webster v. City of Lincoln,* 50 Neb. 1; *Portsmouth Savings Bank v. City of Omaha,* 67 Neb. 50; *Morse v. City of Omaha,* 67 Neb. 426.

Plaintiffs can hardly claim a lack of knowledge of the assessment or of their rights with respect thereto. Section 3, ch. 200, Laws 1915, provides, in substance, that the board shall give due notice of the time and place of its meeting when sitting as a board of equalization, by publishing a notice once a week for three successive weeks in some newspaper in general circulation in the county at least ten days prior to the sitting of the board of equalization, or by service of a personal notice on each owner of property within the improvement district. The board of equalization is required to have for inspection a plat or map of the district showing the location of the improvement and the lots, tracts and parcels of land embraced in said district, and also submit a tentative plan of the assessment and allowance of damages, if any, with respect to each lot, tract or parcel thereof, and shall then hear any objections or complaints on behalf of the owners of such real estate as to the assessments of benefits, or the allowance of damages. A proper tribunal was created to hear the complaints of an aggrieved party and opportunity afforded to be heard. We are unable to see wherein the plaintiffs have a legal cause of complaint.

It would seem, therefore, that the plaintiffs have not stated a cause of action which entitles them to recover upon any theory of the case which has been suggested; and,

also, that the demurrer to the petition was properly sustained and the action dismissed.

The judgment of the district court is

AFFIRMED.

MORRISSEY, C. J., and ALDRICH, J., dissent.

DEAN, J., dissenting.

The language of section 1, ch. 215, Laws 1919, seems to be plain in its requirements when considered in connection with the entire scope of paving legislation. Section 1 reads:

"Wherever any paving district is created along or adjacent to any state institution or the state fair ground, the officers having in charge state institutions, or the fair grounds, are hereby authorized and empowered to sign petitions in the name of the state, to create paving districts."

It is said in the opinion of the majority that to interpret the act according to the plain meaning of its words is to impute to the legislature "the doing of a futile and unnecessary thing." If the act stood alone and was disconnected from any other statute on the same subject the observation would doubtless be true. But the act does not stand alone and when it is considered in connection with all of the legislation on the same subject it is neither futile nor meaningless.

The majority opinion invokes the rule of *pari materia*, but under that beneficent rule it destroys section 1, ch. 215, Laws 1919. The opinion interprets the act literally, destroys its real intent, and causes a legislative act to appear ridiculous. Ordinarily the rule is otherwise employed. I submit that a reasonable application of the rule would preserve and give meaning to a meritorious act. Under the rule of *pari materia* the act seems simply to mean that, wherever the installation of a paving district is contemplated by local authorities which is "along or adjacent to any state institution," the officers having in charge such institutions are authorized and empowered to sign petitions "in the name of the state, to create paving districts." They

are not authorized by this or any statute to sign petitions to "grade and pave" any paving district. That is the main question at issue.

The main opinion observes that the power of the county board to create a paving district "is in no wise dependent upon a petition of the property owners." That is true only as it affects private owners of abutting property or private owners of property situate within the district zone to be affected. But it is not true as affecting "officers having in charge state institutions." They are not excused. Nor are they, by virtue of official position, property owners in the ordinary and usual sense, nor in the sense of any paving statute. For these reasons, among others, and on this theory, in part, section 1, ch. 215, Laws 1919, was enacted. In this sense it should be given full force and effect in the comprehensive scheme of legislation as relating to paving districts. The outcome of the individual case is as nothing compared to an unsound interpretation placed upon an act of the legislature.

Clearly the legislature realized that the county board, having only limited jurisdiction and restricted powers, would be reluctant to make a move toward the creation of a paving district, which would be the beginning of an expensive and pretentious project, unless the creation of such district had first received the sanction of the state officers who are authorized and empowered thereunto by the act. Certainly the county board was entitled to know the attitude of the state officers toward the proposed undertaking before doing anything looking to the installation of an expensive system of paving. The legislature therefore wisely provided that the county board should be so informed by affirmative action of the state officers. The act does not make it compulsory upon the designated state officers to sign petitions to create paving districts unless the contemplated project meets with their approval. In that event to sign becomes an official duty. Strict compliance with its every requirement on the part of the designated officers is necessary to confer jurisdiction. Failure

to perform a statutory duty so plainly imposed should be held to be a fatal jurisdictional defect. That private property shall not be taken or damaged for public use without just compensation is a fundamental law of the land.

A paving law as it relates to highways in the open country, notwithstanding they may be almost a public necessity, very often imposes a grievous burden upon private owners of abutting property. Words need not be multiplied to establish the fact that in some districts, and certainly in the present case, the burden far exceeds the benefit derived by the individual owner. Those who are benefited the most are strangers to the title. Needless to say the paving does not contribute to productivity and it adds but a small sum to the value of the land as compared with the assessment. The law should therefore be strictly construed in all its parts to the end that it is not made a destructive force in the hands of the taxing power.

The omission to comply with the provision under discussion is not technical. It is vital as affecting jurisdiction. When public officers waive performance or for any reason fail to perform a duty imposed by a general scheme of legislation and which is necessary to confer jurisdiction it is as though the law had never been enacted. The petition required by statute having been omitted, it follows that the county board was without jurisdiction to act in the premises.

It is elementary that when a legislative act is obscure or even meaningless when standing alone, resort may properly be had to other parts of the law on the same subject to determine its meaning, to the end that the legislative purpose may not fail. Evidently the legislature did not consider the act futile nor unnecessary. The act forms an essential part of a comprehensive scheme of public enterprise.

It is aptly pointed out in plaintiff's brief that the filing of petitions by state officers "to create paving districts" is not a mere formal ceremony, but is the performance of a useful office, in that such petitions stimulate local officers

to action and satisfy them that there is a demand for the contemplated improvement in the community to be affected. It is also pointed out that, under the facts and the law, the county board would not and could not lawfully create a paving district until after the state signified its assent by its officers in the manner prescribed by the act.

Hurford v. City of Omaha, 4 Neb. 336, is a case that has to do with the assessment and collection of a tax for the improvement of streets. At page 353 we said: "Hence the statute must be strictly construed, for it has been said that every statutory authority in derogation of the common law to divest the title of one, and transfer it to another, must be strictly pursued, or the title will not pass. In *Creighton v. Manson,* 27 Cal. 613, it is said that 'when summary proceedings are authorized by statute, the effect of which is to divest or affect rights of property, the statute must be strictly construed, and the power conferred must be exercised precisely as given; any departure vitiates the whole proceeding.' *Stucker v. Kelly,* 7 Hill (N. Y.) 25." The *Hurford* opinion concludes: "This rule of law is so well established upon principle, and authority, that it is unnecessary to cite authorities in support of it."

Under the rule of *pari materia* section 1, ch. 215, Laws 1919, should be held to be operative. If so held, the county board, as we have seen, was without jurisdiction to engage in the paving enterprise under discussion because the signing of a petition by the state officers for the creation of a paving district, under the decisions, is a condition precedent to jurisdiction. *City of Enid v. Gensman,* 76 Okla. 90, and cases cited.

Defendants argue that plaintiffs cannot be heard to complain because they did not file objections within the time prescribed by the statute. In the absence of jurisdiction that objection does not apply when the proceedings upon which the assessment is based are void. *Morrow v. Barber Asphalt Paving Co.,* 27 Okla. 247. To the same effect is *Southern Surety Co. v. Jay,* 178 Pac. (Okla.) 95. In *Winfrey v. Linger,* 89 Mo. 159, it was held

that where a tax bill is void the property owner is not required to file objections to the assessment. To the same effect is *Richter v. Merrill,* 84 Mo. 150. In *Steinmuller v. City of Kansas City,* 3 Kan. App. 45, it was held that, when the proceedings are void upon which a special assessment is levied to pay the cost of grading city streets, the owner is not required to bring his action within the time limited by statute to defeat the collection of the assessment.

There is no authority in any paving or other statute authorizing officers in charge of state institutions to sign petitions to "grade and pave" highways. This is apparent from an examination of chapter 152, Laws 1917, which provides that, in counties having any cities of the class involved here, petitions to "grade and pave" highways shall be presented to the county board which "shall be signed by the owners of a majority of the property chargeable with the cost of the improvement or part thereof." Section 2 of the same chapter provides that, "If there be any real estate in such district belonging to any cemetery corporation or association, school district or other municipal or quasi-municipal corporation, it shall be the duty of the cemetery board, school board or other proper officers to provide for the payment of any such special assessments against such real estate on account of such improvements." But there is no provision that such association, school district or quasi-municipal corporation shall be authorized to sign a petition to "grade and pave" any highway. If the legislature had intended that state institutions should sign such petitions to "grade and pave" highways it would, by a parity of reasoning, also have provided that cemetery corporations, school districts and other municipal and quasi-municipal corporations should sign such petitions. But the legislature having made no such provision the court should take the law as it finds it. The court has no right to impose a duty or to confer a privilege, within the legislative domain, that was not imposed or conferred by the legislature.

The constitutional division of governmental powers must be respected and obeyed. The judicial branch of government must not presume to supply a link that it conceives to be missing in a legislative chain. Notwithstanding the ease and facility with which it may be done grave danger lies in that direction. The judiciary must be content to remain within its time-honored constitutional province. That the court shall not legislate is a constitutional inhibition that is of course everywhere recognized.

It is conceded that there are about 3,000 acres of land in the paving district and of this the state owns 900 acres. Plaintiffs insist that it is unjust to permit the state, with its immense acreage in the district, by its petition to "grade and pave," to force upon the private owners therein so costly an improvement, and that in this respect the private owner, who is not on equal terms with the state, might be financially ruined while the state with its vast resources would not feel the burden. The argument is sound and doubtless was in the legislative mind when the present system of paving laws was enacted. Hence, permission to sign was not given the state.

In the present case the object of the proceeding is to subject private property to a public use. On this point a distinguished jurist said that the statutory authority to do so must be strictly pursued; that the rule is fundamental and imperative and all of its substantial requirements must be regarded as a condition precedent to the validity of an assessment. 1 Cooley, Taxation (3d ed.) 464; *Batty v. City of Hastings,* 63 Neb. 26; *Casey v. Burt County,* 59 Neb. 624; *McCaffrey v. City of Omaha,* 91 Neb. 184; *Hutchinson v. City of Omaha,* 52 Neb. 345; *Harmon v. City of Omaha,* 53 Neb. 164; *Wiese v. City of South Omaha,* 85 Neb. 844; *Morse v. City of Omaha,* 67 Neb. 426.

While I insist that the officers having in charge state institutions are without authority under the law to sign a petition to "grade and pave" a district, yet a minor feature may be noticed. It is not of controlling importance, but is mentioned here merely to show that the board of state of-

ficers by a resolution authorized the chairman to sign a petition merely to create a paving district. The board in its resolution correctly interpreted its authority, but the chairman signed a petition to "grade and pave" highways. Evidently he was badly advised in the premises.

Edmund Burke in a speech in parliament denouncing a certain oppressive tax levy against the American Colonies gave to the world this expression: "The power to tax is the power to destroy." In modern civilization that age-old proverb is exemplified in many ways. To place a grievous and unreasonable burden upon the owner's property by an act of the legislature, where the burden greatly exceeds the benefit, is to deprive him of his property without due process of law. And that was done in this case. It is a polite form of forfeiture of private property for public use. To appropriate the owner's land without the clear, explicit and unmistakable sanction of the law, in the guise of taxation, is anarchy, because the result is the same as taking the title by force and giving it to another. The court is always driven far afield when it departs from the application of well-recognized and familiar rules in the construction of statutes. The same result follows the wrong application of a righteous rule.

For the reasons stated herein, I respectfully dissent from the decision of the majority of the court.

ANDREW J. SAWYER ET AL., APPELLANTS, V. LANCASTER COUNTY ET AL., APPELLEES.

FILED MAY 6, 1922. No. 22251.

Petition examined, and *held* to state a cause of action under the provisions of section 4, ch. 200, Laws 1915.

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

Lincoln Frost and *J. W. Kinsinger,* for appellants.

Charles E. Matson, Harry R. Ankeny, Max G. Towle and *Cosgrave & Campbell, contra.*

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

DAY, J.

A demurrer to the plaintiff's petition was sustained by the trial court and the cause of action dismissed. Plaintiffs appeal.

This case differs from the case of *Brown Real Estate Co. v. Lancaster County, ante* p. 514, in this respect. In the present case it is alleged in the petition that the plaintiffs made complaint before the board sitting as a board of equalization of the matters now complained of, and at the time of paying the assessment paid it under protest, giving notice of their intention to sue to recover the assessment so paid, stating the alleged grievance and the grounds therefor, and brought this suit within the time prescribed, so as to bring themselves within the remedy prescribed in section 4, ch. 200, Laws 1915. We deem it unnecessary to write a separate opinion in this case, for the reason that what was said in the *Brown* case is a sufficient disposition of this case. From what is said in that case, it follows that the demurrer to the petition should have been overruled.

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

REVERSED.

GEORGE P. LOOS, APPELLANT, V. LANCASTER COUNTY, APPELLEE.

FILED MAY 6, 1922. No. 22349.

Case Followed. The issues presented in this case are identical with, and controlled by, *Brown Real Estate Co. v. Lancaster County, ante*, p. 514.

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

William Niklaus and *H. Rosenthal,* for appellant.

Charles E. Matson, Harry R. Ankeny, Max G. Towle and *Cosgrave & Campbell, contra.*

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

DAY, J.

The trial court sustained a demurrer to the petition and dismissed the action. Plaintiff appeals.

The facts alleged in the petition are substantially the same as those alleged in *Brown Real Estate Co. v. Lancaster County, ante* p. 514. What was said in the *Brown* case disposes of all the questions raised in the present case.

The judgment of the district court was right, and is

AFFIRMED.

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

FILED MAY 6, 1922. No. 22037.

1. **Street Railways:** USE OF STREETS. The general public has the right to the use of a public street and every part thereof. A person who is upon such street, for a lawful purpose, and who enters upon a portion thereof which the city has permitted a street railway company to use in the conduct of its business, does not thereby become a trespasser, or a mere licensee of said company, so as to absolve said company from the duty of exercising ordinary care to prevent injurying him.

2. ———: ———. Where a street railway company and an individual are both making a lawful use of a public street, it is the duty of each to exercise ordinary care for his own safety and the safety of others. A failure to exercise such care may render the party at fault liable for damages sustained by the other resulting from such a failure; and neither such duty nor liability is increased or diminished by the fact that, at the time of the injury, one or both of said parties was, or was not, a "traveler" on said street.

3. "**Contributory Negligence** is an affirmative defense, and cannot be proved unless alleged in the pleadings." *Reed v. Chicago, B. &*

Q. R. Co., 98 Neb. 20.

4. **Street Railways:** LIABILITY. The splitting of a switch which causes a street car to be deflected from its course and to strike and injure a person lawfully on a public street raises a presumption of negligence on the part of the street railway company. In such a case, the fact that said person was not a passenger and did not sustain any contractual relation with the company does not prevent the application of the doctrine *res ipsa loquitur*. The duty which the law requires of a street railway company in contract and non-contract cases only differs in the degree of care to be exercised. The principle involved is the same in both, and the presumption arises from the nature of the act, not from the relation between the parties.

5. **Negligence:** BURDEN OF PROOF. The burden of proof upon the issue of negligence does not shift during the progress of the trial, but rests throughout upon the party alleging such negligence; and a proper application of the doctrine *res ipsa loquitur* does not change said rule.

6. **Appeal:** INSTRUCTIONS. "The giving of an instruction which places the burden of proof to establish some of the facts put in issue by pleadings on the wrong party is reversible error." *Omaha Street R. Co. v. Boesen*, 68 Neb. 437.

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

John L. Webster, for appellant.

Kennedy, Holland, De Lacy & McLaughlin, contra.

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

CLEMENTS, District Judge.

In this action plaintiff seeks to recover damages for personal injuries sustained by him as a result of being struck by defendant's street car, which accident, he alleges, was caused by defendant's negligence. The defendant's answer is a general denial. From a verdict and judgment in favor of plaintiff for $5,000 defendant appeals.

Defendant has a car barn located on the west side of Tenth and the north side of Pierce street in Omaha. Just east of the entrance of this barn, which is in the northeast

corner thereof, defendant, with the permission of the city, caused to be constructed a retaining wall and areaway extending two feet east of the west line of Tenth street and about ten or twelve feet long. Said wall is about six inches thick. Its top is level with the surface of the sidewalk and, because the ground slopes to the north, the south end is twenty-nine and the north end nine inches high. From its Tenth street line a main switch track runs southwest into said barn, which is called track 6. Just west of the street line a switch is located, by means of which cars may be deflected onto a track running thence south near the east side of the barn, which is called track 12. At about 5:45 p. m. on August 5, 1918, the plaintiff, when on his way home from his work, stopped on Tenth street in front of the entrance of said barn to wait for a friend employed therein who usually quit work at 6 o'clock. While waiting he sat on the west edge of the sidewalk and on the top of said retaining wall near its north end with his feet and legs in the areaway. When he had been there 10 or 15 minutes one of defendant's cars was backed from Tenth street over said switch track which crossed the sidewalk a short distance from the north end of said wall. The rear trucks of the car so being backed passed over said switch and continued on track 6, as was intended, but before, or at the time, the trucks at the other end of the car reached said switch it split, said trucks were deflected onto track 12, which caused the end of the car to swing south over and impinge upon the sidewalk and retaining wall. When doing so the side or step of said car struck plaintiff, breaking his hip and seriously injuring him.

In defendant's brief there are various assignments of error which we shall proceed to consider, but not in the order in which they are assigned. In assignment No. 4 it is alleged that the court erred in giving that part of instruction No. 3 which reads as follows: "If you find from a preponderance of the evidence that the plaintiff herein was sitting on the public sidewalk or a retaining wall forming a part of said sidewalk, the plaintiff was where he had a

right, as a matter of law, to be." In each of instructions Nos. 2, 3, and 4, tendered by defendant, the court was requested to instruct the jury that, if they found that plaintiff entered that part of the sidewalk space, which the city permitted the defendant to use for a retaining wall, for his own convenience, and not as a passenger or employee of defendant, then plaintiff is not entitled to recover, unless they further find that the defendant wilfully or wantonly injured him; and in assignments 5, 6 and 7 defendant alleges that the court erred in not giving said instructions. These four assignments of error involve and raise the same questions of law, viz.: (1) Did the plaintiff have the right to be in the place where he was injured? (2) Did the defendant owe him any duty other than to refrain from wilfully or wantonly injuring him? They will, therefore, all be considered together.

In his argument on these assignments, counsel invokes and relies on the familiar rule that the owner of premises owes no duty to a trespasser or licensee except to refrain from wilfully or wantonly injuring him. At the time plaintiff was injured he was not on premises owned by defendant or under its exclusive control. The city council had no right to give the ownership of any part of the street to defendant and did not attempt to do so. Whether it had the power to give defendant the exclusive use of any portion of a public street need not be determined, for neither expressly nor by implication did the permit relied on attempt to do so.

It is the settled law of this state that the general public has the right to the use of a public street and every part thereof, regardless of whether there is a street car track on it or not. The right given the street car company is a privilege to occupy and use the street in conjunction with, and not to the exclusion of, the general public. In its use of the street said company is a part of the public, and every user, whether street car company, driver of a vehicle, or pedestrian, is each bound to exercise ordinary care for his own safety and to prevent injury to others. *Lucas v.*

Omaha & C. B. Street R. Co., 104 Neb. 432. We think this doctrine applies with equal force to the use by defendant of that portion of Tenth street in question. Defendant was not the owner of that part of the street. Its right therein obtained by said permit is that of a licensee and does not exclude the use thereof by the public, at least only in so far as such use would interfere with a proper use of it by defendant. It follows that the rule so invoked is not applicable in this case.

The next question to be determined is: Was plaintiff's use of the street, at the time and place of his injury, such as to absolve defendant from the duty of taking ordinary care to prevent injurying him? To sustain the contention that this question should be answered in the affirmative, cases from the New England and some other states are cited which hold that only a traveler can recover damages from a town or city for injuries resulting from a defect in the street. Nearly all of these cases are from states whose statutes impose on the corporation the duty of keeping highways within its limits, safe for travelers or travel thereon and make it liable for damages resulting from its failure to do so. It is not difficult to understand why the courts in states having such statutes should limit the right of recovery to the persons to whom the duty is due. The foregoing rule does not generally obtain in states whose statutes do not contain provisions similar to those above referred to. In 6 McQuillan, Municipal Corporations, sec. 2754, it is said:

"In some states, in nearly if not all where the liability is statutory and the ruling is influenced by the particular wording of the statute, it is held that the person injured must have been using the street, at the time of the accident, for the purpose of travel. * * * In most states, however, the liability is not confined to travelers, but extends to a person stopping on the street to converse with another, or stopping to see a procession pass, or using the street for convenience or pleasure, and there are liabilities

to abutting owners and to children playing upon the street."

The leading case, in which the rule referred to in the last clause of said quotation is announced, is *City of Chicago v. Keefe,* 114 Ill. 222. That case has been cited with approval in numerous subsequent decisions and said rule has been approved and adopted in several other states, including Nebraska.

City of Omaha v. Richards, 49 Neb. 244, was an action to recover damages for the death of a boy, while playing in the street, by drowning in a pond of water negligently permitted by the city to remain there. In the opinion the following from the *Keefe* case, *supra,* is quoted with approval:

"There is no limitation in the statute that the streets shall be kept in repair 'for travelers.' They are to be kept in repair as streets, and, by necessary implication, for all purposes to which streets may be lawfully devoted. We assume as self-evident that, with us, streets are open to the use of the entire public as highways, without regard to what may be the lawful motives and objects of those traversing them, that those using them for recreation, for pleasure, or through mere idle curiosity, so that they do not impinge upon the rights of others to use them, are equally within the protection of the law while using them, and hence equally entitled to have them in a reasonably safe condition with those who are passing along them as travelers, or in the pursuit of their daily avocations."

A judgment for the plaintiff in the *Richards* case was affirmed, although the boy was in no sense a traveler, but was merely playing on the street. This decision is in direct conflict with three of the cases cited and relied on by defendant in which it was held that no recovery could be had for injuries by a child or other person while playing on the street.

The case at bar has been briefed and argued upon the theory that the same rule governs defendant's liability herein as would govern the liability of the city if plaintiff's

injuries had resulted from a defect in the street. If it should be determined on this theory and the rule stated in the *Richards* case, *supra*, were applied herein, the question of whether plaintiff was, at the time of the accident, a traveler is immaterial; and we are not prepared to say that a proper application of the rule relied on by defendant would prevent a recovery by plaintiff. It is certain that, in passing over Tenth street on his way home from his work, plaintiff was a traveler in the strictest sense of the word, and we do not think that, by stopping at the side of the street for ten or fifteen minutes to wait for a friend, he lost his status as a traveler. But, as we view the case, defendant's liabilitity herein is not governed by the rule which would be applied if the action were against the city. No case has been cited wherein a street railway company, or an individual, when sued for damages for negligently injuring another on a public highway, has been able to defend said action on the ground that the injured party, at the time of the accident, was not a traveler within the technical meaning of that term, and we know of no such case. On the other hand, in *Brightenburg v. Mulcahy*, 104 Neb. 794, this court held that a petition which alleges that a boy, while coasting on a street in Omaha, was injured by coming in contact with defendant's fence which extended into the street, stated a cause of action for damages resulting from defendant's negligence; and, in a recent case in Iowa, *Roennau v. Whitson*, 188 Ia. 138, it was held that a young woman who was injured, while coasting on a public highway, by the negligence of a man who was then traveling on said road in a buggy drawn by two horses, had a right of action against said traveler for damages resulting from said injuries. In our opinion, the proper rule to be applied in determining defendant's liability for negligence in this case is as follows: Where a street railway company and individual are both making lawful use of a public street, each is bound to exercise ordinary care for his own safety and to prevent injury to others. *Lucas v. Omaha & C. B. Street R. Co.*, 104 Neb. 432. A failure to do this may render the

party at fault liable for damages sustained by the other resulting from such failure; and neither such duty nor liability is increased or diminished by the fact that, at the time of the injury, one or both of said parties was, or was not, a traveler on said street. The foregoing effectually disposes of defendant's contention on this point.

Instruction No. 5, requested by defendant, embodies the rule covering contributory negligence of the plaintiff. "Contributory negligence is an affirmative defense, and cannot be proved unless alleged in the pleadings." *Reed v. Chicago, B. & Q. R. Co.*, 98 Neb. 20. As defendant's answer contained only a general denial, and as the evidence adduced would not have required a submission of that issue if it had been pleaded, the court properly refused to give said instruction.

Instruction No. 1, given by the court, is a summary of the material allegations of the pleadings and contains a statement that plaintiff alleged that he was damaged in the sum of $60,750. Defendant alleges that it was error to state the amount claimed, and says that "it is a practice not to be commended and justly deserving of criticism." Several members of the court agree with such criticism and are of the opinion that, when the damages claimed appear to be exorbitant, the amount so claimed should not be mentioned in any of the instructions; but all agree that the statement of the amount claimed in such an instruction is not reversible error where the damages assessed by the jury are not excessive, which they do not appear to be in this case. In the cases cited in defendant's brief on this point the jury were told, in the instruction on the measure of damages, that plaintiff might recover damages not exceeding the amount claimed in the petition, stating said amount. In said cases such an instruction is severely criticised on the ground that it might lead the jury to believe that a verdict for the full amount claimed would be proper and sustained by the court. The distinction between the case at bar and those cited is apparent, yet not

one of them was reversed because of the giving of such instruction.

Assignments of error 1, 2, and 3 is each directed to the giving of a different part of instruction No. 2, and together raise two questions, to wit: (1) Is the doctrine *res ipsa loquitur* applicable to the facts in this case? (2) If so, is the rule as to the effect which the application of such doctrine has on the burden of proof of negligence correctly stated in said instruction? We are satisfied that the first one of these questions should be answered in the affirmative and the second one in the negative.

In *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890, plaintiff was injured by the derailment of one of defendant's cars. He alleged that the derailment was through the carrier's negligence, and this court held that the doctrine *res ipsa loquitur* should have been applied; that, as it was shown that he was a passenger and was injured by the derailment of the car, the law, by presumption, supplied the proof of defendant's negligence for him; that it then devolved upon the carrier to rebut said presumption; and the case was reversed because the trial court instructed the jury, in effect, that said facts raised no presumption of negligence against the defendant company. In *Lincoln Traction Co. v. Shepherd*, 74 Neb. 369, it is said that the doctrine *res ipsa loquitur* applies where a collision or derailment occurs or where there is an accident to the machinery or appliances used as a means of transportation; that, "in such case, evidence of that fact and of the plaintiff's injuries arising therefrom, without other proof, raises the presumption of negligence. The thing itself speaks—'*res ipsa loquitur*'—and this is the foundation upon which the doctrine rests."

The fact that at the time of the injury to plaintiff in the case at bar he was not a passenger and sustained no contractual relation with defendant does not prevent the application of this doctrine, for it is based upon the nature and character of the act, and not on the relation between the parties. This principle is well stated in *Lincoln Trac-*

tion Co. v. Webb, 73 Neb. 136, 143, in the following language: "The presumption of negligence has been more frequently applied in cases of passengers than in any other; but there is no foundation in reason or authority for such limitation of the rule of evidence. The presumption originates from the nature of the act, not from the nature of the relation between the parties. The duty which the law enjoins in the two cases—carriers and noncontract cases—only differs in the degree of care to be exercised. The principle of law involved is the same."

The doctrine *res ipsa loquitur* has frequently been applied by the courts of other states in cases of derailment where the injured party was not a passenger but merely a bystander. *Caffrey v. Philadelphia Rapid Transit Co.,* 249 Pa. St. 364; *Chicago Union Traction Co. v. Giese,* 229 Ill. 260; *Baker v. Metropolitan Street R. Co.,* 142 Mo. App. 354; *Kunkel v. Chicago Consolidated Traction Co.,* 156 Ill. App. 393. We are of the opinion that the reasons justifying the application of this doctrine in such cases are equally potent in cases where the injury results from the deflection of such a car by a split switch. It was so applied in *Najarian v. Jersey City, H. & P. Street R. Co.,* 77 N. J. Law, 704, and *Geiser v. Pittsburg R. Co.,* 223 Pa. St. 170. In each of said cases a person who was not a passenger and who sustained no contractual relation with defendant was injured by the splitting of a switch.

The fact that the switch in question was located on defendant's premises does not prevent the application of the doctrine. It has been frequently applied where a building located on private property adjacent to a street has fallen, or building material or debris has fallen therefrom, thereby injurying a person on said street. *Waller v. Ross,* 100 Minn. 7, and cases therein cited. Said switch was located in such close proximity to the street that the splitting of same caused the end of the car to swing over a part of the sidewalk, thereby endangering the safety of any one thereon. It was therefore the duty of the defendant to use ordinary care in the construction, maintenance and operation

of said switch, and the rules governing its liability for a failure to do so are the same as if it were located in the street. The trial court did not, therefore, err in giving that part of instruction No. 2 which applied the doctrine *res ipsa loquitur* to the facts in the case at bar.

In the last part of said instruction, the court told the jury that, when the plaintiff has proved that he was injured through the splitting of the switch, the law raises a presumption of negligence on the part of defendant, and the burden would then be cast upon defendant of showing that the accident did not happen through want of ordinary care on its part; and that, "If you believe from a preponderance of the evidence that the accident was not due to any negligence on the part of the defendant, then your verdict must be for the defendant; but, if you find that the defendant has failed to show that the accident was not due to negligence on its part, then your verdict must be for the plaintiff." This was instructing the jury, in substance, that, when the plaintiff proved that he was injured by the splitting of the switch, the burden was cast upon defendant of proving that said accident and injury were not caused by its negligence; that such fact must be proved by a preponderance of the evidence before a verdict could be returned for defendant; and that if it failed to prove such fact the verdict must be for the plaintiff. This clearly shifted the burden of proof, on the issue of negligence, from plaintiff to defendant, and required the latter to prove by a preponderance of the evidence that it was not negligent, which is a violation of the well-settled rule in this state that the burden of proof does not shift during the progress of the trial, but rests throughout upon the party alleging negligence. *Rapp v. Sarpy County,* 71 Neb. 382; *Lincoln Traction Co. v. Webb,* 73 Neb. 136; *Lincoln Traction Co. v. Shepherd,* 74 Neb. 374; *Vertrees v. Gage County,* 75 Neb. 332.

That an application of the doctrine *res ipsa loquitur* does not shift the burden of proof of negligence, and what the force and effect of the presumption arising therefrom

is, are clearly stated in the *Shepherd* case, *supra*. After stating that facts and conditions justifying the application of said doctrine raise a presumption of negligence on the part of defendant which is sufficient, in the absence of any other evidence upon the subject, to establish *prima facie* such negligence, this court said:

"But if evidence appears in the plaintiff's own testimony or is offered by the defendant, sufficient to rebut this presumption, then the negligence of the carrier is not established by the presumption. In determining this question upon the whole evidence the burden of proof is upon the party who alleges negligence, and the proof must be sufficient to establish such negligence. The evidence tending to prove negligence of the carrier, including the presumption referred to as a part of said evidence, must preponderate, that is, the plaintiff must show by a preponderance of the whole evidence upon this point that the carrier was negligent and that this negligence contributed directly to his injury."

The judgment in that case was reversed because of the giving of an instruction which was, in substance, like the one now under consideration in this case. "The giving of an instruction which places the burden of proof to establish some of the facts put in issue by the pleadings on the wrong party is reversible error." *Omaha Street R. Co. v. Boesen*, 68 Neb. 437.

Plaintiff's evidence herein, including the presumption raised by the nature of the accident and injury, was sufficient to require the submission to the jury of the issue of defendant's negligence; but evidence was adduced by defendant to rebut said presumption, and plaintiff's other evidence on this point was contradicted by several witnesses, and it was necessary for the jury to determine said issue. It was, therefore, prejudicial error to place the burden of proving absence of negligence on the defendant, and, because of such error, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

JACOB L. KALEY, APPELLEE, V. GEORGE C. ESELIN, APPELLANT.

FILED MAY 6, 1922. No. 22373.

1. **Homestead:** DETERMINATION OF RIGHT. The homestead right of exemption of real property under the laws of this state is not a proper subject for consideration upon proceedings for the confirmation of a sale of the alleged homestead on execution.

2. ———: ———. The motion to confirm a sheriff's sale cannot be resisted on the ground that the land sold is the homestead of the judgment debtor; and an attempt to resist it on that ground will not bar a subsequent action to remove the cloud caused by such sheriff's deed.

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

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

H. H. Claiborne and *Charles W. Haller*, for appellant.

Jacob L. Kaley and *John M. Macfarland*, *contra.*

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

CLEMENTS, District Judge.

On the 26th day of April, 1921, an execution was issued by the clerk of the district court for Douglas county on a judgment theretofore entered by said court in favor of plaintiff and against the defendant herein. The sheriff of said county levied said execution on real estate owned by defendant and proceeded to advertise same for sale. Before the day set for said sale, the defendant served on

the sheriff notice that he claimed said real estate to be exempt as his homestead. The sheriff disregarded said notice and proceeded to make said sale as advertised. The plaintiff filed a motion to confirm said sale, and defendant filed objection to its confirmation on the ground that he has a homestead right in said premises, of which fact he had notified the sheriff before said sale. The court overruled defendant's objection, confirmed the sale, and ordered the issuance of a writ of assistance, from which ruling and order defendant appeals.

Appellant's brief contains no specific assignment of errors, as required by rule 12 (94 Neb. XI) of this court, but states that this is an appeal from orders of the district court in confirming a sheriff's sale of real estate and awarding a writ of assistance. From this and other statements in said brief it appears to be appellant's contention that the trial court erred in making said orders, and we shall consider the case as if it were duly assigned in the brief that the action of the court in making such orders was erroneous.

Under the Nebraska statute providing for the confirmation of a sale made on execution, the only matter settled and adjudicated in the proceedings and order of confirmation is as to the proceedings of the sheriff and those acting under and with him in the levy, appraisement, advertising, making and return of said sale. *Schribar v. Platt,* 19 Neb. 625.

In *Best v. Zutavern,* 53 Neb. 619, defendant's objection to the confirmation of a sale on execution on the ground that the property levied on was his homestead was overruled and the sale confirmed. In affirming that case this court said: "The homestead right of exemption of real property under the laws of this state is not a proper subject for consideration upon proceedings for the confirmation of a sale of the alleged homestead on execution." The fact that the homestead claimant filed objection to and contested the confirmation on the ground that said premises were his homestead and the court found against him on

this claim, overruled said objection, and confirmed the sale, was held not to constitute error requiring a reversal of the case on appeal. Thereafter said homestead claimant brought an action in equity to cancel the sheriff's deed obtained on said sale, in which a decree was entered granting him the relief prayed for. This court affirmed said decree, and in doing so announced the following rule, to wit: "A motion to confirm sheriff's sale cannot be resisted on the ground that the land sold is the homestead of the judgment debtor; and an attempt to resist it on that ground will not bar a subsequent action to remove the cloud caused by such sheriff's deed." *Best v. Grist*, 1 Neb. (Unof.) 812.

The cases in which the foregoing principles and rules are announced have never been overruled or criticised, so far as we have been able to discover. On the contrary, the *Schribar* and *Zutavern* cases, *supra*, are cited with approval in 2 Freeman, Executions (3d ed.) sec. 311, wherein the author says: "We think the better opinion is that the right of exemption, where claimed, should be left for determination in some subsequent action to recover the property sold, or to otherwise determine its title, and, hence, that the confirmation of the sale of real property does not estop its owner from contending, in a subsequent action, that it constituted a homestead, and was, therefore, not subject to execution sale."

The only ground of objection to the confirmation of the sale in the case at bar is that said premises are the homestead of defendant, of which claim the defendant notified the sheriff before the sale. Under the foregoing rules this objection was not a valid one, as it raised an issue which could not properly be adjudicated in that proceeding, and the determination of which therein would not be binding upon either party, nor a bar to or in a subsequent action wherein such issue is properly raised.

Defendant attempts to differentiate the foregoing cases from the one at bar by the fact that in the former the statutory notice of the claim of homestead was not given the sheriff before the sale. He argues that the giving of such

notice blocks the sale and compels the creditor to begin proceedings in which the homestead may be determined properly, and cites and quotes from *Quigley v. McEvony*, 41 Neb. 73, in support of this contention. That was a suit in equity to enjoin the sale of plaintiff's homestead on an order of attachment. This court held that the overruling of a motion to dissolve said attachment, one of the grounds of which was that said premises were claimant's homestead, was not a bar to such a claim in the suit in equity, and said: "We think it is unquestionable that the question of whether the premises constitute a homestead should be determined in proceedings instituted in the manner directed by our statutory law, and if there is any disagreement, then the same can be determined in a proper action in court, in which issues can be regularly joined and the matter tried in the manner prescribed for the trial of issues of law and fact, and that the ends of justice will be better subserved by this latter course of proceedings than by determination of the homestead question in the course of a hearing on a motion to discharge an attachment." Some of the first and a few of the last lines of the above sentence are quoted in defendant's brief, but the most important part thereof, which states how a disputed claim of homestead should be determined, is omitted. In the foregoing the court does not specify what provisions of statute are referred to under which proceedings should be instituted to determine the homestead of a claimant, but we assume that chapter 36, Comp. St. 1893, which is in all respects material to this case the same as chapter 29, Rev. St. 1913, is the statute referred to by the court, as we know of no other statutory law which provides for any such proceedings. Section 5 of said chapter provides that, when an execution is levied upon real estate of the head of a family, he may notify the officer of what he claims as his homestead, and only the remainder shall be subject to such levy; that "the judgment creditor may thereupon apply to the district court in the county in which the homestead is situated for the appointment of persons to

appraise the value thereof." In sections 6 and 7 it is provided that such application must be made upon a verified petition filed with the clerk of said district court, showing (1) that an execution has been levied on property claimed as a homestead; (2) the name of the claimant; and (3) that the value of the homestead exceeds the amount of the homestead exemption. The following sections provide for the appointment of three appraisers by the court, for an appraisement made by them, and, if the appraised value exceeds the statutory exemption and said premises cannot be divided without material injury, for the setting off of the homestead and for the enforcement of the execution on the remainder of the land. It will be noted that the foregoing proceedings are directed to the appraisement and setting off of a homestead; that, by instituting such proceedings, plaintiff admits that claimant has a valid right of homestead in the property, for, in his verified petition, he is required to allege "that the value of the homestead exceeds the amount of the homestead exemption." A careful examination of said chapter discloses no provision whatever for any proceedings to determine the validity or invalidity of defendant's claim of homestead exemption. The statutory notice of said claim given to the sheriff is not required to be verified. If it is true, as contended by defendant, that, when such notice is given to the sheriff, the sale is thereby blocked and the execution creditor is compelled to proceed under the provisions of said statute, then a false and wholly unfounded claim of homestead is just as effective as one which is *bona fide* and valid, for such statutory proceedings would result in the setting off to claimant the homestead right claimed, even though such claim was without foundation. Said statute is not susceptible of a construction that requires or permits a result so violative of reason and justice.

The statutes of some states prescribed the method which must be pursued to determine a contested claim of homestead right in property levied upon. The Alabama Statutes of 1907, vol. 2, sec. 4173, provide that, when the claim of

exemption is made, the execution creditor may contest the same by filing with the officer holding the process an affidavit that, in his belief, "(1) the claim is invalid entirely, or (2) it is invalid in part, or is excessive." The officer is then required to return the writ, together with such claim and contesting affidavit, to the court, where issues are made up and the right of homestead is tried and determined by the court. Under such a statute, it might well be held that the giving notice of a claim of homestead effectually blocks the sale, unless and until said statutory provisions are complied with and the contested right of homestead determined in the manner therein provided for. In Nebraska there are no statutory provisions fixing the method of determining whether a disputed claim of homestead is valid or invalid, and resort must therefore be had to the courts wherein—to use the words of this court in the *Quigley* case, *supra*—"the same can be determined in a proper action in court, in which issues can be regularly joined and the matter tried in the manner prescribed for the trial of issues of law and fact." A suit in equity to enjoin the sale was held to be such a proper action in the *Quigley* case. An action in ejectment by the purchaser to obtain possession of the property, or a suit in equity to set aside said sale, or to cancel the sheriff's deed, or to quiet title in claimant, are all proper actions in which to determine said disputed right of homestead. *Schribar v. Platt,* 19 Neb. 625; *Giles v. Miller,* 36 Neb. 346; *Baumann v. Franse,* 37 Neb. 807; *Best v. Grist,* 1 Neb. (Unof.) 812; *Allen v. Holt County,* 81 Neb. 198.

If, in such a proper action, it shall be established that defendant, at the time of the levying of the execution in question, had a valid right of homestead in the premises levied upon, then said sale, the confirmation thereof, and the order awarding a writ of assistance are all void and of no force or effect. On the other hand, if it shall be determined in such an action that defendant's claim of homestead in said premises is invalid, and that he had no homestead right therein, then all of said proceedings and or-

ders are valid and enforceable. The validity of said claim of homestead has not yet been so determined, and unless and until it is this court is not justified in saying that said sale is void or that the orders complained of are erroneous.

We find no reversible error in the record, and the orders of the district court appealed from are therefore

AFFIRMED.

DANIEL G. HOPPER, APPELLEE, V. ELKHORN VALLEY DRAINAGE DISTRICT, APPELLANT.

FILED MAY 6, 1922. No. 21784.

1. **Damages:** INSTRUCTIONS. Instruction 26 set out in the opinion, on the subject of damages to growing crops, examined, and *held*, under the circumstances shown by the record, not erroneous.

2. **Drains:** NEGLIGENCE: LIABILITY OF CORPORATIONS. A drainage district corporation organized under the laws of this state, although a local corporation clothed with powers of a public nature, is liable for damages caused by its negligence in the construction or maintenance of its works.

3. ———: DAMAGES: RIGHT OF ACTION. Damages caused unnecessarily by the negligence and improper construction and maintenance of the improvements of a drainage district corporation cannot be anticipated and a right of action accrues therefor when the damages occur.

4. ———: ———: ———. A party who sells and conveys to a drainage district corporation a right of way through his lands, and in such conveyance releases such corporation from all claims for damages by reason of the occupancy and use of the land conveyed, may nevertheless recover damages caused by the carelessness and negligence of the district in the construction and maintenance of its improvements.

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

McKenzie, Cox, Burton & Harris, for appellant.

Baldrige & Saxton, contra.

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

COLBY, District Judge.

The action was brought to recover damages on account of the overflow of plaintiff's lands, alleged to be due to the negligent construction and maintenance of a drainage system through and near the lands of plaintiff.

The facts in general appearing of record are that the defendant and appellant is a corporation organized under the name of the Elkhorn Valley Drainage District in the year 1909, authorized by the provisions of chapter 153, Laws 1907, and later laws amendatory thereof and supplementary thereto, for the purpose of constructing ditches and controlling surface and running waters within the limits of a drainage district embracing many thousands of acres of land in Sarpy and Douglas counties, Nebraska, including plaintiff's lands; that in 1910 this drainage corporation constructed a ditch about five miles long, referred to as Ditch No. 3, running from a point in the northwest corner of section 5, township 15, range 10, southeasterly through four sections to a point near the south boundary line of the southwest quarter of section 15. The ditch as constructed joined with and continued into a long narrow lake, sometimes called Hopper lake, running southeasterly through section 15 to a point about 600 feet west of the southeast corner of said section, at which point, by an abrupt angle, it turned nearly straight east about 1,300 feet to and cutting through the west bank of the Elkhorn river, thus making its entry into the river at approximately a right angle; this latter part or ditch is generally referred to as the "outlet ditch."

It is stated in the brief of appellant's counsel that the district which the defendant corporation was organized to drain comprises about 55,000 acres of land lying along the west bank of the Elkhorn river near the village of Waterloo. The plaintiff's farm consists of 480 acres of land situate in an almost square body within the drainage district on the west side of the Elkhorn river and about a mile

southeast of the village of Waterloo. The south half of section 15 was owned by plaintiff and was his home place upon which were located his residence and farm buildings. With the exception of the plat of ground on which the buildings stood and the part occupied by the ditch and the narrow lake, the plaintiff cultivated the south half of section 15 and also owned and cultivated the northwest quarter of section 22, in the same township and range. During the seasons of the years 1915, 1916, 1917 and 1919 the plaintiff had planted and there were growing on his lands varieties of farm products in different stages of development. In each of said seasons his lands were flooded and his crops submerged and partially or entirely destroyed.

The plaintiff brought this action for damages against the defendant, alleged that his loss was directly due to the defective and negligent construction and maintenance of said ditches, setting out four separate causes of action relating to the four different seasons in which the losses occurred, particularizing the crops growing on his lands, the extent to which they were injured or destroyed, and the amount of damages, all of which he charged were the result of the negligent acts and omissions of the defendant in the construction and maintenance of said ditch No. 3 and the outlet ditch.

The defendant in its answer admitted the construction of the ditches, but for its first defense alleged that such ditches were constructed according to the plans and specifications prepared by a skilful and competent engineer, and that if the plaintiff suffered damages the same were due to the acts of the engineer, for which the defendant was not responsible. For a second defense the answer averred that the plaintiff had executed deeds and conveyances to defendant for a strip of land through his farm occupied by and upon which the ditches were constructed and thereby released the defendant from the damages claimed arising from the occupancy and use of the land so conveyed for drainage purposes. The answer further alleged that the plaintiff had examined such plans and speci-

fications, had influenced the engineer to draw them improperly, if they were so drawn, that plaintiff was a director of the district when a floodgate was placed in the outlet ditch, and that he was estopped to claim damages. The answer further charged that whatever loss was suffered by plaintiff was due to his lands being low and too wet for agricultural purposes, and being subject to overflow from the Elkhorn river caused by the negligence of the Union Pacific Railroad Company in the construction of an embankment which diverted such river and caused its overflow. The plaintiff's reply was, in substance, a general denial of the allegations of the answer.

A trial was had to a jury, who found a verdict in plaintiff's favor in the sum of $17,743; a motion for a new trial was overruled and a judgment rendered upon the verdict, from which judgment and proceedings the defendant drainage district appeals to this court.

The first assignment of error urged by counsel for appellant is that the district court erred in giving instruction No. 26 as to the measure of damages, which instruction, for convenience, we quote in full as follows:

"If you find for the plaintiff you should assess his damages in accordance with the following principles:

"The measure of damages to a growing crop by a wrongful act or omission which destroys it is its value at the time and place of destruction.

"The measure of the damage to a growing crop injured but not rendered worthless is the difference between the value of the crop before and after the injury at the time and place thereof.

"Where a growing crop is injured but not rendered entirely worthless as a direct result of the acts and omissions of the defendant, the damage to it may be measured, under these rules, by the difference between the value at maturity of the probable crop, if there had been no injury, and the value of the actual crop at that time, less the expense of fitting for market that portion of the probable crop which was prevented from maturing by the injury.

"In determining the value of the crop of any year at the time of its injury or destruction, you should take into consideration the kind of crops planted, the nature of the land, the kind of season, whether wet, dry, or normal, what crops such land according to the season would ordinarily yield, the state of the crop's growth when injured or destroyed, the average yield of similar land in the neighborhood, the crop of which was cultivated in the same way and not injured, the market value of the crop injured and the market value of the reasonably probable crop without injury at the time of maturity, the expense that would have been incurred after the injury of fitting for market the portion of the crop the wrongful act prevented from maturing, the time of the injury, the circumstances which conditioned the probability or improbability of the maturing of the crops in the absence of injury, and all other facts and circumstances shown by the evidence tending to establish such value.

"In case of the destruction of a perennial crop like alfalfa, the measure of damages is the difference between the value of the land immediately before the injury with the crop growing thereon, and the value of the land immediately after the destruction of the crop.

"If plaintiff was prevented from planting any part of his lands by reason of flooding due to negligence of defendant, his measure of damages on this account would be the reasonable rental value of such land for that season, together with the reasonable expense of preparing the land for planting.

"The only damages, if any, which plaintiff may recover in this action are such as resulted directly from wrongful acts of defendant; and if the jury believe that any part of such damages was caused by the Elkhorn river overflowing its bank north of plaintiff's lands independently of any negligence of defendant, the defendant would not be liable for such damages.

"Furthermore, the evidence must establish the amount of all items of damage with reasonable certainty or they can-

not be recovered. On any amounts you find for plaintiff you should add interest at 7 per cent. per annum from the date of the injury to this date.

"If you find for the defendant you will simply so say by your verdict."

Counsel for appellant contend that this instruction is erroneous in giving the wrong measure of damages where a crop is partly destroyed but not rendered worthless, and that the second paragraph of the instruction is in conflict with the third paragraph.

Under the four causes of action contained in plaintiff's petition there were several different conditions appearing in the pleadings and the evidence which the district court intended to cover by this instruction. The second paragraph was:

"The measure of the damage to a growing crop injured but not rendered worthless is the difference between the value of that crop before and after the injury at the time and place thereof."

It is conceded that this is a correct general statement of the law as to the measure of damages. That part of the instruction objected to as in conflict with this paragraph is the third paragraph, which tells the jury how to measure such damages as follows:

"Where a growing crop is injured but not rendered entirely worthless as a direct result of the acts and omissions of the defendant, the damage to it may be measured, under these rules, by the difference between the value at maturity of the probable crop, if there had been no injury, and the value of the actual crop at that time, less the expense of fitting for market that portion of the probable crop which was prevented from maturing by the injury."

The first two paragraphs plainly and briefly state the law; the third paragraph, to which serious objection is made, just as plainly instructs the jury how to arrive at or measure the damages stated in the second paragraph. It was clearly meant to be a method of determining the damages or of arriving at the difference between the value of

the crop before and after the injury at the time and place thereof. The one is not inconsistent or in conflict with the other. In the latter part of the third paragraph mention is made of the probable crop which was prevented from maturing by the injury, and later on in the fourth paragraph of this instruction the court goes into the matter more fully and the jury is instructed carefully and plainly in this discriminating language:

"In determining the value of the crop of any year at the time of its injury or destruction, you should take into consideration the kind of crops planted, the nature of the land, the kind of season, whether wet, dry, or normal, what crops such land according to the season would ordinarily yield, the state of the crops' growth when injured or destroyed, the average yield of similar land in the neighborhood, the crop of which was cultivated in the same way and not injured, the market value of the crop injured and the market value of the reasonably probable crop without injury at the time of maturity, the expense that would have been incurred after the injury of fitting for market the portion of the crop the wrongful act prevented from maturing, the time of the injury, the circumstances which conditioned the probability or improbability of the maturing of the crops in the absence of injury, and all other facts and circumstances shown by the evidence tending to establish such value."

When the paragraph so strongly objected to is considered in connection with the remainder of the instruction there appears to be no antagonism or inconsistency. The court substantially instructed the jury to take into consideration all of the hazards to the growing products before maturity; while the chances or risks of hail, windstorms, drouths, floods, and other factors in the growth of the crop were not specially and particularly mentioned by name, yet the language of the court was broad enough to cover all of these risks and any others that might be expected to have a bearing upon the maturity of the crop. The several parts of the instruction, when properly con-

sidered, are not in conflict with each other or inconsistent, as to chances and risks, with the cases cited by counsel for appellant of *Pribbeno v. Chicago, B. & Q. R. Co.*, 81 Neb. 657, or *Morse v. Chicago, B. & Q. R. Co.*, 81 Neb. 745, or *Clague v. Tri-State Land Co.*, 84 Neb. 499. The chances and risks enumerated in the cases cited were not eliminated from the instruction given in the case at bar, but on the contrary were carefully retained therein by the clear and explicit general language of the court, which included all "the circumstances which conditioned the probability or improbability of the maturing of the crops."

Another objection urged by counsel for appellant is that the instruction pertaining to the measure of damages permitted the jury to take into consideration the nature and character of the season as it actually was, and not as it might have been; in other words, that the instruction permitted the jury to assess the damages upon the theory that the season for raising crops was the most favorable and that there was no hazard, such as early frost, too much rain, hailstorms, etc.

This objection does not seem to be well taken and appears to arise from a misunderstanding or improper interpretation of ordinary language, as the court told the jury plainly and in unequivocal language that in determining the value of the farm products of any year it should take into consideration "the circumstances which conditioned the probability or improbability of the maturing of the crops in the absence of injury, and all other facts and circumstances shown by the evidence tending to establish such value;" this would properly include those arising before, at the time of, and after the injury, for the purpose of arriving at "the difference between the value of that crop before and after the injury at the time and place thereof," which, under the law, is the true measure of damages to a growing crop injured but not rendered worthless.

This instruction, although having several paragraphs, is but one instruction and must be interpreted as such. The

subsequent parts are to be considered in connection with the first part as an elucidation of the bald statement of the law regarding the measure of damages and when this is done all the parts of the instruction are in perfect harmony and consistent with each other.

A further objection is urged to this instruction that, while there was evidence introduced by the plaintiff tending to show that some of the farm products were destroyed after they were planted and before they had reached such a state of maturity as to have a value as crops, yet that there was no positive testimony as to the value of the crops at the time of their destruction; that no witness testified that they were worth $5 or $10 an acre at the time of their destruction, and that in the absence of such evidence the jury could not arrive at the value of the crops.

It would seem that this objection is also not well taken and not based upon the best reasoning and rules of evidence. What the jury were entitled to consider was all the evidential facts bearing upon the question of damages and all the circumstances and conditions, both before, at the time of, and after the injury, and from these they would come to a conclusion as to the damages at the time and place of the injury. The testimony of a witness as to what, in his opinion, a growing crop on the market was worth which had no market value would be almost useless, unless based on all the facts, circumstances and conditions which should be given to the jury bearing upon the matter, and it was surely within the province of the jury, from a consideration of all of these, to form their own opinion as to the value. The jury would not be materially aided in any way by the opinion of a witness who could know nothing more about it than the jury, and who, at best, would simply be giving his opinion. When there is no market for immature crops, for sprouting, growing or undeveloped products, their value can be arrived at only by taking into consideration the probable yield, the conditon of the season, the average yield, the probability of hailstorms, drouth, excessive rainfall, early frosts and other hazards, and all

other conditions, facts and surrounding circumstances in connection with the average market value of such products at the time of their maturity. This seems to have been very lucidly and intelligently covered by the instruction and the whole matter submitted to the jury for its consideration and judgment.

In the case cited by counsel for appellant, *Baltimore & O. S. W. R. Co. v. Stewart,* 128 Ill. App. 270, the rule under consideration by that court was the measure of damages where the crop was destroyed before it had reached that state of maturity having a market value, and the court properly held in such case that the measure of damages for the destruction of such a crop was the cost of planting the crop, plus the reasonable market value of the land for that season. This rule is applicable in case the crop is up, but not so far matured that the product can be fairly determined. It is very difficult to arrive at the damage where the crop is destroyed before it has reached such a state of development that it has a market value, and testimony in the nature of personal opinions tending to show such value is to be regarded as of much weight only when all things conditioning the maturity of such a crop are shown and taken into consideration. It has no market value and it seems reasonable that no witness can give an opinion as to a value which does not exist. We must conclude that the jury is to find the value, not from opinions, but from a consideration of all the evidential facts, conditions and circumstances, climatic and otherwise, having a bearing upon its maturity and its probable market value at such time. It cannot add to the weight which a jury should give to the facts to have a witness give his opinion thereof; all such facts having a bearing upon the value of the crop at the time of its destruction were, under the court's instruction, taken into consideration by the jury in arriving at its verdict.

Evidence of all the facts, conditions and circumstances bearing upon the question of value was offered by plaintiff and received in evidence on the trial, and generally

without objection, and surely it is not now seriously contended by counsel for appellant that such testimony was incompetent. Indeed, after making and strongly urging the objections which we have just considered, counsel for appellant in their brief naively say that such evidence "would tend to throw some light upon the value of the crop at the time of its destruction or the value before and after its destruction." We think, as before stated, that the contention that direct testimony, that is, in this instance, the opinions of witnesses as to the value of crops which have no market value, is not essential; that the best evidence is not such opinions, but testimony showing the facts, conditions and circumstances having a bearing upon the matters at issue, from which the jury can form its own opinion. The ingenuous admission of counsel quoted above certainly deprives this objection of much of its force and vigor.

The instruction of the district court, which we have been considering covered not only the one kind but the four kinds of damages required by the causes of action and the evidence: The first, where the growing crop was totally destroyed; the second, where the growing crop was injured but not rendered worthless; the third, the destruction of the perennial crop of alfalfa; and the fourth, where the plaintiff was prevented from planting any part of his land by reason of flooding due to the negligence of the defendant.

The instruction objected to in part and in its entirety is supported and justified by the best considered judicial authorities and is fully authorized by the decisions in the following cases: *American Smelting & Refining Co. v. Riverside Dairy & Stock Farm,* 236 Fed. 510; *United States Smelting Co. v. Sisam,* 191 Fed. 293; *McClure v. City of Broken Bow,* 81 Neb. 384; *Morse v. Chicago, B. & Q. R. Co.,* 81 Neb. 745; *Berard v. Atchison & N. R. Co.,* 79 Neb. 830; *Thompson v. Chicago, B. & Q. R. Co.,* 84 Neb. 482; *Anderson v. Chicago, B. & Q. R. Co.,* 102 Neb. 497; *McKee v. Chicago, B. & Q. R. Co.,* 93 Neb. 294.

It is plain that the district court, after a full knowledge

and thorough examination of the adjudicated cases, carefully digested them and correctly restated the law applicable to this case, using as a model the opinion in *United States Smelting Co. v. Sisam, supra.* This case was argued before Judges Sanborn and Vandeventer, circuit judges, and William H. Munger, district judge, and the opinion of the court was delivered by Judge Sanborn. The authorities cited by the learned judge are exhaustive on both sides. After a careful review of the same and the anouncement of the law as to the measure of damages and the rule for the measurement of such damages, where the growing crop was injured but not rendered worthless, the same as in the case at bar, Judge Sanborn used the following language:

"This is a reasonable and practical rule for the measurement of such damages. It is not in conflict with the general current of authority, and it is a necessary and natural deduction from the established rule that the value at maturity of the probable crop, the value of the actual crop, and the expense of fitting for market that portion of the probable crop which does not mature is competent evidence for the jury to consider in determining the damage to the growing crop at the time of its injury."

In regard to the rule for measuring the damages to a growing crop injured but not rendered worthless, the following authorities are found particularly to support and authorize that part of the instruction given by the district court and strenuously objected to by appellant: *Lester v. Highland Boy Gold Mining Co.,* 27 Utah, 470; *Teller v. Bay & River Dredging Co.,* 151 Cal. 209; *Dennis v. Crocker-Huffman Land & Water Co.,* 6 Cal. App. 58; *Little Rock & Ft. S. R. Co., v. Wallis,* 82 Ark. 447; *Risse v. Collins,* 12 Idaho, 689; *Hunt v. St. Louis, I. M. & S. R. Co.,* 126 Mo. App. 261; *Berard v. Atchison & N. R. Co.,* 79 Neb. 830; *Kansas City, M. & O. R. Co. v. Mayfield,* 107 S. W. (Tex. Civ. App.) 940; *International & G. N. R. Co. v. Pape,* 73 Tex. 501; *Gulf, C. & S. F. R. Co. v. McGowan,* 73 Tex. 355; *Colorado Consolidated Land & Water Co. v. Hartman,* 5

Colo. App. 150; *Shotwell v. Dodge,* 8 Wash. 337; *Galveston, H. & S. A. R. Co. v. Borsky,* 2 Tex. Civ. App. 545; *Smith v. Chicago, C. & D. R. Co.,* 38 Ia. 518; *Jones & Jones v. Cooley Lake Club,* 122 Mo. App. 113; *Anderson v. St. Louis, I. M. & S. R. Co.,* 129 Mo. App. 384.

While there are judicial decisions of high authority holding that damage to growing crops at the time they are injured or destroyed may not be measured by the jury by the difference between the market value at the maturity of the probable crop without the injury and the value of the injured crop, less the expense of fitting for market the portion of the probable crop which did not mature, yet, as we have stated, the clear weight of the best authorities is in opposition to this and in favor of the rule stated in the instruction.

The next assignment of error is that the court erred in overruling the defendant's motion for a directed verdict at the close of plaintiff's testimony, for the reason that the plaintiff in the right of way deeds given by him released the defendant from all damages such as are sought to be recovered in this action.

The clause in the first drainage right of way deed executed by Daniel G. Hopper and his wife to the Elkhorn Valley Drainage District, which has a bearing on this assignment, purports to convey "a strip of land four rods wide, being two rods wide on the west side and two rods wide on the east side of the center line of the cutoff ditch, drainage ditch or levee, each or all, as the case may be, as the same is now surveyed and located by second party, and extending across the center of the S. E. quarter of section 15, due south to the south side of section 15 in township 15, range 10, together with any and all desired access thereto by said drainage district, its agents, contractors, representatives and employees, across other portions of said land of first parties. Said land is to be used perpetually according to the present or future plans of said drainage district, its successors and assigns for drainage purposes. Said parties of the first part also grant the right

to throw dirt so far as desired outside of and adjoining said strip of ground. To have and to hold the same, together with all the appurtenances thereto belonging, to the said second party, its successors and assigns for drainage district purposes as aforesaid forever. The first parties hereby release all damages and claims thereto on account of and by reason of the occupancy and use of said land as above mentioned." The consideration alleged in said deed is the sum of "one dollar and other valuable consideration."

The second drainage district right of way deed is in the same form and contains substantially the same provisions as to the use of land and release of all damages and claims for use and occupancy.

The contention of counsel for appellant is that these deeds constitute a bar to plaintiff's recovery, and that the clauses quoted contained in said deeds release all damages and claims against the drainage company for the occupancy and use of said lands so conveyed, and that plaintiff's action and several causes of action for damages are each released by said provisions.

In support of this contention it is urged incidentally on the part of appellant that the conveyances and releases evidenced by these deeds were the inducements for appellant to construct the ditches, and that, as there was no evidence that the defendant did not construct its drainage system in accordance with its "present or future plans," the court erred in overruling defendant's motion for a directed verdict; that the damages and claims for use and occupation specially mentioned in said drainage right of way deeds released the defendant from all damages such as are sought to be recovered in this case.

The allegations in plaintiff's petition are that the defendant carelessly and negligently constructed its drainage ditches and thereafter maintained the same so that the plaintiff's lands were flooded and his crops injured or destroyed; that the negligence in the construction and maintenance of said ditches by defendant company was the

proximate cause of the damages set forth in the four causes of action.

The question to be decided under this assignment of error is whether the provisions in said deeds relieved the defendant from all its responsibility for negligence, provided the ditches were constructed and maintained according to the then present or the future plans of the drainage district.

The question can be answered by the application of certain established principles of law relating to damages caused by negligence. This court has held in *Bunting v. Oak Creek Drainage District,* 99 Neb. 843, that a drainage district corporation, although a local corporation clothed with powers of a public nature, is liable for damages caused by its negligence in the construction of its works. In the same case this court further held that "damages caused unnecessarily by negligence and improper construction of the improvement cannot be anticipated, and a right of action accrues therefor when the damage occurs." When these legal principles are applied to the allegations in plaintiff's petition and to the evidence in support thereof, the question would seem to be answered in the negative. It was the plain legal duty of the drainage district corporation to so construct and maintain its ditches as to not work injury to the lands and crops of plaintiff, and as it did not do so it was liable for the damages. The provisions in the right of way deeds should not be construed as doing away with a duty enjoined by law and relieving the wrongdoer from the consequences of its illegal acts.

The evidence certainly tends to show and in fact appears conclusively to show, that the drainage district did not perform its duty with regard to conserving or protecting plaintiff's welfare and property in the construction and maintenance of its ditches. Many engineering errors or defects are shown by plaintiff's witnesses and in the main admitted or corroborated by the witnesses for defendant. It appears by the testimony of persons skilled in construction and engineering business of this character that for

the protection of plaintiff's lands the ditch constructed by defendant should have been diked along the lake through section 15, but that this was not done; that the angle of the ditch at the south end of the lake and 600 feet west of the southeast corner of section 15 was made so abrupt and with such a short bend that it would not permit the water to flow through it properly, the angle in the ditch acting in the nature of a dam, and that, owing to such improper construction, dirt, refuse, sediment and debris collected and held the water back, and that the defendant drainage district made no effort to open it; that the bank along the west edge of the Elkhorn river, before the ditch was constructed, was several feet higher than the usual level of the water, thus preventing the overflow of the river toward plaintiff's farm, yet the defendant cut open the bank its entire height, in this way providing an entrance for the ditch into the river and also allowed the waters of the river in turn, when high, to flow back through such entrance onto and flood plaintiff's lands; that a trap gate near the mouth of such ditch at the Elkhorn river was constructed, but that the same was inadequate and insufficient to prevent the waters of the river from flowing outward, and that, when closed, such gate acted as a dam and prevented the waters carried by the ditch from flowing into the river; that the best engineering science required that the current of the ditch at the place of its discharge should flow in the same direction as the current of the river, yet the ditch was constructed to enter the river at a right angle, the result of which was the creation of a whirlpool which tended further to dam the ditch waters and force the river waters back through the ditch onto plaintiff's lands; that the main engineering mistake, which might be regarded as the cause of all the other acts of negligence, was in failing to provide a proper direct outlet to the Elkhorn river along the extended and unbroken course of flow of the ditch which carried a large volume of water, especially when such outlet was easily available at a comparatively small expense.

The testimony of Mr. Adams, the county surveyor, and others was that the ditch should have been constructed either straight south into the depression known as the "cut-off," or should have continued south from where the ditch met the county road and turned east, that being the angle which, when constructed along either route, would have drained the waters properly and safely and prevented the flooding of plaintiff's lands; that there was a natural depression or fall of the land in both of the proposed but unused ditch corrections and outlets. Scientific and experienced witnesses in this class of work also testified that there were no engineering difficulties in the way of such construction, and that this would have obviated the objection of the ditch entering the Elkhorn river at a right angle and the depositing of silt and sediment due to the bend or angle referred to.

The record evidence seems to show beyond question that the defendant drainage company was grossly negligent and did not perform its duty; that plaintiff's welfare was entirely overlooked or disregarded; that approved engineering principles were not followed in the construction and maintenance of the ditches. It would be unreasonable to so construe the right of way deeds as to release all damages on account of the negligent and faulty construction or maintenance of the defendant's works. The drainage district was organized for the purpose of controlling the waters and improving the natural drainage of the land within such district, not to take waters from one section and make them overflow the lands lower down and thus destroy their usefulness and producing qualities.

In the case of *Boschulte v. Elkhorn River Drainage District,* 102 Neb. 451, this court states in the syllabus: "One who sells and conveys to a drainage district right of way through land owned by him, and releases the district from all claim for damages by reason of occupancy and use of the land so conveyed, may recover damages caused by carelessness and negligence in the construction of the improvement." This was a case where a drainage district with sim-

ilar, if not the same, powers as this defendant was a party and the right of way deed contained a stipulation almost identical with the one in the case at bar that "said land is to be used perpetually according to the present or future plans of said drainage district, its successors and assigns, for drainage purposes," and which further stipulates that grantor "will release all damages and claims thereto on account of and by reason of the occupancy and use of said land."

Plaintiff's petition alleged, as we have seen, the improper and negligent construction and maintenance of the ditches, and the record evidence by a fair preponderance fully sustains the allegations of his petition. The clauses in the right of way deeds claimed to grant immunity to and release the defendant from all damages should not and do not, either in reason or justice, give the drainage company the right or excuse to destroy the value and usefulness of a 480-acre farm under the name of an improvement. Courts should not be asked to construe a right of way deed given for a nominal consideration into an instrument for the confiscation without remuneration of a large and valuable farm. Such could not have been the intention of the plaintiff or the meaning of the language used, and the defendant drainage district would have hardly dared, on the solicitation of such conveyances, to have so interpreted their meaning and purpose.

The appellant further contends that the verdict of the jury was the result of passion and prejudice caused by misdirection in the instruction of the court, and that the damages assessed were extremely excessive; that, although it is conceded that the plaintiff sustained some damage on account of rains and wet weather, yet only a small part thereof was due to the negligent construction and maintenance of defendant's ditches. It is further contended that the overflow came for the most part directly from the Elkhorn river near the Union Pacific Railroad Company's bridge.

From a careful reading of the voluminous record of the

testimony contained in the bill of exceptions we find no facts admitted or proceedings of a nature to inflame the ordinary mind and no evidence of passion or prejudice on the part of the jury. The record shows the negligent and unskilful construction and maintenance of the ditches resulting in large injury to the crops and lands of plaintiff, but this is not excitable or inflammatory; that the total amount of damages set forth in the four causes of action, computed according to prices, acreage and figures generally most favorable to the defendant, aggregates over $28,000, and there is ample evidence in the record sufficient to sustain a verdict for over $30,000, while the one rendered by the jury was only in the sum of $17,743.

The court instructed the jury in regard to the overflow of the Elkhorn river, claimed to have been caused by acts of the Union Pacific Railroad Company north of plaintiff's lands, in the following words: "The only damages, if any, which plaintiff may recover in this action are such as resulted directly from wrongful acts of defendant; and if the jury believe that any part of such damages was caused by the Elkhorn river overflowing its banks north of plaintiff's lands independently of any negligence of defendant, the defendant would not be liable for such damages." The jury undoubtedly took this whole matter into consideration and must have made a liberal allowance for all such overflow and damages in its verdict. There was only one witness who testified that flood waters came north from the Elkhorn river in the vicinity of the bridge east of Waterloo, and he stated that "a very small amount of water" flowed over the road to the lands of plaintiff. There is no record evidence, however, showing that any of this water which left the river in the vicinity of the bridge ever injured or destroyed any of plaintiff's crops.

We can see no error in the instructions of the court, which were undoubtedly given after a careful, painstaking and able examination of the authorities applicable to the issues and evidence in this case. The evidence was fully sufficient to justify such instructions. The verdict of the

jury is sustained by the evidence and is in strict accord with the instructions. An examination of all the instructions given by the court shows that whatever doubts the court may have had regarding any questions of law were resolved in favor of defendant. An examination of the court's rulings on the admission or rejection of evidence does not disclose prejudicial error or anything that would unduly bias the jury in favor of plaintiff. The final verdict was apparently reached by the jury by giving defendant the benefit of any conflicts in the testimony by taking the lower values of products and by liberally reducing the amount of plaintiff's recovery.

In our judgment substantial justice will be found to have been reached in the proceedings of the court and in the findings of the jury, that no prejudicial errors were committed, and that the judgment of the district court should be

AFFIRMED.

MATT ROBERTSON ET AL., APPELLEES, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL., APPELLANTS.

FILED MAY 6, 1922. NO. 21968.

1. **Railroads:** FEDERAL CONTROL: LIABILITY. "The corporations owning a railroad are not liable at common law for any of the acts of the director general of railroads during the time the roads were in control of the federal government under the president's proclamation pursuant to Act Aug. 29, 1916 (Comp. St. sec. 1974a), confirmed by Federal Control Act March 21, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, secs. 3115¾a-3115¾p), during which time the corporations were completely separated from the control and management of their railroad systems." *Missouri P. R. Co. v. Ault*, 51 Sup. Ct. Rep. 593 (256 U. S. 554).

2. **Negligence:** JOINT TORT-FEASORS. "Where, although concert is lacking, the separate and independent acts or negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it." 38 Cyc. 488.

3. **Costs:** ATTORNEY'S FEES. Chapter 191, Laws 1919, does not repeal section 6063, Rev. St. 1913, by implication.

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

Byron Clark, Jesse L. Root, J. W. Weingarten, O. A. Abbott and *Brown, Baxter & Van Dusen,* for appellants and cross-appellants.

Prince & Prince, contra.

Heard before LETTON, DEAN and FLANSBURG, JJ., DAY and GOOD, District Judges.

DAY, District Judge.

This is an action brought to recover damages for negligent delay in the transportation of a shipment of live stock from Omaha, Nebraska, to Ansley, Nebraska, September 19, 1918. The defendants are the Chicago, Burlington & Quincy Railroad Company, Union Stock Yards Company, Limited, of Omaha, a corporation, James C. Davis, director general, and agent under the transportation act of 1920. From a verdict for plaintiff, all defendants appeal.

The defendant Chicago, Burlington & Quincy Railroad Company contends that a railroad company is not liable on causes of action arising out of the operation of the railroad property during the period of federal control by the government of the United States. In the case of *Missouri P. R. Co. v. Ault,* 41 Sup. Ct. Rep. 593 (256 U. S. 554), the court held: "The corporations owning a railroad are not liable at common law for any of the acts of the director general of railroads during the time the roads were in control of the federal government under the president's proclamation pursuant to Act Aug. 29, 1916 (Comp. St. sec. 197a), confirmed by Federal Control Act March 21, 1918 (Comp. St. 1918, Comp. St. Ann. Sup. 1919, secs. 3115¾a-3115¾p), during which time the corporations were completely separated from the control and management of their railroad systems."

As to the defendant Chicago, Burlington & Quincy Railroad Company the case is reversed and dismissed.

With reference to the other defendants, the case was tried upon the theory, and the jury instructed, that the director general and the stock yards company were each responsible alone for their own acts, and that neither was responsible for the acts of the other. The verdict in this case must be considered in this light, and the question as to the liability of a connecting carrier for the acts of the other is not involved in this case. Each appellant contends that it was the sole negligence of the other that proximately caused the delay to the shipment, thereby damaging the appellees. This question was fairly and properly submitted to the jury, and by their verdict they found that the negligence of both the director general and the stock yards company was the proximate cause of the delay and contributed to the damage. There is ample evidence in the case to support the verdict. In such a case this court has so often held that it will not interfere with the verdict of the jury that it has become an axiom of our law.

But the stock yards company contends that there can be no joint judgment against defendants where there is no joint liability and no joint negligence.

The acts of delay of the stock yards company and the director general were separate acts of delay; but the separate act of the stock yards company did not produce one injury, and the separate act of the director general another; they could not be separated; they both combined to contribute to the single injury. It would be impossible to determine just what injury was caused by the negligence of one or of the other. The rule applicable to this case is stated in 38 Cyc. 488: "Where, although concert is lacking, the separate and independent acts or negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it." See, also, *Wisecarver & Stone v. Chicago, R. I. & P. R. Co.*, 141

Ia. 121. There is in this case liability of both defendants and the judgment is not erroneous.

The trial court taxed an attorney's fee of $300 in favor of plaintiff against the director general. The director general contends that the court erred in taxing an attorney's fee, because it is a penalty, and that a penalty could not to be taxed against the director general. This court has decided that an attorney's fee is not a penalty, but a part of the costs incurred in the action. *Eckman Chemical Co. v. Chicago & N. W. R. Co.*, 107 Neb. 268; *Marsh & Marsh v. Chicago & N. W. R. Co.*, 103 Neb. 654; *Nye-Schneider-Fowler Co. v. Chicago & N. W. R. Co.*, 105 Neb. 151. The supreme court of the United States in the case of *Missouri, K. & T. R. Co. v. Cade*, 233 U. S. 642, has held that it is incorrect to regard a similar statute as imposing a penalty. The court states that, "manifestly, the purpose is merely to require the defendant to reimburse the plaintiff for a part of his expenses not otherwise recoverable as 'costs of suit.'"

The director general further urges that the section of the statute by the authority of which this attorney's fee was taxed has been repealed by implication. This fee was taxed under section 6063, Rev. St. 1913, as amended by chapter 134, Laws 1919. This section was not repealed by implication by chapter 191, Laws 1919. The two acts are not inconsistent and can be harmonized. They were not passed to accomplish the same purpose.

The plaintiff did not file a claim against the stock yards company, as provided by the statute as a condition precedent to the recovery of an attorney's fee against that defendant. Consequently, the court did not tax an attorney's fee against said defendant. In view of the fact that there were two defendants, we think the attorney's fee assessed by the trial court against the director general was sufficient, and no fee is taxed by this court.

For the reasons above stated, the judgment of the district court is reversed and the cause dismissed as to the

Chicago, Burlington & Quincy Railroad Company, and as to the other defendants affirmed.

JUDGMENT ACCORDINGLY.

E. H. SCHROEDER, APPELLANT, V. F. C. ZEHRUNG, MAYOR, ET AL., APPELLEES.

FILED MAY 6, 1922. No. 22463.

1. **Municipal Corporations:** REFERENDUM. The provisions of section 3, art. III of the Constitution, relating to the referendum, have reference to the acts of the state legislature only, and are not applicable to municipal legislation.
2. ———: HOME RULE CHARTER. While a home rule charter of a city, adopted pursuant to the constitutional provisions, may not contravene any provision of the Constitution or of any general statute enacted by the legislature, it is, in all other respects, binding and controlling. 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.
3. ———: ———: REFERENDUM. The referendum provisions contained in section 15, art. IV of the home rule charter of the city of Lincoln, are applicable only to acts that are legislative in character.
4. ———: LEGISLATIVE ACTS. The resolution referred to and summarized in the opinion is *held* not to be legislative in character.

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

C. C. Flansburg, O. L. Jones and *C. L. Rein,* for appellant.

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

Heard before LETTON, DEAN and DAY, JJ., DAY and GOOD, District Judges.

GOOD, District Judge.

Plaintiff brought this action in the district court for Lancaster county to enjoin the city of Lincoln and its mayor

and council from entering into a contract with the Technical Advisory Corporation for the performance of certain work, including the preparation of, and submission to, the mayor and council of a proposed ordinance for the zoning of the city of Lincoln. From a judgment of dismissal, entered upon the sustaining of a general demurrer to the amended petition, plaintiff has appealed.

In his amended petition plaintiff alleges that he is an elector, citizen, taxpayer and property owner of the city of Lincoln; that Lincoln is a city of the first class having a population of over 40,000 and less than 100,000 inhabitants, and is governed by chapters 47 and 51, Rev. St. 1913, and by a home rule charter, a copy of which is made a part of the petition; that the Technical Advisory Corporation made a written proposal to the city engineer of said city to make a field survey and permanently zone said city; that a written contract in accordance with said proposal, duly executed by said corporation, accompanied said proposal; that the city council adopted a resolution accepting the said proposal and authorizing the mayor and city engineer to enter into a contract with said Technical Advisory Corporation in accordance with said proposal, subject to approval in its final form; copies of said written proposal, contract and resolution were made parts of the amended petition; that within the time required by law there was filed in the office of the city clerk of the city of Lincoln a petition in due form signed by the requisite number of legal voters protesting against the passage of such resolution and requesting the council to either repeal or revoke said resolution or submit said proposal, contract and resolution to a vote of the legal voters of said city; that said council has failed to reconsider or set aside such resolution or submit the same to a special election called for that purpose; that the city council will approve said contract and proposal and execute the same unless restrained by the court.

The question for determination is whether, under the facts alleged in the petition, plaintiff and other taxpayers and electors of the city of Lincoln are entitled to have the

resolution adopted by the city council submitted to the electors under the referendum petition filed with the city clerk. Plaintiff insists that the right to have such resolution submitted to a referendum vote is guaranteed by constitutional and statutory provisions, as well as by the provisions of the home rule charter, and he also insists that the resolution is legislative in character, but that it is referable to the voters even if it is not legislative in character.

The constitutional provisions relating to the referendum are found in section 3, art. III of the Constitution. It specifically provides that the petition therefor should be signed by 5 *per centum* of the voters of the entire state, and that they should be distributed over two-fifths of the counties of the state. It is apparent that the voters of other counties in the state could have no interest in, nor right to pass upon, any ordinance or resolution enacted by the municipality, and it is quite clear that the referendum provisions of the Constitution have reference to the acts of the state legislature only, and that they are not applicable to municipal acts or legislation.

The Constitution of the state of Oregon provides: "The initiative and referendum powers reserved to the people by this Constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special, and municipal legislation." The decision of the supreme court of that state in *Long v. City of Portland*, 53 Or. 92, cited and relied upon by plaintiff, and holding that the right of referendum is reserved by the Constitution to the voters of the city regardless of any charter provisions, is not applicable in this state, for the reason that the Constitution of this state contains no provision of a similar character.

The city of Lincoln has adopted a home rule charter pursuant to the provisions of article XI of the state Constitution. Section 2 of that article provides, among other things: "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, * * * and if a majority of such qualified voters, voting thereon, shall ratify the same, it shall at the end of sixty days thereafter become the charter of said city, and supersede any existing charter and all amendments thereof." Plaintiff insists that under this constitutional provision the city is still governed by the provisions of the legislative charters under which it was previously governed. We are not inclined to this view. If a city, after having adopted a home rule charter, was still to be subject to all the provisions of the former legislative charters, there could be no object or purpose in adopting a home rule charter. While a home rule charter adopted pursuant to the constitutional provision may not contravene any provisions of the Constitution or of any general statute enacted by the legislature, it is, in all other respects, binding and controlling. A city may enact and put into its charter any provisions for its government that it deems proper, so long as they do not run contrary to the Constitution or to any general statute. *Simpson v. Paddock,* 195 Mich. 581; *Heilbron v. Sumner,* 186 Cal. 648; *Ex parte Johnson,* 201 Pac. (Okla. Cr.) 533.

Section 15, art. IV of the home rule charter of Lincoln, provides that ordinances passed by the council, with certain exceptions, may be referred to a vote of the electors of the city, if, within 15 days, a petition signed and verified by electors equal in number to at least 15 *per centum* of the highest number of votes cast for any councilman at the last preceding general city election, protesting against the passing of such ordinance, is filed with the city clerk. Upon the filing of such petition, the ordinance is suspended, and does not become operative until approved by a majority of the qualified electors voting thereon at a general or special election. It will be observed that this referendum provision pertains to ordinances only. Appellant contends that the term "ordinance" is defined by section 5227, art. VI, ch. 51, Rev. St. 1913. Said section provides: "The word 'ordinance,' where used in this article, shall mean and include ordinances, orders, resolves, agreements, contracts,

and any measure which it is within the power of the legislative authorities of such city or other municipal subdivision of this state to enact or give the force and effect of law." But by section 5255 of the same article it is provided: "This article shall not become operative in any city until accepted by the voters thereof." It is not alleged that the article was ever adopted by the city of Lincoln, and hence this definition does not apply.

The vital question in this case is whether the resolution is legislative or administrative in character. Let us examine and analyze the present situation in respect to the resolution in question. The home rule charter of the city contains provisions authorizing the city council to enact a zoning ordinance limiting the height and bulk of buildings and determining the area of yards and courts and other open places within certain prescribed districts, and to regulate and restrict the location of trades and industries and the location of buildings designed for specific uses, and other provisions that are pertinent to a zoning ordinance. Previous to the adoption of this resolution an appropriation had been made for the purpose of gathering information and data necessary for the preparing of a zoning ordinance for the consideration of the council. The action of the city council in adopting the resolution in question was a step taken to have the data and information gathered and for the framing of an ordinance to be submitted to it. All that the resolution accomplishes is the making of a contract to collect information and data necessary to the preparation of an ordinance and the preparing of the same to be submitted to the council for its consideration. The resolution, in our opinion, does not attain to the dignity of a legislative act. It is rather an administrative act. The referendum is applicable to municipal legislation; that is, to an ordinance which is a declaration of the municipal law upon any subject, but it cannot be invoked to prevent the council from procuring information or from framing a proposed ordinance for its consideration. The referendum is not applicable and can-

not be invoked until the proposed legislation has assumed definite form and has been enacted into a law by which the municipality will be governed, unless suspended by operation of the referendum. Until the information and data have been assembled, and an ordinance framed and adopted by the mayor and council, it cannot be definitely known that there ever will be a zoning ordinance. It is clear that the resolution in question is not legislative in character and is not therefore subject to a referendum vote.

The judgment of the district court is free from error, and is

AFFIRMED.

DEAN, J., dissents.

STATE OF NEBRASKA, APPELLANT, V. ETHEL THRALL MALTBY, APPELLEE.

FILED MAY 6, 1922. No. 22030.

1. **Injunction:** CRIMINAL ACTS. Where acts complained of are violations of the criminal law, courts of equity will not on that ground alone interfere by injunction to prevent their commission, as they will not exercise their powers for the purpose of enforcing criminal laws by restraining criminal acts.

2. **Nuisance:** INJUNCTION. A court of equity may, at the instance of properly constituted authority, issue an injunction in the case of a public nuisance, when its issuance will give more complete relief than can be afforded in a court of law.

3. **Injunction:** CHIROPRACTORS: PRACTICING WITHOUT LICENSE. A suit in equity brought by the attorney general on behalf of the state to enjoin a chiropractor from practicing her profession without a license is not maintainable. *Held*, that the punishment of the offender for the violation of such laws is solely by criminal action; a complete and adequate remedy being afforded by the courts of law.

4. ———: CRIMES: INADEQUATE PENALTIES. If the penalty for any crime seems to be inadequate, equity will not, for that reason, interfere, for the relief must come from the lawmaking power, and not by extending equity into a field foreign to its purposes.

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

Clarence A. Davis, Attorney General, and *Alfred C. Munger,* for appellant.

Hotz & Lee, contra.

Frank E. Edgerton, amicus curiæ.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and FLANSBURG, JJ., HOBART and PAINE, District Judges.

PAINE, District Judge.

This is a suit in equity brought by the state of Nebraska, through its attorney general, to enjoin Ethel Thrall Maltby, defendant, from maintaining a public office in the city of Omaha in which she gives chiropractic treatments and administers and prescribes drugs to her patients without first having obtained a license. A temporary injunction was granted by the district court for Douglas county, but later a demurrer was sustained and a permanent injunction denied, and the plaintiff electing to stand upon its demurrer, the case was thereupon dismissed, from which order the state of Nebraska plaintiff appeals to this court.

The petition may be briefly summarized as follows: That the defendant is a resident of and doing business and maintaining an office in the Elks Building in Omaha, Nebraska; that she has for more than two years there maintained an office in which she has engaged in the practice of chiropractic; that this profession consists in the treatment of diseases or ills of the human body by adjustment by hand of the vertebræ of the spine; that chapter 197, Laws 1915, requires that persons desiring to engage in chiropractic shall first pass an examination and secure a license, without which no person is permitted to practice chiropractic in this state; that defendant has failed refused and neglected to submit herself to such examination or to procure the required license; that during said time she has falsely represented herself to be a qualified.

licensed chiropractor, and has used the title "D. C." meaning Doctor of Chiropractic, to induce any and all persons to submit their bodies to her manipulation and adjustments; that the laws dealing with said practice were enacted for the protection of the health and welfare of the people, and designed to prevent ignorant and unskilled persons without proper knowledge of anatomy to make the adjustments which, it is claimed, will relieve the pressure on the nerves, and so allow nature's nerve energy to flow freely to and from the brain; that the lives of the public were endangered by quacks and charlatans who were practicing upon the bodies of men, women and children, without proper qualifications, thereby constituting themselves public nuisances; that the state board of chiropractic organized under the above law of 1915 has at all times been willing and ready to examine all applicants for licenses; that said board has frequently notified this defendant that she was violating the law and endangering the health and welfare of the people of Nebraska; that she has also been notified by the department of public welfare as well as by the attorney general's department of this state that unless she obtained a license a criminal complaint would be filed against her; but that in open disregard thereof she has openly, publicly, persistently, intentionally and continuously refused to obey the law, and has publicly stated upon many occasions that she would disregard any criminal prosecutions filed against her for so practicing without a license, and was certain she would be acquitted if arrested and tried, and that she would continue to practice chiropractic even though one or more criminal prosecutions should be brought against her; that, in addition to the above, she has been guilty during all of said times of practicing medicine by administering and prescribing drugs to her patients, all without a license; that by such acts she has become a public nuisance, detrimental to the public welfare, dangerous to public health, against public policy, and contrary to the laws of the state of Nebraska; that such acts and practice on the part of the defendant

constitute an open and continuous public nuisance in the city of Omaha, which cannot be stopped or abated except by an injunctive order of a court of equity, and that plaintiff is without an adequate remedy at law, or means whereby the open, continuous, persistent and repeated violations of the law may be prevented and the health and welfare of the public protected and conserved. Following these and many other allegations of the petition, there was a prayer in apt language asking that a temporary injunction be granted, and that upon a final hearing a permanent injunction should restrain Ethel Thrall Maltby, defendant, from continuing to practice chiropractic medicine in Douglas county without first procuring a license as provided by law.

It may aid in discussing the questions at issue to define the term involved herein. Chiropractic is a system of healing that treats disease by manipulation of the spinal column. There are three general classes of healing at the present time: (1) Medical, as followed by the general and ordinary physicians and surgeons. (2) Mechanical, as employed in osteopathy and chiropractic. (3) Mental healing, as taught by Christian Science and other sects.

The main question presented in this case is: Shall an injunction be granted to enforce the provisions of a criminal statute? Our law books are full of instances in which the same offense gives rise to a civil action and also to a criminal prosecution. In this case the petition recites facts which, taken as true for the purposes of this demurrer, show that the law relating to chropractic is being flagrantly violated at the office of the defendant in the city of Omaha, and the state maintains that such an office may be enjoined as a public nuisance affecting the health, morals or safety of the community. "In early times the English court of chancery, not without much protest on the part of common law courts, occasionally issued injunctions to restrain the commission of certain criminal acts. * * * It is now the rule that, where acts complained of are violations of the criminal law, courts of equity will not

on that ground alone interfere by injunction to prevent their commission, as they will not exercise their powers for the purpose of enforcing criminal laws by restraining criminal acts." 14 R. C. L. 376, sec. 78. However, in the case of public nuisances, an exception to this general rule seems to be well recognized; "it being held that, though such a nuisance is indictable, yet a court of equity may, at the instance of the properly constituted public authority, issue an injunction as giving more effectual and complete relief than can be afforded in a court of law." 14 R. C. L. 379, sec. 80. Examples of injunctions against public nuisances may be cited, such as an injunction from using a building to conduct an illegal prize fight in the case of *Columbian Athletic Club v. State,* 143 Ind. 98, 52 Am. St. Rep. 407; and the three cases combined in *Respass v. Commonwealth,* 131 Ky. 807, 21 L. R. A. n. s. 836, deciding that gambling houses or poolrooms where money was to be bet on horse races are public nuisances. Injunctions have also been granted to restrain managers of a lottery from proceeding with further drawings (*State v. Maury,* 2 Del. Ch. 141); and to restrain the pollution of a stream by draining water from a cemetery into it, which was also a crime (*Barrett v. Greenwood Cemetery Ass'n,* 159 Ill. 385, 31 L. R. A. 109).

In the case of *Beisel v. Crosby,* 104 Neb. 643, this court enjoined an undertaker from conducting a funeral home in an exclusively residential district of the city of Omaha for the reason that no relief the law afforded would remedy the wrong that was threatened.

Judge Sedgwick in *State v. Chicago, B. & Q. R. Co.,* 88 Neb. 669, 34 L. R. A. n. s. 250, says: "The repeated, continuous and persistent violations of the statutes are what make them nuisances, independent of the express terms of the statute declaring them to be such. Indeed, we would think that every place where a public statute is openly, publicly, repeatedly, continuously, persistently and intentionally violated is a public nuisance."

The attorney general contends that under this defini-

tion the practice of chiropractic by the defendant is a public nuisance. It is illuminating to note that the definition relied upon was taken from the case of *State v. Crawford,* 28 Kan. 726, 42 Am. Rep. 182, and was not given as a rule for equity courts to follow, but was founded upon a Kansas statute, in force since 1859, in which the legislature had declared that all places where intoxicating liquors were sold in violation of law were common nuisances and should be shut up and abated as public nuisances. And the court finds that, even after giving the very broad and general definition of public nuisances relied upon in this case, the Kansas court affirmed the lower court in refusing to grant the injunction prayed for, and said that keeping such an illegal saloon open may not be enjoined in a court of equity.

The granting of the injunction in the case of *State v. Chicago, B. & Q. R. Co., supra,* was necessary, because the attempt to stop the serving of liquor on dining cars by criminal arrest of each participant therein would be impossible, especially in those counties where stops were infrequently made, and would result, not only in a multiplicity of suits, but might in the end be entirely futile and ineffectual; while in the case at bar there is but one individual offender who, it is alleged, has defied the law and threatens to continue to violate the law, even though complaints are filed against her.

The cases examined thus far have all involved the misuse of buildings or property or dining cars, and do not establish any precedent for the use of an injunction against one woman who fails to follow the law requiring chiropractors to be examined and licensed. When new schools of practice come into existence, their adherents are not qualified to pass the examinations by boards already established. Failing to be licensed under existing laws, their followers must prevail upon the legislature to legalize their particular mode of practice or they can be arrested and punished. In response to such a call the legislature in 1915 passed a law licensing chiropractors and providing a fine of $200

and imprisonment up to one year in the county jail, or both, for failure to be examined and secure a license. In 1919 the legislature saw fit to amend this law as found in chapter 190, and cut the punishment provided to a fine of not to exceed $100, or by imprisonment of not to exceed three months.

Our attention has been called to a decision by the supreme court of Illinois which involves the exact point at issue. The attorney general and other state officers of that state brought a bill for injunction against an association consisting of 52 chiropractors, alleging conspiracy to defy the laws and continue practicing without a license, and, although many of the members had been arrested and punished with fines, the association protected its members by paying all fines and costs, and all of them continued to practice without a license. That case is much stronger than the case presented to this court, yet that court said: "All the bill alleges appellees to propose to do is to continue to practice without a license, which would be a misdemeanor for which punishment is provided and an adequate remedy at law exists." *People v. Universal Chiropractors' Ass'n*, 302 Ill. 228.

This court finds that the office or residence where a person is practicing chiropractic without a license is not a public nuisance, and neither is such an offender who violates the law in this respect. The statute of Nebraska regulating the practice of chiropractic recognizes such a profession as a legal one and undertakes to regulate it, and such a law is not prohibitive in its provisions, as is a liquor law, and therefore violations of its provisions should be punished by the criminal process, and not by injunction. If the punishment provided is not sufficient, recourse should be had to the legislature, and not to the equity side of the courts.

AFFIRMED.

ROSE, J., dissenting.

Defendant is openly and defiantly practicing chiropractic daily without a license in violation of law.

When the state, for the protection of public health, applies for an injunction to prevent a continuing, public nuisance created by the practice of an unlicensed chiropractor, a court of equity should not abdicate merely because the unlawful acts constituting the nuisance are punishable as misdemeanors.

Misdemeanors committed by an unlicensed chiropractor to an extent amounting to a public nuisance may be enjoined by a court of equity without interfering with the right to jury trials in criminal prosecutions for prior misdemeanors, if such a right exists.

The criminal prosecution of an unlicensed chiropractor who openly defies the public prosecutors and, in spite of law and prosecutions, threatens to continue an unlawful practice amounting to a public nuisance, which, through ignorance and lawlessness, may result in the violation of quarantine regulations and in the spread of epidemics, is not an adequate remedy for the protection of the public. It would be better to abate the nuisance in advance by injunction than to rely on criminal prosecutions after a calamity has befallen the public.

This application of the state for an injunction has an intimate relation to public health and to the laws on that subject. Supplementing the statutes already in existence the legislature, in 1919, prohibited the practice of chiropractic without a license. The qualifications of a practitioner of chiropractic and the conditions of procuring a license are defined by statute. Educational training equivalent to that of a regular high school course of four years is required. An applicant for a license must be a graduate of a chartered chiropractic school after a personal attendance of not less than three terms of nine months each. In addition, an applicant must pass successfully an examination by a public board, and the subjects include "anatomy, physiology, chiropractic, symptomatology, nerve tracing, chiropractic orthopedy, hygiene, principles of chiropractic and adjusting, as taught by chiropractic schools and colleges." Laws 1919, ch. 29, sec. 2.

The court is bound to presume that the lawmakers in adopting these high standards for the practitioners of chiropractic and in legislating for the public health had at hand all the information essential to legislative action.

The branches of learning mentioned indicate that the legislature meant to require the attainments essential to diagnosis for individual and public purposes, including quarantine and the arresting of infectious and contagious diseases. The system of healing by the promiscuous use of the hands on the spinal column and other parts of the human body in ignorance of the subjects of hygiene and diagnosis is condemned by statute. Without the qualifications required by law such a system of healing may become an agency for the spread of epidemics. "Symptomatology," mentioned in the statute, is a branch of pathology relating to the observation and classification of symptoms—a field of knowledge essential to diagnosis. Defendant did not pass the statutory examination on this or any other subject and has not shown that she is qualified to treat diseases according to the system of healing known as "chiropractic" or to protect the public from those who come to her with infectious or contagious diseases. She nevertheless pretends to practice chiropractic in her office in Omaha without a license. The petition so alleges and the allegations are admitted by her demurrer. The state in applying for an injunction to abate the nuisance pleads in the sixth and seventh paragraphs of the petition the following:

"6. That for more than two years last past the defendant has maintained her office as heretofore described and has practiced chiropractic, and that the defendant is still maintaining her said office and practicing chiropractic in violation of law without first securing a license therefor, and has daily throughout said time adjusted the vertebræ of the spines of men, women and children, and she has openly in her said office in the said city of Omaha, Douglas county, Nebraska, and publicly, repeatedly, continuously, persistently and intentionally treated persons chiropractically in direct defiance and contrary to the provisions of

the statutes of the state of Nebraska; that said defendant has frequently been notified by the state board of chiropractic that she was violating the law, and that she was endangering the health and welfare of the people of the state of Nebraska by her practice as an unqualified chiropractor, but she persistently, intentionally and continuously refuses to submit herself to examination as provided by law and thereby secure a license and thereby qualify herself for such practice, and she has continuously, persistently and intentionally continued her said practice as chiropractor in said city of Omaha, Nebraska, until same has become a public nuisance and detrimental to the public welfare and dangerous to the public health and contrary to and against public policy, which requires the examination of those who claim to cure or relieve the ills of the human body; and that defendant has been notified by the officers of the department of public welfare for the state of Nebraska, and by some of the assistants to the attorney general for the state of Nebraska, that unless she obtained a license to practice chiropractic medicine, and if she continued to practice chiropractic medicine without obtaining such a license, a criminal complaint or complaints would be filed against her under the laws as aforesaid, and that defendant has publicly stated a number of times that she would disregard any criminal prosecutions filed against her for practicing chiropractic medicine without a license as aforesaid, and was certain of an acquittal or acquittals, and would continue to practice chiropractic medicine, notwithstanding the fact that one or more criminal prosecutions might be pending against her for practicing chiropractic medicine without a license.

"7. That the continuous persistent and intentional violation of the law in the treatment of the ills of men, women and children who are attracted to her office in said city of Omaha, Nebraska, by her advertising herself as a qualified chiropractor without procuring a license so to do from the statutory authorities, endangers the health of the public, defeats public policy of requiring skill and knowledge

on the part of practitioners before they are licensed to practice on the bodies of the people of the state of Nebraska, and it constitutes an open and continuous nuisance in said city of Omaha, Nebraska, that cannot be stopped or abated except by injunctive order made and issued in and by a court of equity."

The statute is by construction a part of the petition. When both are considered they show that defendant is maintaining a public nuisance which should be abated by injunction. *State v. Chicago, B. & Q. R. Co.,* 88 Neb. 669.

The jurisdiction and powers of courts of equity in Nebraska come directly from the Constitution and consequently are not limited by subsequent legislation. *Matteson v. Creighton University,* 105 Neb. 219.

The constitutional "right of trial by jury" is preserved as it existed at common law and under the statutes in force when the Constitution was adopted, but does not necessarily extend to new misdemeanors, like those committed by defendant, for which mere fines and jail sentences only are imposable. *Bell v. State,* 104 Neb. 203.

On the application for an injunction to abate the nuisance, therefore, the court of equity is not hampered by the plea of defendant that she is entitled to a jury trial. When the state goes into a criminal court and charges her with a misdemeanor, the right, if any, which she may have to a jury trial will be protected by that court. The remedy by inflicting punishment for the misdemeanors constituting the nuisance which menaces the public health is inadequate under the petition and statute. Entertaining these views, I am compelled to dissent from the opinion and the judgment of the majority.

FRED GUND, APPELLANT, V. DOLOR ROULIER, APPELLEE.

FILED MAY 6, 1922. No. 21947.

1. **Contracts:** PROOF. If a contract be reduced to writing, neither the mere transfer of the physical possession thereof by one party thereto to the other, nor the mere failure to make such transfer, is conclusive as to such contract becoming effective, although either such transfer or failure to transfer is probative of the intent of the parties.

2. ———: PAROL EVIDENCE. If a contract is reduced to writing, a condition thereof, not expressed in such writing, to the effect that the same shall become void if not signed by a third person, is a condition subsequent and parol evidence to prove such condition is inadmissible.

3. **Trial:** CONCLUSIVE EVIDENCE. Where the evidence in a case is such that fair and reasonable minds could not differ on the conclusion to be reached therefrom, there is no question of fact for the jury, even though there may be a scintilla of evidence in favor of an opposite conclusion.

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

Tibbets, Morey & Fuller and *George J. Marshall,* for appellant.

A. H. Byrum and *Bernard McNeny, contra.*

Heard before LETTON, DEAN and DAY, JJ., BLACKLEDGE and TEWELL, District Judges.

TEWELL, District Judge.

This is an action brought to recover damages alleged to have been sustained on account of the failure of the defendant to deliver wheat as per the terms of a written contract, as follows:

"July 7, 1916. Contract No. 53. This is to certify that I have this day contracted and sold to Gund & Peterson ——— bushels of wheat at 85 cents per bushel (—— lbs. per bushel) to be clean, sound and dry and to grade No. 2, to be delivered into their elevator or cribs at Campbell on

or before the 30th day of Aug. 1916. If damaged or inferior grain is delivered and accepted on this contract, the market difference at which such grain is selling under the contracted grade day of delivery shall be deducted from the contracted price. I certify that this grain is in my posession and free of all liens and incumbrances. Dolor Roulier.

"Received of Gund & Peterson five dollars to apply on this contract. Dolor Roulier."

The answer is a general denial coupled with a plea that the written instrument sued upon was signed by the defendant under a verbal agreement that the same should be retained by the defendant for the purpose of securing the signature of Moise Roulier, a brother of defendant, who was then a joint owner of some wheat with defendant and that after said Moise Roulier signed said instrument the same should be signed by plaintiff before becoming effective as a binding contract. The answer also alleges that Moise Roulier refused to sign said instrument, and that the same was retained by the defendant, and never turned over to the plaintiff, and never signed by the plaintiff, and never became binding as a contract. The answer further alleges a tender of delivery of certain wheat raised by the defendant and said brother, such tender being later than the making of said writing, at 85 cents a bushel, and a refusal of the plaintiff to accept the same. The reply was a general denial. The cause was tried to a jury, and from a verdict and judgment in favor of the defendant the plaintiff has appealed.

The action was begun in the name of all members of the firm of Gund & Peterson, but later plaintiff, Fred Gund, was by assignment and order of court made sole party plaintiff.

It will be noted from the above statement of the case that the plea in the answer to the effect that the negotiations for sale never ripened into a contract and the plea of a tender of delivery on the contract and a refusal of acceptance are not consistent defenses. Further

note that the blank space for inserting the number of bushels sold is not filled in. The evidence shows a state of facts differing materially from those pleaded in the answer. It is shown beyond dispute that the defendant signed the written instrument which is pleaded as a contract, and that a check for $5 was given the defendant by the plaintiff at the time of such signing. This check, which was never presented for payment, could not be located at the time of the trial, but the undisputed testimony of plaintiff is that there was written upon the check the words, "Advance on 4,000 bushels of wheat at 85 cents." The evidence also shows, beyond the point where reasonable minds could fairly differ, that a carbon was placed between two like sheets of paper prepared in book form for making contracts in duplicate like the one pleaded, and then the contract made by filling in blanks and by the signature of the defendant thereto, the original being given to the defendant and the carbon copy kept by the plaintiff. The plaintiff and witnesses Andy Peterson, Gottlieb Binder, and Fred Koch, all four testify that several days after the signing of the written instrument in suit the defendant made statements to the effect that he had sold 4,000 bushels of wheat to Gund & Peterson for 85 cents a bushel. The only evidence in support of the alleged verbal condition of the contract that the same should not be binding until signed by the plaintiff and Moise Roulier is that of the defendant himself, and the only fair construction that can be placed upon such testimony is that the written instrument took effect as a contract at the time of signing, but *was to become void* if not signed by Moise Roulier. This is clearly indicated, not only by the circumstances of the payment of the check for $5, but by the testimony of the defendant taken as a whole. Relative to the conversation which took place when the instrument sued upon was signed, the defendant was asked: "What was said about the proposition, in case Moise didn't sign it?" The answer was: "The contract I had entered into was to be void." While the answer is a mere conclusion of the witness, it is in keeping

with the rest of his testimony concerning the transaction in which the instrument sued upon was made.

From the above statement of the pleadings and the evidence it will be seen that one of the principal questions involved is whether or not parol evidence is admissible in an action upon a written agreement to prove an alleged oral condition of the agreement not contained in the writing, to the effect that, unless some specified event happened, the agreement, although effective when signed, should become void. We conclude that the answer must be in the negative. The case of *Stanley v. White,* 160 Ill. 605, illustrates the rule involved quite clearly.

It is true that one of the necessary elements of every legal act is that it must be final in its utterance, and that the finality of a writing as a legal act depends upon the circumstances of each case. The mere physical act of transferring the possession of a written instrument is not necessarily a conclusive test as to its finality. In most jurisdictions of the United States even the older rule as to the transfer of the possession of a deed to real estate to the grantee being a conclusive act of delivery is worn away. *Curry v. Colburn,* 99 Wis. 319; 4 Wigmore, Evidence, sec. 2408. That the finality of a writing as a legal act may depend on a third person's assent or upon almost any condition precedent to the act going into effect is not doubted. The case of *Pym v. Campbell,* 6 E. & B. (Eng.) 370, is a leading case in this regard. On the other hand, the fact that the maker may retain the physical possession of the writing, although probative of the intent of the parties, does not necessarily negative the finality of the act. *Doe v. Knight,* 5 B. & C. (Eng.) 671, a leading case. The finality of the act or so-called delivery of a written instrument is one of intention, and is more a question of fact than of law. *Dodd v. Kemnitz,* 74 Neb. 634.

The above citations are all cases of conditions precedent to the instrument becoming effective, or, in other words, becoming a legal act. The difficulty comes in distinguishing in practical application the principle

that conditions precedent to the document becoming effective may be shown, to show that the document never became a legal act, from the principle which denies validity to any oral part of a legal act that has been reduced to writing. This oral part of such act thus reduced to writing is invalid, and therefore parol evidence to prove the same is not admitted, and, if admitted, is of no effect. By this latter principle a condition subsequent to the act becoming effective, which, in order to be such a condition, forms a part of the act which it qualifies, must be contained in the writing, or it not only cannot be proved by parol, but, even if proved, is void. By the first rule, which relates to conditions precedent, this written document is not an act until the moment at which the parties intend it shall become effective arrives, and the arrival of this moment may be made to depend upon future events, which thus become conditions precedent to the existence of the act. By the second rule, which relates to conditions subsequent to the existence of the act, any oral part of such act, if the act is reduced to writing, is denied validity. The two principles are entirely distinct, and the difference between the two will often explain many of the so-called exceptions to the parol evidence rule, many of which are but applications of the rule relating to conditions precedent. *Security Savings Bank v. Rhodes,* 107 Neb. 223. See 4 Wigmore, Evidence, sec. 2410. The appellee relies strongly upon the case of *Dodd v. Kemnitz, supra.* The condition in that case was a condition precedent, and that case is therefore not in point. The case of *Nebraska Exposition Ass'n v. Townley,* 46 Neb. 893, is a case of a condition subsequent.

The above stated principles will often be more clearly distinguished and properly applied if it is constantly remembered that the so-called parol evidence rule is not a rule of evidence in any sense, but is rather a rule of substantive law. *Pitcairn v. Hiss Co.,* 125 Fed. 110; 4 Wigmore, Evidence, sec. 2400. The evidence of conditions subsequent is excluded, not because it is oral evidence, or

consists of spoken words, as it often may be in the form of written letters or telegrams, but because the parties to the written act have by such act declared what facts shall have legal effect, and have conclusively excluded all others, and are bound by contract, a rule of substantive law, and not a rule of evidence, to abide by those facts. Thus conditions subsequent, which qualify the act of which they are a part, become ineffective, and are denied validity, and are therefore immaterial and thus inadmissible. Even if admitted without objection such evidence has no legal effect. In this connection a keen distinction must be made between the rule which provides that the statute of frauds may be waived by failure to object to the introduction of oral evidence and the rule denying validity to conditions not expressed in an act as reduced to writing. At common law no legal act was required to be in writing, except to comply with the rule that if an act was reduced to writing it could not be canceled or annulled except by an act in writing or of as "high" a quality, and yet the parol evidence rule is a principle of the common law. The statute of frauds deals, not with the validity of the agreement, but only with the evidence to prove it, while the parol evidence rule does deal with the validity of the agreement.

Applying the above rules to the case at bar we conclude that no fair construction of the evidence, which includes the circumstances surrounding the execution of the instrument in suit, could result in any other conclusion than that such instrument became effective at the time of signing, and that the alleged condition that the contract should become void if not signed by Moise Roulier was a condition subsequent and therefore of no effect. The evidence fails to support the allegations of the answer. The appellee in his brief makes mention of no objection having been made to a part of the evidence relating to the alleged condition precedent. The application of the statute of frauds might have been thus waived, but that which was denied validity did not become effective by being introduced without objection. The number of bushels sold was

supplied by the writing on the check and the written contract thus made complete and all in writing. Furthermore, the evidence is past the point where reasonable minds could differ relative to there being any condition either precedent or subsequent to the contract. This court has announced the rule that, where a cause is decided by a jury on conflicting evidence under proper instructions, the verdict will not be disturbed on appeal, but it is also a wholesome rule of law, and one which will prevent a lot of litigation and also many a gross injustice, that, where the evidence is such that fair and reasonable minds could not differ on the conclusion to be reached therefrom, there is no question of fact for the jury, even though there may be evidence in favor of an opposite conclusion. We conclude that it was the duty of the trial court to have instructed the jury that the only question of fact for it to determine was the amount of the damage, inasmuch as this damage might vary under the evidence and the rule of damages. For the reasons above stated, the judgment rendered by the trial court is reversed, and the cause is remanded, with directions that the amount of damages be determined under proper instructions as to the measure of damages.

REVERSED.

The following opinion on rehearing was filed October 20, 1922. *Former judgment of reversal vacated, and judgment of district court affirmed.*

Appeal: AFFIRMANCE. Upon a reexamination, the record is found to be free from error, and our former judgment of reversal is vacated and set aside, and the judgment of the district court affirmed.

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

DAY, J.

Upon consideration of the defendant's motion for a rehearing in this case, the court ordered a reargument,

which has been made. Our former opinion is reported, *ante* p. 589, wherein the issues are clearly defined, and need not be here repeated.

It was the plaintiff's theory that the instrument sued upon was a complete, binding and effective contract in all respects, except that the number of bushels of wheat was by inadvertence left blank, and as to that item the plaintiff maintained that he had the right to show by parol testimony the number of bushels sold. As to the other features of the instrument the plaintiff is insistent that its terms could not be modified or explained by parol. The theory of the defendant was that certain conditions precedent were to be performed before the instrument was to become a binding contract, one of them being that the instrument should be signed by Moise Roulier, a brother of the defendant, who was a part owner of the wheat. Defendant insisted that parol testimony was admissible to show that the instrument never became in fact a contract.

In our former opinion the classes of cases in which parol testimony is admissible and those in which it is not admissible are clearly distinguished, and we are satisfied with the principles of law as therein announced. Upon a reexamination of the record, however, we are now convinced that we were in error in holding that the facts showed a condition subsequent, and that therefore the testimony offered was improper as tending to vary the terms of the written contract. We think it a fair inference from the record that the plaintiff knew before the instrument was signed by the defendant that Moise Roulier was a part owner of the wheat proposed to be purchased. This being true, it is probable that the plaintiff would desire that both the owners sign the instrument, and is a circumstance which corroborates the defendant in his statement that the paper was not to be a contract until signed by his brother Moise.

Considering all of the circumstances in evidence, together with the direct testimony of the defendant that the instrument was not to become an effective contract until

after it was signed by Moise Roulier and delivered to the plaintiff, we are convinced that the question as to whether there was in fact an existing contract was a question of fact to be submitted to the jury. The trial court took this theory and submitted to the jury the question as to whether the instrument was to be signed by Moise before it became effective.

Upon a further consideration of the record, we are convinced that our former conclusion as to the facts was erroneous, and that the issues were properly presented to the jury by the trial court.

It appearing that there is no error in the record, our former judgment of reversal is vacated and set aside, and the judgment of the district court

AFFIRMED.

CHARLES W. WENTZ V. STATE OF NEBRASKA.

FILED MAY 15, 1922. No. 22102.

1. **Banks and Banking:** CERTIFICATE OF DEPOSIT: REPORTS. Where a vice-president and managing officer of a bank issues a certificate of deposit on the bank upon a numbered form in regular use by such bank, payable to a person or corporation or order, and delivers it to the payee, to pay a personal obligation of the vice-president, the certificate of deposit is a liability of the bank within the meaning of section 18, art. XVI, title V, ch. 190, Laws 1919, which requires that liabilities of the bank be reported to the department of trade and commerce, although the bank received no consideration or deposit therefor.

2. ———: LIABILITIES: REPORTS. Where an officer of a banking corporation, within the apparent scope of his authority, issues an instrument purporting on its face to be an obligation of the bank, such transaction should be included in the reports of the bank required by law to be made to the department of trade and commerce, if such instrument be outstanding at the time any such report is required.

3. ———: ———: ———. In a prosecution of a bank officer for knowingly omitting an outstanding certificate of deposit from the list of liabilities of such bank in a required report to the depart-

ment of trade and commerce, it is no defense that such officer may have believed that such certificate of deposit was not a liability against the bank.

4. **Criminal Law:** EVIDENCE: PHOTOGRAPHS. If, on the trial, it is shown that the original certificate of deposit is not within the state, the court may admit in evidence a photographic copy of such certificate.

5. ———: ———: ———. The admissibility of a photograph in evidence is a question largely within the discretion of the trial court, and unless it appear that such discretion has been abused, no error can be predicated thereon.

6. ———: VERDICT. The information contained three counts, each charging a separate offense. A verdict of guilty on one count and acquittal on the others is not inconsistent, though the evidence would have justified a conviction on all the counts. *Weinecke v. State*, 34 Neb. 14.

ERROR to the district court for York county: GEORGE F. CORCORAN, JUDGE. *Affirmed.*

Baker & Ready, for plaintiff in error.

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

Heard before MORRISSEY, C. J., ALDRICH and ROSE, JJ., RAPER and STEWART, District Judges.

RAPER, District Judge.

The plaintiff in error was convicted of the crime of making a false report to the department of trade and commerce of the assets and liabilities of the American State Bank of Aurora. The evidence discloses quite conclusively that the plaintiff in error was the vice-president and managing officer of the American State Bank of Aurora; that on the 29th day of September, 1919, he, as vice-president of the bank, issued a certificate of deposit on the regular form used by the bank (being certificate No. 366) on said bank for the sum of $5,000 payable to the American National Fire Insurance Company or its order, twelve months after date, with interest at 3 per cent. At that time Charles W. Wentz was indebted to said insurance company, and

when the certificate of deposit was delivered, the insurance company surrendered to Wentz a note for $5,000 held by it against him. No money or property was actually paid to or deposited in the bank for said certificate, nor was any entry of or concerning the certificate of deposit made on any of the bank books. On or about March 5, 1920, pursuant to a request therefor by the state banking board, the plaintiff in error signed a report to the department of trade and commerce, upon a regular prescribed form, of the assets and liabilities of the bank, but in the listed liabilities omitted the certificate of deposit for $5,000.

At the close of the state's case, the defendant requested the court to direct a verdict of not guilty, because the evidence showed that the certificate of deposit was not a liability against the bank, and consequently the omission of it from the statement was not a violation of the law. The conviction must fail if the law was not intended to and does not embrace within its provisions the duty of the officers of a bank to include such an item in their reports to the state banking department.

Under the banking act, section 21, art. XVI, title V, ch. 190, Laws 1919, it is made a felony for any person to knowingly subscribe to or exhibit false papers, with intent to deceive any person or persons authorized to examine into the affairs of any banking corporation, or to make, state or publish any false statement of the assets or liabilities of such corporation. Other provisions of the law require certain officers of such corporation to make not less than four reports a year to the department of trade and commerce according to the form prescribed by said department, and, among other particular items, it is required that such reports shall state the resources and liabilities at the close of business on any past day specified by the said department. In response to such a request properly made, the plaintiff in error signed such a report, but in which the said certificate was knowingly omitted from the list of liabilities.

In construing a statute, the purpose of the legislature should be kept in view, to assist in ascertaining the meaning and scope of the language used. The plain purpose of the legislature was to require a full statement of the transactions of the officers concerning the business done by them in their official capacities as officers and agents of the bank, and experience has shown the necessity of such complete reports, so that the persons appointed by the state to examine, oversee and safeguard the interests of the bank's capital and the depositors may have full knowledge of all the business and transactions done by the officers, either actually or ostensibly, on behalf of the bank or within the apparent line of their authority that may affect its standing, reputation or solvency, or the integrity of its officers and agents, and their course of dealing in the conduct of the bank's affairs. These things are necessary for the state's agents to have knowledge of, in order that the state may, if it be found that said bank is insolvent, or "is conducting its business in an unsafe or unauthorized manner, or is endangering the interests of its depositors" (as the statute provides), take immediate possession of said bank, and hold the same until a receiver be appointed.

The meaning of the word "liabilities" has been given many times by judicial decisions, as well as by lexicographers. It is a broad term, and, while it may include debts, it is not generally limited to such term. In common speech, in contracts, and in judicial decisions, it is very frequently used, and has been referred to as of the most comprehensive significance, including almost every character of hazard or responsibility, absolute, contingent, or likely. The Standard Dictionary defines "liability" as "The condition of being responsible for a possible or actual loss, penalty, evil, expense, or burden." In *Home Ins. Co. v. Peoria & P. U. R. Co.*, 178 Ill. 64, Judge Boggs' opinion refers to the word "liable" in this language: "The word as used in the policy does not signify a perfected or fixed legal liability, but rather a condition out of which a legal liability may arise. The word, as most frequently used,

does not necessarily exclude the idea of a contingency." In *Cochran & Sayre v. United States,* 157 U. S. 286, 296, it is said: "We know of no definition of the word 'liability,' either given in the dictionaries or used in the common speech of men, which restricts it to such as are absolute, or excludes the idea of contingency." See, also, 25 Cyc. 223; *City of Denver v. Hubbard,* 17 Colo. App. 346; *Fidelity & Deposit Co. v. Comonwealth Trust Co.,* 119 N. Y. Supp. 598; *State v. Sheets,* 26 Utah, 105; *Price v. Parker,* 197 Mass. 1; *Hyatt v. Anderson's Trustee,* 74 S. W. (Ky.) 1094. In *Commonwealth v. Donovan,* 170 Mass. 288, a prosecution for giving a bribe to an officer to influence his vote, the defendant gave the officer his promissory notes, and it was contended that, inasmuch as the notes were given for an illegal consideration, they were void and of no value, and that therefore nothing of value was given, but the court announced the rule that the notes were valid on their face, were negotiable, and were of value, and in effect held that they created a liability, although given for an illegal consideration.

The purpose of the requirements of the law is to have all such transactions reported, so the banking department of the state might know whether the bank was insolvent, or was conducting its business in an unsafe or unauthorized manner, or was endangering the interests of its depositors, because it is on the truth or falsity of such reports and the facts disclosed thereby that the discretionary power and subsequent action of the department of trade and commerce largely depend. The conclusion follows that the certificate of deposit was a liability that should have been reported and its wilful ommission was a violation of the statute. To hold otherwise would largely nullify the positive provisions of the law; indeed, it would give rise to a situation which would render reports of bank officials of little or no value in determining the condition and status of banks. It is difficult to conceive a construction of the law with its obvious purpose and plain language which would give a dishonest bank official the right to issue obli-

gations which purport on their face to be liabilities of the bank and then exonerate him from blame by saying there was not sufficient consideration to hold the bank as a debtor and therefore no harm was done. Oftentimes in the course of such dealings it is a close question, frequently depending upon questionable testimony, as to whether such instruments do create a debt, and it is then only determined after long and costly litigation. The lawsuit itself may be a liability, even if it is decided finally in the bank's favor, because of the necessity of expending money in defending against such *prima facie* obligations.

The state did not produce the original of the certificate of deposit No. 366, but a photographic copy was offered, and admitted over the objection of plaintiff in error. This is assigned as error. It is claimed that the state did not show that the original could not be produced, and therefore secondary evidence was inadmissible; and further it is urged that no sufficient foundation was laid for the introduction of the photograph. While the evidence as to the inability of the state to produce the original possibly was not followed up as strictly and in as minute detail as is generally done, it does appear by a letter offered by the defense that a short time before the trial the certificate was in possession of a party in Kansas City, Missouri, and the further testimony of Mr. Ahmanson, president of the National American Fire Insurance Company, that about 30 days before the trial he had given the certificate to the attorney for the Schooley Bank Equipment Company of Kansas City, and that, so far as he knew, it was not in the state. This seems *prima facie* sufficient to establish the inability of the state to produce the original. Mr. Ahmanson testified that he delivered the certificate to a photographer for the purpose of having a photograph made of it; that the photographer later returned to him the certificate and the photograph. The photographer was called as a witness, and testified that the certificate was given to him to be photographed, and that he made the photograph and returned it and the certificate to the person who gave it to

him (Mr. Ahmanson), and that it was a correct photograph; and he produced the original negative from which the picture was printed. This seems sufficient identification and authentication of the exhibit.

The third contention of plaintiff in error alleges that the court during the progress of the trial made certain prejudicial statements in the hearing of the jury. Some of those no doubt were inadvertent and might well have been couched in more dignified, and in one instance more courteous, language; yet it does not seem probable that the jury were in any way influenced by the judge's remarks.

The fourth proposition relates to the instructions. These are in some respects faulty; but, taken altogether, they fairly submitted the issues to the jury, and, in view of the conclusive and undisputed evidence, it is quite certain that no prejudice resulted from these inaccuracies.

The remaining assigned error is that the action of the court in directing a verdict of not guilty on count 2, in the information, was an acquittal on count 3, which was the count upon which the verdict of guilty was rendered, and a motion in arrest of judgment was made, which was overruled. The amended information contained four counts; the first was dismissed before trial; in the second count the defendant was charged, in substance, with making a false entry and statement on the books of the bank by making no record or entry whatever of the said certificate of deposit; in the fourth count the defendant was charged with publishing a false statement of the liabilities of the bank by omitting any reference to said certificate; the court directed the jury to return a verdict of not guilty as to the second and fourth counts. The court probably based its ruling as to the second count upon the ground that, to sustain a verdict of guilt, it was necessary for the state to show some actual false entry on the books, and that the mere omission to make any entry was not within the purview of the statute. Whether that is a proper interpretation of the law is not material, and that question is not determined. The second and third counts charge

different offenses, and, while it may be that the same proof would have justified a conviction on both counts, the fact that a verdict of not guilty was rendered on the second count does not affect an acquittal on the third count. *Weinecke v. State*, 34 Neb. 14. The verdict was not inconsistent, and the motion in arrest of judgment was properly overruled.

No prejudicial error appears in the record; the proof was positive and clear; and the judgment of conviction should stand.

AFFIRMED.

STATE, EX REL. CHARLES F. STROMAN ET AL., APPELLANTS, V. ARTHUR J. RICHARDSON ET AL., APPELLEES.

FILED MAY 17, 1922. No. 22423.

1. **Schools and School Districts:** CONSOLIDATED DISTRICTS. Under the act "to provide for the districting of all territory into districts for consolidated and high school purposes, and to provide for the organizing and operating of the same," a new public school district may be established by the vote of the school electors in the proposed new district, where the old territory included a village in a public school district with a board of three members, though high school branches were taught therein and high school grades were available to pupils. Laws 1919, ch. 243.
2. ———: ———: ELECTION: NOTICE. Notice of an election to establish a new consolidated school district under the act of 1919 could be given by the posting of notice in three places for 20 days in territory where the consolidation could be effected by a majority vote of the school electors. Laws 1919, ch. 243.

APPEAL from the district court for York county: GEORGE F. CORCORAN and EDWARD E. GOOD, JUDGES. *Affirmed.*

Hainer, Craft, Edgerton & Fraizer and *H. L. Norval*, for appellants.

Sandall & Wray, contra.

Heard before ROSE, DEAN, DAY and FLANSBURG, JJ.

ROSE, J.

This is an action in the nature of *quo warranto* to oust from office respondents Arthur J. Richardson, William Myers, William Lytle, Myron Osborn, Samuel Severn, and James Keefe, who, it is charged, are unlawfully exercising the powers of the board of education of consolidated school district No. 3 of York county. A further purpose of the action is the dissolution of the consolidated school district described, on the ground that it has no legal existence. One of the relators is Charles F. Stroman, county attorney of York county. Another is William J. Hoffmaster, a resident taxpayer, who sues for himself and all others similarly situated. In answering the information respondents pleaded their election and qualification as members of the board of education and the valid organization of the consolidated school district in controversy. Upon a trial of the issues the action was dismissed. Relators have appealed.

The litigation grew out of a dispute over the meaning of statutory provisions relating to the consolidation and organization of public school districts under chapter 243, Laws 1919, the title of which declares a legislative intent "to provide for the districting of all territory into districts for consolidated and high school purposes, and to provide for the organizing and operating of the same." Ever since the act went into effect its constitutionality or meaning has engaged the attention of the courts. *State v. Cox,* 105 Neb. 75; *Malin v. Housel,* 105 Neb. 784; *State v. Warrick,* 106 Neb. 750; *Dappen v. Weber,* 106 Neb. 812; *Dappen v. Weber,* 106 Neb. 817. In opinions from which the writer hereof dissented the act in the main was held to be constitutional but the legislative intent is still in doubt.

The consolidated school district in controversy includes the village of Benedict and adjacent territory formerly divided into a number of public school districts, each having a separate organization.

The act of 1919 seems to provide two methods of consolidation applicable to public school districts of different

classes. If a proposed new school district does not already contain an "organized consolidated or high school district," the method of consolidation is a majority vote of the school electors residing within the new boundaries. Laws 1919, ch. 243, sec. 5. "If the proposed new district contains an organized consolidated or high school district," the method of consolidation or annexation is a petition of not less than 51 per cent. of the "school electors in said new district residing outside of the existing organized consolidated or high school districts." Laws 1919, ch. 243, sec. 6.

Consolidated school district No. 3 of York county depends for its legal existence upon a majority vote of school electors therein. A proposition to establish the district was submitted at an election and carried by the requisite number of votes. The organization or consolidation is assailed by relators on the ground that the original school district in which the village of Benedict was situated was an "existing organized consolidated or high school" district within the meaning of the act of 1919, and that therefore the school electors residing in the new territory were without power to effect a consolidation by means of a majority vote, the procedure, relators assert, requiring a petition of 51 per cent. of the school electors "residing outside of the existing organized consolidated or high school" district. Laws 1919, ch. 243. Respondents defend the consolidation on the ground that the former school district in which the village of Benedict was situated was not a "high school district" within the meaning of the statute. The import of the term quoted is thus presented. The legislature of 1919 did not define it. The former legislation in which it appears uses it in different senses for different purposes. The act of 1919 was not amendatory in nature and could only be sustained as new legislation. *State v. Cox*, 105 Neb. 75. The former school laws do not contain the key to the solution, but must of necessity be consulted for light. The new act, for the purposes of consolidation, seems to deal with organizations and districts rather than

with the branches taught in the public schools or with the grades of different schools. In these respects there is a difference between high schools and high school districts. Under the general school laws of the state there are two systems of organization and government which remain unchanged. One is a democratic organization in which the school electors at annual or special meetings control generally the affairs of the public schools, the officers comprising a board of three members only. Rev. St. 1913, ch. 71, art. III. The other is representative in form and is governed by a board of six members, except as their powers in relation to taxes, to issuance of bonds and to other fiscal matters are limited by statute. Rev. St. 1913, ch. 71; *Gaddis v. School District,* 92 Neb. 701. Respondents, six in number, comprising the board of education, were elected at the annual meeting June 13, 1921, when the form of government was changed after the new district had been formed. The act of 1919 makes provision for changing the boundaries of existing common school districts organized under either system. In the first section it is declared:

"All of the territory in any county of the state shall be districted into districts for high school and consolidated school purposes according to and under the provisions of this act." Laws 1919, ch. 243, sec. 1.

The legislation, for the purpose of boundaries, seems to be aimed at old school districts as formerly organized and governed and to consolidation with districts having suitable or enlarged areas and better facilities for "high school and consolidated school purposes." It is natural to suppose, with this aim in view, that the old common school districts were in the legislative mind, when provision was made for determining the new method of organization, rather than the branches taught or the number of grades available to pupils. Reasoning from this premise, in view of the infirmities in the language used by the legislature, the interpretation of respondents appears to be more logical than that of relators.

While some high school branches were taught in the public school at Benedict and some high school grades were available to pupils there, the public school district, before the recent consolidation, had a board of the three members. If this democratic form of government with a board of three members determines the method of consolidation by a majority vote of school electors, the course pursued in the organization of consolidated school district No. 3 of York county was authorized by law, and this seems to be the more plausible view of the entire act of 1919, when considered in the light of former legislation. While this conclusion has not been reached without misgivings, it is in harmony with the interpretation of the other departments of government—an interpretation which courts may properly consider in construing a statute of doubtful meaning. The state superintendent of public instruction, acting within his powers as a public officer, expressed the following opinion:

"A school organized under article III with a three-member board, even though it taught some high school branches, was not a high school, within the meaning of section 6 of the 1919 redistricting law."

The legislature of 1921 apparently took the same view. It amended section 6 of the act of 1919 to include the following definition:

"For the purposes of this act the term 'high school district' shall be construed to mean any school district, comprising an incorporated village, town, city, or platted town or village maintaining one or more high school grades of school work approved by the state superintendent." Laws 1921, ch. 74, sec. 6*a*.

There was no occasion for this amendment if former legislation contained a definition or expression of the same import. By inference, therefore, the interpretation of the legislature of 1921 was the same as that of the state superintendent of public instruction and there does not seem to be a sufficient reason for a contrary ruling.

It is also urged by relators that there was no legal no-

tice of the election held and that therefore it was void. The posting of notices was the only method adopted. It was effective for the purpose of bringing school electors to the polls, but relators argue that there could be no valid election without the publication of notice in newspapers. The act of 1919 did not prescribe in specific terms how the notice should be given, but provided:

"The county superintendent shall order an election to be held in such proposed district at such central place as he may designate and shall give at least twenty (20) days' notice thereof required by law for holding school district elections." Laws 1919, ch. 243, sec. 5.

In the act of 1919 no direct reference is made to any specific law requiring notice of a school district election. The effect of such a reference would have been to incorporate by construction in the new law the terms of the old on the subject of notice. Relators refer to a number of school laws which require newspaper notice of elections for different purposes, but none of those laws is identified as the one describing notice "for holding school district elections" and which by adoption, had it been pointed out, would have become a part of the act of 1919. Since the legislature required elections for the purposes of consolidation in territory where there were no high school districts, or where the organization was democratic with a board of three members, it is more reasonable to suppose that the lawmakers meant the notice required in districts of that kind, namely, "by posting up copies thereof in three public places within the district." Rev. St. 1913, sec. 6732. Under this construction the new act specifies the time and the old act the kind of notice. Notice was thus given in the present instance. It was sufficient and seems to be in harmony with the more reasonable view of the new act in connection with former legislation on the subject of notice.

With the two principal questions thus determined, respondents have made a complete defense to the action. The writ was properly denied.

AFFIRMED.

CREIGHTON NATIONAL BANK, APPELLANT, V. KNOX COUNTY ET AL., APPELLEES.

FILED MAY 17, 1922. No. 21934.

1. **Taxation:** BANKS: SHARES OF STOCK. "The tax contemplated by section 6343, Rev. St. 1913, as amended, Laws 1915, ch. 108, relating to the taxation of banking corporations, is a tax upon shares of stock in the hands of stockholders, and is not a tax upon the property of the corporation." *State v. First Nat. Bank*, 103 Neb. 280, followed.

2. ———: ———: ———. In making an assessment upon the shares of stock in the hands of the stockholders for purposes of taxation, as provided in section 6343, Rev. St. 1913, as amended, Laws 1915, ch. 108, the assessor should not deduct from the total value of the shares mortgage securities held by the banking corporation upon which the mortgagor has agreed to pay any tax which may be levied against the mortgage or the debt secured thereby.

3. **Constitutional Law:** TAXATION: BANK STOCK. The levying of a tax in such case does not impair the obligation of the contract as between the mortgagor and the mortgagee.

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

W. A. Meserve and *J. F. Green*, for appellant.

P. H. Peterson, contra.

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

DAY, J.

On April 1, 1915, the Creighton National Bank of Creighton, Nebraska, made a return to the assessor of Knox county for the purpose of fixing a value for taxation upon the shares of its capital stock. The schedule showed that the capital stock was $25,000, divided into 250 shares of $100 each, surplus, $8,500, and undivided profits of $698.26, making a total book value of its shares of $34,198.26.

It was the claim of the bank that it was entitled to de-

duct from this aggregate amount the sum of $12,900, because the bank held on April 1, as a part of its assets, notes secured by mortgages on real estate in this amount, in which the mortgagors agreed to pay the amount of any taxes which might be levied upon the debt secured by the mortgages. The assessor refused to make any deduction on account of this claim by the bank. An appeal was taken to the county board of equalization, where the board also refused to make the deduction. The bank then took an appeal to the district court, the case being docket No. 3793. Nothing was done in the case until 1919, when it was consolidated with another case between the same parties, and involving the same legal questions.

It also appears that the bank made a similar return to the assessor for the year 1918. In that schedule the capital stock, surplus, and undivided profits amounted in the aggregate to the sum of $40,207.43. At that time it was the claim of the bank that among its assets were notes secured by real estate mortgages aggregating $22,789, in which the mortgagors agreed to pay any tax which might be levied upon the debt secured by such mortgages, and also that it held $8,200 of liberty bonds. The bank contended that the amount of these mortgages and the liberty bonds should be deducted from the total assets for the purpose of ascertaining the taxable value of the shares of its capital stock. The same process was had before the assessor and the board of equalization as was had in the assessment for the year 1915, and it resulted adversely to the bank's claim. An appeal was likewise taken to the district court to review the assessment for the year 1918. The two cases were consolidated.

Upon the trial the district court affirmed the assessment made by the board of equalization. From this judgment the plaintiff appeals.

We think the legal questions presented on this appeal have been settled by the decisions of this court in *Nemaha County Bank v. County Board*, 103 Neb. 53, and *State v. First Nat. Bank*, 103 Neb. 280. In the *Nemaha County*

Bank case, as in the case at bar, it was contended that the amount of certain mortgages owned by the bank, in which the mortgagors agreed to pay the taxes, should be deducted from the total value of the shares of stock for the purpose of determining the value of the shares for taxation. In that case section 6343, Rev. St. 1913, as amended, Laws 1915, ch. 108, was construed, and it was held that such mortgage securities should not be deducted from the total valuation of the shares of capital stock in arriving at the valuation of each share for taxation.

The case of *State v. First Nat. Bank*, 103 Neb. 280, presented the question whether certain liberty bonds owned by the bank, and admittedly tax exempt, should be deducted from the total value of the shares of stock for the purpose of determining the value of the shares of stock in the hands of the stockholders for taxation, and it was held that the bonds could not be deducted. In that case the court reviewed section 6343, Rev. St. 1913, as amended, Laws 1915, ch. 108 (not necessary to be here set out), and held that the tax contemplated by that section of the statute is a tax upon the shares of stock in the hands of the stockholders, and is not a tax upon the property or assets of the banking corporation. It was clearly pointed out that the shares of stock of the corporation are a distinct entity from the property or assets of the corporation itself.

We are satisfied with the reasoning of these cases, and the construction placed upon section 6343, Rev. St. 1913, as amended, Laws 1915, ch. 108, and are not inclined to disturb the rule therein announced.

The argument is made that the bank became the owner of a part of the mortgages before the amendment of 1915 to section 6343, Rev. St. 1913, became operative, and that the effect of the amendment, if literally enforced, is to impair the obligations of the bank's contracts. The argument is founded on a wrong premise. It assumes that the stockholders are the owners of the mortgages, when in fact the banking corporation, a distinct entity, is the owner. The contract between the bank and the several

mortgagors is not disturbed. The stockholders whose shares are being taxed have no contract relation with the mortgagors.

We conclude that in laying a tax upon the shares of stock in the hands of the stockholders the taxing authorities were not required to deduct the value of the mortgages owned by the bank in which the mortgagors agreed to pay the taxes which might be laid against the debt secured by the mortgages.

The judgment of the district court is

AFFIRMED.

KATHERINA METZGER, APPELLANT AND CROSS-APPELLEE, V. PHILLIP METZGER ET AL., APPELLEES AND CROSS-APPELLEES: GEORGE HERRING, APPELLANT AND CROSS-APPELLEE: FRANCIS P. GARVAN, CROSS-APPELLANT.

FILED MAY 17, 1922. No. 22027.

1. **Homestead:** FORFEITURE. Under the provisions of chapter 68, Laws 1917, a surviving spouse who elects to partition the homestead premises thereby forfeits all homestead rights in such premises, and the homestead then descends as other real property of which the deceased died seised.

2. **Aliens:** TITLE BY DESCENT. Section 6273, Rev. St. 1913, precludes a nonresident alien from acquiring or taking any title or interest in lands in this state by descent, devise, purchase, or otherwise, except as to such lands as are within the exceptions provided in that section.

3. **Wills:** DEVISE TO NONRESIDENT ALIEN. Where a citizen of the United States, by will duly probated, devised to certain nonresident aliens land which was not within any of the exceptions to section 6273, Rev. St. 1913, such nonresident aliens take no interest in such land, and the interest attempted to be devised to them must be regarded as intestate property, and descends as provided by law to the next of kin who are capable of taking.

APPEAL from the district court for Madison county:

WILLIAM V. ALLEN, JUDGE. *Reversed in part, and remanded, with directions.*

Albert & Wagner, for appellants.

Arthur F. Mullen and *M. B. Foster, contra.*

Heard before ROSE, DEAN, DAY and FLANSBURG, JJ.

DAY, J.

Karl Metzger, a citizen of the United States and an inhabitant of the city of Norfolk, Madison county, Nebraska, died testate on January 4, 1918. At the time of his death he was seised in fee simple of a quarter section of suburban farm land situated in Knox county in this state, and also two lots in the city of Norfolk, the two lots and the improvements thereon constituting his homestead. His will was duly probated. Among other bequests in the will he devised to his wife, Katherina Metzger, all of his real estate for life, and one-half of the remainder to the children of his brothers and sister, and the other half to the children of his wife's brothers and sisters. He left surviving him no issue or direct descendants. All of the devisees to whom the real estate was devised were nonresident alien enemies, except the widow, the children of the widow's brother Peter, the children of her sister Margaretha, and George Herring (a son of the testator's sister), who were citizens of the United States. George Herring is the only next of kin of the testator who is not a nonresident alien. The widow elected to take under the statute rather than by the terms of the will. Thereafter proceedings in partition were commenced by the widow, in which action all of the devisees under the will, as well as the alien property custodian, were made parties defendant. The real estate was duly sold by a referee appointed by the court. At the sale the town lots brought $4,600, and the farm lands $20,640, making a total of $25,240. After deducting the costs incident to the sale, there remained for distribution the sum of $23,247.66.

It was the claim of the widow that she was entitled to

receive one-half of the net proceeds of the sale of the real estate, and in addition thereto the value of her life estate in the homestead, which by stipulation of the parties was fixed at $1,090. In the distribution the trial court decreed that the widow was entitled to one-half of the net proceeds of the sale of the real estate, but denied her claim to the $1,090. From the decree denying her claim to the value of a life estate in the homestead the widow appeals.

The trial court further found that the nonresident alien enemies were entitled to receive one-third, and the other legatees one-sixth of the net proceeds of the sale of the real estate. After deducting from the share of the nonresident aliens an attorney's fee of $300 for the alien property custodian, and $3 costs, the court ordered the balance of $7,446.24 to be deposited by the clerk of the court in some bank or trust company, to be paid to the nonresident aliens when friendly relations were again resumed between the government of the United States and an established government of Germany.

It was the claim of George Herring that, in addition to the share willed to him, he was entitled to that portion of the proceeds of the sale derived from the farm lands which was devised to the nonresident aliens, and, from that part of the decree denying him the right to the share devised to the nonresident aliens in the farm lands, he has appealed.

The alien property custodian filed a cross-appeal from that part of the decree denying him the right to the possession of that part of the proceeds belonging to the nonresident alien enemies.

With respect to the claim of the widow for a share of the proceeds of the sale in lieu of her homestead rights, it must be determined in the light of statutory provisions existing at the time of the death of her husband. Chapter 68, Laws 1917, which was in force at the time, provides in substance that, where a homestead is selected from the separate property of either husband or wife, it vests on the death of the person from whose property it was selected in the survivor for life. This act contains a pro-

viso, as follows: "Provided, further, that in case the surviving spouse * * * elects to partition the homestead premises, the homestead right of the survivor shall then terminate and the homestead premises shall then descend as other real property of which the deceased died seised." The right of homestead rests purely upon statutory provisions, and is held subject to such conditions and limitations as the legislature may impose. By the act in question it is clear that the legislature intended that, when the surviving spouse elects to partition the homestead premises, the homestead right becomes thereby forfeited, and the premises descend as other real property of which the deceased died seised. We think, therefore, that the trial court was right in holding that the widow took nothing by virtue of her claim in lieu of a homestead right.

In decreeing that the nonresident aliens who were devisees under the will took their proportionate shares of the net proceeds of the sale of the farm lands, as well as of the city lots, the trial court followed the rule announced by this court in *State v. Thomas,* 103 Neb. 147. Since the decision of the trial court, however, this court has had occasion to again examine the question presented in the *Thomas* case, and has overruled the doctrine therein announced, in so far as its principles are applicable to the present situation. In *State v. Toop,* 107 Neb. 391, this court held that section 6273, Rev. St. 1913, precludes nonresident aliens from acquiring any title to lands or any interest therein in this state by descent, devise, purchase or otherwise, except as affected by treaties or where the lands fall within the exceptions designated in the section. This section provides: "Nonresident aliens and corporations not incorporated under the laws of the state of Nebraska are hereby prohibited from acquiring title to or taking or holding any lands or real estate in this state by descent, devise, purchase or otherwise." To this general sweeping prohibition subsequent provisions make exceptions, one of which only is applicable to the present situation, and which permits aliens to acquire real estate within the

corporate limits of cities and towns. This exception to the general provisions of the section has been sustained in *Glynn v. Glynn,* 62 Neb. 872. The evidence shows that the nonresident alien legatees are, and all times mentioned herein have been, subjects of the German Empire, and residents of the state of Baden. Our attention has not been called to any treaty limiting the application of our statute, and we assume that none exists.

In *Wunderle v. Wunderle,* 144 Ill. 40, a case was presented very similar to the case at bar, and it involved the construction of a statute almost identical with our own; and it was held that the treaties existing between the state of Baden and the United States and the treaties between the German Empire and the United States did not preclude the operation of the Illinois statute prohibiting nonresident aliens from acquiring an interest by devise in real estate. From what has been said, it is apparent that a part of the testator's estate must descend intestate, and, inasmuch as George Herring is the only next of kin, it would follow that the proportionate shares of the nonresident alien legatees arising out of the sale of the farm lands would by operation of law descend to him.

The question presented by the cross-appeal of the alien property custodian, that he is entitled to the possession of that part of the estate going to the nonresident alien enemies, has, in view of the fact that friendly relations have been restored between this country and Germany, become a moot question, and need not be determined. As we view it, no reason now exists why the proportionate shares going to the nonresident alien enemies may not be paid to them.

It follows from what has been said that the decree of the trial court should be modified to the extent that the proportion of the proceeds of the sale arising from the farm lands, which under the will went to the nonresident aliens, should be decreed to belong to George Herring. The cause is remanded, with directions to enter a decree in harmony

with the views herein expressed. The costs in the district court should be apportioned upon some equitable basis.

REVERSED IN PART, AND REMANDED, WITH DIRECTIONS.

NEBRASKA MAUSOLEUM COMPANY, APPELLANT, V. THOMAS H. MATTERS, APPELLEE.

FILED MAY 17, 1922. No. 19707.

1. **Corporations:** DUTIES OF PROMOTERS. The promoters of a corporation sustain a fiduciary and confidential relation toward the corporation and toward the persons who become stockholders therein, and such promoters must act with the utmost good faith in their dealings on behalf of and with the corporation, and are not allowed to derive any advantage or profit over other stockholders without making a full and fair disclosure of what that advantage or profit is to be, and without giving an opportunity to the corporation and its stockholders to decline to grant it.

2. ———: ———. A promoter of a corporation does not perform the duty required of him, to disclose what profits he is to make in his transactions connected with and on behalf of the corporation, by making a statement, not fully disclosing the facts, but containing something which, if followed up by further investigation, would enable the inquirer to ascertain that profits were to be made, and what such profits would amount to.

3. ———: ———: SECRET PROFITS. Where a promoter disclosed facts which would apprise the corporation, for which he was acting, with knowledge that he was to receive what he called a "commission" for the sale of the corporate stock of the company, but did not disclose the amount of that commission, *held*, that the corporation would not be charged with knowledge that he was to receive more than what was a reasonable and customary broker's commission for making such sales; and, where it developed that he, in fact, had an agreement by which he was to receive $51,000 out of the proceeds of the sale of $150,000 in stock, *held*, that this was an agreement for a secret profit which had not been fully and fairly disclosed.

4. ———: ———: RECOVERY OF SECRET PROFITS. The corporation, by acquiescence, having tacitly consented that a reasonable commission should be paid for the sale of corporate stock, was entitled to recover from the promoters only what profits had been retained by them in excess of that amount.

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

Bigelow, Peterson & LaViolette, for appellant.

Lloyd A. Magney, contra.

Heard before DEAN, DAY, ROSE and FLANSBURG, JJ.

FLANSBURG, J.

This was an action by the plaintiff corporation to recover from defendant Matters alleged secret profits, made by him while he was acting as promoter for the said corporation. The judgment was in favor of defendant, and the plaintiff appeals.

A corporation of Iowa was the owner of certain patent rights for the erection of mausoleums, and, desiring to sell its rights for territory in Nebraska, entered into a contract with the defendant Matters, of date October 8, 1910, whereby Matters was to undertake the incorporation and organization of a Nebraska company, which it was proposed should purchase such patent rights. Defendant Matters accordingly organized the Nebraska Mausoleum Company, the plaintiff in this case, with a capital stock of $200,000. By the agreement of October 8, referred to, the Iowa company was to receive, as payment for its patent rights, corporate stock of the Nebraska company to the extent of $101,000, face value, and defendant Matters further agreed that he would, within 90 days, sell $150,000 of the stock of the Nebraska company at par. Stock of the amount of $101,000 was to be first transferred to the Iowa company for its patents and then sold by Matters for that company, and the proceeds of the remainder, $49,000, was to be paid into the treasury of the Nebraska company, to be used as working capital. The remainder of the total corporate stock, $50,000, was to be retained by the Nebraska company as treasury stock and not sold. The contract did not directly specify that the defendant Matters was to receive any compensation or promoter's profits from the Iowa company, but did contain this rather ambiguous

and indefinite declaration: "The question of commission for the sale of said stock is to be made by E. E. Little, representative of the party of the second part (the Iowa company), and the party of the first part (defendant Matters)."

The findings of the lower court were that, in the organization of the Nebraska company, an independent board of directors was elected, and that this board was not controlled by, nor did it have any secret agreement with, Mr. Matters, but that it did have full knowledge of the terms and provisions of the written contract of October 8, above mentioned, the contract having been referred to in the minutes of its meetings. Defendant Matters and the man Little had a further agreement or understanding with the Iowa company, not set out in the written agreement of October 8, nor made known to the directors or subscribers for stock in the Nebraska corporation, covering the amount of compensation to be received by them, and, although the total amount of profits to be made was not perhaps fully known to Matters in the beginning, it appears that by this agreement, as ultimately transpired, Matters was to pay to the Iowa company, from the proceeds of the sale of the $101,000 of stock, only $50,000, and that the balance was to be retained as expenses and for the services of Matters and of Little, the latter being the representative of the Iowa company and really acting as a copromoter with Matters. It appears that defendant undertook the sale of the stock and paid commissions of 10 per cent. to his agents for securing subscriptions. The trial court found that he and his copromoter Little had received in all, as compensation under the contract, a total of $30,000. Their profits had been reduced below what was contemplated by them by the fact that some of the stock subscriptions were not paid.

This suit was instituted by the Nebraska corporation to recover these profits, made by the defendant Matters, charging that he had sustained a confidential relation to the corporation, since he was acting as promoter for it,

and that the profits so made were secret profits, he not having made a full and fair disclosure of the facts with reference thereto to the board of directors, nor to the subscribers for stock in the corporation. The defendant's answer to this contention is, since the board of directors was an independent board, not acting under defendant's influence, nor under any agreement with him, that his disclosure to the board of the contract of October 8 was a sufficient disclosure to apprise the corporation that he was to make a profit, that the only matter which was not set forth in the contract was the amount which he was to receive, and, since the directors and subscribers of stock were, or must have been, aware of this provision in the contract, they could, had they desired, have learned what the amount of his profit was to be by making inquiry.

A promoter of a corporation stands in a fiduciary or confidential relation toward the corporation, and must act with the utmost good faith in his dealings with the corporation, to the end that the corporation shall receive the greatest possible benefit that can come to it from his services. This does not mean that in a transaction, in which the corporation is interested, the promoter is precluded from making profits or from receiving compensation, but that, when the promoter has an interest which is in any way adverse to that of the corporation, it is his duty to make a full and fair disclosure of all the facts in relation thereto, so that the corporation may have an opportunity of determining whether or not it is willing that he should make the profit, or whether it should desire to decline to allow the profit to be made. Defendant, in view of his relation to the Nebraska company, does not contend that he was not required to make a full and fair disclosure to the company of his personal interests concerning it, and of the fact that he was to receive promotion fees and compensation from the Iowa company out of sales of the Nebraska company's stock, but he does contend that he has made such a disclosure as is sufficient to meet the requirements of the law.

It is very questionable whether the provisions in the contract, which declared that "the question of commission for the sale of said stock is to be made by" E. E. Little and defendant Matters, would fully apprise the board of directors of the Nebraska company of the fact that either Mr. Matters or Mr. Little was personally to receive that commission or any promotion profits. The clause in the contract states that the "question of commission" "shall be made" by these parties, which is perhaps no more than to say that the question of the amount of commission for the sale of stock shall be decided upon by these parties. Neither does this clause nor does any other express provision in the contract specifically declare that either of these parties is to receive any commission or compensation whatsoever. It is, however, fairly inferable from the contract, taken as a whole, that Mr. Matters, since he was to sell $150,000 of the corporate stock of the Nebraska company, was to receive the broker's commission which is mentioned, and that the amount of that commission was to be determined by Mr. Little, acting for the Iowa company, and Mr. Matters, acting for himself. But would the declaration in the contract that Mr. Matters was to receive a commission for the sale of this stock be any indication to the Nebraska company that he was to receive more than the usual and customary commission fees made by stock-sales agents? Certainly, in the sale of this amount of stock, it is not customary to agree that the agent shall retain $51,000 of the proceeds of such sale. The retention of that amount would not be a commission, in the ordinary sense in which the term "commission" is used, but would be a promoter's profit under the guise of a commission. The disclosure by the written contract could have been no more than a disclosure that the defendant Matters was to receive a commission for the sale of stock. The use of the term "commission," without disclosure, in this case, of the amount of that commission, was misleading. The mere use of the term tended to conceal the fact that defendant Matters was, in truth, receiving a promoter's profit. A disclosure

of a part of a set of circumstances, although the facts disclosed be literally true, may, when the full circumstances are not disclosed, be sufficient to lead to a false impression, and such deceit is as effective as actual misrepresentation. The mere representation that Matters was to receive a commission for the sale of stock was not, as we view it, a full and fair disclosure of defendant's interest, nor of the profits which he was to make. Suppose, for example, a promoter were to propose to purchase for a corporation a piece of land at the price of $100,000, and should represent to the corporation that the person, from whom he was to make the purchase, was to pay him a commission for accomplishing the sale. Would not the corporation, without a disclosure as to the amount of the agreed commission, be entitled to believe that the promoter, in such case, was expecting to receive only such an ordinary and reasonable commission as is usually and customarily paid in such real estate transactions, and, should the corporation discover that the land had been actually purchased from the owner by a payment, net to him, of $50,000, and that the corporation promoter had retained the remainder of the $100,000 purchase price, as an alleged commission for making the sale, could not the corporation complain of a secret profit having been made? We do not see that the principle is so far different in this case. In effect, the representation of the promoter here was that he would purchase patent rights from the Iowa company, and that the Iowa company would receive the net proceeds of $101,000 of the corporate stock of the Nebraska company, after deducting the reasonable cost of selling, at most, $150,000 of such stock. Quite naturally, the Nebraska company would not have thought it material whether the Iowa company or the Nebraska company itself should bear the cost of selling stock, since it was only the reasonable and necessary cost which must have been in contemplation. It cannot be imagined that the stockholders and directors in the Nebraska company would have been willing, on their own behalf, to have entered into an agreement to pay to Mr. Matters $51,000

for the marketing of the corporate stock which he had agreed to sell. Yet the result to the Nebraska company is identically the same. The proceeds of the sale at par of $101,000 in corporate stock has, in fact, in this case, purchased patent rights which the Nebraska company was legally and equitably entitled to purchase for $50,000.

The defendant argues that the Nebraska corporation should have been upon its guard and that the directors, as prudent persons, should have used due diligence to have discovered what was meant by the term "commission," as used in the contract, and, upon inquiry, should have ascertained what the amount of that commission was to be. It is perhaps true, as between parties who are dealing with each other at arm's length, and between whom no confidential relation exists, that a declaration of facts by one to the other of circumstances which would raise a suspicion in the mind of a prudent person and cause him to investigate and learn the truth might be sufficient to charge him, as a matter of law, with constructive knowledge of such facts, where he was negligent and did not make the investigation; but, as we understand it, that rule does not obtain in transactions between parties where the party making the representation sustains a fiduciary or confidential relation toward the other. 26 C. J. 1136, sec. 56, 1158, sec. 72; 14 C. J. 292, sec. 341.

The defendant relies upon the case of *Milwaukee Cold Storage Co. v. Dexter,* 99 Wis. 214. In that case it was held, where a defendant had purchased real estate and organized a corporation, not thought of when he made the purchase, for the purpose of taking the property off his hands at a price known to the other subscribers of the corporation, that the corporation could not complain that he had charged more than he had paid for it. The court pointed out in that case that the defendant had not purchased the property for or on behalf of the corporation, nor at a time when he was acting as its trustee, and stated that the case would have been different had he, while acting as a promoter, purchased the land and resold it to the

corporation at a profit. That case, as we view it, goes no further than to hold that a person who owns property, not bought as an agent of the corporation, may sell it to the corporation at whatever price he fixes and without regard to the price he paid for it, so long as there is no misrepresentation, and so long as the board of directors, that deals with him, is independent and does not act in collusion with him. Not being a trustee in the holding of the property, no duty would devolve upon him to disclose what he had paid for the property when he acquired it. *Victor Oil Co. v. Drum,* 184 Cal. 226.

Another case relied upon by the defendant, and which we believe brings out the distinction in the Wisconsin case, above discussed, is the case of *Lomita Land & Water Co. v. Robinson,* 154 Cal. 36. In that case a person, who had owned property prior to the organization of a corporation, sold his property to the corporation after it was organized, and at a price greater than what he had paid. The court in that case stated that the defendant had not known of any intention to form a corporation, and had entered into an agreement to sell to the promoters of the corporation before the corporation was, in fact, organized. He was not a promoter and had no connection with the organization except to become a subscriber, later, of one share of stock. The court held that he had a right to sell to the corporation without disclosing what the land originally cost him. In that case also it was shown that, after this defendant had sold his property to the promoters and had subscribed for one share of stock in the corporation, these promoters resold the property to the corporation at an advanced price and kept the difference as a profit. This was known to the defendant, although he did not share in the profit, and the court held that the defendant, by his failure to disclose that the promoters were selling the property to the corporation at a price in advance of what he had sold it for to them, and because of his connection in the transaction, aided and abetted the promoters in making the secret profit and was jointly liable with them.

Another case relied upon by defendant is *Advance Realty Co. v. Nichols,* 126 Minn. 267. In that case the promoters purchased for the corporation certain lots at the known price of $85,000, and it was made known to the corporation that these promoters were to receive a commission from the vendor for accomplishing a sale to the corporation, but it was not made known to the corporation what amount the commission was to be. It was contended that, since the promoters had not disclosed the amount of the commission, they had not made a full and fair disclosure, and, therefore, could not retain the commission as a profit. The court, however, said that, having knowledge that the promoters were to receive a commission, the corporation could not act in disregard thereto and allege ignorance of details as a ground for action for fraud. The amount of the commission paid in that case was $5,000, and the court especially emphasized the fact that the "reasonableness of the commission received by defendants for the sale of the lots" was not involved in the case. In that case, a disclosure, that the promoters were to receive a commission, was a disclosure that they were to receive what would constitute a reasonable commission, and, since it was not questioned but that the $5,000 was a reasonable commission for selling an $85,000 piece of property, it could not be said that the corporation had been deceived by any concealment of facts.

It was the duty of the defendant in this case to make a full and fair disclosure of the profits which he was to make. He not only failed to make a full disclosure, but, if the provision of the contract regarding a commission can be taken as a representation that he was to receive a commission for the sale of stock, then that was a representation which was positively misleading.

In the transactions carried on for a corporation by a promoter, where he has an interest and derives a profit, it is not sufficient that he make such a disclosure of facts as would merely require an ordinarily prudent person to investigate and discover what the interest or profit of the

promoter is, but nothing short of such a disclosure as will give actual knowledge to the corporation will suffice. The burden of furnishing that information cannot be shifted from the promoter to the corporation. It is always the promoter's duty to disclose such facts, and not the duty of the corporation to investigate and discover them. The corporation has a right to place full confidence in its promoter, as in a trustee, and to presume that he is to make no profit which is not clearly and fully disclosed. Actual, as distinguished from constructive, notice must be brought home to the corporation and to the stockholders. *Mason v. Carrothers,* 105 Me. 392; *Arnold v. Searing,* 73 N. J. Eq. 262; *In re Olympia,* 2 Ch. Div. 1898 (Eng.) 153; *Wills v. Nehalem Coal Co.,* 52 Or. 70; 14 C. J. 294, sec. 344.

It is our conclusion, then, that the plaintiff is entitled to recover from the defendant the $30,000 profits so found by the trial court to have been realized, except, however, that certain deductions should be made.

It was known to the plaintiff corporation that a reasonable commission was to be allowed for the sale of the $150,000 of stock. To that extent the corporation, it may be said, has given its consent, and to that extent the profits made were not secret. Where promoters are required to account for secret profits, they are, as a rule, entitled to recover expenses reasonably incurred in behalf of the corporation, except where the services or expenses are peculiarly connected with their fraud (14 C. J. 303, sec. 362; *Mason v. Carrothers, supra*), and where the corporation has offered to pay reasonable commissions, such an amount may be recovered, though an attempt may have been made to make a secret profit (*Bagnall v. Carlton,* 6 Ch. Div. (Eng.) 371).

The deductions to be made in favor of the defendant for services and expenses, furnished in accomplishing the sale of the Nebraska company's stock, should be limited to what would constitute a reasonable, usual and customary broker's commission for accomplishing stock sales. The plaintiff corporation had no knowledge that more than

that was to be paid. So far as known to it, defendant Matters might have been personally able to procure subscriptions and place the stock, and with only reasonable or even slight effort to himself. "The flattering promises contained in the prospectus which seemed to fairly promise a profit of 85 per cent. on all business transacted," as such promises were described by the trial court, would lead credulous persons to believe the stock would be quite easily salable, as in fact it proved to be.

Just what the amount of those deductions should be is a question of fact, to be ascertained and determined upon a further hearing. The judgment of the lower court is therefore reversed and the cause remanded for such trial and proceedings as are necessary to determine that question, and for entering judgment in accordance therewith.

REVERSED.

C. F. SEEFUS, APPELLEE, V. WERTER DE VAUGHN, APPELLANT.

FILED MAY 17, 1922. No. 21754.

1. **Sales:** IMPLIED WARRANTY. Where seed corn is sold by sample and the buyer is furnished with a sample for the purpose of making a test as to germinating qualities, and there is nothing in the contract between the parties to negative an implied warranty, a warranty will be implied that the bulk of the corn to be sold is substantially the same as the sample in kind and quality and in its germinating powers.

2. ———: ———: REFUSAL OF GUARANTY. An affirmative refusal by the vendor to guarantee the germinating qualities of the bulk of the corn to be furnished will negative an implied warranty as to such qualities.

3. ———: GUARANTY: INSTRUCTIONS. An instruction, declaring if the jury found that the vendor, selling by sample, did not guarantee the corn as to its germinating qualities, that then the vendor was only bound, by his contract, to furnish such corn as would be substantially the same as the sample, *except as to germination, held* erroneous, since the jury were not also, in that

event, required to find that the vendor had expressly refused to make a guaranty covering the quality of germination.

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

Baldrige & Saxton, for appellant.

Kennedy, Holland, De Lacy & Horan, contra.

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

FLANSBURG, J.

This was an action to recover the purchase price of a certain amount of seed corn, alleged to have been sold by the plaintiff to the defendant. The plaintiff recovered a judgment, and the defendant appeals.

The defendant denies that he purchased the corn from the plaintiff, and sets up as a defense that he was acting simply as a broker for the sale of the corn by the plaintiff to the McCullough Seed Company; and defendant also asserts that, after the corn had been delivered by the plaintiff to him and shipped to the McCullough Seed Company, it was retaken by the plaintiff, and a complete settlement, on the contract, made. These issues of fact, however, were passed upon by the jury under the directions of the court, and, upon an examination of the record, we do not find that the evidence is insufficient to support the jury's findings in those particulars.

The defendant, however, particularly complains of the instruction given by the court upon the question of warranties.

The seed corn was sold by sample. It appears that the plaintiff and the defendant had a conversation, some time before any contract was entered into, with regard to the 1917 corn crop, in which the defendant stated that he did not believe that there was good seed corn produced that season. The plaintiff replied that he had seed corn of that year which was of good germinating quality, and the defendant stated he would not take any corn without first

having a sample submitted to him so that he might test it. The plaintiff delivered such a sample to the defendant. The defendant's testimony is that the plaintiff agreed to furnish the corn according to the sample, and that nothing was said by the plaintiff regarding a guaranty as to germinating qualities. The testimony of the plaintiff as to that his conversation with the defendant was as follows: "I said, 'I will not guarantee germination.' I said, 'You seed houses don't guarantee germination or quality,' and I said, 'Why should I guarantee it when you seed houses do not?' And my son and Mr. Gilbert heard that. He (defendant) said, 'All I ask is that you give me corn and corn to your sample.' I said, 'I will give you corn to the sample I brought you;' and I did."

The sample seed corn furnished by the plaintiff to the defendant was, when tested, found by the defendant to test from 56 to 60 per cent. good germinating quality. There is testimony to show that, in order to be merchantable as seed corn, the germination must be above 50 per cent., and that the seed corn furnished under the contract, and later delivered to the McCullough Seed Company, tested below 50 per cent., and in a test of 2,200 seeds averaged only 18 per cent.

On this phase of the case, the court instructed the jury as follows: "It is conceded or established that the corn seed in question was sold by sample, and therefore the defendant had the right to demand that the corn should substantially compare with the sample in quality."

"You are instructed that in considering the question as to whether or not the corn was up to sample plaintiff claims that he did not guarantee the corn as to germination, and if the plaintiff has proved by a preponderance of the evidence that he did not guarantee germination, then plaintiff's only duty was to furnish corn substantially the same as the sample except as to germination."

The defendant complains that this instruction, as applied to his version of the evidence, is erroneous. His testimony is to the effect that nothing was said with regard

to guaranteeing the corn as to germination. Had it been conceded that the plaintiff had refused to guarantee as to germination, then, of course, no implied warranty would arise from the fact that the corn was sold as seed corn, nor would the seller then be bound to furnish corn that was fit for the purpose for which it was to be used.

Under the evidence the jury might have found that, though the plaintiff did not make any affirmative guaranty of the germinating qualities of the corn, still he did not expressly refuse to make such a guaranty. The plaintiff's testimony was that nothing was said between the parties upon the subject of guaranty, in which event the law would have raised an implied warranty that the corn was in substantial accord, in all essential qualities, with the sample furnished. Where goods are sold by sample, there is an implied warranty that the bulk of the goods will be equal in kind and quality, in all material respects, to the sample. *Borden v. Fine,* 212 Mass. 425; *Glanzer v. Armsby Co.,* 170 N. Y. Supp. 1055; *Holmes v. Cameron,* 267 Pa. St. 90; *Greenwood Cotton Mill v. Tolbert,* 105 S. Car. 273; *American Mfg. Co. v. McLeod & Co.,* 78 Fla. 162; 35 Cyc. 405. And where corn is sold by description for seed which is known to the seller, and there is nothing in the contract between the parties showing a refusal, on the part of the vendor, to warrant, there is an implied warranty that the corn is fit for seeding purposes and has reasonably sufficient germinating qualities. *Totten v. Stevenson,* 29 S. Dak. 71.

Plaintiff further contends that the defendant had full opportunity to inspect the bulk of the corn and, in fact, did so inspect it, and that, having had equal opportunity to judge its qualities with the plaintiff, no implied warranty would arise. Such inspection, however, did not precede the making of the contract. It appears only that when the defendant called for delivery of the corn he and his helper placed the corn in sacks for shipment, but this was after the contractual relations between the parties had been consummated. Whether or not defendant received

such information from his observation of the condition of the corn as he handled it, as to have given rise to a waiver of any warranty by his accepting it in such known condition, is not in the case.

It appears to us that the defendant was entitled to have submitted to the jury the issue of whether or not the plaintiff made an affirmative refusal to guarantee the germinating quality in the seed, and was entitled to have the jury instructed, if they should find that no such refusal was made and no agreement was made between the parties which would negative an implied warranty, that then such an implied warranty would, in law, arise, and that the plaintiff would, in that event, have the burden of showing that the bulk of the corn, for the price of which he was suing, was substantially the same as the sample in all essential particulars, including that of its germinating qualities. Such an instruction might have made a material difference in the result of the suit.

We are of opinion that the defendant is entitled to another trial. The judgment of the lower court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

WILLIAM R. LINCH, APPELLEE, V. GEORGE DOBSON ET AL., APPELLANTS.

FILED MAY 17, 1922. No. 21991.

1. **Master and Servant:** AUTOMOBILE COLLISION: LIABILITY. Where a father has furnished an automobile for the customary convenience and pleasure of his family, the car being intended especially for the use of the wife, but which the son is allowed to take when the wife is not using it, *held*, where the son was driving the car for his own pleasure, unaccompanied by any other members of the family, and through negligence in the operation of it caused damage to another, that the father was liable to the person damaged, under the doctrine of *respondeat superior*.

2. ———: ———: ———. Where the son lives at home with his parents and is supported there and is subject to parental control

as a member of the family, the fact that he is over 21 years of age does not alter the rule.

3. **Evidence** upon the issue of negligence examined, and *held* to support the verdict, within the application of the comparative negligence rule.

4. **Damages** *held* not excessive.

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

C. M. Skiles, for appellants.

Burkett, Wilson, Brown & Wilson, contra.

Heard before DEAN, ROSE, DAY and FLANSBURG, JJ.

FLANSBURG, J.

This was an action by the plaintiff, Linch, to recover for the damages which were caused to his automobile in a collision with a car, driven by the defendant Paul Dobson. The action was brought against Paul Dobson and his father, George Dobson, the latter being the owner of the car. The verdict and judgment was against both defendants and in favor of the plaintiff. Both defendants appeal.

Defendants contend that the evidence is insufficient to show such negligence on the part of the defendant Paul Dobson which, compared with the negligence of the plaintiff, would sustain a verdict in favor of the plaintiff under the comparative negligence rule. Such of the testimony as was more favorable to the plaintiff, and which, it must be assumed, was followed by the jury, since the general finding was for the plaintiff, shows that the plaintiff, just prior to the accident, was driving north on Fifty-sixth street in the city of Lincoln uphill and over a rough dirt road, and was approaching South street, which extends east and west, is paved with brick, and is a street upon which there is considerable traffic; that at the southeast corner of the intersection of these two streets was a store building, and that as the plaintiff was about to pass in front of the store building he looked beyond it toward the east and saw defendant's car a quarter of a mile distant, coming down

the hill on South street toward Fifty-sixth street; that after plaintiff, driving at about 15 miles an hour, had proceeded north on Fifty-sixth street until he had passed the store, he looked again and saw the defendant at that time some 400 to 600 feet distant. Believing that he had plenty of time to cross South street, he proceeded to cross before he realized, he said, the speed at which the defendant was driving. He now estimates the speed at 60 miles an hour. The undisputed testimony shows that the Dobson car, after the brakes were set, slid on its wheels for a distance of over 55 feet; that when it neared the plaintiff's car it was turned slightly to the right, in an apparent effort to avoid collision, and the two cars struck sideways; that the Dobson car continued to slide for a short distance and then toppled over in a westerly direction, being the direction in which it had been going. The plaintiff's car was, by the collision, deflected to the west, and, before it could be controlled, ran into a small frame building, standing on the northwest corner of the intersection. Plaintiff says that the defendant Paul Dobson had with him a young lady, and that they were so close behind the wheel that he believed the young lady was doing the driving. The testimony above referred to is, in most particulars, in direct contradiction to the testimony introduced by the defendant, but, under the plaintiff's version of the case, as above outlined, we are unable to say, as a matter of law, that the case should have been taken from the jury, nor that the plaintiff's evidence is insufficient, under the comparative negligence rule, to support the verdict.

The defendant George Dobson contends that he is not liable, for the reason that the car was being used by his son, for the private purposes and pleasure of the son, and not as an agent for the father. The testimony shows that Mr. George Dobson owned two cars, a larger car and the car which was being driven by Paul Dobson at the time of the accident, a Willys-Knight coupé. Both cars had been purchased and were kept for family use. Though it appears that the coupé was bought especially for the use of

Mrs. Dobson, Paul was allowed to use it when it was not otherwise wanted, but he was supposed to ask permission. The testimony shows that he had driven the car on a number of other occasions and when no other members of the family were present with him. In the particular instance in question he did not affirmatively ask permission of his mother to use the car; neither is there anything to show that he would have been denied the right had he asked it. It further appears that Paul was 22 years of age. He was, however, living at home as a member of the family and under parental control. In this case, the father's control over the son and the privilege of the son to the use of the car were, in no particular, different than had the son been a minor. The car was one which, there is evidence to show, was kept for the pleasure and convenience of the family. Though there was an understanding that the car was never to be used by Paul when his mother needed it, that is the usual rule in all families. The evidence was sufficient to raise the issue for the jury that the car was kept for family use, and that Paul, at least with what might be called the tacit acquiescence of his parents, was driving it on the occasion in question for one of the purposes for which it was kept—his own pleasure.

The defendant George Dobson especially complains, since Paul had no other member of the family with him, but was using the car for his own individual pleasure, that the car was not being used for a strictly family purpose, and that Paul could not, in the particular instance, have been acting as agent for his father, nor in furtherance of his father's interests.

The courts are divided on the so-called "family purpose" doctrine. This court, however, by the decision in *Stevens v. Luther,* 105 Neb. 184, is committed to that rule. Where the head of a family has purchased or maintains a car for the pleasure of his family, he is, under the so-called "family purpose" doctrine, held liable for injuries inflicted in the negligent operation of the car while it is being used by members of the family for their own

pleasure, on the theory that it is being used for the purpose for which it is kept, and that in operating it the member of the family is acting as the agent or servant of the owner. The rule, and the reason for it, is nowhere better stated than in the case of *King v. Smythe,* 140 Tenn. 217, L. R. A. 1918 F, 293, where the court say:

"If a father purchases an automobile for the pleasure and entertainment of his family, and, * * * gives his adult son, who is a member of his family, permission to use it for pleasure, except when needed by the father, it would seem perfectly clear that the son is in the furtherance of this purpose of the father while driving the car for his own pleasure. It is immaterial whether this purpose of the father be called his business or not. The law of agency is not confined to business transactions. It is true that an automobile is not a dangerous instrumentality so as to make the owner liable, as in the case of a wild animal loose on the streets; but, as a matter of practical justice to those who are injured, we cannot close our eyes to the fact that an automobile possesses excessive weight, that it is capable of running at a rapid rate of speed, and, when moving rapidly upon the streets of a populous city, it is dangerous to life and limb and must be operated with care. If an instrumentality of this kind is placed in the hands of his family by a father, for the family's pleasure, comfort, and entertainment, the dictates of natural justice should require that the owner should be responsible for its negligent operation, because only by doing so, as a general rule, can substantial justice be attained. A judgment for damages against an infant daughter or an infant son, or a son without support and without property, who is living as a member of the family, would be an empty form. The father, as owner of the automobile and as head of the family, can prescribe the conditions upon which it may be run upon the roads and streets, or he can forbid its use altogether. He must know the nature of the instrument and the probability that its negligent operation will produce injury and damage to others."

Even in those states where the "family purpose" doctrine obtains, there is still a division of authority upon the question of whether or not a child, a member of the family, in using the car for his own individual pleasure, is, within the meaning of the rule, operating the car for a family purpose. We, however, can see no reason for a distinction, whether the car is being used for the pleasure of two or more members of the family, or is being used by a single member of the family for his individual pleasure alone. That such a distinction exists has, by the decisions of other courts, been denied. *Crittenden v. Murphy,* 36 Cal. App. 803; *Birch v. Abercrombie,* 74 Wash. 486; *Johnson v. Smith,* 143 Minn. 350; *King v. Smythe, supra; Davis v. Littlefield,* 97 S. Car. 171; *Miller v. Weck,* 186 Ky. 552; and see notes 5 A. L. R. 226, and 10 A. L. R. 1449.

Where the car is kept for the use and pleasure of the family, and one member of the family is using it for his individual pleasure, or for one of the family purposes for which it is kept, it comes strictly within the reason of the rule that, in such use, the member of the family is acting as the agent, in furthering the purposes of the owner, as truly as though other members of the family were in the car with him, and that the owner can be held responsible for damages resulting from the negligent operation of the car while so used.

It is next contended that the verdict of $1,000 is excessive. Plaintiff had a Cadillac car, practically new. Two wheels were broken; the fender and the running board had to be replaced; the frame of the car was sprung; the body was so dented that the doors would not shut; and the supports for the top were broken. The difference in the value of the car before and after the accident, as shown by the testimony of plaintiff's witnesses, ranged from $1,000 upwards. The verdict of $1,000, as it appears to us, was clearly within the scope of this testimony.

The judgment of the district court is therefore

AFFIRMED.

STATE, EX REL. CLARENCE A. DAVIS, ATTORNEY GENERAL, ET AL., APPELLANTS, V. HARRY D. CLARKE ET AL., APPELLEES.

FILED MAY 17, 1922. No. 22479.

1. **Schools and School Districts:** CONSOLIDATED DISTRICTS. Chapter 243, Laws 1919, provides two methods for the consolidation of school districts, and declares, where the new district "contains" an organized consolidated school district, that consolidation shall be had by a petition of not less than 51 per cent. of the school electors in said new district, residing outside of the existing organized consolidated district. *Held*, where an organized consolidated district is only partially contained within the newly organized district, that this provision for consolidation upon petition does not apply.

2. ———: ———. The phrase, "contains a consolidated school district," as used in the statute, refers to a consolidated district which is completely contained within the proposed new district.

3. ———: ———: TRUSTEES. The provision found in section 6, ch. 243, Laws 1919, providing for an organization meeting and election of officers in the newly created district, contemplates and was intended to give the electors authority, at that meeting, to choose the plan of school district organization, and, though the districts which have become included within the newly consolidated district were previously operating under the statute providing for three trustees, the electors may, at the organization meeting, provide for a school district government through six trustees, and elect such trustees in pursuance of that plan.

4. ———: ———: ———: TERM OF OFFICE. Under section 6753, Rev. St. 1913, where such trustees are elected at the organization meeting of the newly consolidated district, *held*, that the first year of their respective terms shall be construed to include that period of time elapsing from the date of the organization meeting and the election of such trustees up to the time of the holding of the first annual meeting, prescribed by statute, of the newly created district.

APPEAL from the district court for Seward county: GEORGE F. CORCORAN and EDWARD E. GOOD, JUDGES. *Affirmed.*

Norval Bros., Coleman, Landis & Mastin, Hainer,

Craft, Edgerton & Fraizer and *R. R. Schick,* for appellants.

Thomas, Vail & Stoner and *McKillip & Barth, contra.*

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

FLANSBURG, J.

This is an action in *quo warranto,* to test the legality of the organization of consolidated school district No. 6, in Seward county, and to test the right of the two opposing sets of trustees, who claim to have been elected in that district, to hold office. The trial court sustained the validity of the school district organization, held that those trustees, elected at the organization meeting, were entitled to hold office; and that the trustees, elected at the annual meeting of the new district, held in June, 1921, were illegally elected. The relator and those persons claiming to have been legally elected as trustees in June appeal.

Consolidated school district No. 6 was organized and established under the provisions of chapter 243, Laws 1919. Proceedings were first had, duly prescribing the boundaries of the proposed district. The boundaries thus fixed included eight districts and a part of a consolidated district, being consolidated district No. 99, in which the incorporated village of Tamora is located. These individual districts, as they were then existing, were organized under the law (Rev. St. 1913, ch. 71, art. III) providing for three school district trustees. After fixing the boundaries of the proposed consolidated school district No. 6, an election was called for the purpose of passing upon the question of consolidation. Five notices of election were posted within the boundaries of the proposed district. At this election the proposal to consolidate was carried. Following the election, the county superintendent called a meeting of all the electors of the district for the purpose of organizing the district and electing officers. Personal notice of such meeting was given each elector. These notices described the place for the meeting as the Modern Woodmen hall in

the village of Tamora. The meeting, however, was actually held in the street, near this hall, an injunction having been procured restraining the manager of the hall from permitting the use of the hall for the purpose. It is contended that this meeting was informal, and that there was so much noise and confusion and irregularity that the electors present were unable to fairly express themselves, and that the proceedings as to organization and election of officers did not take place exactly as the minutes of the meeting purport to show. The trial court, however, has found upon those issues of fact against those contentions, and there is sufficient evidence in the record to support the findings of the court in that respect.

At this meeting it appears that a resolution was adopted, declaring that the district was a consolidated high school district, and that it should elect a district board, consisting of six trustees. This was an adoption of a form of government provided by chapter 71, Rev. St. 1913. In pursuance of that resolution, the six trustees were elected, they being the respondents Clarke *et al.*, and whom we shall hereafter call the first set of trustees.

On June 13 the district held, according to the statute, its first annual meeting, and at that meeting, the contention of a majority of the electors present being that at the organization meeting the district could not adopt a plan of government providing for six trustees, and that the election of the six trustees at that meeting was illegal, proceeded to elect an entirely new and second set of trustees; these trustees being the respondents Charles Gladwish *et al.* It is the contention of this second set of trustees that, should it be found that the district is legally organized, they are the duly elected trustees thereof.

The first question raised is as to the validity of the organization of the district. It is claimed that the district, which includes the village of Tamora, was not only a high school district, but was an "organized consolidated" district, and that, therefore, the organization of consolidated district No. 6, which included that district, should have

been by the method of a petition of 51 per cent. of the school electors residing outside of the Tamora district (Laws 1919, ch. 243, sec. 6). It is also urged that no legal notice of the election, called to pass upon the question of consolidation, was given, as is required for holding school district elections (Laws 1919, ch. 243, sec. 5), since the only notice given was by the posting of five different notices at different places throughout the proposed district.

These objections, so far as they involve the question of what constitutes a high school district, and of what constitutes the sufficiency of the notice, are controlled by the decision in *State v. Richardson, ante,* p. 604.

This leaves the question of whether or not the district, in which Tamora is located, was an "organized consolidated" school district, and was "contained" within the proposed consolidated district No. 6, so that the method for consolidation of district No. 6 should have been by petition instead of by election.

It appears, however, that the district, in which Tamora is located, is not wholly included within the proposed district No. 6, and therefore does not come within the wording of the statute which says, when the proposed district "contains" a consolidated school district, the consolidation may be had upon a petition of 51 per cent. of the electors of the proposed district, residing outside of such consolidated district. It is true that only a small portion—640 acres—of the district, in which Tamora is situated, is excluded from the proposed new district No. 6, and it is the contention of counsel that, in practical effect, this exclusion of territory makes no material difference. However, the statute prescribes a strict and arbitrary rule of procedure, and, should we follow the reasoning of counsel, how would it be possible to tell how much of a consolidated school district might be excluded from the newly proposed district and still the consolidated school district as such be, within the contemplation of the statute, "contained" within the new district? Where the entire consolidated district is not included within the new district, the effect of

the consolidation of a new district is not to add territory to the already established consolidated district, but is to change and alter the boundaries of such original consolidated district, and, in effect, establish a different and entirely new district, as distinguished from an enlarged one. The word "contain," in its usual and ordinary sense, means "contain completely," for if a thing is not completely contained within another it is not contained at all. To give the word "contain," as used in the statute, any other meaning would only lead to confusion.

The next question presented is whether or not the electors had authority, under the statute, to adopt at the organization meeting a plan of organization providing for the election of six trustees, and whether they had authority to elect such trustees at such meeting.

Section 6798, Rev. St. 1913, prescribes the manner in which a school district may change its organization from that providing three trustees to an organization providing six trustees. The statute reads as follows:

"Any district containing more than one hundred and fifty children, between the ages of five and twenty-one years, may elect a district board consisting of six trustees: *Provided,* the district shall so determine at an annual meeting by a vote of a majority of the voters attending such meetings. When such change in the district board shall have been voted, the voters at such annual meeting shall proceed immediately to elect two trustees for the term of one year, two for the term of two years, and two for the term of three years, and annually thereafter two trustees shall be elected whose term of office shall be three years and until their successors shall have been elected and qualified."

It is evident that this provision of the statute had no reference, in any sense, to proceedings to be had at the first meeting of newly organized districts, nor does it prohibit a district, which is newly organized, from choosing between the two forms of school district government at its organization meeting. The law of 1919, under which the

consolidated school district in question is organized (Laws 1919, ch. 243, sec. 6), contains the provision:

"If the election results are favorable to the establishment of said new school district, the county superintendent, within ten days thereafter, shall call a meeting of the electors as provided by law for the organization of new districts. At said meeting the qualified electors shall proceed to elect a school board as provided by law."

It appears to us clearly within the contemplation of the legislature, by this enactment, that the electors of the new district should have authority to adopt the plan of school district organization which they deemed fit. Surely, it would be unreasonable to say that at this organization meeting they must proceed with a plan of government providing for three trustees until an annual meeting of the newly consolidated district could be had, and this for the sole reason that the several districts, which had become included within the new district, were found to have had, as their previous form of government, organizations providing for three trustees. Surely, there could have been no object in so restraining the electors at the organization meeting. On the other hand, the purport of the statute is to give them full authority to organize the new district under such plan of school district government as they should choose, and to elect officers in pursuance of that plan. This was done, and it is our opinion that the trustees, elected at the organization meeting in April, were legally elected and are entitled to hold office for their respective terms.

In this connection, and as further bearing out this position in the interpretation of the statute, we call attention to section 6753, Rev. St. 1913, which is as follows:

"When a new district is organized and officers elected at any other time than at the annual meeting, the time intervening between the date of organization and the beginning of the next school year shall constitute the first year in the term of such officers." We believe this section of the statute governs as to terms of office of the trustees elected at

the organization meeting, and that the time elapsing, from such election to the first annual meeting held in June of that year, should be construed, under the statute, to constitute the first year of their respective terms.

It seems to us that the writ was properly denied as against the first set of trustees and properly allowed against the others, and the judgment of the trial court is therefore

AFFIRMED.

FIRST NATIONAL BANK OF BERTRAND, APPELLANT, V. GEORGE B. AMIOT, APPELLEE.

FILED MAY 17, 1922. No. 21746.

1. **Appeal:** VERDICT: OBJECTIONS. Objections to the form of a verdict should be made in the trial court at the time of its rendition to be of any avail in this court.
2. **Trial:** VERDICT. Where the verdict contains proper findings on the issuable facts submitted to the jury, clearly indicating the judgment which the law should pronounce, severable matters outside of the pleadings, the proof, the issues, the instructions and the law may be rejected as surplusage.

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

Frank A. Anderson and *S. A. Dravo,* for appellant.

O. E. Bozarth and *A. J. Shafer, contra.*

Heard before LETTON, DAY and DEAN, JJ., SEARS and WESTOVER, District Judges.

WESTOVER, District Judge.

This is an action brought by appellant, hereafter called plaintiff, to recover on a promissory note for $72. The plaintiff claims that it purchased the note in due course, before maturity, for value, and without notice of any defense thereto.

The defendant for answer denies the allegations of the

petition, and by way of defense alleges: That Roscoe J. Slater, an officer of the plaintiff bank, recommended and advised the defendant to procure and purchase certain shares of stock in the Investors' Syndicate of Minneapolis, Minnesota; that said recommendation was written upon a card which was presented to the defendant by an agent and representative of said Investors' Syndicate of Minneapolis, Minnesota; that said agent of said Investors' Syndicate, with the knowledge and consent of plaintiff bank and Roscoe J. Slater, to induce the defendant to sign the note in question, represented that, if defendant signed and delivered the note, at the end of two years, if defendant was not satisfied, he could withdraw from said syndicate, and that the withdrawal value of his share therein at the end of two years was of a value of $72, and that the same would be paid to defendant without charge or expense, and that he could so withdraw without further liability, cost or expense to him; that said statement was false and untrue, and was so known to be false and untrue by the plaintiff bank and Roscoe J. Slater and the agent, and was made with the purpose to cheat and defraud the defendant; that the agent of said syndicate, with the knowledge and consent of the plaintiff bank and Roscoe J. Slater, represented that at the end of three years this defendant could withdraw out of said syndicate the said $72 and all the sums paid, together with 2 or 3 per cent. interest thereon, without further cost or expense to the defendant, which representations were false, and were made for the purpose of inducing the defendant to sign the note in question; that upon the receipt of said certificate defendant discovered that said representations were wholly false, and that said $72 and other sums paid could only be drawn at the end of six years, and then without interest or income; thereupon defendant notified the agent of the syndicate that he rescinded his purchase and demanded the return of his note, and said agent agreed that the plaintiff bank would arrange to take over the certificate and return to defendant his note; that defendant demanded his note of plaintiff bank, and said bank informed

him that it did not have or own the note and had not purchased it, and defendant prayed that said action be dismissed and for his costs. To this answer the plaintiff filed a reply denying the allegations of new matter therein contained.

The case was tried to a jury, and the jury returned the following verdict: "We, the jury duly impaneled and sworn in the above entitled cause, do find for the defendant, for the following reasons: That upon inquiry by the defendant, that he was led to believe that said note was not in possession of said bank and that he was not notified of same until several months past maturity, also that the defendant had not received value as represented. Dated this 28th day of April, 1920. Hayes W. LeFever, Foreman."

No objections were made to the form of the verdict at the time it was returned, and after the verdict was received without objection it was then too late to urge either upon the trial court or this court objections to the form of verdict. *Roggenkamp v. Hargreaves,* 39 Neb. 540; *Brumback v. German Nat. Bank,* 46 Neb. 540; *Jones v. Driscoll,* 46 Neb. 575.

A motion for a new trial was filed by plaintiff and overruled by the court, and judgment was entered on the verdict. In overruling the motion for a new trial and entering judgment on the verdict, the trial court undoubtedly disregarded the reasons for the verdict as stated therein, and rejected such reasons as surplusage, thus leaving the general verdict finding for defendant, upon which judgment was entered. In this we hold the trial court committed no error. In *Hallett v. Ransom,* 97 Neb. 643, it is said: "Where the verdict contains proper findings on the issuable facts submitted to the jury, clearly indicating the judgment which the law should pronounce, severable matter outside of the pleadings, the proof, the issues, the instructions and the law may be rejected as surplusage." In *State v. Beall,* 48 Neb. 817, it is said: "A verdict which responds to all the issues made by the pleadings should not

be rejected on account of immaterial findings or recommendations superadded by the jury." In *Gover v. Turner*, 28 Md. 600, the supreme court of Maryland, in upholding a verdict where the jury had departed from the proper form by assigning reasons for their finding, said: "It is true, the verdict is not in the usual form, the jury having assigned the reason upon which they based it; but, as we have said, we do not regard this departure from the usual form as material. 'Where the intention of the jury is manifest and beyond doubt, the court will set right matter of form.' "

Having held that the trial court properly disregarded the reasons assigned by the jury for their verdict as surplusage, it leaves a general verdict finding for the defendant. This verdict is responsive to the issues raised by the pleadings and the instructions given by the court; and from a careful review of the evidence in the case there is no doubt but the verdict is fully warranted by the evidence. But two witnesses testified in this case, the cashier of the plaintiff bank on one side and the defendant on the other. If the jury believed the defendant's testimony, which it had a right to do, the verdict was right and is supported by sufficient evidence. The record discloses that there is no doubt the note in question was procured originally by fraud and misrepresentations. The defendant testified to facts from which no other conclusion can be drawn, and there is nothing to the contrary in the record. Under these circumstances, the burden of proof was upon the plaintiff, and before it could recover it was required to satisfy the jury by a preponderance of the evidence that it purchased the note in good faith, in due course, and without notice of any defense thereto. From the evidence in the case the jury were fully warranted in believing that the plaintiff had notice of the fraudulent character of the transactions leading up to the execution of the note.

There is no complaint made as to any instructions given by the court, and we find no error in the record, and the judgment is AFFIRMED.

FRANK CAMPBELL, APPELLEE, V. LINCOLN TRACTION COMPANY, APPELLANT.

FILED MAY 17, 1922. No. 21753.

Appeal: CONFLICTING EVIDENCE. Where the evidence conflicts respecting the existence of material facts, and such evidence is fairly submitted to the jury under proper instructions, the verdict will not be set aside unless manifestly wrong. *Trumble v. Leavitt, ante*, p. 65.

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

Hainer, Craft & Lane and *Hall, Baird & Williams*, for appellant.

Wilmer B. Comstock and *E. G. Maggi, contra.*

Heard before LETTON, DAY and DEAN, JJ., SEARS and WESTOVER, District Judges.

WESTOVER, District Judge.

The appellee brought this action to recover damages for an alleged injury received by him through the negligence of the appellant in permitting two of its cars to collide at or near the intersection of Twenty-second and O streets in the city of Lincoln.

The material allegations of the plaintiff's petition, omitting formal matters, are that on the 21st day of July, 1919, the plaintiff boarded one of the defendant's street cars, which was passing eastward on O street, paid his fare and took passage upon said car and became a passenger thereon from the city of Lincoln to the city of Havelock; that said car was crowded with passengers, the seats being all occupied and persons standing in the aisle and rear vestibule, and plaintiff was required to remain and stand in the rear vestibule of said car, a place regularly provided for passengers and habitually used and occupied by passengers at the invitation and with the consent of the defendant; that while the plaintiff was standing quietly and

orderly in the rear vestibule of said car and in the exercise of due care, at the intersection of Twenty-second and O streets, about 3 o'clock in the afternoon of said day, "the defendant, negligently and carelessly, caused another of its street railway cars following the car upon which plaintiff was a passenger to be run into and against the rear end of the car upon which plaintiff was a passenger, and negligently and carelessly caused said cars to collide with great and terrific force and violence, and thereby caused plaintiff to be thrown about in said vestibule and against the sides, walls and floor thereof, and severely bruised and sprained the plaintiff about his head, neck, trunk and limbs, and caused concussion of plaintiff's brain and spinal column, and produced a terrific shock to plaintiff's entire system, permanently and seriously impaired and shattered plaintiff's nervous system, caused plaintiff to be confined to his house and bed for the period of about one week, seriously injured plaintiff's spine and spinal column, caused plaintiff to suffer excruciating pain and anguish, both of body and mind, rendered it necessary for plaintiff to incur indebtedness for medical and surgical attendance, medicine and nurse hire in the sum of about $200, caused partial paralysis of plaintiff's limbs, caused plaintiff to have constant and severe pains in his head and back, and rendered plaintiff a permanent and incurable invalid, unable to perform any manual labor or to pursue his usual avocation, or to earn a livelihood." It is further alleged that plaintiff was 25 years of age, and immediately prior to the injury complained of was a strong and able-bodied man in perfect health, a skilful mechanic employed as a machinist's helper and was actually earning the sum of $4.95 a day.

The answer denies each and every allegation of said petition, and alleges that, if the plaintiff received any injuries at all at the time and place alleged, such injuries were received solely as a result of the carelessness of the plaintiff, and were not caused by the negligence or carelessness of the defendant or any of its agents or employees.

The case was submitted to a jury upon the evidence adduced, and a verdict was returned in the sum of $7,350, upon which judgment was rendered. A motion for a new trial was duly filed, which was overruled, and from the verdict and judgment so rendered this appeal was taken.

The trial court, upon its own motion, among others, gave the following instructions:

"It is undisputed in the evidence that an accident and collision occurred, and, as admitted by counsel for the defendant in their statement and argument, the law imputes negligence to the defendant. It is further undisputed in the evidence that the plaintiff was himself without negligence. You will therefore turn your attention to the question of whether or not the plaintiff was actually injured in and by such collision, and, if so, to what degree. In this the burden of proof is upon the plaintiff, that is to say, the burden of proving by a preponderance of the evidence. But if you find by a preponderance of the evidence that the plaintiff suffered injury in such collision and by reason of the same as a proximate cause, and that the plaintiff was thereby damaged to some amount that you can determine from the evidence, then and in that case your verdict should be for the plaintiff. Otherwise it should be for the defendant.

"Defendant defends on the theory that the ills of which the plaintiff complains, if any, result from his infected teeth and from other causes not connected with the collision. If you are satisfied from the evidence that this theory is correct, and that plaintiff's condition was not caused, and proximately caused, by the impact of the two cars, then and in that case your verdict should be for the defendant."

It seems that the contention of defendant at the trial was that the injuries of which the plaintiff complained were not the result of the collision, but resulted from infected teeth. The issues were thus narrowed and specifically defined. It appears to us from a careful examination of the record that no question of law was involved

in this case, but simply questions of fact to be determined by the jury; and in our judgment the jury were fully warranted, from the evidence, in finding and returning a verdict for the plaintiff. We have searched the record in vain for evidence tending to show that the plaintiff was afflicted with infected teeth at any time prior to the collision and injury complained of in the petition. On the contrary, the evidence is undisputed that prior to that time he was an able-bodied man, had been a blacksmith, and just prior to his alleged injuries he was helper to a machinist in the shops at Havelock, and capable of and did earn $4.95 a day.

It is urged, however, that the verdict is excessive. At the time of plaintiff's injuries he was 25 years of age, and according to the mortality tables his prospect of life was 37.86 years. He was injured on the 21st day of July, 1919, and the trial in the district court closed on the 7th day of May, 1920. During this period of time the evidence discloses that the plaintiff constantly suffered pain, and was unable to perform any character of work, and earned nothing during that time. The medical testimony as to whether he will probably recover his health is not at all satisfactory or convincing, and the best that can be said of that testimony is that it discloses that he may probably some time in the future regain his health. At the trial in the district court the jurors had the opportunity to see the plaintiff and to observe his condition. This was more than nine months after the alleged injury. The jurors, of course, had a right to take into consideration his appearance at that time, and they were in a better position to judge of his condition than we are from the record. We find no sufficient reason for disturbing this verdict. An examination of the record fails to disclose or suggest that there was any misconduct on behalf of any person or the jury connected with this trial. No irregularity is complained of, and there is nothing in the record suggesting that the jury were influenced by passion or prejudice, or that the

sum awarded was based upon anything but the evidence. The judgment is

AFFIRMED.

GRANT L. SHUMWAY, APPELLANT, V. STEPHEN K. WARRICK, APPELLEE.

FILED JUNE 12, 1922. No. 22045.

1. **Libel:** PUBLICATION LIBELOUS PER SE. Published words which charge one with malfeasance in office are libelous *per se.*

2. **Banks and Banking:** APPLICATION FOR CHARTER: DUTY OF BOARD. When application is made to the state banking board for a charter to do a banking business, it is the duty of the board to determine, after proper investigation, the integrity and responsibility of the persons making the application, and, in conducting the investigation and determining the questions before them, the board exercises quasi-judicial powers.

3. ———: ———: ISSUES. The integrity and responsibility of plaintiff being matters of pertinent inquiry by the state banking board, the issues raised by defendant's protest were relevant and material to the inquiry.

4. ———: ———: ORDER: REVIEW. An order of the state banking board, made on an application for a bank charter, may be reviewed by petition in error to the district court.

5. **Libel:** PRIVILEGED COMMUNICATIONS. In judicial proceedings, the test of privilege is not the motive of the libelant but the relevancy and materiality of the matter published.

6. ———: PLEADING: MALICE. Whatever a litigant may properly plead as a cause of action or ground of defense as relevant and material to the issue, he may plead with or without malice, and in such case the intent with which he pleaded the same cannot be inquired into or become an issue in an action for libel, and this rule extends to one who files with the state banking board a protest against the issuance by the board of a bank charter to the person named in the protest.

7. **Demurrer.** The demurrer to the petition was properly sustained.

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

Burkett, Wilson, Brown & Wilson, for appellant.

F. A. Wright and *Mothersead & York, contra.*

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

MORRISSEY, C. J.

Plaintiff filed his petition in libel. Defendant filed a general demurrer. The demurrer was sustained and plaintiff's action dismissed.

The petition contains the following allegations:

(2) That the plaintiff was from January, 1917, to January, 1919, commissioner of public lands and buildings of the state of Nebraska.

(3) That since the first of January, 1919, the plaintiff has been engaged in making financial investments and handling and dealing in real estate and loans for other people, in which business his reputation for honesty, integrity and fair dealing was of great value, and that he had a good reputation in and about Scotts Bluff county for uprightness and probity of character.

(4) That the defendant is a man of great wealth and influence in Scotts Bluff county and surrounding territory, and is president of the First National Bank of Scottsbluff, and by that position he has great influence in the community.

(5) That on or about the 19th day of April, 1919, the plaintiff and others formed a banking association under the name of "Commercial State Bank of Scottsbluff" and adopted articles of incorporation, and on the 8th day of May, 1919, filed with the banking board an application for a charter to do a banking business.

(6) That the plaintiff was at the time of making said application a stockholder in said Commercial State Bank, holding 110 shares of the capital stock thereof of the face value of $100 each, and was one of the promoters and organizers of said bank.

(10) That on or about the said 13th day of June, 1919, the defendant wrote and published of and concerning this

plaintiff the following false and libelous language, to wit:

"The protestant (meaning the defendant herein) questions the integrity of G. L. Shumway (meaning the plaintiff herein) while he held the office of commissioner of public lands and buildings of the state of Nebraska in connection with the potash industry of Nebraska (meaning and intending thereby to charge, and charging, this plaintiff with malfeasance in the office of commissioner of public lands and buildings of the state of Nebraska)."

(11) Plaintiff says that the language used by the defendant of and concerning this plaintiff as set forth in the tenth paragraph of this petition was contained in a document in the form of a protest, filed in the office of the state banking board of the state of Nebraska, for the purpose of preventing this plaintiff and his associates from obtaining a charter for said bank, and that said protest was filed by the defendant and was uttered and published by the defendant of and concerning the plaintiff.

(12) By reason of the filing of said protest, said libelous matter gained great circulation in the state of Nebraska and in Scotts Bluff county, and was largely copied and circulated by the public press of said county and of said state.

(13) Plaintiff further says that in using, writing, and publishing the said libelous language of and concerning this plaintiff, set forth in the tenth paragraph of this petition, the defendant was impelled and actuated by hatred, ill will, and express malice toward this plaintiff, and that each and all of said charges and insinuations were and are false and were known at the time of their publication to the defendant to be false.

(15) That, by reason of the foregoing facts, the plaintiff was damaged in his good name and reputation to the amount of $50,000.

For the purposes of this review the demurrer admits the truth of each and every allegation of the petition that is well pleaded, including the allegation that in writing and publishing the matter complained of defendant was actu-

ated "by hatred, ill will, and express malice, * * * and that each and all of said charges and insinuations were and are false and were known at the time of the publication by defendant to be false."

In addition to the allegations of the petition set out, it contains two other counts. But, disregarding the rule of absolute privilege claimed by defendant, the language used was not actionable, and we, therefore, omit them.

The accusation of malfeasance in office was a serious charge made, as confessed on the record, with malice. "Words which impute a want of integrity to any one holding an office of confidence or trust, whether an office of profit or not, are clearly actionable in themselves." Newell, Slander and Libel, (3d ed.) sec. 184. The language used was libelous *per se*. Defendant relies upon the rule of absolute privilege, and asserts that though the language may be libelous it cannot be made the basis for an action for damages. In order to determine this question it is necessary to consider the functions of the tribunal before which plaintiff's application for a banking charter was pending, and the nature of the proceeding therein. Chapter 6, Rev. St. 1913, being sections 280-345, inclusive, is a comprehensive act creating a banking board and establishing rules and regulations for the organization of banks, issuance of charters thereto, and prescribing general regulations for the conduct of institutions organized under its provisions. Under section 284 a state banking board is created and is given general supervision and control of banks and banking within the state, and it is specifically provided that no person, or persons, shall be permitted to engage in or transact a banking business save corporations having complied with the provisions of the statute; provision being made to exempt from the operation of the act banks organized under the laws of the United States. By section 290 it is made unlawful for any person or corporation to conduct a bank or to engage in or transact a banking business without first procuring a charter from the banking board. Section 295 provides that after the examination and approval

of certain statements required to be filed the banking board, "if, upon investigation, it shall be satisfied that the parties requesting said charters are parties of integrity and responsibility, shall * * * issue to said corporation the certificate provided for." The banking board is charged with the duty of making an investigation as to the integrity and responsibility of parties applying for a charter to do a banking business. Under this provision of the statute the integrity and responsibility of plaintiff were directly involved in the proceeding. After inquiry it was the duty of the board to determine the integrity and responsibility of the applicant. In this it was exercising quasi-judicial powers.

"When the law commits to any officer the duty of looking into facts and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is quasi-judicial." *Mitchell v. Clay County,* 69 Neb. 779. On rehearing the judgment wherein this rule was announced was set aside, but the rule of law was not changed. See, also, *Mathews v. Hedlund,* 82 Neb. 825, and cases cited; *State v. Morehead,* 99 Neb. 146.

The integrity and responsibility of plaintiff being matters of pertinent inquiry by the banking board, the issues raised by defendant's protest were relevant and material to the inquiry.

But plaintiff asserts that defendant is not protected by the rule of absolute privilege because his rights and interests were not directly involved in the matters before the banking board. In *Flynn v. Boglarsky,* 164 Mich. 513, 32 L. R. A. n. s. 740, defendants caused to be signed and presented to a police justice a petition requesting that the plaintiff and his wife be required to vacate the premises where they resided on the ground that they were disturbers of the peace, quarrelsome, and a general nuisance. The court held that, as the matter stated in the petition was pertinent and material to a matter in which the justice had jurisdiction, the statements it contained were absolutely privileged in so far as the proceeding before the

justice was concerned. And in *Reycraft v. McDonald*, 194 Mich. 500, we find the following language:

"Statements made by defendant to the judge of probate, no one else being present, in instituting proceedings to have plaintiff's sanity judicially determined under Act No. 100, Pub. Acts 1909 (1 Comp. Laws 1915, sec. 1325), were absolutely privileged and cannot be made the basis of an action for slander, notwithstanding defendant did not belong to any of the classes of persons authorized by said act to bring such proceedings."

But defendant's right to invoke the rule of absolute privilege may be placed on another ground. He had the right to appear before the banking board and protest against the issuance of the charter sought by plaintiff and his associates; and, if defendant's protest had been overruled, he might have prosecuted error to the district court. Rev. St. 1913, sec. 8175; *State v. Morehead,* 101 Neb. 37. This being true, it would be paradoxical to hold that he was merely an interloper, a stranger to the proceedings, and therefore denied the privileges and immunities granted a party litigant. Appellant lays stress upon the admitted fact that in publishing the libel defendant was actuated by malice, hatred, and ill will. However, this court is committed to the rule that, in judicial proceedings, the test of privilege is not the motive of the libelant but the relevancy and materiality of the matter published.

Adopting the language of the supreme court of Idaho, this court has said:

"Whatever a litigant may properly plead as a cause of action or ground of defense as relevant or material to the issue, he may plead with or without malice, and in such case the intent with which he pleaded the same cannot be inquired into or become an issue in an action for libel." *Simon v. London Guarantee & Accident Co.,* 104 Neb. 524. See, also, *Carpenter v. Grimes Pass Placer Mining Co.,* 19 Idaho, 384, and authorities there cited.

The demurrer was properly sustained, and the judgment of the district court is AFFIRMED.

THOMAS R. PHILIPS, APPELLEE, V. ELLA S. BOSSUNG, APPELLANT.

FILED JUNE 12, 1922. No. 22079.

Landlord and Tenant: LEASE: PROOF OF VALUE. In a suit by the lessee of a farm to recover damages from the lessor for wrongfully withholding possession thereof, plaintiff was permitted to prove the number of acres planted to crop, the yield per acre, the price at which the product was sold, and the approximate cost of production. With this testimony and a showing of the rent reserved as a basis, witnesses were permitted to testify as to the value of the lease. *Held* error.

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

O. E. Bozarth and *Cook & Cook,* for appellant.

E. T. Grunden and *Stewart, Perry & Stewart, contra.*

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

MORRISSEY, C. J.

In January, 1919, and prior thereto, defendant owned a farm of 640 acres in Gosper county, Nebraska. Plaintiff alleges that at that time and for many years prior thereto, he was a capable and experienced tenant farmer and was possessed of the necessary equipment for the operation of such a farm as defendant owned; and that in the month of January, 1919, the exact date not being given, certain negotiations were entered into between plaintiff and defendant in relation to defendant's farm. The language of the petition is such that it appears to allege that these negotiations constituted an agreement between plaintiff and defendant whereby defendant was, at a future date, to enter into a lease of the farm for the remainder of the year 1919, and to also allege that then and there defendant leased the farm to plaintiff for the remainder of the year 1919. It is alleged that during these negotiations the terms and condition of the lease were reduced to writing in the form of a

memorandum which was not signed by either party. Although the allegations of the petition are uncertain, the cause appears to have been presented by plaintiff on the theory that defendant actually entered into an oral lease of the premises, and defendant so shaped her defense as to meet that theory. In the petition it is specifically alleged:

"That the value of the lease for the year 1919, aforesaid, and the value of the possession of said land for the year 1919, under the terms and conditions as heretofore set forth, had defendant executed said lease and permitted plaintiff to enter possession thereof on the first day of March, 1919, to plaintiff was not less than six thousand ($6,000) dollars, all of which defendant well knew at the time that she wickedly and unlawfully refused to execute the same and refused to permit plaintiff to enter into the possession of said premises.

"That, by reason of the said false and fraudulent representations and by reason of defendant's refusal to execute said lease and her refusal to permit plaintiff to enter into the possession of said land, plaintiff has sustained damages in the aggregate sum of six thousand ($6,000) dollars."

There is a further allegation which alleges that because of his failure to get possession of the farm plaintiff was deprived of an opportunity to use his farm equipment and was compelled to sell the same at a great sacrifice, to wit, $3,000.

The answer in general terms is a general denial, but specifically sets out what defendant alleges were the circumstances and conditions under which plaintiff and defendant met and discussed the leasing of the farm, and the writing of the unsigned memorandum. It denies that any lease was made between the parties, and alleges that their conversation was simply an agreement that, if defendant, upon reflection, concluded to rent the farm to plaintiff, she would at a future date meet him at her attorney's office in Elwood, where a lease would be executed; that de-

fendant later concluded not to lease the premises to plaintiff and gave him timely notice of her conclusion.

Plaintiff offered no proof of the value of the lease at the time it is alleged to have been made, or of its value at the time it is alleged to have been breached. The defendant offered proof which conclusively shows that it was then worth nothing in excess of the rent reserved. Therefore, on this cause of action, plaintiff could recover no more than nominal damages.

Plaintiff contends that the allegations of the petition are sufficient to differentiate this case from *Herpolsheimer v. Christopher,* 76 Neb. 352, and *Shutt v. Lockner,* 77 Neb. 397, and that the rule governing the measure of damages announced in these cases does not apply. In the brief it is frankly stated that, if "plaintiff had not pleaded that he had informed defendant of the use to which he expected to put this farm and of facts which acquainted the defendant with the value of the occupancy of the place to the plaintiff, then these cases would be in point." The published opinions in the cases mentioned do not set out at length the petitions, but the transcripts, forming a part of the records of this court, are before us, and the petition in *Herpolsheimer v. Christopher,* 76 Neb. 352, sets out at great length and with much detail every element of special damage that is here pleaded, and that has any proof to sustain it. No proof was offered as to any loss suffered by the sale of plaintiff's farm equipment, or the sum earned by plaintiff in the business in which he engaged during the term covered by the alleged lease. Indeed, the only proof worthy of mention to support a claim of special damages is that relating to the crop produced on defendant's farm during the year covered by the alleged lease. Over objection, plaintiff was permitted to prove the number of acres planted to crop, the yield per acre, and the price at which the product was sold, and he showed by expert testimony the approximate cost of producing the crop. Based on this showing, witnesses testified to the value of the alleged lease. On this testimony, and this alone, the verdict of the

jury appears to rest. Apparently the jury arrived at the amount of recovery by ascertaining the total value of the crop produced and deducting therefrom the cost of production, and the rent reserved. This is not the proper measure of damages. In *Shutt v. Lockner,* 77 Neb. 397, this court had occasion to consider a somewhat similar question. The product in that instance was hay which had been harvested and its market value determined before the cause was tried. The plaintiff in that case insisted that the profits were definite, certain, and recoverable as damages. In its discussion of the subject the court pointed out that the cause of action arose when the contract was breached, and said:

"Had the action been commenced and tried at that time, the amount of hay which the land would produce, the market value of the hay when harvested, and other elements which would enter into the question of whether the plaintiffs would profit or lose from their venture were matters of conjecture and speculation. Clearly no rule of law administered by our courts would allow damages to be predicated on opinions that might be formed relating to these questions. The fact that these questions had been determined by lapse of time when the case was tried does not in the least change the rule of law as to the evidence admissible to establish the plaintiff's damage."

Applying the foregoing reasoning to this record, it is clear that the court erred in admitting the testimony mentioned. Other errors are assigned, but we do not deem it necessary to discuss them, as they are not likely to again occur. The cause is reversed, with leave to parties to file such new pleadings as may seem proper for a retrial of the cause upon its merits.

REVERSED AND REMANDED.

IN RE ESTATE OF GEORGE ISAAC.
GEORGE R. ISAAC, EXECUTOR, APPELLEE, V. CHARLES F. VINSON, ADMINISTRATOR, APPELLANT.

FILED JUNE 12, 1922. No. 22086.

1. **Appeal:** FINAL ORDER. An order of a county court appointing a guardian *ad litem* in proceedings for the probate of a will is not a final order from which an appeal can be taken before final decree.

2. **Insane Persons:** GUARDIAN AD LITEM: APPOINTMENT: REVIEW. Where a county court has jurisdiction of proceedings to probate a will, it has jurisdiction to appoint a guardian *ad litem* for an infant or incompetent who is interested in the proceedings, but such appointment, if erroneously made, may be challenged upon an appeal from the final decree, and may be subject to reversal by a reviewing court.

3. ———: ———: ———. In order to justify the appointment of a guardian *ad litem* for a defendant on the ground of incompetency, such incompetency must be alleged, the court should be satisfied from the proofs that such a status exists, and a finding to that effect should be made.

4. ———: ———: ———: REVIEW. Where the only ground alleged in a petition for the appointment of a guardian *ad litem* is that a petition was on file in the county court praying for the appointment of a general guardian, and no notice was given to the proposed ward of the application, and no evidence was taken as to the fact of incompetency, and no finding made that the proposed ward was incompetent, an order appointing a guardian *ad litem* was erroneous, and may be reviewed upon an appeal from the final decree.

5. ———: ———: ———: WILLS: ELECTION: REVIEW. A purported election to renounce the provisions of a will by the ward, and an election to take under the statute of descent, filed by a guardian so appointed, may also be reviewed after final decree, and may be set aside if the guardian *ad litem* was erroneously appointed.

6. **Evidence:** PRESUMPTION. A presumption may not be used to nullify facts shown by a judicial record.

7. **Insane Persons:** GUARDIAN AD LITEM: APPOINTMENT: PRESUMPTION. A presumption that the appointment of a guardian *ad litem* was regular and was based upon sufficient allegations and proof

will not be indulged in, where the record recites the actual facts and establishes the insufficiency of the proceedings.

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

Claude S. Wilson, Albert S. Johnston, John J. Ledwith and *John H. Barry,* for appellant.

Burkett, Wilson, Brown & Wilson, contra.

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

LETTON, J.

The county court of Lancaster county entered a final order and decree of distribution in the matter of the estate of George Isaac, deceased. An appeal was taken to the district court, the decree of the county court was reversed, and an order of distribution was made in that court materially different from that of the lower court. From the decree of the district court this appeal is taken.

George Isaac died in December, 1917, leaving surviving him his widow, Lucy Isaac, or Lucy P. Isaac, as she is termed in some of the proceedings, and one son, George R. Isaac. He left a will whereby he devised a life estate in all his property to his wife, with remainder to his son, George R. Isaac. Notice of proceedings for the probate of the will was duly given. A hearing was had on February 14, 1918. On the same day there was filed a petition for the appointment of a guardian *ad litem* for Lucy Isaac. This was signed "George R. Isaac, by Harlan A. Bryant, his attorney." The authority of Bryant to file this petition is challenged by Isaac, and the petition is also attacked as not alleging facts sufficient to give the court jurisdiction to appoint a guardian *ad litem.* On the same day an order was made on this petition, appointing John J. Ledwith guardian *ad litem,* who accepted the appointment, entered his voluntary appearance in the proceedings, and filed formal objections to the probate of the will. On the same day, after a hearing, the will was probated. A few

days afterwards Mr. Ledwith, as guardian *ad litem,* filed a paper alleging the incompetency of Lucy Isaac, her refusal to accept the provisions of the will, and her election to take under the statute of descent and distribution.

Lucy Isaac died before the final settlement of the estate of George Isaac in the county court. When the decree of distribution came to be made, the county court considered that, having, by her guardian *ad litem,* elected to renounce the provisions of the will, Lucy Isaac was entitled to one-half of the estate and George R. Isaac the other half, and entered a decree accordingly. On appeal to the district court this decree was reversed, and the whole estate awarded to George R. Isaac. This is an appeal from the latter decree.

The question involved is whether the devisees of Lucy Isaac shall take one-half of the estate, or whether the son, George R. Isaac, shall take the whole estate as remainderman.

George R. Isaac, the appellee, contends that Lucy Isaac was not incompetent; that the petition for the appointment of a guardian *ad litem* was insufficient; that no notice was given and no hearing had on the question of incompetency; that the order of appointment is void on its face; that the guardian *ad litem* had no authority to make the purported election for the widow who was sane at that time.

On November 5, 1917, an application had been filed in the county court by William A. Newsham, her son, alleging that Lucy Isaac was incompetent, and asking for the appointment of a guardian for her person and estate. Lucy Isaac filed objections to the petition, denying her incompetency, but no hearing had been had on the issues thus raised at the time of the appointment of the guardian *ad litem.* The only ground alleged in the petition for the appointment of the guardian *ad litem* is as follows: "That there is also on file in this court a petition praying for the appointment of a guardian of the person and estate of Lucy Isaac, wife of the said George Isaac, deceased, for the

reason that she is old, infirm and mentally incompetent to care for and manage her estate."

The mere fact that such a petition had been filed in another proceeding did not authorize the appointment of a guardian *ad litem* in this proceeding, and the order of ap-appointment was erroneous. To justify such an appointment, which may have the effect to deprive a person of the control of litigation in which his interests may be largely involved, the fact of incompetency should be specifically alleged, and the court should be satisfied from the proofs that the status of incompetency actually exists at the time the appointment is made. A finding of incompetency should be made. *Patton v. Furthmier,* 16 Kan. 29; *Spencer v. Popham,* 5 Redf. Sur. (N. Y.) 425; *Patton v. Taylor,* 144 Ark. 254; *Ex parte Trice,* 53 Ala. 546. The court did not find that Lucy Isaac was incompetent, but merely found that a petition had previously been filed in that court for the appointment of a general guardian for her, on the ground of mental incompetency. This was insufficient ground for the appointment.

It is shown that, upon a subsequent decree in such proceedings appointing a general guardian, a supersedeas was filed and an appeal taken. While the appeal was pending, Lucy Isaac died, and the proceedings were dismissed, so that she was never in fact under guardianship. A great deal of testimony was taken in the district court in the case at bar, as to whether she was ever in fact incompetent. That court found that she was sane, and the evidence, though in sharp conflict, is sufficient to support the finding.

It is asserted that the order appointing the guardian *ad litem* was a final order, and therefore, not having been appealed from, it may not be attacked. Such an order does not fall within the statutory definition of a final order. Rev. St. 1913; sec. 8176; *In re Hathaway,* 111 Cal. 270. It is merely an incident in the proceedings, and of itself affects no substantial right, although such rights may be affected by subsequent action, or omission to act, by the appointee. The authority of the appointee to act may be challenged

at the time of the final hearing, and may be reviewed in an appellate court.

It is insisted that George R. Isaac is estopped from complaining of this appointment, since it was made on his petition, and he was present and assenting to the order when it was made. He denies this. The evidence is conflicting, but there is sufficient to sustain the finding of the district court on this point.

Appellant argues: "The effect of appointing a guardian *ad litem* as to the fact upon which the appointment is based is, like any other judgment of a court, conclusive proof of the facts upon which the judgment is based." And also says: "The appointment of a guardian *ad litem* to appear and answer for the respondent necessarily presupposes that in a previous stage of the case her mental condition and capacity had been inquired into and the fact of her insanity during the pendency of the suit duly ascertained and adjudicated"—quoting from *Little v. Little,* 13 Gray (Mass.) 264. But where the record itself discloses that no allegation of incompetency was made in the petition, that no notice was given to the alleged incompetent, that no hearing on the question took place, and no finding of incompetency was ever made, the appointment cannot presuppose such an ascertainment and adjudication. A presumption cannot be used to nullify facts shown by a judicial record.

We find no error in the decree of the district court, and it is, therefore,

AFFIRMED.

ROY E. FISHER ET AL., APPELLANTS, V. BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA, APPELLEE.

FILED JUNE 12, 1922. No. 21769.

1. **Constitutional Law:** HOG-CHOLERA SERUM ACT. The legislative act requiring the board of regents of the University of Nebraska to establish and operate a plant for the manufacture of hog-cholera serum and to distribute the product to farmers and swine-

growers at the actual cost of production is not void as class or special legislation inhibited by the state or federal Constitution. Laws 1911, ch. 139.

2. ———: ———: INCIDENTAL BENEFITS TO INDIVIDUALS. Incidental or unavoidable benefits to an individual or a class do not necessarily invalidate legislation enacted in the exercise of the police power for the benefit of the public.

3. ———: ———: CLASSIFICATION. The classification "farmers and swine-growers" is not unreasonable for the purposes of legislation to protect the food supply of pork by manufacturing and distributing hog-cholera serum at a state institution.

4. **Taxation:** OBJECTS. The raising of public funds to protect the food supply of pork by manufacturing and distributing hog-cholera serum at a state institution is within the taxing power of the state.

5. **Animals:** PROTECTION AGAINST DISEASES. In the exercise of police power the state may create agencies and provide means for scientific research on behalf of the public in an effort to aid in the production and preservation of food, and to that end may make experiments and manufacture and distribute remedies for the purpose of eradicating diseases among domestic animals.

6. ———: ———. The exercise of police power to prevent the destruction of animal food at the source of supply does not necessarily await commercial enterprise or initiative prompted by pecuniary gain.

7. **Constitutional Law:** STATUTES: ANNULMENT. If an unrepealed act of the legislature was valid when passed, the burden is on a person who pleads its unconstitutionality under subsequent conditions to prove the facts showing the process of annulment.

8. ———: UNIVERSITY: EXTENSION OF ACTIVITIES. The Constitution of 1875, by adopting the University of Nebraska as a state institution under a charter declaring a purpose "to afford to the inhabitants of this state the means of acquiring a thorough knowledge of the various branches of literature, science and the arts," and by vesting its general government in a board of regents under the direction of the legislature, did not prohibit the latter from imposing new and additional duties on the regents or from requiring them to establish and conduct a plant for the manufacture and distribution of hog-cholera serum.

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

T. F. A. Williams, Clark Jeary and *Cosgrave & Campbell,* for appellants.

Clarence A. Davis, Attorney General, and *Peterson & Devoe, contra.*

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

ROSE, J.

This is a suit for an injunction to prevent the board of regents of the University of Nebraska, defendant, from manufacturing, buying or selling hog-cholera serum and from expending public money for those purposes. Plaintiff is a resident taxpayer of Lancaster county, Nebraska, and is engaged in buying, selling and raising hogs. Defendant is operating a hog-cholera serum plant at the state agricultural college under authority of a legislative act declaring:

"Section 1. There shall be established by the board of regents of the state university a plant for the production and preparation of the hog-cholera serum discovered by the biochemic division of the bureau of animal industry, Washington, D. C. Said plant shall be under the regulation and control of the board of regents of the Nebraska State University.

"Section 2. The department of animal pathology of the state university shall carry on the production and preparation of said serum under the provisions of this act and shall deliver to the Nebraska state veterinarian, or his authorized deputies, said serum at the actual cost of production for so much of the serum as shall be used and applied under the direct supervision of the state veterinarian or his deputies. Said department shall also distribute said serum to farmers and swine-growers, residents of Nebraska, at the actual cost of its production." Laws 1911, ch. 139.

The act contained an appropriation of $15,000 for buildings, plant, equipment and expenses of operation, maintenance and distribution.

The petition contains allegations to the effect that the

act of the legislature is unconstitutional and void, that defendant is illegally operating a hog-cholera serum plant with public funds and is distributing serum at cost in competition with private enterprises and is going beyond the scope of the act itself in buying and selling serum produced by private manufacturers.

By petition in intervention Otto E. Lindburg, a veterinarian engaged in buying and selling hog-cholera serum for profit, also applied for an injunction on the grounds pleaded by plaintiff.

By formal answers defendant, among other things, justified the act of 1911 and the work done under it as valid exercises of police power. Upon a trial of the case the district court upheld the act and the conduct of defendant generally, but enjoined it from purchasing for resale hog-cholera serum not manufactured at the state agricultural college. Plaintiff and intervener have appealed.

The legislative act is first assailed as class or special legislation violating both the federal and the state Constitutions. The reasoning takes this form: In requiring the manufacture of hog-cholera serum at public expense and in limiting the distribution to "farmers and swine-growers, residents of Nebraska, at the actual cost of its production," the legislature violated the fourteenth amendment to the federal Constitution, providing that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws;" and also section 15, article III of the Nebraska Constitution, providing that "The legislature shall not pass local or special laws * * * granting to any corporation, association, or individual, any special or exclusive privileges, immunity, or franchise whatever." In this connection it is argued that licensed veterinarians, for instance, who buy, sell and use hog-cholera serum for profit, are denied the benefits and privileges inuring under the act to the special class limited

to "farmers and swine-growers."

There was no petty motive or unlawful class privilege to account for this legislation when it was enacted in 1911. The ravages of hog-cholera had amounted to a public calamity and the losses therefrom were topics of current history. A serum had recently been discovered through researches and experiments by governmental agencies. It was to give the public the benefit of the discovery that the act was passed. Society as a whole was interested. The quantity, quality and price of hogs were unavoidably affected by cholera and the results extended directly or indirectly to every individual consumer of foods containing pork. Both the disease and the remedy were subjects of grave public concern. They affected one of the chief industries of the state. Protecting the sources of food supplies is a legitimate function of government. The supreme aim of the legislature was the welfare of the public as a whole and not class or special legislation limited to the expenditure of public funds for the individual benefit of "farmers and swine-growers." These producers were named in the act because they were at the source of the animal food supply, where the remedy for hog-cholera could be applied. A veterinarian, as such, is not a farmer or a swine-grower. He may be put in a different class for purposes of legislation like this. If he engages in farming or swine-growing, hog-cholera serum will be available to him on the terms open to farmers and swine-growers. For the great purpose of exercising the police power for the benefit of the public at large a reasonable classification is essential. Incidental or unavoidable benefits to an individual or a class do not necessarily invalidate legislation enacted in the exercise of the police power for the benefit of the public. There is no convincing reason for condemning "farmers and swine-growers" as a classification for the purposes of legislation to protect the food supply of pork by manufacturing and distributing hog-cholera serum at a state institution. The raising of public funds for the purposes outlined is within the taxing power of the state. *State*

v. Miller, 104 Neb. 838.

Another argument is based on the proposition that the legislature is without power to require the state to establish and conduct at public expense a manufacturing enterprise, because the police power is limited to regulation and control. The point does not seem to be well taken. In the exercise of police power the state may create agencies and provide means for scientific research on behalf of the public in an effort to aid in the production and preservation of food and to that end may make experiments and may manufacture and distribute remedies for the purpose of eradicating diseases among domestic animals. The exercise of governmental power to prevent the destruction of animal food at the source of supply does not necessarily await commercial enterprise or initiative prompted by pecuniary gain. The act in controversy was passed in 1911. It does not appear that the legislation then interfered with any right of plaintiff or intervener or that hog-cholera serum was then an article of commerce. For anything appearing in the record the act was valid when passed. If plaintiff and intervener have since been deprived of any constitutional right by operation of the act under new conditions, the burden is on them to prove the circumstances resulting in their unhappy plight. The findings of the trial court are not sufficient for that purpose and the evidence adduced below has not been presented here. If a valid, unrepealed act of the legislature vanishes from the written law by operation of the Constitution and changed conditions, the facts showing the process of annulment must be free from doubt. If the expenditure of public money legally appropriated by the legislature for public purposes becomes unlawful by constitutional limitations and new circumstances, disbursing officers of the government should have some definite means of learning when and how the statute disappears and the use of the money appropriated becomes unlawful. On this phase of the case there is nothing in the record to establish the invalidity of the act of 1911.

The most formidable argument is directed to the propo-

sition that the board of regents of the University of Nebraska is limited fundamentally to educational duties, and that therefore the lawmakers cannot require it to engage in the business of manufacturing and distributing hog-cholera serum as an article of commerce. On this point the legislative and constitutional provisions relating to the University of Nebraska are reviewed. The charter was adopted by statute in 1869. The general government was vested in a board of regents. The charter declared:

"The object of such institution shall be to afford to the inhabitants of this state the means of acquiring a thorough knowledge of the various branches of literature, science and the arts." Laws 1869, p. 172, sec. 2.

It is insisted that the University of Nebraska, the purposes thus defined by its charter and the early laws enacted with a view to carrying out those purposes were adopted by the Constitution of 1875 and became parts of the supreme law, binding alike on the legislature, the board of regents and the courts. The Constitution of 1875 provided:

"The general government of the University of Nebraska shall, under direction of the legislature, be vested in a board of six regents to be styled the Board of Regents of the University of Nebraska, who shall be elected by the electors of the state at large, and their term of office, except those chosen at the first election as hereinafter provided, shall be six years. Their duties and powers shall be prescribed by law; and they shall receive no compensation, but may be reimbursed their actual expenses incurred in the discharge of their duties." Article VIII, sec. 10.

The attorney who presented at the bar this phase of the limitations on legislative power pointed to the provision requiring regents to serve without pecuniary compensation and emphasized the reasons for a governing board composed of public spirited members prompted by an unselfish interest in higher education, uninfluenced by pecuniary considerations. He confidently predicted that this wise purpose of the Constitution will be defeated, if

regents are subjected personally to irritating contentions arising from commercial rivalry with private enterprises. In addition to the usual incentives to advocacy his argument was animated by his love for the University of Nebraska as an educational institution and also by his pride in his *alma mater*.

The question, however, is not one of policy or wisdom, but of legislative power. The only limitations thereon are those imposed by the Constitution. When the Constitution of 1875 was adopted, all former constitutional and statutory provisions were subject to its terms. That instrument declares that the general government of the University of Nebraska shall, under the direction of the legislature, be vested in a board of six regents, and that their duties and powers shall be prescribed by law. Affording "the means of acquiring a thorough knowledge of the various branches of literature, science and the arts" is not now the limit of its purposes, powers or activities. It has long since passed the stage of scholastic instruction and in addition, is conducting practical experiments and applying knowledge for the benefit of the public, and incidentally aiding individuals, professions and industries. A constitutional provision prohibiting the legislature from authorizing the operation of a hog-cholera serum plant at the state agricultural college or from imposing new duties on the board of regents has not been pointed out or found. The court is committed to the opinion that new purposes may be added by the legislature to those enumerated in the original charter of the University of Nebraska and that new duties may be imposed upon the regents. *State v. Whitmore*, 85 Neb. 566; *Union Stock Yards Co. v. Nebraska State Railway Commission*, 103 Neb. 224.

AFFIRMED.

JAY BURNS BAKING COMPANY ET AL., APPELLANTS, V. SAMUEL R. MCKELVIE, GOVERNOR OF THE STATE OF NEBRASKA, ET AL., APPELLEES.

FILED JUNE 12, 1922. No. 22452.

1. **Weights and Measures:** LEGISLATIVE POWER. The legislature in the exercise of police power may establish reasonable minimum and maximum standards of weights for loaves of bread.

2. **Constitutional Law:** POLICE POWER. The legislature is presumed to act with full knowledge of all facts essential to valid legislation, when it adopts a regulation in the exercise of police power.

3. ———: BURDEN OF PROOF. If plaintiffs assail legislation as unreasonable, the burden is on them to prove every fact essential to a determination of that issue in their favor.

4. **Food:** WEIGHTS FOR BREAD: REGULATIONS. The use of wax-paper or other means to retard evaporation of moisture in bread may be required for the purpose of keeping it in a good state of preservation for 24 hours as an incidental result of a police regulation establishing standards of minimum and maximum weights for loaves of bread.

5. **Constitutional Law:** POLICE POWER. The exercise of police power for the public welfare may inconvenience individuals, increase their labor, and decrease the value of their property.

6. **Evidence:** WEIGHTS FOR BREAD: TESTS. Tests to prove the unreasonableness of a tolerance of two ounces to the pound in excess of standards of weights for loaves of bread for 24 hours after it is baked, as not allowing a sufficient margin for loss of weight by evaporation of moisture, are not conclusive, in absence of proof that reasonable precautions were taken to retard evaporation by the use of wax-paper for wrappers or by other means.

7. **Constitutional Law:** FIXING WEIGHTS FOR BREAD. Standard minimum and maximum weights for loaves of bread of one-half pound, one pound, one and one-half pounds, and exact multiples of one pound, with a tolerance of two ounces to the pound in excess of standard maximum weights, *held* not shown to be void as unreasonable, or as discriminatory, or as depriving plaintiffs of the equal protection of the laws.

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

Montgomery, Hall & Young, for appellants.

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

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

ROSE, J.

This is a suit for an injunction to prevent the enforcement of the legislative act of 1921, providing: "Every loaf of bread, made or procured for the purpose of sale, sold, exposed or offered for sale in the state of Nebraska, shall be the following weights, avoirdupois: One-half pound, one pound, one and one-half pounds, and also in exact multiples of one pound, and of no other weights." Laws 1921, ch. 2. A rate of two ounces to the pound, and no more, in excess of the maximum standard weights is tolerated by the act. Unreasonableness of the regulation or impossibility of complying with the standards fixed by the legislature is the principal plea for an injunction.

The Jay Burns Baking Company, plaintiff, is a Nebraska corporation with a capital stock of $252,000. It manufactures bread for commercial purposes in Omaha and distributes its products in Nebraska and surrounding states. Its annual output of bread is estimated at 10,000,000 pounds, valued at $1,000,000. The other plaintiffs are engaged in the same enterprise on an extensive scale. Plaintiffs sue for themselves and for others similarly situated. The act in question is in the following form:

"Section 1. It shall be the duty of the department of agriculture to enforce all provisions of this act. It shall make or cause to be made all necessary examinations and shall have authority to promulgate such rules and regulations as are necessary to promptly and effectively enforce the provisions of this act.

"Section 2. Every loaf of bread, made or procured for the purpose of sale, sold, exposed or offered for sale in the state of Nebraska, shall be the following weights, avoirdu-

pois: One-half pound, one pound, one and one-half pounds, and also in exact multiples of one pound, and of no other weights. Every loaf of bread shall be made of pure flour and wholesome ingredients and shall be free from any injurious or deleterious substance. Whenever twin or multiple loaves are baked, the weights herein specified shall apply to each unit of the twin or multiple loaf.

"Section 3. A tolerance at the rate of two ounces per pound in excess of the standard weights herein fixed shall be allowed, and no more; provided, that the standard weights herein prescribed shall be determined by averaging the weight of not less than twenty-five loaves of any one unit and such average shall not be less than the minimum nor more than the maximum prescribed by this act. All weights shall be determined on the premises where bread is manufactured or baked and shall apply for a period of at least twenty-four hours after baking; provided, that bread shipped into this state shall be weighed where sold or exposed for sale.

"Section 4. Any person, firm or corporation violating any of the provisions of this act, shall be punished by a fine of not less than ten dollars nor more than one hundred dollars or by imprisonment in the county jail for not more than thirty days; provided, however, that upon the second and all subsequent convictions for the violation of any of the provisions of this act such offender shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars, or by imprisonment in the county jail for not more than ninety days." Laws 1921, ch. 2.

The legislation is challenged on the ground that it violates the fourteenth amendment to the federal Constitution, providing that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws;" that it violates section 3, article I of the Nebraska Constitution, providing, "No

person shall be deprived of life, liberty, or property, without due process of law;" that it violates section 1 of the Nebraska bill of rights, protecting "life, liberty and the pursuit of happiness."

On the issues raised by the pleadings, plaintiffs took the position that, owing to physical conditions, such as humidity and temperature, and the natural process of evaporation, varying the weight of loaves in the baking pan, in the oven, and in storage, the manufacture and distribution of bread for commercial purposes on a large scale were impracticable without violating the legislative act and subjecting the manufacturers, however conscientious and law-abiding, to fine and imprisonment, and that therefore the regulation was unreasonable, unconstitutional and void. On this phase of the case experiments covering considerable periods of time were made. Testimony was adduced by both sides at great length. After a full hearing the trial court sustained the legislation and dismissed the suit. Plaintiffs have appealed.

The manufacture of bread as an article of commerce is of course a legitimate enterprise and those engaged therein are protected in their constitutional rights. At the same time bread is a necessity of life in universal use without regard to poverty or wealth, class or station. Society as a whole is interested in the quality, quantity, condition, and distribution of the manufactured product. The police power of government extends to these subjects for the protection of public health and welfare. The loaf is the usual form in which the food reaches the consumer. The individual purchaser of a day's supply of bread makes too small an investment to justify litigation for the protection of his rights, if wronged, but he must have food in any event. A standard weight exacted by the state is a safeguard against fraud and imposition.

It is conceded that plaintiffs can comply with the minimum standards, "one-half pound, one pound," and "one and one-half pounds," and "exact multiples of one pound," because dough enough to prevent short weights can be

used. Plaintiffs admit that legislation fixing a minimum weight has been sustained. It is earnestly argued, however, that they cannot limit the maximum weights to the standards fixed by the legislature with a two-ounce tolerance or margin only, for the reason that natural and unavoidable changes in the weights of loaves, owing to atmospheric conditions at different times and places, exceed two ounces to the pound. The maximum is denounced by plaintiffs as unreasonable and as not serving any useful purpose. Attention is directed to the proposition that variances in the weight of a loaf at different times are due to the evaporation of moisture alone—a natural process which does not affect nutriment or take anything of value from consumers of bread. The intention of the legislature in fixing a maximum is obvious, when the purpose of the statute is considered. The legislation goes beyond a remedy for short-weight loaves and establishes standards of weights for bread to protect the public from fraud and imposition. As already stated the standards are one-half pound, one pound, one and one-half pounds, and "exact multiples of one pound." It is to prevent a loaf of one standard from being increased in size until it can be readily sold for a loaf of a larger standard that a maximum weight is fixed. The test is reasonableness. In a former opinion this language was used:

"A police regulation, obviously intended as such, and not operating unreasonably beyond the occasions of its enactment, is not invalid simply because it may affect incidentally the exercise of some right guaranteed by the Constitution. In all matters within the police power some compromise between the exigencies of public health and safety and the free exercise of their rights by individuals must be reached. The test in such cases is whether the regulation in question is a *bona fide* exercise of the police power or an arbitrary and unreasonable interference with the rights of individuals under the guise of police regulation." *In re Anderson,* 69 Neb. 686.

It is shown that water or moisture, subject to evapor-

ation, is an element of weight in bread at every stage from wheat in the field to the manufactured product in the market. This was no mystery to the legislature and a margin or tolerance of two ounces to the pound for evaporation in 24 hours after baking was allowed. The presumption is that the legislature acted with full knowledge of all facts and conditions essential to valid legislation of this kind. That department of the government was without limit in sources of knowledge and in the means of obtaining information. The burden of proving unreasonableness was on plaintiffs. If they are entitled to equitable relief, their tests and proofs must establish their plea without omitting any facts or circumstances essential to the determination of the issue in their favor.

Of course the legislature cannot require bakers to manufacture a product which will retain exactly the same amount of moisture for 24 hours in spite of the evaporation caused by natural processes operating in varying degrees of intensity outside of human power, owing to changing conditions in climate, altitude, atmosphere and temperature. The statutory margin or tolerance being two ounces to the pound, can bakers, for example, make a loaf 18 ounces in weight that will weigh not less than 16 ounces 24 hours after it is baked? The tests and proofs on behalf of the state tend to show that the regulation is reasonable and can be observed at all times. It is fairly inferable from the evidence adduced by plaintiffs that compliance with the regulation is practicable most of the time, but that tested by their experiments as made, there are periods when the operation of natural laws will prevent compliance with legislative requirements. There are a number of reasons, however, why the tests made to prove unreasonableness should not be accepted as conclusive. If correctly understood, these tests were made with bread manufactured in the regular course of business, without any attempt to change ingredients or processes or to retard evaporation of moisture in loaves by the use of wax-paper or other means. There is testimony, however, that the chang-

ing of ingredients to prevent evaporation would impair the quality of the bread and make it unsalable. It is a well-known commercial custom to wrap loaves of bread in paper adapted to that purpose, and the proofs show that evaporation and absorption are thus retarded. Containers to protect commodities from atmospheric changes are familiar articles in trade and commerce. The act of the legislature does not fix prices but leaves bakers free to make reasonable charges for bread wrapped in inexpensive wax-paper for its preservation in transportation and in the markets. Perishable fruits, composed principally of water, grow in the humid tropics, uniting moisture, light, heat, air and other elements of nature in processes more wonderful than the baker's art. Such fruits are transported to the arid north and there distributed to consumers in good condition during hot seasons. This result is accomplished by retarding the natural agencies of decay and by the care required in the channels of trade and commerce. Precautions to retard evaporation of moisture in bread for the purpose of keeping it in a good state of preservation for 24 hours may be required as an incidental result of a police regulation establishing standards of maximum weights for loaves of bread. Palatableness, a quality demanded by the public, is affected by excessive evaporation, if food value is not. The exercise of police power for the public welfare may inconvenience individuals, increase their labor, and decrease the value of their property. The liberty of a citizen to consult his own tastes in selecting a lawful vocation and in conducting a legitimate business is limited by the obligation which his citizenship imposes upon him to respect the right of the public to be protected by the police power of the government. The evidence does not prove that, if reasonable means or precautions are taken by plaintiffs and other bakers to retard evaporation, they cannot comply with the act of the legislature, or that the regulation is unreasonable.

It is further argued that the legislation is not uniform in its operation, that it discriminates between resident and

nonresident bakers, and deprives plaintiffs of the equal protection of the laws.

This argument is based on provisions that bread of resident bakers shall be weighed where manufactured, while bread shipped into the state shall be weighed where sold, and that tests shall be made by averaging the weight of not less than 25 loaves of a unit. In this connection plaintiffs insist that they manufacture bread on a large scale where 25 loaves of a unit are available at their bakeries for tests, while nonresident bakers, shipping into the state bread in quantities less than 25 loaves of a unit, and local bakers making less than 25 loaves of a unit at a time, are not disturbed by tests. It does not appear that the legislation goes beyond reasonable classifications for the purpose of exercising the police power. The law operates uniformly on all of a class and in these respects is valid under familiar principles of constitutional law.

AFFIRMED.

IN RE ESTATE OF THOMAS F. BARTLETT. CORA L. BARTLETT, APPELLANT, V. REBECCA ST. ISLE LAHR ET AL., APPELLEES.

FILED JUNE 12, 1922. No. 21994.

1. **Wills:** REVOCATION BY IMPLICATION. "There is no fixed rule by which the revocation of a will may be implied from subsequent changes in the condition or circumstances of the testator. Each case must be governed by its own peculiar facts." *Hill v. Hill*, 106 Neb. 17.

2. ———: ———: DIVORCE. Where a wife obtained a divorce subsequent to the making of a will in her favor by her husband and the decree therein only satisfied the property rights of the parties as they existed when the divorce was granted, such decree will not operate as a revocation of the will by implication of law.

3. ———: ———. The court will not hold that a will has been revoked by "subsequent changes in the conditions or circumstances of the testator" unless the record clearly and unequivocally supports the theory of revocation.

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

W. T. Thompson and *Leonard Ulman,* for appellant.

Fawcett & Mockett, contra.

Heard before LETTON, DEAN and FLANSBURG, JJ., DAY and GOOD, District Judges.

DEAN, J.

Thomas F. Bartlett executed his last will and testament December 10, 1903, at Lincoln, Nebraska. He died July 28, 1919, at Kansas City, Missouri, where he was then and had for many years been a legal resident. So far as material here, the will reads: "I will and bequeath all my wordly effects to my wife, Cora Louise Bartlett." The will was disallowed in the county court and Mrs. Bartlett appealed to the district court. Her suit was there dismissed on the ground that the will "was by implication revoked by the testator in his lifetime." Thereupon she appealed to this court.

A bill of exceptions was not filed. The record before us, therefore, upon which our decision must rest, consists of the pleadings, the findings of fact and of law, and the judgment. The contestants in their brief practically concede that, if their answer does not state a complete defense to Mrs. Bartlett's cause of action, the judgment of the trial court cannot be sustained. They argue:

"From our view of the case, the motion for a new trial without a bill of exceptions only raises one proposition, and that is: 'That the judgment of the court is contrary to law.' The plaintiff's case now comes down to the question as to whether or not the answer of the defendants stated a cause of action."

The following material facts are disclosed in the answer of the contestants. September 18, 1916, Bartlett's wife, hereinafter called the proponent, obtained a divorce in Jackson county, Missouri, wherein, among other things, she was awarded $5,000 alimony, which was subsequently

settled for $4,500. She was also awarded $15 additional suit money, $100 additional attorney's fees, the household furniture, and additional alimony of $100 a month until the court otherwise ordered.

The contestants further pleaded that in the prayer of proponent's petition for a divorce she asked:

"That the bonds of matrimony heretofore and now existing between the plaintiff and the defendant be forever dissolved; that the defendant be required to pay her a reasonable amount as temporary alimony, suit money, and for support; and that she shall be awarded such sum as alimony from year to year, or in gross, upon the final determination of this suit, as to the court may seem right and just in the premises."

It was also pleaded by contestants that Bartlett's payment of temporary alimony, attorney's fees, suit money and monthly payments during the pendency of the suit, and his payment to her of $4,500, January 29, 1918, in addition to the furniture which was awarded to her, effected a complete satisfaction of the decree of divorce. Contestants also pleaded that the divorce obtained by proponent was, "on account of the conduct of the defendant towards the plaintiff and his indifference towards her."

Upon joinder of issues, as we have seen, proponent obtained a decree of divorce wherein it was decreed by the court as pleaded in defendant's brief: "That the bonds of matrimony heretofore contracted between plaintiff and defendant be and the same are hereby dissolved and for naught held and plaintiff forever freed from the obligations thereof. It is further ordered by the court that plaintiff be and she is hereby allowed as additional suit money the sum of fifteen ($15) dollars; that plaintiff be allowed as additional attorney fee the further sum of one hundred ($100) dollars; that plaintiff be allowed as alimony, furniture now in possession of plaintiff, the further sum of five thousand ($5,000) dollars as alimony and the further sum of $100 per month, payable on the 15th day of each month, the first payment to be made on October 15, 1916,

and a like sum of one hundred ($100) dollars on the 15th day of each month thereafter, until the further order of this court."

It is pleaded too by defendants that, January 29, 1918, proponent executed and delivered to Bartlett a satisfaction of the divorce decree, which was filed by him in the office of the circuit court for Jackson county, Missouri. The release so executed by the proponent, as shown by their answer, *inter alia,* recites:

"It being the intention of this satisfaction to compromise and forever discharge and clear of records any and all judgments against the defendant for amounts already accrued and all amounts to accrue in the future."

Defendants further pleaded:

"The four thousand five hundred ($4,500) dollars so paid was in addition to the furniture set aside to Cora Louise Bartlett by the court in the decree in her favor for a divorce, and in addition to temporary alimony, attorney's fees, and monthly payments paid by Thomas F. Bartlett under the order of the court, during the pendency of said suit, and after the decree was rendered, and said final payment was a full and final settlement of all property rights between the parties forever discharging Thomas F. Bartlett, of Kansas City, Missouri, his heirs, executors, administrators and assigns of and from a certain judgment entered in the circuit court for Jackson county, Missouri, * * * together with all alimony, attorney's fees, costs, interest, and amounts coming due under said judgment."

The answer shows that the same release also discharged Bartlett from liability for the payment of a certain judgment in Lancaster county in which, with other persons, she claimed an interest. It also appears that for the same consideration the proponent filed a disclaimer of any and all interest in a certain case then pending and undetermined in Lancaster county wherein she was adversely interested as against Bartlett and others. Contestants' answer also shows this recital in the release:

"The object being by this release to compromise, dis-

charge and free Thomas F. Bartlett of any and all judgments, interest, costs and attorney's fees so that the records will be free and clear against said Thomas F. Bartlett."

It is pleaded, among other things, that Bartlett, October 24, 1917, substituted the name of a sister as beneficiary, in the place of proponent, in a certain accident insurance policy, and that this act and his changed condition generally after his divorce indicated that he "believed that all relations between him and his wife were severed, and that by said divorce he was fully free from any provisions made by him for his said wife by any will or otherwise."

Contestants also pleaded that the relations between Bartlett and proponent from the time that the petition for divorce was filed until the "payment of $4,500 was one of continuing hostility and litigation," and that her conduct "clearly indicated that she (proponent) believed at all times that it was the intention of her former husband to destroy all provisions made for her in any will," and that the divorce, and the several payments made in pursuance thereof, annulled the marital relations theretofore existing, so that when Bartlett died she was not his wife and consequently at the time of the trial was not his widow. It was finally pleaded that the provisions in the will in proponent's favor conferred upon her no right, title or benefit in his estate, either real or personal, and that as to all of his estate Bartlett died intestate.

Proponent's reply denied generally the allegations pleaded in the answer, except as to certain formal admissions respecting the marriage, the divorce, the place and date of Bartlett's death, and the like. It was pleaded that she, "by her labors, frugality and thrift helped him to acquire and accumulate the estate of which he died seised and possessed, and that, * * * shortly prior to the death of said testator proponent secured a divorce from her said husband on account of the violation of the marriage contract and obligations by him, her said husband." She further alleged that, in view of Bartlett's legal residence in

Missouri immediately before he died, by the laws of that state the will in question was not revoked, nor was it revoked by the laws of Nebraska, and that it was never the intention of the testator to revoke his will.

That the will was legally executed is not questioned by the contestants, but they argue that it "has been revoked by implication of law" as found by the district court. They insist that Bartlett's settlement with his wife terminated their marital relations, and that the will which was executed many years before the settlement should not become operative at his death. The argument is that Bartlett either forgot that there was a will or he believed that the divorce proceedings and the settlement revoked the will, and that he would not knowingly have allowed the will to remain in existence under the strained relations that existed between himself and his former wife.

In view of the record and of the law and of the weight of authority as announced in the decisions, the argument of contestants is not tenable. Section 1295, Rev. St. 1913, provides how a will may lawfully be revoked. The section reads:

"No will, nor any part thereof, shall be revoked, unless by burning, tearing, canceling, or obliterating the same, with the intention of revoking it, by the testator, or by some person in his presence and by his direction; or by some other will or codicil in writing, executed as prescribed in this article; or by some writing signed, attested and subscribed in the manner provided in this article for the execution of a will; excepting only, that nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the conditions or circumstances of the testator."

The statute was first construed by this court in *Baacke v. Baacke,* 50 Neb. 18. The second paragraph of the syllabus reads:

"An absolute revocation of a will cannot be implied by law from the obtaining of a divorce from the testator by his wife after the making of the will, the death of one of his

children for whom provision was made in the will, and the birth of three children to such deceased child, prior to the testator's death."

In the body of the opinion at page 22, it is said:

"While our statute recognizes revocations of wills by implication of law, it has not undertaken to designate or specify what subsequent changes in the condition and circumstances of the testator will produce such revocation, but it is for the court to determine from the facts of each particular case, under the rules and forms of law, whether the testator intended the will to stand notwithstanding the changes in his condition and circumstances. * * * No case has been cited, nor has the writer been able to find a single authority, which holds that a subsequent granting of a divorce to the wife of a testator, and a settlement of her property rights, work a revocation."

In *Hill v. Hill,* 106 Neb. 17, we held: "There is no fixed rule by which the revocation of a will may be implied from subsequent changes in the condition or circumstances of the testator. Each case must be governed by its own peculiar facts." In the *Hill* case these facts appear:

"Fifteen years elapsed between the date of the execution of a will and the death of the testator. The will provided that his wife, whose death preceded his by about two years, should have as her share of the estate 'the provisions made by law for her.' In the interim a section of farm land was purchased that was not devised by the will. A life estate in a house and lot was devised to an only daughter, of the value of $5,000 or $6,000, which the testator subsequently sold. * * * When the will was executed the testator had practically no personal property, but he then owned 1,000 acres of farm land worth about $50,000; when he died he had about $25,000 in money and owned property worth more than a quarter of a million dollars. *Held,* that the 'changes in the conditions or circumstances of the testator' did not, under section 1295, Rev. St. 1913, work a revocation of the will by implication of law."

Substantially the same question was before the supreme

court of Iowa in 1908. *In re Estate of Brown,* 139 Ia. 219. In that case Brown executed a will whereby he devised all his estate to his wife, save the sum of $1,000 to each of his two children. In 1905 his wife was divorced from him. In the divorce action the property rights of the parties were settled by the decree, which concludes with this language:

"That the foregoing provisions for and in behalf of the plaintiff when paid and complied with by the defendant shall be in full payment, satisfaction, and discharge of all her interest in and to the property of the defendant."

It is pointed out in that case that there was nothing to indicate that Brown intended to change the provisions in his will in favor of his wife, nor was there anything to show that his wife believed that such was his intention, and that she did nothing to prevent her former husband from destroying or revoking the will. The court there observed that the provision made for the wife in the divorce decree was not a voluntary agreement or advancement, but was awarded because of defendant's legal obligation to support her, and that so far as the record disclosed the divorce decree was not intended to take the place of the provision made in the will. The court proceeded to say:

"The divorce decree simply satisfied the property rights between the parties as they existed at that time, and had no reference whatever to any disposition which the testator might then or thereafter have made of his property by will. * * * Manifestly the revocation implied as of law must result from facts and circumstances which were everywhere regarded as sufficient under the common law."

Jones' Estate, 211 Pa. St. 364, is in point. At page 381 the court said: "The decree in divorce took away only what the law gave to her when the marriage was contracted. This was the right to support, and to dower in his estate if she survived him. After the entry of the decree, the testator was no longer bound to provide for her, and she had no further claim upon his estate. What the law gave, it took away; nothing more. The beneficiary is not here claiming anything which accrued to her in pursuance of her mar-

riage. She is here only as a legatee, and is asking for that only which the testator gave to her of his free grace, and as a matter of bounty. That which he gave to her in his will was his own, to give or to withhold as he saw fit, A bequest needs no consideration to support it. As a legatee she stands upon the same footing as any other individual, and her relation to the testator has nothing to do with the case, unless he chose to make it an element, in the bestowal of the gift."

In 1 Schouler, Wills (5th ed.) sec. 427, it is said:

"Modern legislation itself repudiates in England and some of our states the whole theory of a presumed intention to revoke on the ground of an alteration in circumstances; and what is left of that theory, aside from such statutes, it would be very difficult to say."

Card v. Alexander, 48 Conn. 492, is a case where, a year and a half after the execution of his will, the testator obtained a divorce from his wife for her misconduct. Four years thereafter he died leaving the will unrevoked. In that case it is said: "But it is contended that the divorce by operation of law revoked this bequest. No case is cited in support of this position, and we are not aware that any exists. It may be true that the divorce divested the wife of all those executory property rights which had no basis but the coverture; but that hardly reaches this case, for here the right rests mainly, not upon coverture, but upon the will; and it cannot be said that coverture was the sole motive or inducement to the will." To the same effect is *Charlton v. Miller,* 27 Ohio St. 298.

From the record in the present case the divorce decree merely appears to have satisfied the property rights of the parties as they existed when the divorce was granted. From the fact that Bartlett did not revoke his will in the statutory manner naturally leads to the presumption that he did not intend to revoke it. Clearly the court should not hold that the will has been revoked by implication of law except in a clear case. The court has no more right to set a will aside, unless it is clearly warranted by the facts, than

it has to make a will for a testator. Bartlett's reasons for leaving the will unrevoked were his own. What his relations were with his wife may in part be gathered from some of the grounds alleged in her petition for a divorce. The contestants' answer shows that the proponent obtained her divorce on account of her husband's conduct and his indifference toward her. From this it may reasonably be inferred that it was Bartlett's intention to make amends for some of the wrongs he had committed against his wife, whatever they may have been, and for that reason he did not revoke the will.

Contestants stress the fact that Bartlett substituted the name of a sister for that of his wife in an accident beneficiary policy. That circumstance, if it proves anything, goes to show that decedent was willing to take from his wife a thing which was of no value, except upon the problematical or the remote contingency of personal injury to the insured, and bestow it upon another, but he was not willing to, nor did he, deprive her of that which was of real value, namely, the provisions made for her in the will. It is obvious that to have revoked the will in any of the methods pointed out by the statute would have been a more simple process than the technical procedure which is required to effect the substitution of one beneficiary for another in any sort of an insurance policy. The fact remains that Bartlett, apparently for reasons of his own, gave the substance of his estate to his wife, and there it remained at his death. To another he gave a remote expectancy which in comparison was a mere shadow.

After Bartlett's death the rights of proponent could not of course be based on a marriage tie which was dissolved, but were based on a valid will which does not appear to have been revoked in the statutory manner nor by implication of law. The decisions are not altogether harmonious, but the great weight of authority supports our conclusion. There is nothing in the pleadings, nor in the record, which should be held to amount to implied revocation of the will.

The conclusion is that the will in question is operative and the district court is so advised. The judgment is reversed and the cause remanded for further proceedings in conformity with the views expressed in this opinion.

REVERSED.

FLANSBURG, J., dissents.

The following opinion on motion for rehearing was filed November 25, 1922. *Former judgment vacated, and judgment of district court affirmed.*

1. Wills: REVOCATION BY IMPLICATION: DIVORCE. A divorce between husband and wife, with a judgment for permanent alimony, followed by an agreement of settlement, which agreement was sufficient to settle all the property rights of the parties, is such a change of circumstances affecting the husband as to work, by implication, a revocation of his previously executed will.

2. ———: ———: STATUTORY PROVISION. The statute (Comp. St. 1922, sec. 1250), specifying the methods by which a will may be revoked, and providing that nothing contained in the section "shall prevent the revocation implied by law from subsequent changes in the conditions or circumstances of the testator," was not intended to preserve implied revocations in those cases only where the particular facts were found to be such as warranted a revocation at common law, for what were considered to be controlling conditions then had become changed at the time of the enactment of the statute, but rather the statute was intended to preserve and perpetuate the principle upon which those revocations were based.

3. ———: ———: ———. By that statute it was intended that the matter should be left to the courts to decide what subsequent changes in the conditions or circumstances of the testator should be sufficient, under our law, to fall within the reason and principle of implied revocations.

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

FLANSBURG, J.

On motion for rehearing. Former opinion, *ante*, p. 681.

This was an action by plaintiff, Mrs. Bartlett, claiming the property of her former husband by virtue of a will which named her sole beneficiary. The defense was that, by reason of the divorce of Mrs. Bartlett and her husband

and a settlement of property rights between them, the will had become revoked by implication of law.

The facts are fully set out in the former opinion. In brief it is shown that the testator, Mr. Bartlett, executed the will in question at a time when he entered the masonic lodge, in December, 1903. In 1916 plaintiff obtained a divorce from him and was awarded judgment for $5,000 alimony, suit money and attorney's fees. She also was given the household furniture, and, in addition, he was required to pay her $100 a month until the court should otherwise order. He refused to comply with the order, and plaintiff resorted to an attachment and other court proceedings for the purpose of compelling payment. Pending that litigation, an agreement of settlement was entered into, whereby he paid to her a certain amount of money and delivered to her the household furniture; it being agreed that this was to be in full settlement of the judgment, for amounts already accrued and all amounts to accrue in the future. By this agreement these parties made a complete settlement as to their then existing property rights.

The question presented is whether a divorce between husband and wife, coupled with a complete settlement of property rights, constitutes such a change of circumstances as to revoke, by implication, a will in favor of the wife, executed by the husband prior to the divorce.

There are decisions to the effect that the divorce alone of the testator from his wife after the making of his will is not sufficient by implication to revoke the will. *Card v. Alexander,* 48 Conn. 492; *Charlton v. Miller,* 27 Ohio St. 298; *Jones' Estate,* 211 Pa. St. 364; 40 Cyc. 1205.

However, we believe it to be a well-established rule and one which is nearer in accord with reason and justice, that a divorce, coupled with a settlement of the property rights of the parties, is such a change of circumstances as to work an implied revocation. *Lansing v. Haynes,* 95 Mich. 16; *Donaldson v. Hall,* 106 Minn. 502; *Wirth v. Wirth,* 149 Mich. 687; *Will of Battis,* 143 Wis. 234.

It is argued that our statute does not permit of an implied revocation in such a case.

The statute (Comp. St. 1922, sec. 1250) reads: "No will, nor any part thereof, shall be revoked, unless by burning, tearing, canceling, or obliterating the same, with the intention of revoking it, by the testator, or by some person in his presence and by his direction; or by some other will or codicil in writing, executed as prescribed in this article; or by some other writing signed, attested and subscribed in the manner provided in this article, for the execution of a will; *excepting only, that nothing* contained in this section *shall prevent the revocation implied by law from subsequent changes in the conditions or circumstances of the testator.*"

The contention is made that the "revocation implied by law" in the statute covers only such cases where the particular facts would have been sufficient at common law to have worked a revocation. The marriage alone of a woman revoked her will, and, in the case of a man, marriage and birth of issue.

The reason for an implied revocation at common law is found in the peculiar conditions of the law governing the family relation at that time, which at this time and at the time of the enactment of the statute in question had been changed. At common law the will of the woman was revoked by marriage because coverture destroyed her testamentary capacity. The law in Nebraska at the time of the enactment of the statute in question had been modified in this respect, and a married woman had been given a limited testamentary capacity. Now she has the same rights with respect to her property as a man. The same reason for an implied revocation upon the marriage of the woman, therefore, does not now exist. *Baacke v. Baacke,* 50 Neb. 18. As to an implied revocation of the man's will by marriage and the birth of issue, the situation had, at the time of this enactment, also to a degree been changed. Provision had been made by statute for an inheritance to any child born after the testator had made his will, unless expressly dis-

inherited by the will. Comp. St. 1922, sec. 1266. In the *Baacke* case, in an interpretation of the statute, it was said that the statute left it for the court to say what changes in the condition and circumstances of the testator should be sufficient to work an implied revocation.

The statute, instead of attempting to preserve and provide for those specific revocations allowed at common law, we believe, sought to preserve and perpetuate the underlying principle only upon which those revocations were based. To our mind, the legislature, in using the phrase authorizing such revocations as are to be implied by law, enunciated a rule of justice and a principle that the court should recognize and apply, whenever the change in the conditions or relations of the testator should be sufficient to create different duties on his part, or sufficient to make other persons than those who existed at the time of the making of the will the natural and proper objects of his bounty, and to raise a clear presumption that the testator would have desired to make a revocation, had his attention been directed to it. In the cases cited above, statutes, identical in wording with the statute here under consideration, were so interpreted. Where a husband and wife are divorced and their property rights settled, the wife is excluded from any further share in the husband's estate. Her relation to him as an heir is destroyed. In her place, the law points out who the proper heirs and distributees of his estate shall be. To these persons he also owes a natural obligation. It is beyond reason to suppose that a husband, after a divorce and settlement of property rights, should still desire that a will, which he had previously made in favor of his wife, should continue, and that his estate should pass to her under the will, to the exclusion of his natural heirs. As said in *Lansing v. Haynes, supra*: "The natural presumption (that there is an intended revocation) arising from these changed relations is the reasonable one, and the one which in law implies a revocation." "To hold the will unrevoked under these circumstances

would be repugnant to that common sense and reason upon which the law is based."

A full property settlement between husband and wife, either expressed in their agreement or embodied in the divorce decree, is usually arrived at after a consideration of the value and extent of the estate of the husband. The wife upon the separation is given an award, its amount influenced to a large degree by the inchoate interest that she then has in her husband's property. Such a settlement, so far as it affects the husband's will, bears to some degree the characteristics of an ademption, and it is the underlying principle of justice which supports the rule as to ademption which no doubt gives strength and reason to the implied revocation in case of a divorce and property settlement betwen husband and wife.

Plaintiff relies upon the decisions in the cases of *Jones' Estate,* 211 Pa. St. 364, and *In re Estate of Brown,* 139 Ia. 219. In the *Jones* case the court, in rendering the opinion, points out that the statute in that state expressly provides the specific manner in which revocation may be had, and does not contain a general provision for revocations by implication. The court also distinguished the case of *Lansing v. Haynes, supra,* pointing out that in the *Lansing* case there had been a property settlement. We might further mention, though it hardly bears upon the question here, that in Pennsylvania, in the case of *Morris' Estate,* 22 Pa. Dist. Rep. 466, a property settlement, made between husband and wife at the time of divorce, was even under the Pennsylvania statute held to be sufficient to revoke the will.

The decision in *In re Estate of Brown,* from Iowa, is also based upon a statute which, like that in Pennsylvania, is not similar to our own.

The decision in *Baacke v. Baacke,* 50 Neb. 18, is urged as controlling the question here. In that case the contention was made that the will had been revoked by a series of circumstances, including the divorce of the wife, the death of one child for whom provision had been made in the

will, and the birth of three other children. The divorced wife was not a party to the suit and made no claim to a revocation *pro tanto* in her favor, nor to a distributive share of the testator's estate. Though the court held generally in that case that there was no implied revocation, in speaking particularly of the divorce and property settlement, the court said (p. 23): "It could no more than revoke the will as to her (the former wife's) legacy, and whether it would have that effect in this case it is not necessary now to determine, as the question is not before us." That decision expressly left the question, here under consideration, open for future solution.

We therefore believe that our former opinion should be modified as herein indicated. The former judgment of this court is set aside, and the judgment of the lower court is

AFFIRMED.

ALDRICH, J., dissents.

DEAN, J., dissenting separately.

After providing for the manner in which a will may be revoked, section 1250, Comp. St. 1922, concludes with a proviso, or exception clause, which reads: "Excepting only, that nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the conditions or circumstances of the testator."

I respectfully submit, that, under the great weight of authority, the clause in question should not be applied to the facts in the present case and the will held for naught. In the main opinion it is said that the legislature, in the enactment of the clause in question, "enunciated a rule of justice and a principle that the court should recognize and apply, whenever the change in the conditions or relations of the testator should be sufficient to create different duties on his part, or sufficient to make other persons than those who existed at the time of the making of the will the natural and proper objects of his bounty."

It is the application of the rule to the facts of which I complain. No reference is made in the record to "other persons than those who existed" when Bartlett's will was

made who should, to the exclusion of Bartlett's wife, become the "natural and proper objects of his bounty." The Bartletts were childless. The claimants are his sisters. Both are adults and both are married.

Nor is there anything in the record that even tends "to raise a clear presumption that the testator would have desired to make a revocation, had his attention been directed to it." Every pleaded fact and every presumption points the other way. The contestants themselves, in their answer, pleaded that the divorce was obtained by Mrs. Bartlett on account of her husband's wrong-doing, and in her reply Mrs. Bartlett pleaded that she "secured a divorce from her said husband on account of the violation of the marriage contract and obligations by him." It is also significant that she pleaded that she, "by her labors, frugality and thrift helped him (her husband) to acquire and accumulate the estate of which he died seised and possessed."

In view of the record, can it be fairly said, as argued by the majority, that "It is beyond reason to suppose that a husband, after a divorce and settlement of property rights, should still desire that a will, which he had previously made in favor of his wife, should continue, and that his estate should pass to her under the will, to the exclusion of his natural heirs?" The answer is that it is clearly within the pale of finite reason to believe that a man who was not lost to every sense of honor, and whose wife had obtained a divorce from him because of the violation of the marriage vows, would naturally make such poor amends as money and property might make for his misconduct. Should there remain a lingering doubt anywhere that Bartlett died in the fond belief that by his will he had made some amends for the wrongs he had committed against the woman whom he had made his wife? If such doubt does remain, it may well be said that another terror has been added to Death's storehouse.

The merits of the clause in question are not of course for discussion here. Nevertheless it is proper to observe

that the revocation of a will by implication is not a favorite of the law and should not be permitted except in the clearest case.

A testator is endowed with the inalienable right to rest in the belief that his will, if unrevoked by him, shall stand just as he made it, if it conforms to the rules of law. He should not be harassed by the spectral thought that some other person or persons will presume either to change the terms of a will so made or to set it aside.

In the firm belief that a grievous wrong has been committed against Mrs. Bartlett by a misconstruction of the intent of the legislature and that a highly technical and harsh interpretation of a rule of law has been improperly applied to the pleaded facts, I respectfully dissent from the conclusion of the majority and therefore adhere to the rule announced and adopted by the court in the former opinion, *ante*, p. 681.

HENRY FURRER ET AL., APPELLEES, V. NEBRASKA BUILDING & INVESTMENT COMPANY ET AL., APPELLANTS.

FILED JUNE 12, 1922. No. 22213.

1 **Corporations:** RECEIVERS: APPOINTMENT. "Unless expressly authorized by statute, a court has no jurisdiction to appoint a receiver of corporate property upon grounds which would not be sufficient were the owner a natural person." *Vila v. Grand Island Electric Light, Ice & Cold Storage Co.*, 68 Neb. 222.

2. ———: ———: ———: NOTICE. Where a petition for the appointment of a receiver for a corporation shows on its face that the managing officers are not properly representing the stockholders, but are using corporate powers and corporate property for individual benefits, the appointment of even a temporary receiver without notice to the stockholders themselves is an abuse of discretion and erroneous; notice to the derelict officers, under such circumstances, not being sufficient.

3. ———: ———: ———. Misconduct or mismanagement of corporate business by officers is not ground, at the suit of complaining

minority stockholders, for the appointment of a permanent receiver to wind up the affairs of a solvent corporation.

4. ———: ———: ———: NOTICE. Statutory notice to interested persons of an application for the appointment of a permanent receiver to wind up the affairs of a solvent corporation is jurisdictional; an appointment without such notice being void. Rev. St. 1913, secs. 7811, 7818.

5. ———: ———: ———. Proceedings under a void order appointing a receiver to wind up the affairs of a solvent corporation, at the suit of some of the stockholders without notice to the others, are void.

6. ———: ———: SALE. A receiver's sale in bulk of the property of a solvent corporation, at the suit of some of the stockholders without notice to the others, amounts to an invasion of private rights and is void.

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

C. C. Flansburg, Cosgrave & Campbell and *Sterling F. Mutz,* for appellants.

Good & Good, Boehmer & Boehmer and *F. C. Foster, contra.*

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

ALDRICH, J.

This is a suit in equity brought by Henry Furrer, Delbert Lautzenheiser and John Peterson, owners of preferred stock in the Nebraska Building & Investment Company, against the Nebraska Building & Investment Company, the Nebraska Hotel Company, the Lincoln Security Company, Frank E. Schaaf, Edward O. Gregg, H. Louis Lohmeyer, Robert W. Johnson, James H. Gore, and Albert J. Schaaf, asking for an investigation and accounting. It is also asked that the personal defendants be temporarily restrained from unlawfully and unnecessarily expending money belonging to the various corporations; that a receiver be appointed to take charge of the business, proper-

ties, assets and affairs of the several defendant corporations and all the real estate owned or held in trust by either of the defendants and belonging to the stockholders of the defendant corporations; that the receiver take immediate possession of the funds and real and personal property and all business conducted by defendants or either of them belonging to the stockholders of the defendant corporations, and that said defendant corporations be dissolved, and the receiver be empowered to handle and dispose of such assets as may come into his hands; that the personal defendants be enjoined from further conducting and operating the business of the defendant corporations; that at the final hearing a judgment be entered against defendants Schaaf, Gregg, Gore, and Lohmeyer, in such amounts as found due from them; and that all the assets of the several defendant corporations, after paying the legal indebtedness against the same, be preserved for the benefit of such stockholders of the defendant corporations as have paid cash for their stock.

Service of summons was had on the Nebraska Building & Investment Company and the Nebraska Hotel Company by delivering in person to Frank E. Schaaf, president and manager of each of said corporations, at their usual place of business, true and certified copies of the writ with all indorsements thereon. Summons was served on the Lincoln Security Company by delivering in person to Frank E. Schaaf, president and general manager of said corporation, a true and certified copy of the writ with all indorsements thereon. Service was also had on Frank E. Schaaf, Edward O. Gregg, James H. Gore, H. Louis Lohmeyer and Albert J. Schaaf. The statutory notice of the time and place for hearing of the application for appointment of a receiver was served on each of the three above-named defendant corporations by delivering in person to F. E. Schaaf, president and manager of each corporation, true and certified copies of the notice with all indorsements thereon. Service of the notice was also had on Frank E.

Schaaf, Edward O. Gregg, James H. Gore, H. Louis Lohmeyer and Albert J. Schaaf.

The trial court found that a receiver was necessary and appointed W. E. Barkley receiver for each of the defendant corporations. On April 4, 1921, the trial court authorized the receiver to offer for sale and to sell, subject to the approval of the court, the interest of the companies in the Fontenelle Hotel of Omaha, Nebraska, Lincoln Hotel, Capitol Hotel site, Lincoln, Nebraska, Evans Hotel, Columbus, Nebraska, Lincoln Hotel at Franklin, Nebraska, Lincoln Hotel at Table Rock, Nebraska, Lincoln Hotel at Scottsbluff, Nebraska, and also the ranch owned and operated at Kearney, Nebraska. On April 5, 1921, D. W. Osborne and Herbert Reeder, holders of preferred stock in the Nebraska Building & Investment Company and the Nebraska Hotel Company, appeared specially and challenged the jurisdiction of the court to its right and authority to appoint a receiver and to make sale of the properties, claiming, among other things, that they, and more than 900 other stockholders, were affected by the proceedings, none of whom had received notice required by law, precedent to the appointment of the pretended receiver; that they had not been made parties and were not bound by the proceedings; and also that no sufficient or proper showing had been made for the appointment of a receiver, or for a sale of the assets and the winding up of the business of the corporations. Other preferred stockholders of the Nebraska Building & Investment Co. and the Nebraska Hotel Company appeared specially to challenge the jurisdiction of the court because no notice or summons had been served upon them or either of them. The special appearances were overruled. On the same day Otto Gloe and Laura A. Walters, preferred stockholders in the Nebraska Building & Investment Company, G. H. Walters, a common stockholder in both the Nebraska Building & Investment Company and the Nebraska Hotel Company, and Maurice I. Walters, a stockholder and creditor of the Nebraska Building & Investment Company, each for himself separately

filed a motion of intervention objecting to the receiver's bond, claiming it should be equal to double the value of the property, as required by section 7813, Rev. St. 1913, and moved for an order requiring a $2,000,000 bond. Otto Gloe and others filed a motion to set aside the appointment, and a motion resisting the sale, on the ground that it was unnecessary to sell all the assets of the corporations because the sale of certain properties would meet all obligations. The same preferred stockholders filed a motion for an order directing that all stockholders and creditors of the defendant corporations be made parties defendant, claiming that they were parties affected by the receivership proceedings, and that, without notice as provided in section 7811, Rev. St. 1913, the proceedings were void as to the creditors and stockholders. The same intervening stockholders filed other motions resisting and objecting to the proceedings, and they were all overruled by the court.

The trial court on April 16, 1921, confirmed the sale of the hotel properties, which were sold to Eugene C. Eppley for a total consideration of $1,000,000, and the final decree of the court below was entered on May 25, 1921. The court found that mismanagement and fraud had been practiced by the officers and directors of the defendant corporations, and that certain sums were due from certain personal defendants. Judgment was entered accordingly. Otto Gloe and others, intervening defendants, the Nebraska Building & Investment Company, the Nebraska Hotel Company, Frank E. Schaaf and Albert J. Schaaf have appealed from the order of the court, (1) confirming the sale by the receiver, (2) overruling objections made to said sale, (3) overruling the challenge to its jurisdiction and power to either entertain the cause, appoint a receiver, order sale, or affirm and approve the same.

It appears that the the Nebraska Building & Investment Company, a corporation, was organized in 1914, with a capital stock of $500,000. The incorporators were Frank E. Schaaf, H. Louis Lohmeyer and J. R. Kruse, and they were to act as directors of the corporation until the first

annual meeting. In December, 1917, and again in May, 1919, the articles of incorporation were amended, increasing the capital stock to $2,000,000.

The Nebraska Hotel Company was organized in 1917, with a capital stock of $500,000, by Frank E. Schaaf and Edward O. Gregg, who acted as directors of the corporation until the first annual meeting. The articles in corporation were amended in 1918, and the capital stock increased to $1,500,000.

The Lincoln Security Company was organized in 1917, with a capital stock of $10,000, by Frank E. Schaaf, Edward O. Gregg and James H. Gore, who were to act as directors until the first annual meeting. This corporation never functioned. One share of stock was issued to F. E. Schaaf, and one share to Edward O. Gregg; no stock of the corporation was ever sold. The company never in fact transacted any business except on paper.

It is shown by the record that the general nature of the business to be conducted by the Nebraska Building & Investment Company was to lease or buy real estate, building materials, erect buildings, borrow money, issue bonds and mortgages, and to do whatever was necessary to carry the granted powers into effect. The business to be conducted by the Nebraska Hotel Company was to build, lease, operate, buy, sell and maintain hotels throughout the United States, with all the necessary powers incidental thereto. The Lincoln Security Company was organized for the purpose of transacting general real estate, rental, insurance and bonding business, with all powers incident thereto, to act as agent, sales agent, or manager for any person, partnership or corporation, as attorney in fact or otherwise, to develop lands and buildings thereon, to advance and loan money and enter into agreements of all kinds, to act as attorney in fact or trustee for issues of bonds, stocks, indebtedness, and to carry out any trust committed to it. At the time this suit was commenced, Frank E. Schaaf was president and manager of all three

defendant corporations, with their principal place of business at Lincoln, Nebraska, and he had general supervision and direction of all business transacted by them.

This, in fact, is an application for the appointment of a receiver to conduct and wind up the affairs of the defendant corporations. This is recognized as a harsh and extraordinary proceeding provided for by special statutes and only resorted to as a last desperate effort to conserve the property and property rights of interested parties, and in the absence of all other remedies. Did the court have statutory authority to do what it has done or attempted to do? As a matter of law it had only such rights in the premises as were delegated to it by special statute, and, if the court failed to follow and comply with the statute, then it was without jurisdiction.

Section 7811, Rev. St. 1913, is as follows: "No receiver shall be appointed except in a suit actually commenced and pending, and after notice to all parties to be affected thereby, of the time and place of the application, the names of the proposed receiver, and of his proposed sureties, and of the proposed sureties of the applicant. Such notice shall state upon what papers the application is based and be served upon the adverse party or his solicitor at least five days before the proposed hearing, and one additional day for every thirty miles of travel from the place of serving the notice to the place where the application is to be made, by the usually traveled route, or shall be published in the same manner as notices of the pendency of suits to nonresident defendants."

This being the requirement of the statute, the question is, has the court complied with its provisions. If it has not complied with the same, then all he has done in this matter is a nullity. It is incumbent upon the trial judge to comply with the statutes absolutely in the appointment of a receiver.

This statutory authority is a well-known rule of this court. A similar situation was involved and the rule was thoroughly analyzed and laid down in *Vila v. Grand Is-*

land Electric Light, Ice & Cold Storage Co., 68 Neb. 222, 233. This case precisely meets the issues and situations as we find them here. There the issue was to "wind up the affairs and terminate the business, and indirectly dissolve the corporation." Also it was stated along this line in *State v. Farmers & Merchants Ins. Co.,* 90 Neb. 664, that "The power of the court to decree a dissolution and distribution of the effects * * * must be conferred by statute, and, in the absence thereof, such a proceeding is not within the jurisdiction of the court."

It may be inferred and it is plainly indicated in the case of *Miller v. Kitchen,* 73 Neb. 711, that in the appointment of a receiver in a stockholders' suit for mismanagement of corporate affairs, when neither the corporation nor the corporate affairs are insolvent, as it was in this case, there is no necessity for the appointment of a receiver to wind up the affairs of a corporation as in this case.

In *Wilcox v. Bickel,* 11 Neb. 154, the general rule is stated as follows: "A stockholder in a corporation has a remedy in chancery against the directors to prevent them from doing acts which would amount to a violation of the charter, or to prevent any misapplication of their capital or profits which might lessen the value of the shares, if the acts intended to be done amount to what is called in law a breach of trust or duty."

In the consideration of the instant case as to whether or not there was service upon the stockholders whose property rights were in court pending adjustment, we will adhere to the well-established rules of this court. In the case of *Wilson v. Bumstead,* 12 Neb. 1, we find a rule which should be invoked here. It is the law in this state, and every application for receiver must give notice of the time and place of hearing, and, in addition, the names of the proposed sureties for applicants, and the name of the proposed receiver. Along this line let it be known and let it be understood that we are intending to follow the provisions of the statute, and we call attention to the fact that section 7811, Rev. St. 1913, must be followed in this

proceeding. That section of the statute in this connection we say is imperative and mandatory, and so important that the legislature designed that, in a proceeding of this kind, where the law steps in and arbitrarily sells one's property, it is incumbent upon the law to do this only when the special regulatory steps have been taken as provided by statute. The legislature considered this subject of so much importance that it said: "Every receiver shall be considered the receiver of any party to the suit, and no others." Rev. St. 1913, sec. 7817. It must be conceded, then, that a party cannot be divested of his rights and of his property unless he has previous to this been properly brought into court. This was plainly stated in the celebrated case of *Chambers v. Barker*, 2 Neb. (Unof.) 523. We notice along this line that our statute, section 7818, Rev. St. 1913, requires a notice, and that is essential to jurisdiction.

It appears of record herein that the receiver's appointment must be void as to notice. It is plain that, in order to give the court complete jurisdiction, it is necessary to give notice to all parties desired to be brought into court and have their interests adjudged. The statute actually contemplates notice to those who have an interest in the property. In the drastic appointment of a receiver which results in the sale and distribution through the court of the property of the stockholders, then, in that case it can only be thought of when these stockholders have had an opportunity to be heard. In other words, the stockholders are entitled to their day in court. They are vitally interested, for property rights are being bartered away unless it can be shown that they are brought into court by virtue of statutory notice. This application of a receiver is the last and most drastic relief granted by the statute, and it is only granted when all other proceedings have been exhausted or have failed. We know nowhere of a statute intended to circumscribe, check, limit and control the powers of the court and give proper protection to a litigant more thoroughly than the rule enacted by the legislature in this

proceeding, and in no statute is it more incumbent upon the trial court to literally follow a statute than section 7811, Rev. St. 1913.

It is our opinion, and we hold, that under section 7818, Rev. St. 1913, an appointment of a receiver without notice is void, and if, as we have said, a receiver is only a receiver to the parties to the suit, and to no others, then notice is required to give the court complete and entire jurisdiction over all parties concerned or to be affected thereby. This must be done before the court can divest them of their property interest. The statute contemplates and insists upon notice to every one who has an interest in the property owned by the defendant corporations, as it more fully appears in section 7818, Rev. St. 1913, which is as follows: "Every order appointing a receiver without the notice provided for herein shall be void, and every such order heretofore made, under which the appointee has not possessed himself of the property in question, shall be suspended until an order shall have been made and the bonds executed and filed in accordance with the provisions of this chapter." Therefore it is plain and we conclude that there is no presumption of service, especially where notice is denied. Then it must be plain that there is nothing to support the jurisdiction either in the proof or the recital appointing the receiver. The provisions of the statute, as set out in section 7818, Rev. St. 1913, apply, and its requirements must be followed.

The power of a court to dissolve a corporation depends upon statute. *Osborn v. Montelac Park,* 89 Hun (N. Y.) 167. It will be seen in this case that, where a statute authorizes dissolution on certain grounds, the matter is left to the sound discretion of the court. Thus it is plain, as said by the New Jersey equity court in *Atlantic Trust Co. v. Consolidated Electric Storage Co.,* 49 N. J. Eq. 402: "The power to dissolve a corporation and wind it up is statutory. It formed no part of the original jurisdiction of the court. It was conferred by statute * * * The statute makes

insolvency the jurisdictional fact. * * * The power is only to be used when the ends of justice require its exercise. The court should strive in such cases to foster and preserve rather than strangle and destroy."

Where you have a statute made and provided for in such cases as the instant one it is absolutely mandatory and must be followed. It is a method which the legislature has adopted to guide and control courts in winding up the affairs of a corporation when dissolution is necessary. 2 Cook, Corporations (7th ed.) sec. 629; 10 Cyc. 988. In this state our statute makes insolvency one of the prerequisites to proceedings for dissolution. What way is there to terminate this proceeding and comply with the law? Nebraska law and statute really cover the whole ground.

In Beach on Receivers (Anderson's ed.) we have a citation in which the author, at section 421, says: "The winding up of the business and affairs of a corporation through a receiver has been said to be, in effect, a dissolution of the company, and, therefore, cannot be done by a court of equity without statutory authority. While the complete winding up of the affairs of a corporation cannot be said to amount to its dissolution, yet it is going to an extremity which courts of equity have refused to approach; it destroys the means afforded the corporation to transact business and virtually annihilates it, and practically puts the corporation out of existence.

"As will hereafter be shown, a court of equity has inherent power to appoint a receiver and take charge of the affairs of a corporation under certain conditions. But its power to continue in charge of the corporate assets, as well as to dispose of them, is limited. It cannot destroy the corporation, or so control and dispose of its assets as to virtually prevent it again exercising its corporate powers. Its power, even in extreme cases, is not to be extended beyond preserving the assets. The court will take charge of the property until the trouble has been adjusted, when it 'must lift its hand and retire.' "

"It follows necessarily that the control of the court of

the corporate property must be temporary. 'The court,' it has been correctly said, 'will take charge of the property until there is an adjustment of the trouble, or the election of a new board of directors; and when the officers are ready to proceed in the proper discharge of their duties the court must lift its hand and retire.' "

One thing is obvious in considering the report of the receiver. It is plainly shown, as appears of record, that the sale value of the Omaha property, the Capitol Hotel site in Lincoln, and the Franklin county property would be enough to relieve all indebtedness of the company.

In *Neall v. Hill,* 16 Cal. 145, 149, it is said: "We are also of opinion that the court erred in the appointment of a receiver, and in decreeing a sale of the property and a settlement of the affairs of the corporation. This decree, if permitted to stand, must necessarily result in the dissolution of the corporation; and in that event the court will have accomplished in an indirect mode that which, in this proceeding, it had no power to do directly."

This view is adhered to by the federal court and many state jurisdictions. It appears to be a necessity and it is a well-settled proposition that, in absence of a statute enlarging its powers, a court of equity has no jurisdiction at the suit of a stockholder or other private person to dissolve a solvent corporation. It is true that in this bill the object and purpose of the action, among other things, was to dissolve a corporation and to cause a general winding up of the affairs. We are convinced that property has been taken without authority of the statute and without due process of law. Then it must follow that the jurisdiction of the court is at issue, and, not having followed the statute, the court is without jurisdiction to appoint a permanent receiver to wind up the affairs of the solvent corporations. It was the object and purpose of the trial judge to protect and preserve these properties *pendente lite,* and it was incumbent upon him to follow the special mandatory directions of the statute. Under these circumstances, we are reminded of the fact of the decision of

Woodmansee v. Ann Arbor Brick Co., 164 Mich. 688. There the court held, in a situation analagous to the facts in the instant case: "In a suit by stockholders and directors of a corporation against other directors who are in control of the corporate business, and who are alleged to be mismanaging the same, dissipating its assets, and planning and attempting to defraud complainants, the order of the circuit court at a preliminary hearing, appointing a receiver and depriving the corporation of its right to manage and dispose of the business and assets, after the coming in of an answer denying the averments of fraud, insolvency, and concealment, is not sustainable."

Misconduct or mismanagement of corporate business by officers is not ground, at the suit of complaining minority stockholders, for the appointment of a permanent receiver to wind up the affairs of a solvent corporation.

It has been held: "The appointment will not be made if the applicant has been guilty of laches, or of acquiescence in the wrong complained of; when the expense, or other disadvantage, will outweigh the advantage; when some other remedial relief is open to plaintiff; or when preventive relief will be effective." 1 Smith (Tardy's) Receivers (2d. ed.) 702. This quotation aptly expresses our opinion as we have heretofore said that a receivership is the most drastic remedy and the most expensive luxury known to the realm of law. It has been well and aptly said: "An order for the appointment of a receiver is more comprehensive in its effects than either an attachment, a sequestration, or an injunction, or, in fact, than all these writs combined, and is said to reverse the ordinary course of procedure in the administration of justice by levying a species of executions and determining afterwards who is entitled to the benefits." *State v. Ellis*, 108 La. 521, 531. This view meets our conception of the situation in this case and it is amply sustained by Nebraska decisions.

The petition shows on its face that the managing officers of the corporations were not properly representing the stockholders, but were using corporate power and corpo-

rate property for individual benefits, to the injury of other stockholders. Plaintiffs, while invoking the extraordinary powers of a court of equity to seize, hold and sell corporate property of which the stockholders generally were beneficial owners, on the ground, among others, that the officers in control were acting for themselves individually at the expense of those whom they wronged, did not give notice to many stockholders whose confidence had been thus abused. The respect in which plaintiffs did not give lawful notice of their application for the appointment of a receiver, and of their purpose to wind up its corporate affairs, was the failure to notify stockholders generally of the proceeding, the circumstances as shown by the petition being such that notice to derelict officers was not notice to stockholders. The latter had a right to notice of the application, to inquire into the conditions of the corporations, to oppose the appointment of a receiver, to make objections to the person suggested for receiver or appointed as such, to suggest corporate action to remove unworthy officers of the corporation and select new ones to take charge for the purpose of paying corporate debts and preserving corporate property and corporate business. The appointment, without notice, of even a temporary receiver to conserve corporate property until such a time as real conditions could be disclosed to the court was, under the circumstances, an abuse of discretion and erroneous. Plaintiffs, as stockholders, had no right, without notice to other stockholders, to use the equity arm of the court to seize, hold and sell property common to all stockholders. Because the officers of a corporation abuse their powers and betray the confidence of their principals is no reason why those who own the property lose their voice in its control, their dominion and their property rights. No set of stockholders without notice to the others can seize, hold and sell the latter's corporate property or use the judicial arm of the government for that purpose. Plaintiffs knew that the corporate officers did not properly represent the stockholders. Their petition so shows, and a receiver

should not have been appointed without any notice except to the officers themselves. *Smiley v. Sioux Beet Syrup Co.*, 71 Neb. 581; *Vila v. Grand Island Electric Light, Ice & Cold Storage Co.*, 68 Neb. 222; *Miller v. Kitchen*, 73 Neb. 711.

The evidence shows beyond question that there was no substantial ground for the appointment of a permanent receiver to wind up the affairs of the corporations and to sell their entire assets. The undisputed evidence shows that the corporations were solvent and that only a portion of the corporate property was needed for the payment of corporate debts. A sale of their property in bulk for the purpose of winding up the affairs of the solvent corporations was an invasion of private rights requiring an exercise of equity powers not committed to the district court. The sale of properties of the corporations in bulk for the purpose of winding up the affairs of the solvent corporations, without giving many of the stockholders, the equitable owners, notice of the proceedings or a day in court was made without warrant of law. The sale by the receiver and the proceedings on which it was based were absolutely void.

The appointment of the receiver, the orders leading up to the sale, the order for the sale, and the sale itself are vacated and set aside, and the cause is remanded for further proceedings. REVERSED.

STATE, EX REL. JOSEPH R. MILLSAP, APPELLEE, V. THOMAS STODDARD, DIRECTOR, ET AL., APPELLANTS.

FILED JUNE 12, 1922. No. 22435.

1. **Officers:** STATUTORY POWERS. Powers conferred on public officers are generally construed as mandatory though the language may be permissive, where the public are concerned in their execution or where they affect the rights of third persons.

2. **Schools and School Districts:** SCHOOL BOARDS: MANDATORY POWERS. A school district board, after it is "empowered to contract with

the neighboring district for the instruction of pupils," as provided by section 6944, Rev. St. 1913, does not have discretionary powers. The intention of the legislature was not to devolve a mere discretion, but to impose an absolute duty, to carry out the expressed wish of a two-thirds majority of the legal voters of the district.

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

Hainer, Craft, Edgerton & Fraizer, for appellants.

J. L. Cleary, contra.

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

ALDRICH, J.

Action in mandamus brought by Joseph R. Millsap, moderator of school district No. 53 of Hamilton county, against his colleagues on the board, the director and treasurer. The trial court found for the plaintiff and granted a peremptory writ of mandamus. Defendants appeal.

This action was commenced to enforce the provisions of section 6944, Rev. St. 1913, which is as follows: "A board of trustees of a high school district or a district board of a school district in this state, when authorized by a two-thirds vote of those present at any annual or special meeting, is hereby empowered to contract with the district board of any neighboring district for the instruction of pupils residing in the first-named district in schools maintained by the neighboring district, and to make provision for the transportation of such pupils to the above-named school of the neighboring district under the conditions named in the preceding section: Provided, school districts thus providing instruction for their children in neighboring districts shall be considered as maintaining a school as required by law: Provided, further, the teacher of the last-named school shall keep a separate record of attendance of all pupils from the first-named district and make a separate report to the director of said district."

Pursuant to this statute a petition was circulated call-

ing a special meeting of the voters of district No. 53. Notices of the special meeting were posted according to law, and this notice is as follows:

"Notice.
"Special School District Meeting.

"A special meeting of the legal voters of school district No. 53 of Hamilton county, Nebraska, called on the written request of five legal voters, will be held at the schoolhouse in said district, on Friday night, the 29th day of July, 1921, at 8 o'clock p. m., for the purpose of transacting the following business, to wit:

"To vote upon the question of whether or not the district board of said district No. 53 shall be authorized and empowered to contract with the district board of district No. 95, Phillips, Nebraska, for the instruction of the pupils residing in said district No. 53, and to contract and make provisions for the transportation of said pupils to the school in said district No. 95 as provided by law.

"This notice must be posted in three public places at least fifteen days before the meeting. See sections 32 and 33, article 11, Nebraska School Laws.

"F. G. Wright, Director."

On the 29th day of July, 1921, at the time and place stated in the notices, the question was voted upon. There were 24 legal voters present at the special meeting, that number being a two-thirds majority of all the voters of the district. They unanimously voted to empower the school district board with authority to contract with the district board of district No. 95, at Phillips, for the instruction of pupils residing in district No. 53, and to make provisions for the transportation of such pupils to the schoolhouse of district No. 95.

Thereafter the appellants in this case, being the treasurer and director, respectively, maintained that the action of the voters at the special meeting was not mandatory upon them, and that they still possessed discretionary power to veto their action at such meeting. They refused

to join Mr. Millsap, the moderator, appellee in this case, in entering into a contract with the Phillips school board, and in making provision for the transportation of the pupils as by the voters of district No. 53 they were instructed to do. These officials further insisted that they were still at liberty to act, and, without consulting the moderator, Mr. Millsap, entered into a contract with a teacher to teach the school in district No. 53. The voters of the school district, it appears of record, who had favored sending their children to the Phillips school, thereafter made provisions for the transportation of their children to such school, and as a result 18 of the children in this district in question attended the school in district No. 95, and 13 children attended school in district No. 53.

There was a meeting of the three members of the board, two of which declined to enter into a contract with the Phillips board. This meeting was held on August 6, after the action of the voters had been called to the attention of the opposing members of the board. Mr. Joseph R. Millsap, appellee herein, applied to the district court for Hamilton county for an alternative writ of mandamus to require the other members of the board to make arrangements and contract with the board of district No. 95 for the instruction of the pupils in district No. 53 in the schoolhouse of district No. 95, and to provide for the transportation of the pupils in district No. 53 to the schoolhouse in district No. 95.

The main issues tendered herein are dependent upon section 6944, Rev. St. 1913.

This is a concise statement of the situation, and, in so far as the school officers are concerned, when the interests and rights of other parties are brought in issue, it is mandatory upon these officers to enforce the statute that it may result to the benefit of the district concerned. *Newburgh Turnpike v. Miller,* 5 Johns. Ch. (N. Y.) *101, 9 Am. Dec. 274; *State v. Henry,* 87 Miss. 125, 5 L. R. A. n. s. 340; *Supervisors v. United States,* 4 Wall. (U. S.) 435; *Bowen v. City of Minneapolis,* 47 Minn. 115.

The powers conferred upon public officers are generally construed as mandatory though the language may be permissive, where the public are concerned in their execution or where they affect the rights of third persons. 22 R. C. L. 457, sec. 116. As a matter of law, it is obligatory to do whatever act is authorized to be done, not necessarily for their own benefit, but for the benefit of others. See, also, *Beadle v. Sanders,* 104 Neb. 427. In that case this court held that the words "may levy," as used in chapter 26, Laws 1919, meant "must levy," thereby making the statute mandatory.

"Statutes imposing duties and conferring powers on officers are either mandatory or directory. Permissive words in a statute are construed as mandatory where the exercise of the power granted is necessary to protect the public interest or the rights of third persons." 29 Cyc. 1432.

Then it is plain that what the appellants did does not have the approval of statutory and judicial authority. The board of education, in pursuing the course they did, are outside of the law, and did what they did in violation of it as shown by the above citations. It is plain that the majority of the voters of school district No. 53 had power and control of the policy of the district in the matter of sending the school children to the Phillips school and discontinuing their own school. The action of the appellants in refusing to act according to the directions of two-thirds majority of the voters is contrary to authority and against the better public policy.

Therefore it is clear that the judgment of the district court in mandamusing the appellants to act as members of the board in entering into a contract with district No. 95, and to do those things necessary to comply with the mandate of the voters, was right, and it is

AFFIRMED.

LURA F. ALEXANDER, APPELLANT, V. J. H. BAILEY, APPELLEE: STATE OF NEBRASKA, INTERVENER.

FILED JUNE 12, 1922. No. 22645.

1. **Municipal Corporations:** PAVING DISTRICT BONDS: LIABILITY OF CITY. Where a city of the second class issues its bonds, designated as "paving district bonds," under the provisions of section 5110, Rev. St. 1913, as amended by chapter 50, Laws 1919, which authorizes such cities to pave streets, and assess the cost thereof upon property in the paving district in proportion to benefits, and where the statute contains no provision that such bonds shall be payable only out of the funds realized from such assessment, and where neither the bonds nor the ordinance authorizing the same contain such a declaration, and where the bonds purport on their face to be the general obligations of the city, the city is bound for their payment.

2. ———: ———: ———: REFUNDING. In such case, the debt will be regarded as a general obligation of the city, and may be refunded under the provisions of section 425, Rev. St. 1913, as amended by chapter 197, Laws 1921.

3. ———: STREET IMPROVEMENTS: AUTHORITY OF CITY. Where a statute authorizes a city to pave streets, and such statute contains no restrictions to the contrary, there arises an implication that such city is authorized to enter into contracts for the performance of the work, and also to pay for the same by a general tax levy.

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

William C. Dorsey and *Howard S. Foe,* for appellant.

J. S. Gilham and *Frank J. Munday, contra.*

Clarence A. Davis, Attorney General, for the state.

Stout, Rose, Wells & Martin, amici curiæ.

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

DAY, J.

The question presented for determination by this record is whether certain defaulted district paving bonds, issued

by the city of Red Cloud, a city of the second class, to raise funds to pay for paving in paving districts, are such general obligations of the city as will warrant the city in taking them up by the issuance of funding bonds payable from funds raised by a general tax.

It appears that the city, by proper ordinances of the council, had created paving districts designated numbers 2, 3, and 4, and after the paving was completed the city issued its bonds in payment for the work. Default was made in payment of some of the bonds and interest, totaling the sum of $10,000. In September, 1921, the mayor and city council of the city, proceeding upon the theory that these paving bonds were general obligations of the city, took the initial steps under section 426, Rev. St. 1913, to take up the defaulted bonds and interest by the issuance of funding bonds. Notice of the proposed action was duly given as provided by law. Certain taxpayers filed objections to this course. The objections, together with a statement of facts and the proceedings before the city council, were transferred to the district court of the county as provided by law. Later Lura F. Alexander, the holder of one of the defaulted bonds, intervened, as did also J. H. Bailey, another objecting taxpayer. Different reasons are assigned by the objecting taxpayers why the funding bonds should not be issued, but they all present the one main question, whether the paving bonds are the general obligations of the city, or only of the respective paving districts. The trial court was of the opinion that the paving bonds were not the general obligations of the city, and adjudged that the city authorities were without power to issue the proposed bonds. From this judgment the intervener, Lura F. Alexander, appeals. The attorney general made an argument in behalf of the state in support of the issuance of the funding bonds. The state's interest in the controversy arose out of the fact that a large amount of the school funds are invested in bonds of a similar character. We are also favored with a brief filed as *amici curiæ,* supporting the issuance of the funding bonds.

The paving bonds in question were identical in form except as to dates, amounts, and numbers of the paving districts, and, omitting portions thereof immaterial to the present issue, recite as follows: "The city of Red Cloud * * * hereby acknowledges itself to owe, and, for value received, promises to pay to bearer * * * the sum of——— dollars, * * * together with interest thereon at the rate of 6 *per cent. per annum,* payable semi-annually, * * * until the principal sum shall have been paid, upon presentation and surrender of the proper interest coupons hereto attached as they severally become due. And for the prompt payment of this bond at maturity, and the interest instalments as they become due, the full faith, credit and resources of the city of Red Cloud are hereby irrevocably pledged. * * * This bond, and others of its series, is issued by the said city of Red Cloud for the purpose of paying for the cost of paving of streets in paving district number—— of said city, by authority of and in full compliance with the laws of the state of Nebraska governing said city and by virtue of ordinances and resolutions duly enacted as required by law. And it is hereby certified and recited that all things required to be done precedent to and in the issuance of this bond have been done and performed in regular and due form and time as required by law, and that the total indebtedness of the said city of Red Cloud, including this issue of bonds, does not exceed any constitutional or statutory limitations, and that a sinking fund has been created for the payment hereof and interest. In witness whereof, the said city of Red Cloud, Nebraska, by its mayor and city council has caused this bond to be signed," etc.

These bonds were issued under authority of section 5110, Rev. St. 1913, as amended by chapter 50, Laws 1919. This section of the statute is entirely too long to set out at length in an opinion, but, in so far as it bears upon the question in hand, it may be said to confer upon cities of the second class the powers, as follows: (1) To pave streets. (2) To create improvement districts for the purpose of paving.

(3) To levy special assessments upon property abutting on, or specially benefited by, the paving. (4) To issue bonds or warrants of the city to pay the cost of paving, said bonds to be called "District Paving Bonds of District Number ——." (5) To constitute the special assessments a sinking fund for the payment of the bonds or warrants. (6) To issue bonds to pay for paving intersections. (7) To make partial payments as the work progresses by issuing warrants redeemable when the bonds are sold.

The objectors contest the proposed action of the mayor and city council upon two main grounds: First, that the special assessments provided for by statute is the fund out of which the paving bonds can be paid; and, second, that the paving statute does not specifically authorize the levy of a general tax to pay such bonds.

With respect to the first objection, we think it may be said that the statute clearly gives to the city the right to pave its streets. The exercise of this right clearly implies the right to create valid obligations on the part of the city to pay for such improvement. There is nothing in the statute which limits the power of the city to contract for paving and to make payment therefor only out of money collected from special assessments. There is nothing in the statute which says that a contractor to do paving work for the city must look only for his pay to the proceeds of special assessments. The case of *Pine Tree Lumber Co. v. City of Fargo,* 12 N. Dak. 360, is in point. In that case it is said:

"As between the city and the parties with whom it contracted to furnish the labor and material and to pave its streets, the city had power to render itself generally liable, notwithstanding the cost of the improvement was to fall ultimately upon the owners of abutting property. * * * The contractor is not in privity with the property owners, and has no means of enforcing collection against them. He looks alone to the city. There is nothing in the statute which imposes upon the person to whom the contract is let to pave the streets the requirement to look alone to the

proceeds of the special assessments for his pay, or limiting his recovery to the funds realized therefrom."

One of the leading cases upon the point involved is *United States v. Fort Scott,* 99 U. S. 152. In that case, it is said:

"It is true that section 17 declares that 'for the payment of said bonds' assessments shall be made 'upon the taxable property chargeable therewith;' that is, 'on all lots and pieces of ground to the center of the block, extending along the street or avenue, the distance improved.' But it is neither expressly nor by necessary implication provided that the holder of the bonds may not be paid in some other mode, or that the city will not, under the authority derived from other sections of the statute, comply with its promise to pay the bonds, with interest, at maturity. As between the city and its taxpayers, it was certainly its duty, through the council, to provide, if practicable, payment by taxation upon the property improved, rather than upon all the taxable property within its corporate limits. But the duty to make such distribution of the burden of special improvements did not lessen its obligation, in accordance with its express agreement, to pay the interest and principal of the bonds at maturity. * * * There is no reservation, as against the purchasers of the bonds, of a right, under any circumstances, to withhold payment at maturity, or to postpone payment until the city should obtain, by special assessments upon the improved property, the means with which to make payment, or to withhold payment altogether, if the special assessments should prove inadequate for payment. Experience informs us that the city would have met with serious, if not insuperable, obstacles in its negotiations had the bonds upon their face, in unmistakable terms, declared that the purchaser had no security beyond the assessments upon the particular property improved."

For other authorities to the same general effect, see *Vickrey v. City of Sioux City,* 115 Fed. 437; *Rialto Irrigation District v. Stowell,* 246 Fed. 294; *State v. Commis-*

sioners, 37 Ohio St. 526; *Mutual Benefit Life Ins. Co. v. City of Elizabeth,* 42 N. J. Law, 235; *Colby v. City of Medford,* 85 Or. 485. From these authorities we conclude that where a city of the second class issues its bonds, designated as "paving district bonds," under the provisions of section 5110, Rev. St. 1913, as amended by chapter 50, Laws 1919, which authorizes such cities to pave streets, and assess the cost thereof upon property in the paving district in proportion to benefits, and where the statute contains no provision that such bonds shall be payable only out of the funds realized from such assessment, and where neither the bonds nor the ordinance authorizing the same contain such a declaration, and where the bonds purport on their face to be the general obligations of the city, the city is bound for their payment.

The objectors next urge that there is no express authority given by statute for the levy of a general tax to pay for paving bonds. As before pointed out, however, the city is given authority to pave its streets. Where a statute authorizes a city to pave streets, and such statute contains no restrictions to the contrary, there arises an implication that such city is authorized to enter into contracts for the performance of the work, and also to pay for the same by a general tax levy. In *United States v. New Orleans,* 98 U. S. 381, it is said:

"Indeed, it is always to be assumed, in the absence of clear restrictive provisions, that when the legislature grants to a city the power to create a debt, it intends that the city shall pay it, and that the payment shall not be left to its caprice or pleasure. When, therefore, a power to contract a debt is conferred, it must be held that a corresponding power of providing for its payment is also conferred. The latter is implied in the grant of the former, and such implication cannot be overcome except by express words excluding it."

The same principle is announced in *Loan Ass'n v. Topeka,* 87 U. S. 655; *Minden-Edison Light & Power Co.*

v. City of Minden, 94 Neb. 161; Dillon, Municipal Corporations (5th ed.) sec. 237.

It is also urged in behalf of the objecting taxpayers that an injustice will result from the levy of a general tax, because certain of the property owners within the district have paid their assessments in full, and also because other taxpayers will be compelled to bear some part of the burden when their property is not specially benefited. It would seem a sufficient answer to this argument that the special assessments are questions solely between the city and its taxpayers, with which the bondholders have no concern. If the special assessments were levied in sufficient amount, and the property is sufficient in value to pay them, no loss should result to the city as a whole, if it will faithfully enforce its liens; but, if loss should result, there is less injustice if it fall upon the citizens who have the use and benefit of the paving whether they live in the paving district or not, rather than upon an innocent bondholder who had no benefit from the paving, no recourse upon any one, and no remedy to recover his money in case the city should be relieved of responsibility upon its obligations.

We conclude that the mayor and city council were authorized to take up the defaulted bonds and interest by the issuance of funding bonds, which are general obligations of the city.

The judgment of the court below is reversed and the cause remanded, with directions to enter judgment in conformity with the views herein expressed.

REVERSED.

WILLIAM D. MCCORD, APPELLANT, V. GEORGE W. MARSH, AUDITOR, APPELLEE.

FILED JUNE 12, 1922. No. 22691.

1. **Schools and School Districts:** ISSUANCE OF BONDS. **Section 6971, Rev. St. 1913, as amended by chapter 129, Laws 1917, and as later amended by chapter 143, Laws 1919, authorizes boards of educa-**

tion of school districts to issue bonds of the school district by consent of two-thirds of the members of such board, whenever a petition is filed with the board requesting the issuance of bonds, signed by not less than 51 per cent. of the qualified voters of such school district.

2. ———: ———. In such case, it is not necessary that the question of the issuance of bonds should be submitted to a vote of the electors at any regular or special election.

3. ———: ———. In such case, it is competent for the board of education to appoint a committee of its members to examine the petition and investigate the number of legal voters in the district, and to make a report of its investigation, so long as the final determination of the ultimate fact still remains with the board.

4. ———: ———. The record made by the board of education examined, and *held* to be a sufficient finding that not less than 51 per cent. of the legal voters of the school district had signed the petition requesting the issuance of the bonds in question.

5. **Constitutional Law:** SCHOOL DISTRICTS: ISSUANCE OF BONDS. Where bonds are issued in pursuance of a petition of the electors, as provided by statute, section 6971, Rev. St. 1913, as amended by chapter 129, Laws 1917, and chapter 143, Laws 1919, a taxpayer cannot complain that he is deprived of his property without due process of law because the legislature has failed to provide a tribunal before whom he can appear and object to the issuance of the bonds.

6. ———: ———: ———. When, before a tax is levied to aid in the payment of school bonds, the county board, sitting as a board of equalization, meets at a time and place designated by general law, a taxpayer cannot complain on the ground that his property is being taken without due process of law.

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

C. C. Flansburg, for appellant.

Clarence A. Davis, Attorney General, Hall, Baird & Williams and *William M. Ely, contra.*

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

DAY, J.

The plaintiff, a resident elector and taxpayer of the city of Ainsworth and of school district No. 10, Brown county, brought this action against George W. Marsh, as auditor of public accounts of the state of Nebraska, to enjoin the registration of school bonds in the sum of $125,000, which had been executed by the officers of said school district. The plaintiff also sought to have the bonds declared void. The trial court denied the relief prayed, and dismissed the petition. The plaintiff appeals.

The record shows that a petition signed by 396 of the duly qualified electors of the school district was filed with the board of education requesting them to issue bonds of the district in the sum of $125,000 to run for a period of not to exceed 30 years and to bear interest at not to exceed 6 per cent. the proceeds to be used for the purpose of erecting and equipping a new school building and repairing the present school buildings. The board thereupon appointed a committee from among their number to examine the last census report, the tax records, and other sources of information, and determine whether at least 51 per cent. of the legal electors of the district had signed the petition. The committee reported to the board that 396 of the signatures to the petition were of qualified voters of the district, and that upon a careful count there were 711 legal voters in the district. The board thereafter found that more than 51 per cent. of the legal voters in the district had signed the petition, and thereupon issued the bonds of the district in the sum of $125,000, payable at stated intervals. The bonds, together with their history, were duly signed and presented to the defendant, the auditor of public accounts, for registration.

The plaintiff assails the validity of the bonds upon two main grounds: First, that the proceedings of the board of education, in determining whether a sufficient petition had been filed authorizing the issuance of the bonds, were not in accordance with the provisions of the statute; and, second, that the statute under which the board acted is

unconstitutional, because it deprived the plaintiff of his property without due process of law.

The proceedings of the board leading up to the issuance of the bonds were taken under section 6971, Rev. St. 1913, as amended by chapter 129, Laws 1917, and as later amended by chapter 143, Laws 1919, and will be referred to hereinafter as the statute. As originally enacted, this statute empowered boards of education to issue school district bonds, when authorized by a majority vote of the electors at any regular election or at any special election called for that purpose. The amendment of 1917 simply added to the statute the power to issue special warrants. The amendment of 1919 embodied all of the features of the law as it formerly stood, and added a clause as follows: "Provided, further, that when there shall have been presented to such board of education a petition signed by at least 51 per cent. of all the legal voters of said district praying for the issuance of such bonds or special warrants, the board of education may issue such bonds or special warrants in such an amount as may be named in such petition, without having submitted the question of the issuance of the same to the voters of said district at any election."

It is argued by the plaintiff in support of his first objection that the reference by the board of education to a committee to ascertain whether not less than 51 per cent. of the qualified voters of the district had signed the petition was an unwarranted delegation of the powers of the board. It is plain from a reading of the statute that the board has no power to issue bonds upon a petition, unless such petition be signed by not less than 51 per cent. of the qualified electors of the district. It is also plain that the statute has not prescribed any method or means of determining the sufficiency of such a petition. In such case, we think it is clearly within the power of the board to determine that fact upon knowledge obtained from any reliable source of information available. We can see no valid objection to the board appointing a committee from its num-

ber to examine the petition and investigate the number of legal voters in the district, and to make a report of its investigation, so long as the final determination of the ultimate fact still remains with the board. Of course, the board could not delegate to the committee the power of final determination of matters committed to its judgment. In this connection, it is further argued that the findings of the board are not sufficient to show that at least 51 per cent. of the voters of the district had signed the petition, and that, therefore, the proceedings of the board in issuing the bonds must fail. In this regard, the record shows that the committee reported that there were 711 legal voters in the district, and that 396 of them had signed the petition. The records of the board show that this report was adopted. Thereupon a resolution was unanimously passed, reciting: "Whereas, a petition signed by more than 51 per cent. of the legal voters of said school district of the city of Ainsworth, Brown county, Nebraska, has been presented to the board of education of said district and duly filed by the secretary thereof, praying that bonds of said school district be issued in a sum not to exceed $125,000." This finding, it is true, lacks the formality as well as the accuracy usually found in court proceedings. Still, we think that it is a sufficient finding to show the determination of the board that the requisite number of voters had signed the petition. That it was so intended by the board, we think there can be no doubt. It is a matter of common knowledge, which the courts recognize, that business affairs of school districts are frequently placed in the hands of persons who are unskilled in the use of language, and that the public records made by such persons are often not full and complete; but such records are usually sustained by the courts, where the intent of the board sufficiently appears.

In support of his second contention, that the statute is unconstitutional, the plaintiff invokes the general rule that an owner of property is entitled to notice and an opportunity to be heard before some tribunal before a tax burden

is irrevocably fixed against his property. It is argued, inasmuch as the statute nowhere gives him the opportunity to contest the validity of the bonds, that, therefore, he is deprived of his property without due process of law. We think the argument is founded upon a wrong premise. The issuance of bonds based upon a petition of the voters stands upon the same legal footing as bonds issued by virtue of an election. The maintenance of schools is a governmental function, and it was clearly within the power of the legislature to authorize the issuance of bonds for school purposes upon any conditions it might see fit to impose. It could direct that the bonds be issued by a vote of the electors, or by petition, or by the mere action of the board itself. We have been cited to no case holding that a taxpayer must be given a hearing and an opportunity to contest the validity of the election before the district officers act upon the results thereof. Where school district officers are exceeding their powers or acting without jurisdiction the courts are open to an aggrieved taxpayer for redress; but, besides this, we think it can hardly be said that the mere voting of bonds is equivalent to the levying of a tax. It is one of the steps leading up to a tax levy. Under our system of taxation the board of education does not make a levy. It certifies the number of mills necessary for school purposes to the county board, and the county board makes the levy. Before doing so, the county board sits as a board of equalization, the time and place of which are fixed by general provisions of statute. At such time a taxpayer feeling himself aggrieved has full opportunity to resist any inequality in a proposed tax. It is a general rule that, before a tax is levied upon the property of the owner, he must have an opportunity to be heard; but it is also the rule that, where a tribunal is created for the equalization of taxes, which body by statute meets at a given time and place for hearing complaints, such tribunal meets all the requirements of due process of law. In such case, the notice by statute is sufficient, and personal notice is unnecessary.

The tax which may be levied against the plaintiff's property for the payment of the indebtedness is a general tax to be levied and assessed upon all the property in the school district in proportion to value, and the plaintiff will have opportunity to be heard before the board of equalization if he claims any inequality in his tax.

From a consideration of the entire board, we think it clear that the bonds were issued in full compliance with the requirements of the statute, and that the statute authorizing the bonds was a legitimate exercise of legislative authority. No sufficient reason has been pointed out why the bonds should not be registered.

The judgment of the district court is, therefore,

AFFIRMED.

RICHARD C. HUNTER, TRUSTEE, APPELLANT, V. WILLIAM L. HUFFMAN ET AL., APPELLEES.

FILED JUNE 12, 1922. No. 22016.

1. **Guaranty:** CONSTRUCTION. The rule of *strictissimi juris* applies in determining the effect of a contract of guaranty. When the meaning of the contract is ascertained, or its terms are clearly defined, the liability of the guarantor is controlled absolutely by such meaning and limited to the precise terms.

2. ———: RELEASE. Where the principal contract, which is described and covered by the guaranty agreement, is, without the assent of the guarantors, materially changed or varied from such contract as it is described in such agreement, the guarantors will be released.

3. ———: ———. Where such changes in the principal contract are of such a nature that they can be said to be wholly immaterial, they will not effect a release of the guarantors' liability.

4. ———: ———. Where defendants, by written contract, agreed to guarantee the payment of a loan made to another and which was to run for six months, and the parties to the loan made it run for four months instead of six, without informing the defendants of the variation and without procuring the assent of the defendants to the change, *held*, that the variation in the principal

contract was a material one, and that the defendants could not be held to their guaranty.

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

I. J. Dunn, J. E. Von Dorn and *Richard C. Hunter,* for appellant.

Frank H. Gaines and *William H. Herdman, contra.*

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

FLANSBURG, J.

This was an action to recover on a contract of guaranty, signed by the defendants, Huffman and Gordon, and purporting to guarantee a $5,000 note, payable by the Omaha Motor Car Company to Walter Moise. The case was tried without a jury. The court found generally in favor of the defendants, and the plaintiff appeals.

The defense is grounded upon the fact that the guaranty agreement purported to cover a note, to be payable in six months, and that Walter Moise, instead of taking a note payable in six months, in accordance with the terms of the guaranty contract, took a note payable in four months, and that the defendants, being entitled to a strict limitation of their obligation, could not be held to be guarantors of a four-months' note.

It appears that the two defendants, Huffman and Gordon, together with one Henry, in February, 1912, organized a corporation known as the Omaha Motor Car Company. There is testimony to show that Walter Moise, immediately after the organization of this company, became connected with and had some interest in it, but none of the testimony definitely shows what that interest was. The testimony of the two defendants is to the effect that on March 20, 1912, which was a few weeks after the incorporation, Walter Moise came to the defendants and stated that he was about to make a loan to the company of $5,000, and that he and Henry, the president, had agreed upon the

details of the arrangement. The testimony of these defendants shows that Mr. Moise presented to them the guaranty agreement, already prepared, which they signed. That agreement is now the basis of this suit. The agreement recited that the Omaha Motor Car Company had issued to Walter Moise 50 shares of preferred stock and 25 shares of common stock as payment for the use of the loan of $5,000, which was payable by the company to Walter Moise in six months from the date of the loan. The agreement further recited that Walter Moise and the two defendants would divide equally the stock, or the proceeds from the sale thereof, between them, and that the two defendants, upon that consideration, would "further guarantee that said loan of the Omaha Motor Car Company will be paid to said Walter Moise when due." Their testimony is further to the effect that they were not present when the loan was made by Moise through Henry, acting as its president, nor when the note executed by Henry for the company was given to Moise, and that they were never advised as to the terms of the note, and had never seen it until it was introduced in evidence in this case. The note, instead of being for six months, as is described in the guaranty agreement, was, by its terms, payable in four months. Mr. Moise was deceased at the time of the trial, and his testimony had not been preserved. Mr. Henry, the president of the company, was not called as a witness. The company became bankrupt and the note was never paid.

The plaintiff alleges in his petition that the guaranty contract, through a mistake of the parties, was not drawn to conform to their real agreement, and that the real agreement between the parties was one to cover a loan for four months, but there is very little, if any, testimony in the record to support that allegation, and, in any event, the finding of the trial court has resolved that issue, as well as all other issues of fact, in favor of the defendants. The finding of the trial court, in this case, carries the same force as the verdict of a jury.

We must assume, then, as a premise, that the defendants

agreed to guarantee a loan which was to be repaid in six months, and that they were not informed that the loan actually made, and the one which their guaranty agreement was intended to cover, was made for four months, instead of six.

The plaintiff's contention is, first, that the obligation of the defendants was that of an original undertaking to repay the loan when due, and was not a guaranty that the company would pay it; and, second, that the variation between the time fixed for maturity of the loan actually made and the six-months loan described by the guaranty agreement is not a material variation, nor one which would be prejudicial to the defendants, and therefore could not release the defendants, even in event their obligation should be considered as that of guarantors.

We cannot agree with the contention that the obligation was an original undertaking and promise, and not a guaranty. The effect to be given to the contract depends on the intention of the parties as ascertained from the terms used in the contract, fairly construed in the light of the surrounding circumstances. The loan was to be made by Moise to the Omaha Motor Car Company and the obligation for the repayment of the loan was primarily that of the company. It seems to us clearly the intention of the parties, as gathered from the contract, and in light of the circumstances, that the contract was one of absolute guaranty whereby the defendants obligated themselves to pay, unconditionally, the amount of the loan in case of default of the motor car company. Their agreement was collateral to the loan and a guaranty of payment of it. By their agreement they were to receive a consideration. The nature of that consideration is no doubt material in solving the question as to whether or not the promise of the parties was original and direct, or whether it was collateral and a guaranty, but a consideration of some kind is essential to the validity of any contract, and the nature of the consideration for the agreement, in this case, does not necessarily

lead to the conclusion that the agreement was not a guaranty.

The terms of the guaranty being ascertained, the defendants were entitled to a strict compliance therewith. The effect of any material departure in the principal contract from the terms of such principal contract, as described in the guaranty agreement, if made without the consent of the guarantors, would be sufficient to release them. An immaterial change made in the principal contract, to which the guaranty is collateral, is not sufficient to release the guarantors (*Quinn v. Moss*, 45 Neb. 614; *Rawleigh Medical Co. v. Bunning*, 104 Neb. 179), but, where a departure is made in the principal contract which is a material change of the obligation which the guaranty contract describes, the guarantors will be released (20 Cyc. 1444; *Chandler Lumber Co. v. Radke*, 136 Wis. 495). The effect of the contract of guaranty, after its meaning is determined, must be strictly limited, within the meaning, in favor of the guarantors. Its terms cannot be extended by construction.

In *Chandler Lumber Co. v. Radke, supra*, the court, in speaking of the obligation of the guarantor, said: "As he ordinarily does not receive the benefit of the contract, but is a mere volunteer, he has a right to define exactly the conditions upon which he shall be responsible for the debt of another, and only upon compliance with those conditions can he be held to such liability. * * * While this rule was originally enforced with entire strictness, it is now subject to certain exceptions, * * * if the variation appear to be wholly immaterial and without prejudice to the surety's rights, it will be ignored. Of course, the principle remains that the surety may determine and specify the exact terms upon which he will be liable and has a right to stand upon those terms, and it is only when a court is able to say with certainty that an expression in the contract apparently declaring a condition of such liability is so immaterial to him and departure therefrom so necessarily without prejudice that it cannot believe in an intention of the parties

to express it as a condition of liability does the above-noted exception apply."

Where the contract of guaranty, by its terms, covers a loan payable in six months, the parties who have become obligated as guarantors of such agreement cannot, without their consent, be bound to extend the terms of their agreement so as to cover a loan made payable in four months instead of six. Such a departure in the terms of the loan cannot be said to be a wholly immaterial one. *Chandler Lumber Co. v. Radke, supra; Robertson v. Southwestern Co.,* 136 Ark. 417; *Warren v. Lyons,* 152 Mass. 310; *Bacon v. Chesney,* 1 *Stark.* (Eng.) 192; 2 C. J. 1200, sec. 46.

Plaintiff relies upon the case of *Koenigsberg v. Lennig,* 161 Pa. St. 171. The guaranty agreement in that case, by its terms, covered two notes of $1,600 each, one to be payable in one month and the other in two months. The principal obligation actually entered into did not conform to the guaranty agreement, since only one note was taken instead of two, and that was for $3,200, and to be payable in two months. The guaranty agreement, however, contained an express provision that no extension of time for payment of the notes should release the guarantors, and it was on the ground of that provision that the court held that the departure from the provisions of the guaranty agreement did not release the guarantors, saying (p. 175): "The contract of guaranty distinctly provided that no extension of the notes should in any way affect or release the liability of the guarantors. The enlargement of the time of payment of one of the $1,600 notes for one month was nothing more than an extension of that note."

Upon the general finding of the trial court, resolving the issues of fact in favor of the defendants, we cannot see but that the taking of a four-months note, when the defendants had agreed to guarantee a six-months note, was such a material departure that they cannot be required, without their consent, to extend the provisions of their

guaranty agreement to cover the note actually taken.

The judgment is therefore

AFFIRMED.

E. G. DOVEY & SON ET AL., APPELLANTS, V. FRANK E. SCHLATER, SPECIAL ADMINISTRATOR, ET AL., APPELLEES.

FILED JUNE 12, 1922. No. 22436.

Dower. Under the statute (Comp. St. 1881, ch. 23, sec. 11), where an owner of land died intestate, leaving a widow and three sons, and dower was neither petitioned nor assigned to the widow, but where the rents from the properties were collected by the sons during the lifetime of the widow, with the understanding between all the parties that the widow was entitled to her share thereof, and where the moneys were placed in an account that she was allowed to draw upon, *held*, that a one-third share of the rents, as collected, vested in the widow in her lifetime, and that after her death her administrator was entitled to an accounting for such rent moneys so collected as remained in the fund.

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

John L. Webster, Byron G. Burbank and *D. O. Dwyer*, for appellants.

Jesse L. Root, A. L. Tidd and *C. A. Rawls, contra.*

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

FLANSBURG, J.

This case has been before this court in its different phases a number of times. The only issues now presented involve the right of the defendant Schlater, as special administrator of the estate of Jane A. Dovey, deceased, to an accounting as to certain moneys held by the firm of E. G. Dovey & Son, plaintiff. The trial court found the defendant entitled to such an accounting and entered judg-

ment thereon in his favor. From this judgment the plaintiffs appeal.

Among other items, upon which there is now no controversy, the trial court found the administrator entitled to the sum of $7,147.79, which the court found was a one-fourth share of an account, held by the partnership, which represented funds furnished and held as the individual and personal property of Edward G. Dovey, deceased; and the sum of $15,695.64, being one-third of the rents collected from the real estate of which Edward G. Dovey died seised.

Jane A. Dovey was the widow of Edward G. Dovey, deceased. There were three sons. In 1876 Edward G. Dovey, who was at that time engaged in the mercantile business in Plattsmouth, had taken into partnership with him his son George E. Dovey. On the books of the partnership was one account which was denominated the "stock account." Edward G. Dovey owned a number of properties, having no connection with the partnership, from which he derived rentals. His collections from these properties and from his individual business interests were mingled with the partnership assets and entered of record in this "stock account." Throughout the partnership books the "stock account" was, it seems, the personal account of Edward G. Dovey with the partnership and appears as an account of moneys due to him for capital furnished.

It is the contention of George E. Dovey that these amounts, represented by the stock account, had, in fact, become partnership assets, and did not remain the personal and individual property of Edward G. Dovey, nor an account of any liability, on the part of the partnership, to Edward G. Dovey. The evidence, however, we believe does not bear out that contention.

A statement of the accounts of the partnership, prepared by George E. Dovey on January 31, 1881, was found among the partnership papers. This statement shows the total assets of the partnership at that date to be $97,755.96, and shows that there were liabilities against the firm in the

amount of $45,663.54, leaving a net value of the partnership assets at $52,092.42. Throughout the litigation involving this estate, it seems to have been always conceded that the net value of the partnership assets at that time was $52,092.42. This was exclusive of the value represented by the "stock account." The "stock account," in the amount, at that time, of $27,355.70, was included as part of the total liabilities, above set out, of $45,663.54. This written statement of the firm's financial condition, made by George E. Dovey himself, seems to us to furnish a clear admission on his part that the stock account was a liability of the firm in favor of Edward G. Dovey, and that, in arriving at the net value of the assets of the firm, the funds represented by the stock account should be deducted. Furthermore, it appears that after the decease of Edward G Dovey the stock account was carried on the books as an account between the firm and the estate. The moneys of the estate were mingled with the moneys of the firm, and were entered in the "stock account." The testimony of George E. Dovey shows that in 1885, in arriving at the amount which the firm then owed to the estate, the stock account was considered by him as representing the amount of that liability.

We have reached the conclusion that the partnership was a partnership where George E. Dovey was to share in the profits only, and that the moneys furnished the partnership by Edward G. Dovey, the account of which was kept in the so-called "stock account," did not become the property of the partnership, but at all times remained the property of Edward G. Dovey and stood on the books as a liability from the partnership to Edward G. Dovey. Since the stock account represented a liability of the firm and was payable to and represented individual property of Edward G. Dovey, we think it is clear that a one-fourth interest therein descended by operation of law to Jane A. Dovey. This amount, $7,147.79, the trial court has awarded to her administrator, and it seems to us the judgment in that respect is correct.

It is the further contention of the plaintiff E. G. Dovey & Son that the administrator of the Jane A. Dovey estate is not now entitled to recover one-third of the rents which have been collected since the decease of Edward G. Dovey from the real estate of which he died seised, for the reason that the widow, Jane A. Dovey, during her lifetime, caused no assignment of dower to be made to her in such real estate, and did not demand nor require the rents to be paid to her; that such rents were not collected for her during her lifetime, and are not now held in trust by the plaintiff, E. G. Dovey & Son, for her benefit; that she had not become possessed of these rents during her lifetime, and, not having claimed them, it is too late for her administrator now to make such claim in behalf of her estate.

The statute, relating to dower, in force at the time in question (Comp. St. 1881, ch. 23) provides:

"Section 1. The widow of every deceased person shall be entitled to dower, or the use, during her natural life, of one-third part of all the lands whereof her husband was seised, of all estate of inheritance at any time during the marriage, unless she is lawfully barred thereof."

"Section 11. When a widow is entitled to dower in the lands of which her husband died seised, she may continue to occupy the same with the children or other heirs of the deceased, or may receive one-third part of the rents, issues and profits thereof, *so long as the heirs or others interested do not object,* without having the dower assigned."

The plaintiff's argument is that this statute, which provides that the widow may continue to occupy the premises of her deceased husband with her children, or may receive one-third of the rents, issues and profits thereof, so long as the heirs or others interested do not object, without having the dower assigned, is unavailing to the defendant administrator, for the reason that the statute is only permissive, and that Jane A. Dovey has never demanded, nor has she, during her lifetime, *received* her share of these rents, and that she has never perfected an

election to take the rents without assignment of dower.

Upon an examination of the record, and in view of the findings of the trial court, and the persuasive weight to be given to those findings, we are unable to come to any other conclusion than that at which the trial court arrived, and that is, that the rents were collected during the lifetime of the widow by her son, George E. Dovey, and were mingled with the partnership funds, with the understanding and agreement between the widow and her sons that the rental moneys should be so used, and that she was entitled to and, in fact, had a one-third interest in them. The several legal questions raised on those issues, it seems to us, are therefore based upon a false premise in fact.

At one stage of the proceedings, the pleadings, signed by George E. Dovey, and which are admitted in the record in this case as an admission against interest, contained a declaration that "whatever rents were collected and received by him (George E. Dovey) during said period of years (July 25, 1881, to September 23, 1909) were so collected and received *as the agent* of all the respective parties in interest, and by the consent of all the respective parties in interest, and that said rents so collected and received were placed with the assets of E. G. Dovey & Son with the knowledge, acquiescence and consent of all the parties in interest, *including Jane A. Dovey.*"

It is true that the record contains no specific and express agreement to the effect that the rents were to be collected and that the widow should receive a one-third part of them. In family arrangements of this kind such specific agreements are not necessarily expected. The actions and doings of the parties and the natural inferences to be drawn therefrom are sufficient to furnish evidence of such agreements and understandings.

The evidence discloses that the three sons recognized and spoke of the right of their mother to a one-third interest in the rents. The rent moneys were placed in the partnership, in which she had an interest, which interest

had descended to her as a part of her husband's estate. From time to time the firm honored her checks and demands for cash, in the total aggregate amount of over $26,000, which was in excess of any amount due her from the firm, unless she was then considered as entitled to share in the rents. The amounts which she thus withdrew from the partnership were charged to her account. In 1909 one of the sons, Oliver, withdrew from the partnership, which was then being carried on by the three sons, and a settlement was made with him. A few years subsequent to that, George E. Dovey is shown to have presented a bill of sale to his mother for her signature, which was for the purpose of conveying certain personal properties to the two remaining members of the firm, and which included grain and the increase in live stock raised on the farm lands in question, and which constituted a part of the rental income therefrom. This was a recognition of her rights and of the fact that her title to these properties, rental income from the lands, had at that time vested in her. The evidence, we think, fully sustains a showing of an understanding between the parties that the widow was entitled to a one-third share in the rents, and that these rents were being collected by George for all parties and invested for them in the partnership, and that the three sons were allowing the rents to be credited to their mother without a formal assignment of a dower interest in the lands to her, and without any objection on their part to her so receiving them.

It was not necessary that dower should be set off to the widow, or that she should demand an assignment of dower before she would be entitled to receive rents; but, in the absence of objections on the part of the heirs, she was entitled to receive her share of the rents, issues and profits of the lands in which she was entitled to dower. The assignment of dower does not create her right in the estate, but only segregates it from the interest of the heirs. Her dower interest in the land was never specifically set apart to her, but this did not deprive her of her right to her

share of the rental income therefrom. No objection was made by the heirs against her receiving her share of the rents. The rents were not being withheld from her. On the contrary, the record bears out an understanding that the rents were being collected and invested in the partnership for her, and that she became immediately entitled to them and had the right to withdraw them from the firm as she saw fit. Where the heirs are making no objection, and where the widow is led to believe that rents are being collected and held for her, to be drawn upon at her pleasure, certainly there is no necessity of a demand on her part, nor a requirement that she resort to any affirmative proceedings for the establishment of her right. The collection of these rents by her son as agent for her was, in law, a collection of the rents by her, and the possession by the firm was her possession. The mutual understanding between these parties and the collection and application of the rents, as stated, are sufficient, without any formal assignment of dower and without any further demand on her part, to establish her right and to vest in her title to those funds. In this connection see *McFarland v. McFarland,* 278 Mo. 1; *Martin v. Fletcher,* 77 Or. 408; *Sloss-Sheffield Steel & Iron Co. v. Yancey,* 202 Ala. 458; *Lenfers v. Henke,* 73 Ill. 405, 24 Am. Rep. 263; *McGowan v. Bailey, Wilson & Co.,* 179 Pa. St. 470.

It is our conclusion that the trial court properly found that the defendant, as administrator of the estate of Jane A. Dovey, is entitled to an accounting for one-fourth of the funds represented by the stock account, and to a one-third interest in the rents, issues and profits of the real estate of Edward G. Dovey, that on these amounts the credits allowed by the trial court were correct, and that the defendant was entitled to recover the balance found due.

The judgment is therefore

AFFIRMED.

STATE OF NEBRASKA v. WILLIAM L. KELLER.

FILED JUNE 12, 1922. No. 22564.

1. **Nuisance:** FINDINGS OF FIRE MARSHAL: CONCLUSIVENESS. The finding by the state fire marshal, acting for the department of trade and commerce, under article XXI, title V, ch. 190, Laws 1919, that a building is a nuisance and liable to fire by reason of its being out of repair or because of age or dilapidation, is not conclusive upon the owner of the building, since the statute does not require notice to be given him and does not afford him a hearing.

2. ———: ABATEMENT. Where a building is, by reason of its being out of repair or from age or dilapidation, especially liable to fire, and is for that reason a public nuisance, such steps may be taken by the department as are reasonably necessary to abate the nuisance, but the decision of the department that the building is a nuisance, without a judicial determination of some kind on the question, is not conclusive upon the owner or final upon the courts.

3. ———: ———: NOTICE. The statute providing that the department may, with or without complaint having been made, make investigations of buildings, and, when it finds that any building constitutes a nuisance, within the meaning of the statute, may order it abated, cannot be held by implication to require that notice and a hearing be given to the owner of the property before such finding of the existence of a nuisance can be made.

4. **Constitutional Law:** NUISANCE: NOTICE. Section 5 of the act (Laws 1919, ch. 190, title V, art. XXI, Comp. St. 1922, sec. 8149), declaring that any person who shall fail to comply with an order of the department to abate a nuisance shall be guilty of a misdemeanor, is unconstitutional as lacking in due process of law, since the person made guilty is denied the right to any notice or to a hearing on the question of whether or not a nuisance does, in fact, exist.

ERROR to the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Objections overruled.*

H. M. Sinclair, for plaintiff in error.

Pratt, Hamer & Beynon, contra.

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

FLANSBURG, J.

This was a prosecution instituted before a justice of the peace, to recover a statutory penalty from the defendant on the charge that he had violated an order of the state fire marshal, directing the defendant to abate a nuisance. The nuisance complained of was a building which was charged to be out of repair and in a dilapidated condition, and especially liable to fire. A conviction was had and the case appealed by the defendant to the district court, where the conviction was reversed on the ground that the portion of the statute, upon which the prosecution was based, was unconstitutional. The county attorney, as provided by statute, has presented his objections here, raising the question of the constitutionality of the act.

The act (Laws 1919, ch. 190, title V, art. XXI) declares: "Section 3. Any building, or other structure, which for want of proper repair, or by reason of age and dilapidated condition, or for any cause, is especially liable to fire, and which is so situated as to endanger other buildings or property, * * * is hereby deemed and declared to be a nuisance." The act further provides that the department of trade and commerce may, either upon complaint of some person or without complaint, make investigations and that: "Section 4. Whenever the department shall find that any building or other structure * * * constitutes a nuisance within the meaning of the (act), * * * it shall order the same to be abated, and such order shall be forthwith complied with by the owner or occupant of such building or premises." The act also provides that the department may institute an action in the district court to have such buildings declared to be a nuisance, and, by the court, ordered abated. It further contains a provision that, where there is an immediate and pressing necessity for the abatement of the nuisance, and the owner of the building is a nonresident or cannot be found, the department may immediately abate such nuisance, and a provision is made for a reimbursement by collection of the costs of abatement from the owner, or through a lien upon

the property. The provision of the statute, now especially involved, is section 5, which is as follows: "Any person who shall fail to comply with the order issued by the department of trade and commerce to abate a nuisance as in this article defined, shall be guilty of a misdemeanor and, upon conviction, shall be fined in any sum not exceeding one hundred ($100) dollars."

In this case no judicial proceeding was had for the determination of the question of whether a nuisance, in fact, existed. The department determined that question upon its own investigation, proceeding under those provisions of the act which are above quoted. It is the contention of the defendant that section 5 of the act, which declares a disobedience of an order, made by the department without notice to the defendant and wihout a hearing, a crime, is unconstitutional.

It is the contention of the state that the statute, by implication, requires a notice, citing, in support of that contention, the decision in *Enterprise Irrigation District v. Tri-State Land Co.*, 92 Neb. 121. In that case the court pointed out that, since a proceeding was provided by the statute to be had before a board of quasi-judicial authority, a notice of the hearing before such board would be implied, though none was specifically provided by the statute, and that a party, having actual notice and appearing before such board, could not complain that the procedure was lacking in due process of law. In the statute under consideration, on the other hand, there is no provision whatsoever for a hearing or proceeding before the department. A hearing is only provided when the department applies to the district court. Except where proceeding in the district court, the department is given the right, upon its own investigation, to declare that a nuisance exists and to order it abated when, in its judgment, the structure falls within the definition of the statute.

The extent of the right of the department, under this statute, to summarily abate a nuisance, without notice or hearing, is not directly involved. The property complained

of in this case was finally placed in proper condition by the owner. The prosecution is based upon the owner's default in failing to immediately abate the nuisance after the order of the department had been served upon him.

At common law, either by official authority or when a person was acting in his individual capacity, there was the right to abate a public nuisance without a hearing and without a notice and without liability resulting by reason of the necessary destruction of property. But, where a thing is adjudicated, by an individual, to be a nuisance, or even by public authorities acting under a statute which has not provided for a notice to the owner of the property, and does not render him a hearing, such adjudication will not afford the person protection, and, in abating the nuisance, he must act at his peril. If later, by a judicial determination, the property destroyed be held not to be a public nuisance, the party causing damage is held responsible. The state, in the exercise of its police power, may declare that certain conditions constitute a public nuisance, and only in clear cases are the courts warranted in going behind such legislative determination, but the state cannot denounce as a nuisance that which is not a nuisance in fact. Where a statute so definitely defines what shall constitute a nuisance as to leave no room for latitude on the question, officials are authorized and protected in abating such described nuisances, and no notice or hearing is essential. The legislature in such case has, by a description set forth in the statute, foreclosed the question of what, in law, shall constitute a nuisance. But where the legislature has not specifically defined the exact condition which shall constitute a nuisance, and perhaps is unable to do so, the question of what does constitute a public nuisance under the general terms of a statute must be determined by individual judgment in each given case. The authority to decide generally when a nuisance exists is the authority to weigh evidence and make findings of fact and to apply rules of law, and necessarily involves the exercise of judicial functions.

The first question, then, to be considered is whether or not the terms of the statute so specifically define what conditions in buildings and structures shall constitute a nuisance as to eliminate the necessity of a judicial determination and an exercise of individual judgment on the question. It is argued by the defendant that the law in question furnishes no specific rule or limitation upon the action or authority of the department, and that it is within the power of the department, so far as limitations of the statute go, to determine, according to its own judgment, what condition of ill repair or age or dilapidation or other cause is sufficient to constitute a basis for a finding that the building is a nuisance. It seems to us that the statute is so general in its terms that it does not, and possibly could not, furnish strict definitions of what exact conditions in a building or structure would constitute a nuisance.

In *People v. Sholem,* 294 Ill. 204, 207, in a case involving a statute almost identical in terms with this one, the court held the provision of the law unconstitutional, saying that objection was made that the statute did not "fix any rules by which the fire marshal shall determine when a building shall be declared to be, 'for want of proper repair, or by reason of age and dilapidated condition, or for any cause,' especially liable to fire, or when said building is 'so situated as to endanger other buildings or property, or so occupied that fire would endanger persons or property therein,' and that therefore the vesting of the power in the fire marshal to determine when such conditions arise is, in the absence of any rule by which such shall be determined, a delegation of legislative and judicial authority," and that the fire marshal (p. 211) "is given the arbitrary power of determining these matters without rule or limitation by which such determination shall be reached, except that such building shall be especially liable to fire. All buildings are to a greater or less degree subject to be destroyed by fire. Some are especially liable to fire, while others are almost fireproof. By this act the fire marshal is

given the power arbitrarily to determine, without the intervention or assistance of a court or jury, where the line of demarcation is in any case."

Under such a statute, it seems clear to us that the terms are so general that the question of whether or not a nuisance exists in any specific case is a question for individual judgment and must be left to judicial determination. Decisions of like import with the holding in the case just above cited are *Stockwell v. State,* 110 Tex. 550, 12 A. L. R. 1116; *In re City of Brooklyn,* 87 Hun (N. Y.) 54. In order that the decision of the fire marshal or a board exercising quasi-judicial authority should be conclusive on the question of whether or not a nuisance exists, a notice and a hearing to the party interested is essential. In many statutes, providing for the abatement of nuisances on property which has come into such a condition as to be especially liable to fire, a notice and a hearing are provided, and the laws, in those instances, held constitutional. *York v. Hargadine,* 142 Minn. 219, 3 A. L. R. 1627; *Runge v. Glerum,* 37 N. Dak. 618; *State Fire Marshal v. Fitzpatrick,* 149 Minn. 203.

We do not mean to say that the department is prohibited from summarily abating a public nuisance. As said in the case of *Stockwell v. State, supra*: "The state (after specifically defining certain things as public nuisances) may also remit to such agencies as health boards or other proper administrative officers, the authority of determining whether other things constitute public nuisances, with the power to abate them. But where this is done, the determination of such boards or officers is not conclusive, and cannot be made so, unless it be with respect to something having the nature of a public emergency, threatening public calamity, and presenting an imminent and controlling exigency before which, of necessity, all private rights must immediately give way. If this were not true, all property would be at the uncontrolled will of temporary administrative authorities, exercising, not judicial powers, but purely executive powers. The result would be to subject

the citizen's property solely to executive authority, putting it beyond the protection of the courts, and depriving the courts of their essential power of determining what, under the written law, is lawful and what is not—declaring the law of the land—and adjudging property rights accordingly."

The findings of an officer, based on his judgment that a thing constitutes a nuisance, cannot be conclusive when there has been no notice and hearing provided by statute, and, where an abatement of a nuisance is conducted by him, his adjudication that the property constitutes a nuisance, under the general provisions of the statute, would not afford protection in case later, by a judicial determination, the property should be found not, in fact, a nuisance. *Hutton v. City of Camden,* 39 N. J. Law, 122; *Manhattan Mfg. & Fertilizing Co. v. Van Keuren,* 23 N. J. Eq. 251.

Since the finding of the fire marshal that the property in this case constituted a nuisance was not a judicial determination of the question, but was his own independent determination, his order, directed to the defendant, that the property should be removed was not such a final determination or fixation of the defendant's obligations as to constitute a sufficient basis for a criminal prosecution, based on the defendant's violation of the order. In the justice court, following the literal construction and proper interpretation of the statute, the finding and order of the fire marshal was construed as conclusive of the defendant's rights and the defendant's violation of the order was held to be an offense under section 5 of the statute. As we view it, this section of the statute, which makes it a penal offense for a person to violate an order made by the state fire marshal, which order is based upon his individual judgment and is made without the necessity of a notice or a hearing to the party who is to be charged, is unconstitutional, as lacking in due process of law.

We do not see, however, that this section operated as an inducement to the passage of the remainder of the act,

and the remainder is not, by the elimination of the section complained of, held to be invalidated.

The objections of the county attorney to the decision of the lower court are therefore

OVERRULED.

STATE, EX REL. SCHOOL DISTRICT NO. 2 OF PIERCE COUNTY, RELATOR, V. GEORGE W. MARSH, AUDITOR, RESPONDENT.

FILED JUNE 12, 1922. NO. 22814.

1. **Schools and School Districts:** BOND ELECTIONS: STATUTES: REPEAL BY IMPLICATION. Section 449, Rev. St. 1913, and section 448, Rev. St. 1913, as amended by chapter 9, Laws 1917, are *held* to have been repealed by implication by section 4, ch. 66, Laws 1921.
2. ———: ———: NOTICE. The provision of the statute (Rev. St. 1913, sec. 6801, as finally amended, Laws 1921, ch. 66, sec. 4), providing that notice of an election, held for the purpose of authorizing the issuance of school bonds, should be published within the district for at least 20 days, *held* to be directory, and not a mandatory provision where a failure to comply therewith would, in all cases, invalidate the election.
3. ———: ———: ———. Where it appears that the election, held for the purpose of authorizing the issuance of bonds to raise money for the construction and equipment of a school building, was generally attended by the voters in the district, and that considerably more than a majority of all the voters in the district voted in favor of the bonds, *held* that a posting of notices, though not in compliance with a statutory provision requiring publication, would not invalidate the election, it being manifest that, had all the electors in the district voted, the result of the election could not possibly have been changed.

Original proceeding in mandamus to compel respondent, as auditor, to register certain school district bonds. *Writ allowed.*

Douglas Cones and *M. H. Leamy,* for relator.

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

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

FLANSBURG, J.

This is an original action in mandamus, brought by school district No. 2 of Pierce county, Nebraska, to compel the state auditor to register $135,000 of bonds, voted by the electors of the school district on January 26, 1922, for the purpose of erecting and equipping a schoolhouse within the district. The auditor refused to register the bonds on the ground that there had been no proper notice of the election.

School district No. 2 was organized in the year 1870, as a primary school district, with three trustees, and in 1885, under the provisions of section 1, subd. VI, ch. 79, Laws 1885, the district was reorganized and a government by six trustees adopted. The district is still operative as a district having six trustees, under the statutes as they have been amended from time to time since then.

It appears that there are 542 qualified voters in the district. A petition, signed by 307 electors, as provided by section 449, Rev. St. 1913, was presented to the district board, praying that an election should be held for the purpose of authorizing the issuance of the bonds now in question. An election was accordingly called and a written notice thereof, which it is not claimed was insufficient in form or substance, was posted 20 days prior to the election in three public places within the district. At the election 339 votes were cast, of which 304 were in favor of the bonds.

It is the contention of the state that the notice should have been published in a newspaper, and this contention is based upon the provisions of section 6801, Rev. St. 1913, as finally amended by section 4, ch. 66, Laws 1921. By the latter paragraph of that section, it is provided that an election may be called by a two-thirds vote of the *board of education,* and that a majority of the ballots cast at the election shall be sufficient to authorize the issuance of the

bonds. It is further provided that 20 days' notice of the election shall be *published* within the district.

The relator's answer to this contention is that the provision of section 6801, above referred to, does not apply to school districts organized, as district No. 2 is organized, with a government by six trustees, since the provision mentions only the power of a *board of education,* instead of the power of a *board of trustees,* and relator argues that the amendment of section 6801 by chapter 66, Laws 1921, was intended to apply to school districts organized under article XXII, ch. 71 (secs. 6948-6975) Rev. St. 1913, which applies to city school districts having *boards of education.* The provision in section 6801, as amended, however, we find is practically copied from section 6971, art. XXII, Rev. St. 1913. The legislature surely could not have intended to amend article XXII by adding to it a provision already contained therein. The term "board of education" in section 6801 was inadvertently used probably when copying from section 6971, which employs that phrase. It seems clear to us that the legislature, in amending section 6801, was attempting to provide regulations for the issuance of school bonds in school districts, organized under article III (secs. 6752-6762) and article VI (secs. 6798-6801) ch. 71, Rev. St. 1913, and that the provision is applicable to the relator school district No. 2. The provision of the statute (section 6801, as amended, *supra*) covers the same subject-matter and is directly in conflict with section 449, Rev. St. 1913, and section 448, Rev. St. 1913, as amended by chapter 9, Laws 1917. By those two sections of the statute it is provided that no election shall be called except upon a petition signed by one-third of the qualified voters in the district, and that a two-thirds vote of the electors shall be required in order to carry the proposition at the election. On the other hand, by section 6801, as amended, it is provided that an election may be ordered by a two-thirds vote of the members of the board of trustees, and that a majority of the ballots cast at the election shall be sufficient to authorize the issuance of the bonds.

Section 6801, as finally amended in 1921 (Laws 1921, ch. 66, sec. 4), is in direct conflict with the two previous sections of the statute mentioned. Both cannot stand. Section 449, Rev. St. 1913, and section 448, Rev. St. 1913, as amended, must, therefore, be held to have been repealed by necessary implication.

It is clear, then, that the notice of the election for the issuance of bonds in this case should have been published in the newspapers for 20 days prior to the election. This was not done. The notices were posted. The question, then, is whether or not the failure to give the statutory notice invalidates the election.

As pointed out, there are 542 qualified voters in the district, 304 of whom voted in favor of the bonds. A clear majority in the district voted in favor of the proposition, and, had the notice given been published, no other result at the election could have been obtained had every elector in the district cast a vote. It is not contended, nor is any showing made, that the electors in the district were not fully informed of the time, place and purpose of the election, nor that any one failed to vote by reason of not receiving information that the election was to be held.

As we construe the statute (section 6801, as amended), the provision for publication of notice is directory. We do not gather from the provisions of the act that it was the intention of the legislature that the election should be void, where the notice given was not published or was defective. Where the statutory provision for notice is directory, failure to give the notice in compliance with the statute will not necessarily invalidate the election. If it is apparent that the electors generally had actual notice of the time, place and object of the election and participated generally at the polls, and if the result of the election is supported by such a vote that it is manifest no other result could have been possible, even though every elector had voted, the election will not be held void on the ground that the notice given was not in accordance with the statute. *Ellis v. Karl*, 7 Neb. 381; *State v. School Dis-*

trict No. 13, 13 Neb. 466; *State v. McFarland,* 98 Neb. 854; *State v. Thayer,* 31 Neb. 82; *State v. Skirving,* 19 Neb. 497; *State v. Lansing,* 46 Neb. 514.

In our opinion, the election, authorizing the issuance of bonds in this case, being an election that was generally attended by the voters, and an election which was carried by considerably more than a majority of all the electors in the district, is not invalidated by a failure to give the notice of election in the exact manner prescribed by the statute.

The writ is therefore

ALLOWED.

ROBERT A. GOODALL, APPELLANT, V. W. H. SWARTSLEY ET AL., APPELLEES.

FILED JUNE 12, 1922. No. 22001.

1. **Specific Performance:** "Courts of equity will not always enforce a specific performance of a contract. Such applications are addressed to the sound legal discretion of the court, and the court will be governed, to a great extent, by the facts and merits of each case." *Morgan v. Hardy,* 16 Neb. 427.
2. **Evidence** examined, and *held* to sustain a decree denying specific performance.

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

Hainer, Craft & Edgerton and *John J. Reinhardt,* for appellant.

Pratt & Hamer and *I. D. Beynon, contra.*

Heard before LETTON, DEAN and FLANSBURG, JJ., DAY and GOOD, District Judges.

DAY, District Judge.

This is an action in equity for the specific performance of a contract for the sale of a quarter section of land in Keith county, Nebraska. Two men, Swartsley and Olson,

entered into a contract for the purchase of said land from one Boyd for $9,600, with a cash payment of $1,000. Several days later Boyd entered into a contract for the purchase of said land from the owner, Goodall, for $8,000, and paid him the same $1,000. Goodall brings this action for specific performance, not against Boyd, but against Swartsley and Olson. The trial court denied specific performance and decreed that defendants recover the amount paid upon the contract from plaintiff. The plaintiff, Goodall, appeals to this court.

The issues in this cause are briefly set out in appellant's brief, as follows: First. Is Goodall entitled to specific performance of this contract? Second. Does the evidence support the allegations of misrepresentation on the part of the agents of plaintiff? Third. Are these alleged misrepresentations sufficient to defeat the appellant's right to specific performance?

Goodall alleges that Boyd was his agent and that the contract between Boyd and Swartsley and Olson was made for him. From the evidence it appears that Boyd contracted to sell this land to Swartsley and Olson, subject to the approval of the owner. Until the owner approved, the $1,000 payment was to stay in the bank. Later Boyd entered into a contract to purchase the same land from Goodall, the owner, and turned the same $1,000 over to Goodall as first payment. These two contracts were identical, except for the consideration, and must be construed in the same way. A court of equity cannot construe one as a real estate dealer's contract for commission and the other as a contract for the sale of real estate. The logical conclusion seems to be that Boyd bought and sold this land for a profit of $1,600, and that no contract exists between Goodall and Swartsley and Olson. This view is almost forced upon us by the letter of Goodall to Swartsley, within a short time after the defendants had refused to go on with their contract, in which he wrote: "This settlement does not really make a particle of difference one way or the other to me, as I sold the land direct to

the Boyd Land Company." In the case of *Morgan v. Hardy,* 16 Neb. 427, this court held; "Courts of equity will not always enforce a specific performance of a contract. Such applications are addressed to the sound legal discretion of the court, and the court will be governed, to a great extent, by the facts and merits of each case." This holding was followed in *Lopeman v. Colburn,* 82 Neb. 641, *Furse v. Lambert,* 85 Neb. 739, and many other cases. Goodall was not in this case entitled to specific performance, but his application was directed to the court's sound legal discretion.

The evidence discloses that the defendants sought to make an examination of this land; that upon their first visit they only saw a small corner of the quarter section. The next morning it was raining so that Swartsley did not feel able to go out to the land, but Olson made an attempt to inspect. He was taken by an associate of Boyd's, but almost as soon as they drove upon the land their automobile became stuck in the mud. He saw the same corner of the quarter he saw the evening before, and this is admitted to be the best part of the land. This was in the summer time and the densest vegetation of the year covered the land. Olson returned to town and never saw the land again before he and Swartsley signed the contract with Boyd. He testified that he was a stranger in the country and relied upon the representations made by Boyd. Swartsley was familiar with some other land in that county and Boyd assured him that this land was as good as some particular land he already owned. Neither he nor his associate said anything about the sand ridge or the sandy part of the land. They did not see fit to mention the lagoon of buffalo wallows, and did not tell them about the deposits of magnesia. According to the testimony of Boyd, none of these things impairs in any degree the value of the land. Boyd and his associate were able to limit the examination of Swartsley and Olson to the best part of the land, and they were not afforded an opportunity to examine the land, but were forced to depend

upon the representations made by Boyd, and the real character of the land was not disclosed to them.

We have examined this case *de novo,* and we conclude that there is such misrepresentation as to justify the court in its sound legal discretion to deny specific performance. The rescission was made within a reasonable time after discovery of the misrepresentations. Goodall admits that he received the $1,000 paid by defendants, which they ought to recover. For the reasons heretofore set out, the decree of the district court is

AFFIRMED.

PETER H. EHLERS ET AL., APPELLEES, V. BANKERS FIRE INSURANCE COMPANY, APPELLANT.

FILED JUNE 12, 1922. No. 22013.

Corporations: FRAUD: EQUITY. A court of equity will not permit mere corporate forms to serve as a cloak and a shield to the perpetration of a fraud, but will examine the whole transaction, looking through corporate forms to the substance of things, to protect the rights of innocent parties, or to circumvent fraud.

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

Holmes, Chambers & Mann, M. V. Beghtol and *A. E. Langdon,* for appellant.

Gaines, Ziegler, Van Orsdel & Gaines, contra.

Heard before LETTON, DEAN and FLANSBURG, JJ., DAY and GOOD, District Judges.

DAY, District Judge.

This is a suit in equity to rescind the contract of purchase of 400 shares of the capital stock of the Bankers Fire Insurance Company, and to cancel a certain note and mortgage given by Ehlers and his wife to the said company, and to require the defendant to return said note and mortgage, and to release the mortgage from record, for the

reason that the sale was brought about through the fraud of the defendant and its agents.

The decree of the district court found in favor of the plaintiffs and ordered them to surrender to the clerk of the court the certificate for capital stock of the defendant company, and ordered the defendant fire insurance company to deliver to the clerk the note and mortgage securing it, and to pay the costs. The defendant fire insurance company appeals.

The Bankers Fire Insurance Company was organized with an authorized capital stock of $2,000,000, divided into shares with a par value of $10 each. The articles of incorporation were filed with the county clerk of Lancaster county on the 2d day of April, 1919, and on the same day filed with the secretary of state of Nebraska. On the same day the Bankers Brokerage Company was incorporated under the laws of the state of Nebraska. Its incorporators were H. W. Kenyon, Charles Maixner, and M. V. Beghtol, who were also the incorporators of the Bankers Fire Insurance Company. The capital stock of the brokerage company was $5,000, divided into shares of $10 each. The brokerage company stock was transferred to E. R. Kenyon, a brother of H. W. Kenyon, Gus Johnson, and C. E. Sanden, a lawyer occupying an office with M. V. Beghtol, in whose office the articles of incorporation were prepared. Johnson and Sanden owned only a few shares of stock, but E. R. Kenyon was the owner of most of the stock.

Just six days after the organization of these twin corporations the fire insurance company entered into a contract with the brokerage company whereby they sold 150,000 shares of the capital stock at a price of $15 a share, or a total of $2,250,000. The brokerage company, with a capital of $5,000, gave the fire insurance company its note for $2,250,000, and the stock was held as collateral for said indebtedness. In fact, the certificates of stock were never issued until the brokerage company sold them, and then issued directly to the purchaser. The brokerage company

sold said stock for $25 a share, 60 per cent., or $15, of which went to the fire insurance company, and 40 per cent., or $10, was retained by the brokerage company. The fire insurance company knew the brokerage company was selling the stock for $25 a share, because they delivered the certificates directly, and the notes and mortgages of this plaintiff were assigned to it.

The appellee purchased 400 shares of stock in the bankers Fire Insurance Company on December 5, 1919, and upon the delivery of his note and mortgage in payment thereof was given a receipt, as follows:

"1192. Chalco, Neb., Dec. 5, 1919. Received of Peter H. Ehlers the sum of $10,000, as follows: Mortgage $10,000, running 5 years at 5½, for which the undersigned agrees forthwith to cause to be issued to him, capital stock in the Bankers Fire Insurance Company in his name to the amount of 400 shares. This stock is fully paid, nonassessable. Bankers Brokerage Company, by James C. Snow, Representative."

In this receipt, for the only time in this whole transaction, the name "Bankers Brokerage Company" appears. By this they agreed to "cause to be issued to him capital stock in the Bankers Fire Insurance Company," and that is exactly what was done. Four days later, on the 9th of December, the Bankers Fire Insurance Company inclosed a certificate for 400 shares of its capital stock with the following letter signed by H. W. Kenyon:

"Bankers Fire Insurance Company, Lincoln, Nebraska, December 9, 1919. Mr. Peter H. Ehlers, Chalco, Sarpy County, Nebraska. Re Certificate No. 471. Dear Mr. Ehlers: We are pleased indeed to inclose you herewith above numbered stock certificate for four hundred additional shares of stock. Please sign the inclosed receipt therefor and mail to us in the inclosed stamped addressed envelope. Thanking you and trusting that you will call at the Home Office when in the city, we are, Yours very truly, H. W. Kenyon."

This rather detailed statement of the case has been

made because the mere statement of the facts shows that the sole purpose of the organization of the brokerage company was to dispose of the stock of the fire insurance company. Since this stock was not to be issued until sold by the brokerage company, why the brokerage company, if the transaction was not fraudulent? One cannot read the undisputed evidence in this case and reach the conclusion that the sale of the stock by the fire insurance company to the brokerage company was a *bona fide* transaction. It was surrounded by the circumstances which attend the actual underwriting of a block of stock. The simultaneous organization, the identity of interest of the organizers, and all subsequent transactions refute the proposition that the Bankers Fire Insurance Company made a *bona fide* sale of its corporate stock to the Bankers Brokerage Company. A court of equity will not permit mere corporate forms to serve as a cloak and shield to the perpetration of a fraud, but will examine the whole transaction, looking through corporate forms to the substance of things, to protect the rights of innocent parties, or to circumvent fraud. See *McCaskill Co. v. United States,* 216 U. S. 504, and *United States v. Milwaukee Refrigerator Transit Co.,* 142 Fed. 247.

We have examined the evidence in this case, and the sale of stock was induced by fraud and misrepresentation. If there ever is a case where a court of equity should look through the forms to the substance, it is this one, and the conclusion is forced upon us that the Bankers Fire Insurance Company itself practiced the fraud, and that the Bankers Brokerage Company was simply an artificial cloak to escape the penalties which naturally flow from such a fraudulent transaction.

The appellant further contends that the plaintiff was not damaged, and then further in its brief answers that argument by another contention that a return of the certificate of stock would not place the company in *statu quo,* because the stock purchased by the plaintiff for $10,000 only netted the insurance company $6,000, and the plain-

tiff should pay $4,000 more for the cancelation of the note and mortgage. These contentions are not worthy to be dignified by the further consideration of this court. The conclusions of the trial judge are the only ones possible in this case.

AFFIRMED.

JOHN J. LUTZ, JR., APPELLEE, V. BANKERS FIRE INSURANCE COMPANY, APPELLANT.

FILED JUNE 12, 1922. No. 22014.

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

Holmes, Chambers & Mann, M. V. Beghtol and *A. E. Langdon,* for appellant.

Gaines, Ziegler, Van Orsdel & Gaines, contra.

Heard before LETTON, DEAN and FLANSBURG, JJ., DAY and GOOD, District Judges.

DAY, District Judge.

This case is similar to the preceding case of *Ehlers v. Bankers Fire Ins. Co., ante,* p. 756. Both cases were argued together, and all the propositions involved in this case were decided in that case. The trial court probably overlooked requiring the plaintiff to return the certificate for 100 shares of stock of the Bankers Fire Insurance Company. The plaintiff should be required to do this, and the decree is modified in this regard.

AFFIRMED AS MODIFIED.

HARRY A. BROOKS ET AL., APPELLANTS, V. ORA E. ELDER ET AL., APPELLEES.

FILED JUNE 12, 1922. No. 21953.

1. **Injunction:** SCHOOL BUILDINGS: USE FOR DANCES. A permanent injunction will not be granted under the evidence in this case to restrain the board of education from allowing and permitting supervised dances in the auditorium of the high school building under the excellent rules adopted by said board and herein set out.

2. **Schools and School Buildings:** USE OF PROPERTY. The legislature has the power to bestow upon school authorities unlimited control and discretion in the use of school property, within constitutional limitations.

3. ———: ———. The board of education of a city school district may permit the use of public school buildings for public assemblages. In rural school districts a majority of the qualified electors may, at any annual meeting, permit such use and fix the rental therefor as provided in chapter 236, Laws 1915.

APPEAL from the district court for Lincoln county: HANSON M. GRIMES, JUDGE. *Affirmed.*

William E. Shuman, for appellants.

Evans & Evans, contra.

Heard before MORRISSEY, C. J., ROSE and ALDRICH, JJ., HOBART and PAINE, District Judges.

PAINE, District Judge.

The plaintiffs and appellants are residents of and taxpayers of the school district of North Platte, and upon January 15, 1921, filed a petition for an injunction against the defendants and appellees, who are the members of the board of education of said school district. The relief sought was a permanent injunction restraining the defendants forever from permitting the high school building, known also as the "Franklin School," or any of the school buildings in said district from being used for dancing. Bond of $500 being approved, the district court upon said date issued a restraining order fixing January 31,

1921, as the time when the defendants were to show cause why a temporary injunction should not be issued. Upon said date oral evidence was introduced by plaintiffs and four affidavits submitted by the defendants, upon which the court directed that the temporary restraining order be dissolved, but, in addition, passed finally upon the case and denied the injunction and dismissed the action at the costs of the plaintiffs. Thereupon the plaintiffs moved the court to vacate the order so made, for the reason that the only question for hearing on said date had been whether a temporary injunction should be issued, and contend that the court was without jurisdiction to hear, try or determine said action upon the merits or to dismiss the same, which motion was overruled and the plaintiffs appealed to this court.

The evidence discloses that, during the voting of bonds for the construction of said building something over 12 years ago, one of the arguments advanced was that said high school building would contain a large assembly room to be used for school and community purposes; that said building had in it a large assembly room or auditorium in size 90 feet by 65 feet which has been used upon over 1,000 nights for every sort of athletic, social, patriotic, and recreational purpose; that among the uses to which it has been put have been lectures, community gatherings, parties, institutes, Twentieth Century Club meetings, school of music, chautauquas, community choruses, minstrel shows, theatrical entertainments, and during the war for every form of patriotic advancement, including its use for several months as a barrack for the company of soldiers raised at North Platte. For each and all of these events, lights and janitor service as well as heat in the winter time were furnished by the taxpayers of the school district; that the board of education received applications from some of the parents to permit supervised dancing to keep their children from attending public dances with their miscellaneous crowds and no supervision, and that vigorous protests came in from other parents who ob-

jected to dancing in any form as a recreation and asked the board to prohibit the same; that long and careful study and discussion was given to the matter by the board during a period of several years, and at last the board decided to permit dancing under three general rules, with minor conditions, as follows:

"1st. No general policy permitting dancing in the auditorium would be allowed by the board of education. 2d. No dancing would be permitted at any function attended by all students. 3d. Dancing would be permitted for one and one-half hours under the following conditions: Written permission must be obtained from the secretary of the board of education. It must be announced in advance that there would be dancing at the party. Members of the board of education must be present. A number of the parents of the children taking part must be present. The welfare board should always be invited. There must be some program other than dancing to occupy part of the evening."

During the first year after these rules were adopted some three dances were allowed. The secretary of the board objected strenuously to the use of the word dances, and said that dancing was only a part of the program at the five parties at which it had been allowed in two years, and that she had attended all of the parties and danced at each one.

The superintendent of schools testified that at parties where dancing had been allowed the same decorum had been enforced as in homes when dancing is allowed, and that the majority of the pupils and their parents approved of such parties for the reason that the general public were never admitted.

The president of the board of education admitted the contention of the plaintiffs that parents of children of high school age were caused much worry with their children, and says: "The complaint of the plaintiffs that the permitting of these dances has caused hard feelings and turmoil in the homes of those objecting to dances seems to

this affiant to be a condition unavoidable. This affiant is well aware that there is some mental anxiety for all parents raising families in any community, but he doubts if it has been increased by any of the parties in the Franklin auditorium by reason of dancing." The president continues that there are those who object to dancing as a recreation and there are those who object to every form of amusement or exercise now recognized as regular school functions, such as swimming, football, basketball, cadet military instruction, school band, and gymnastics, and the board of education in dealing with people of every creed, belief and denomination knew of no way of handling any of these problems except by using its own best judgment, and the total hours during which dancing has been permitted under these rules has been six and one-half hours during a period of two years.

With this brief review of the evidence, we will consider the law. We are cited to the case of *Lewis v. Bateman*, 26 Utah, 434, wherein it was held that school trustees have no right to permit schoolhouses to be used for public and private dances, for the reason that trust property built from the taxes of citizens at large can not be used for private purposes. But in the case before us no leasing for private use has been attempted, but the board of education have permitted the use by the pupils under very strict regulations for parties at which dancing was a part of the program.

Our attention is also called to *Spencer v. Joint School District*, 15 Kan. 259, 22 Am. Rep. 268. In a very able opinion by Judge Brewer, afterwards a very worthy member of the United States supreme court, the court restrained school officers from leasing property for gatherings and meetings. He said that it was unncessary to pursue the discussion further, for it would be simply traveling over a road already well worn and dusty upon the power to use public funds or property for private purposes.

In the half century that has past since this opinion was written by Judge Brewer wonderful changes have been

taking place. The dusty roads of his day are now well oiled for fast flying motor cars, and in a few months patrons will gather nightly in schoolhouses to hear radio programs from far-distant cities. It is urged that our young people are vastly different in this day and should be more restrained, but we venture the opinion that the parents of today are just as different in their home life and personal habits from the parents of 50 years ago as our young people differ from those of that age.

An injunction is hardly a proper remedy to try out the policy of a school board in reference to dancing. However, each of the parties to this suit urges in his brief that this court do not dispose of this case on a technical ruling but discuss the merits of the general question.

This court is not aware of any approved regulations for the control of school dances emanating from any educational body, such as the National Educational Association, and thus each board and faculty is perplexed in the handling of this subject so as to best meet the needs of each locality. Three general plans have grown up in relation thereto: First, in some public schools it is decided that dancing will not be allowed in any way, shape or form. No class or organization within the school may use the school or a class name in advertising any dance which any group of pupils may hold, nor is any teacher allowed to chaperon or attend such dances. The burden is placed entirely upon the parents who permit their children to attend such dances. Second, another group of city public schools teach folk dancing and certain other approved forms of dancing to the girls as a part of their regular gymnasium exercises, but allow no other form of dancing in the schools. Third, in other schools dancing is permitted as a part of the regular supervised social work of the schools, but jazz music is tabooed. In such schools dancing may be allowed upon some Friday afternoons, and parents are invited and the faculty members supervise the entire event; or evening parties may occasionally be given at which school orchestras furnish the music, but the public are never permitted

to take part therein. Our public school system has been kept fairly free from popular tendencies and collateral purposes and school boards have been rightly held to the strict limitations of the statutes governing their action. However, the legislature of any state has the power to bestow upon school authorities unlimited control and discretion in the use of school property, within the constitutional limitations.

This case is fully covered by chapter 236, Laws 1915, which reads as follows: "Schoolhouses may be used for public assemblies. The board of education of every school district in which is included any incorporated city or village may in its discretion permit use of public school buildings for public assemblages under such rules and regulations as it may adopt. A majority of the qualified electors at any annual meeting in any rural school district may by resolution permit a similar use of school buildings within such district under rules and regulations which may be adopted at such annual school meeting, or in case none are adopted then under rules and regulations prescribed by the district board. The board of education may exact such rental as may be necessary to meet the expense of such meeting, restore the property, and pay for extra help required. In rural school districts such rental may be fixed by resolution adopted at the annual school meeting, but in default of such provision the district board may fix the rental." If the majority of the taxpayers of Nebraska do not approve this law, then the appeal should be made to the legislature and not to the courts.

Our attention is called in appellees' brief to a California case decided in 1918 and, which is the latest case to which our attention has been called. In this case of *McClure v. Board of Education,* 38 Cal. App. 500, an injunction was sought against the social dance, and we quote from that case as follows: "The question here is, manifestly, one of power and not of policy. * * * There is some intimation that a moral question is involved herein. Of course, the board of education should not tolerate an indecent or im-

moral use of the schoolhouse, but it cannot be said that they contemplate anything of the kind. It is clear that there is a difference of opinion among well-informed people as to the moral effect of dancing. 'There are many excellent, intelligent, and pious people who are opposed to modern social dancing as being fraught with harm to the participants and to the community.' "

In some communties there are a larger number of equally good people who dance and teach their children to dance and who crave for their young children the protection of carefully supervised school dances. Shall such a demand be met at the expense of the taxpayers of a school district? Schools have installed chemical, physical, electrical, botanical, and biological laboratories, as well as meeting the demand for manual training in carpentry and blacksmithing. Domestic science and sewing classes render efficient service in making homebuilders of our girls. Million-dollar public school buildings with great auditoriums and expensive stage apparatus have been constructed. The most complete gymnasiums with shower baths and swimming pools and highly paid men and women instructors are found in many cities. Athletic parks with amphitheaters of large seating capacity bring and accomodate the crowds which attend foot ball and other games. Yet some parents can be found who object to each and all of these things. In spite of this the public schools have constantly grown in power and influence in both city and country and have, in many instances, become the one great community center for wholesome entertainment of all. During the past year the city of North Platte has enrolled one out of every ten of its inhabitants in its night schools, where gray-haired men attended classes with children in their teens. Meeting the demands of its community is the burden placed upon school officers. One of these demands of recent years is for supervised dancing to which parents, who desire it, may send their children. This demand arose at North Platte, the board of education considered it carefully for several years and finally

decided to grant the use of the Franklin building under rules herein set out, which are not open to criticism and which meet the hearty approval of the parents of the children attending.

The action of the district court was right and it is

AFFIRMED.

SOPHIA C. M. SMITH, APPELLANT, V. CHARLES KOBER ET AL., APPELLEES.

FILED JUNE 12, 1922. No. 22029.

1. **Landlord and Tenant:** EVICTION. Evidence examined, and *held* that plaintiff's demand for possession and threat of eviction unless defendants released their rights under a void oral lease and enter into a written lease which changed the terms of the contract and was for a shorter period amounted to an eviction under the original oral lease.

2. ———: ORAL LEASE. An oral lease of land for five years, although unenforceable at law, is a sufficient consideration for work and labor performed and materials furnished by a tenant in reliance thereon.

3. ———: IMPROVEMENTS. A tenant who makes improvements on the demised premises for a consideration from the lessor may recover the value of such improvements upon the failure of the consideration.

4. ———: ———. A tenant in possession under a verbal lease who puts permanent and valuable improvements on the land under the promise of a written lease is entitled to recover the value of such improvements in the event that the landlord refuses to execute the written lease, where there has been an eviction.

5. **Statute of Frauds:** ORAL LEASE: IMPROVEMENTS. Where the labor or money of a person has been expended in the permanent improvement and enrichment of the property of another by a parol contract or agreement which cannot be enforced because, and only because, it is not in writing, the party repudiating the contract, as he may do, will not be allowed to take and hold the property thus improved and enriched, without compensation for the additional value which those improvements have conferred upon the property. This rule rests upon the broad principle that

it is against conscience that one man shall be enriched to the injury and cost of another, induced by his own act.

6. ———: ———: ———. If a lease is invalid by reason of the statute of frauds, and on the faith of its validity the lessee makes improvements of which he is denied the benefit, an equitable right of compensation for the improvements will be recognized.

7. Evidence examined, and *held* that defendants' counter-claim was valid and that it was properly proved.

APPEAL from the district court for Lincoln county: HANSON M. GRIMES, JUDGE. *Affirmed.*

J. E. Willits, for appellant.

Beeler, Crosby & Baskins, contra.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and FLANSBURG, JJ., DICKSON and STAUFFER, District Judges.

STAUFFER, District Judge.

Action for land rent under oral lease. Appellant, who will hereafter be referred to as plaintiff, alleges that she was the owner of about 1,200 acres of land in Lincoln county, Nebraska, which she leased under an oral agreement during the year 1918 to the appellees, hereafter called defendants, for a period of one year commencing March 1, 1919, and ending March 1, 1920; that the defendants agreed to pay as rent therefor $200 for the pasture land and to deliver one-third of all the crops raised upon said land in Sutherland as crop rent. She further alleges that the defendants converted to their own use her share of the corn, amounting to $826.18, and her share of the wheat, amounting to $1,040 and had failed to pay the $200 due for pasture rent, making in all a total of $2,066.18, for which sum, with interest from October 1, 1919, at 7 per cent. and costs of suit she prays judgment.

The defendants filed an answer and counterclaim. They admit they raised and sold corn of which the share of the plaintiff amounted to $676.17, and wheat of which the share of the plaintiff amounted to $910.19, and that they owe $200 for pasture rent, making a total sum of

$1,786.36. Defendants further, by way of counterclaim, allege that said oral agreement of lease was for a period of five years, and that under said agreement they were to do and perform certain improvements on the lands; that, in reliance upon a five-year oral lease, they went into possession of said premises and did perform work and labor and furnish the material necessary for improving said premises; that the plaintiff, in disregard of the oral agreement of lease for five years, proceeded to sell the said land to one Harry Wright and delivered possession thereof to said Wright March 1, 1920, making no reservation in her deed to him of the improvements placed on the land by the defendants, and that said Harry Wright now claims all of said improvements placed thereon; that said defendants, in compliance with their oral agreement of lease, repaired the fences and houses, built a barn and outbuildings upon the premises and repaired other buildings, and performed work and labor in connection therewith of the reasonable value of $1,060; that said defendants furnished material used in said repairs and paid for same the sum of $156.50, and further placed upon said premises, aside from the improvements above designated, new fences, furnishing the labor and material therefor, which labor and materials were of the reasonable value of $250; that, by reason of the wrongful termination of said lease by plaintiff and for the failure to reserve said improvements for the defendants, said defendants are entitled to receive from the plaintiff the sum of $1,466.50, which should be allowed as a credit upon the rent which they admit owing to the plaintiff; that after allowing the said credit there is a balance due and owing to plaintiff of $319.86, which sum the defendants tender into court for the use and benefit of the plaintiff.

The plaintiff filed a motion to strike all of the counterclaim of the defendants, for the reason that the same is irrelevant, redundant and not constituting any defense to the action of the plaintiff, which motion was overruled by the trial court. Thereupon plaintiff, for reply to the an

swer and counterclaim of defendants, alleges that the same does not constitute a defense to the cause of action of plaintiff; that said oral agreement for five years was not made, but, if made, it would be void and within the statute of frauds except for the period of one year; that there was an agreement that defendants would do the work and plaintiff was to pay and has paid for posts and wire necessary to inclose 160 acres; that the work and labor, if any, performed by defendants was voluntary and for which the plaintiff never agreed to pay in any manner; that said defendants occupied said premises for 1918 and the material was furnished and paid for during that year by the plaintiff; that on July 21, 1919, plaintiff and defendants entered into a written lease for a term of 12 months beginning March 1, 1920, and ending on March 1, 1921, whereby defendants agreed to pay for the use of said premises $300 for pasture land and one-third of all crops raised, to be delivered to market free of charge; that said written lease definitely fixed the length of term of said oral lease as ending March 1, 1920; that the sale of said premises while the defendants were in possession thereof could not in any manner affect the legal rights of defendants. Plaintiff renews the prayer of her petition.

The case was tried to a jury, verdict returned and judgment entered thereon in favor of plaintiff and against the defendants in the sum of $419.86, interest $38.67, total $458.53, from which judgment the plaintiff has prosecuted this appeal.

The defendants in this case are both family men. In the summer and early fall of 1917 the defendants, pursuant to their oral lease, went out from Adams county to the land of plaintiff in Lincoln county and sowed wheat thereon. They moved to the land with their families in March, 1918. There were two sets of very meager improvements upon the land. The houses were almost uninhabitable. There were no arrangements for sheltering stock. The fences were in so dilapidated a condition that defendants were obliged to herd their cattle whenever they turned

them out to graze. The condition of the premises was known to the defendants prior to their entering into the oral lease. They needed better living quarters, shelter for their stock and fences around the pastures. They agreed to make the improvements, plaintiff buying the material therefor. They insisted, however, on a written lease for five years. They did not propose to improve the place and have their tenancy for any less term. Plaintiff refused to give defendants a written lease, on account of the condition of the title. Defendants claim that plaintiff leased the land to them for five years. Plaintiff insists that she did not give them a lease for more than one year, although she testified that defendants stated they wanted the place for five years, and that "I told them if we agreed they could stay as long as they wanted." The defendants greatly enhanced the value of the improvements upon the land. They hauled 26 loads of material 10 miles. They brought some material with them from Adams county. They worked many weeks in putting the place in good condition. The plaintiff contends that defendants were to do this work and labor gratis. Defendants maintain that they exerted themselves thus for the sole reason that they were to remain on the land a period of five years under their oral agreement with the plaintiff. The defendants settled with the plaintiff for the improvements made during the year 1918 by taking them out of the rent. Labor, however, was not mentioned nor settled for. The material for the 1919 improvements, consisting of hog fencing, chicken house, garage and cattle sheds were paid for entirely by the defendants. The plaintiff paid nothing for the material used for these later improvements, nor anything for the labor of defendants.

July 21, 1919, plaintiff insisted upon the defendants signing a written lease. At that time her place had been improved by the labors, and partly at the expense, of defendants. The defendants signed the written lease for one year upon threat of actual dispossession on March 1, 1920, if they did not sign. They signed the lease only after

having been advised by counsel that they could not hold the premises under the oral lease as the same was void under the statute of frauds. Their testimony is to the effect that they stated at the time they signed the lease that they would look to plaintiff for payment for the improvements. There can be no question but that the defendants were evicted. As soon as the plaintiff had canceled the five-year oral agreement under threat of immediate dispossession and had secured the execution of the written lease by the defendants, she sold the land to Mr. Wright by deed, in which no reservations were made as to the improvements placed by the defendants upon the premises. By the execution of this deed she took possession of the fruits of the labors expended and materials furnished by the defendants in improving her land, in reliance upon the five-year term, and placed them beyond the reach of defendants. She enjoys the benefits thereof, having received a greatly enhanced purchase price for the land.

It is to be noted that the defendants did not voluntarily release their rights under their oral lease and enter into the subsequent written lease. They contend that the demand for possession and the threat of eviction, unless they released their rights under the void oral lease, and enter into a written lease, changing the terms of the contract, and for a shorter period, amounts not only to an eviction under the original oral lease, but that it shows conclusively that possession was not voluntarily given up under the oral lease. We find that the record bears out the defendants in this particular.

The defendants do not claim that the oral lease for five years was a valid agreement which was enforceable at law. They do contend, however, that such an agreement was a sufficient consideration for the work and labor performed and materials furnished by them in reliance thereon. The following authorities indicate that defendants' position thereon is well taken:

"The tenant, however, who makes improvements on the

demised premises upon a consideration from the lessor may recover the value of such improvements upon the failure of the consideration." 24 Cyc. 1105, citing *Yates v. Bachley,* 33 Wis. 185, where the following legal principle is laid down: "A tenant in possession under a verbal lease, who puts permanent and valuable improvements on the land under a promise of a written lease, is not entitled to recover the value of such improvements merely because the landlord refuses to execute the written lease, where there has been no eviction."

We take it that the negative of the above proposition would be that, in the event that there has been an eviction, the tenant would be entitled to recover for the value of the permanent improvements which he has placed upon the land during his occupancy under an oral lease, where the landlord fails to execute a written lease under an oral agreement to do so and evicts the tenant. In the case at bar there has been an eviction. Hence, the above rule would apply.

Ballard v. Boyette, 171 N. Car. 24, lays down the following principle: "Where the owner of land makes a parol contract to sell it, he cannot repudiate the agreement and retain benefits received, whether money on the purchase price or the enhanced value of the land by reason of improvements."

Allen, J., in writing the opinion in that case quotes the rule from *Pitt v. Moore,* 99 N. Car. 85, 90, and used the following language: "Whatever may have been the ancient rule, it is now well settled by many decisions, from *Baker v. Carson,* 21 N. Car. 381, in which there was a divided court, but Ruffin, C. J., and Gaston, J., concurring, and *Albea v. Griffin,* 22 N. Car. 9, by a unanimous court, to *Hedgepeth v. Rose,* 95 N. Car. 41, that where the labor or money of a person has been expended in the permanent improvement and enrichment of the property of another, by a parol contract or agreement which cannot be enforced because, and only because, it is not in writing, the party repudiating the contract, as he may do, will not be allowed

to take and hold the property thus improved and enriched, 'without compensation for the additional value which these improvements have conferred upon the property,' and it rests upon the broad principle that it is against conscience that one man shall be enriched to the injury and cost of another, induced by his own act."

Ferrell v. Ormand Mining Co., 176 N. Car. 475, lays down the following principle: "The lessor may terminate a parol lease of land to 'continue so long as the lessee may pay the agreed rent,' * * * but a further agreement to allow the lessee to remove improvements he has placed thereon, or compensate him therefor, is not an interest in lands coming within the meaning of the statute of frauds, and upon the lessor's terminating the agreement he must compensate the lessor therefor to the extent the improvements have enhanced the value of the land, both under the terms of the parol agreement and under the equitable principle that, having acquiesced in and received the benefit of the agreement, he must pay therefor."

In the above case the plaintiffs claimed to have leased from the defendant the land in question under an oral agreement. The plaintiffs were to hold it during the life of one of plaintiffs, and the tenant was to clear the land, erect buildings and improve the land by cultivating the same and planting fruit trees, and in consideration of such work and improvements the defendant agreed that the plaintiffs should remain on the land so long as they might wish, paying the usual rent for said premises from year to year, and that the defendant would permit plaintiffs to remove all the buildings from said land and other improvements placed thereon by the plaintiffs if they should desire to leave, or pay for said improvements whatever they were reasonably worth.

Clark, C. J., discussing the rights of the tenants to recover for improvements, said: "This right arises, not only upon the terms of the contract or lease, but upon the equitable principle that, having acquiesced in the occupation of the premises by the plaintiffs, and having accepted

the benefit of such improvements, while the defendant could terminate the lease, the defendant must compensate the plaintiffs for the benefits put upon the land by their labor in reliance upon the verbal agreement, which the jury have found to be as stated by the plaintiffs."

Judge Clark also refers to the broad equitable principle that allows a recovery for benefits which the tenant has placed upon the land with the knowledge of the landlord.

This equitable principle is well stated in 6 R. C. L. 936, sec. 319, as follows: "The very idea of rescinding a contract implies that what has been parted with shall be restored on both sides. That one party should be released from his part of the agreement, and that he should be excused from making the other party whole, does not seem agreeable to reason or justice. Hence, the general rule is that a party who rescinds an agreement must place the opposite party in *statu quo*"—citing several cases.

In 16 R. C. L. 794, sec. 290, we find the following principle laid down: "In the absence of any agreement between the parties there is no obligation on the part of the lessor to pay the lessee for improvements erected by the latter upon the demised premises, though the improvements are such that by reason of their annexation to the freehold they become a part of the realty and cannot be removed by the lessee. On the other hand, if the lease is invalid by reason of the statute of frauds and on the faith of its validity the lessee makes improvements of which he is denied the benefit, an equitable right to compensation for the improvements has been recognized. So it has been held that where a son, in possession of his father's land as a tenant from year to year, makes improvements upon the land in pursuance of the father's oral promise that the land shall be his upon the father's death, he is entitled to recover the reasonable value of the improvements made, on the death of his father without fulfilling his promise; this is in pursuance of the rule that where a party to an agreement, void by the statute of frauds, fails to execute

it, the price advanced, or the value of articles delivered in part performance of the contract, whether in money, labor, or chattels, may be recovered back, as in such cases the law raises, by implication, a promise to pay advances made upon the faith of the contract, and for which no consideration has been paid"—citing *Smith v. Admrs. of Smith*, 28 N. J. Law, 208, 78 Am. Dec. 49.

The main issue presented in the instant case was whether or not the parties entered into an oral lease for five years. The jury so found. The record seems conclusive in favor of defendants thereon. With this circumstance resolved in favor of the defendants, we find no error in the record nor in the instructions of the court. Defendants' theory of the case was adopted by the trial court and was correct. The plaintiff in the trial court accepted the defendants' figures as to rentals due. She failed to introduce any evidence contradicting the testimony of defendants as to the value of work and labor performed and materials furnished, the fruits of which have all been accepted by the plaintiff and profited in by her. The plaintiff, without any provocation or warrant therefor, although acting within her bare legal rights, having canceled the oral lease and evicted the defendants and having sold and delivered possession of the premises to a third party, making no reservation in the deed of conveyance as to improvements placed upon the premises by the defendants so that they might in small measure recover their losses, and thus enjoying the full benefits therefrom herself, is required to reimburse the defendants therefor. Defendants had a valid counterclaim and it was properly proved.

The judgment of the court upon the findings as returned by the jury is

AFFIRMED.

SENNA THOMPSON, APPELLANT, V. CATHRINE M. JOST ET AL., APPELLEES.

FILED JUNE 12, 1922. No. 22041.

1. **Sales:** RESCISSION. Evidence examined, and *held* that, fraud having been established and plaintiff being guilty of no laches, is entitled to a rescission of the contract and the return of the purchase money paid thereunder.

2. ———: CONTRACT. The general rule is that, in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in course of the same transaction, are, in the eye of the law, one instrument, and will be read and construed together as if they were as much one in form as they are in substance.

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

T. F. A. Williams, E. B. Chappell and *Homer L. Kyle,* for appellant.

Wilmer B. Comstock, contra.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and FLANSBURG, JJ., DICKSON and STAUFFER, District Judges.

STAUFFER, District Judge.

Action in equity by Senna Thompson against Cathrine M. Jost and George A. Jost for rescission of transaction in which the plaintiff leased certain real estate and purchased certain furniture from defendants. Plaintiff asked for the cancelation and annulling of the lease and bill of sale given in pursuance of said transaction and for the recovery of $1,264.30 paid by her to defendants under said contract. The district court found for the defendants and against the plaintiff on all the issues, and ordered that the plaintiff take nothing by her writ and that the defendants go hence without day. The plaintiff thereupon filed motion for a new trial, which the court overruled.

Defendants are wife and husband. They inserted the

following advertisement in the March 28, 1920, issue of the Lincoln Daily Star. "For sale or rent—sixteen-room house suitable for hospital, rooming-house, sorority or frat house; two baths, sleeping porch, hot water heat, garage; also furniture for sale. Address 1725 Q. B1959. Mrs. G. Jost."

The plaintiff, who had experience in conducting rooming houses in Lincoln, saw the above advertisement. She called at the home of the defendants and made a casual examination of the premises and the personal property therein offered for sale by the defendants. A period of negotiations ensued, which finally culminated in the leasing of the premises by the plaintiff and the purchase of certain of the rooming-house equipment by the plaintiff under a bill of sale. Defendants then began to pack up. They were getting ready to move to Omaha. By mutual agreement they remained in the premises until April 15, 1920. During the delay in their removal the plaintiff visited the premises on several occasions and perhaps made the beds in a few rooms. Plaintiff moved in as the defendants were moving out.

April 15 was a day of discoveries for the plaintiff. The rooms were not equipped as defendants had assured plaintiff they were. The mattresses were inferior. Some beds had dirty ticks on them. The curtains were full of holes and the rugs were worn and dusty. The comforts were ragged and faded. The blankets were thin and worn and showed that they had been washed many times. In one room the mattress had been removed and an old torn tick put in its place. In room No. 1 the mattresses and curtains had been changed and old ones substituted. In one room an old pair of springs broken down in the center had been put into the bed and a dirty pillow stuffed into the hole to make it smooth. The carpets were worn and full of holes which had been covered up by throw rugs. They were moth eaten in places. Part of the draperies had been removed and those remaining were old and full of holes.

These discoveries caused plaintiff to telegraph the defendants at Omaha rescinding the entire transaction. She later wrote the defendants that she had rescinded the contract and that the personal property was in the premises at their risk. Thereupon the defendants took possession of the personal property and rented the house to one Mrs. Fitzgerald. Mrs. Fitzgerald insisted on an inventory being made of the rooming-house furnishings prior to her taking possession of them. This inventory was prepared by two of the roomers and is identified as exhibit 22. We will have occasion to refer to this inventory later.

Plaintiff claims that the furnishings left in the house by the defendants were not the furnishings that she purchased from the defendants on April 2, 1920. She claims that the defendants removed from the rooming-house the greater part of the furniture, fixtures, carpets, rugs, curtains, draperies, mattresses, quilts, ticks, and other bedding, bed-springs, towels, rocking chairs, and other furniture, leather settee cover, and other articles purchased of them by the plaintiff and passing to the plaintiff under the purchase, and had shipped them to Omaha, and substituted therefor other articles that were old and worn-out, shabby, dirty, unsanitary, useless, and of far less value than the articles purchased of defendants by the plaintiff.

We have read the record with painstaking care and can arrive at no other conclusion than that the defendants did not deliver to the plaintiff the precise rooming-house equipment that she purchased from them. We believe that other articles were substituted for the ones purchased by the plaintiff.

We have here a plaintiff who was experienced in the operation of rooming-houses. On her first visit to the home of the defendants she made a casual examination of the bed and bedding in room No. 1. Mrs. Jost told her that the blankets throughout all of the rooms were new, had never been washed, and had cost $6 a pair. She was further informed that the bedding, carpets and draperies in all of the

other bedrooms were equally as good as the equipment in room No. 1. Plaintiff relied on the assurance of the defendants in this respect and was thereby prevented from making a more extensive examination of the bedding, carpets and draperies in the other rooms.

It can hardly be said that she did not know what she was bargaining for. We are reinforced in our belief that the property was "switched" on account of the notations made on exhibit 22, the invoice heretofore referred to as having been prepared by two of the roomers for Mrs. Fitzgerald when she first moved in the premises. The notations on this exhibit are very illuminating as regards the condition of the property in the various rooms. The furniture in room No. 1 was referred to as "second-hand and badly worn;" that in No. 2 as "more or less damaged;" that in No. 3, No. 5, and No. 6 as "all more or less worn;" that in No. 4 as "all more or less bad order." With reference to room No. 7 the notation is, "mattresses all gone to pieces." The reference to the furniture downstairs closes with the note, "carpets all more or less worn and worthless." This invoice made by disinterested parties for the express purpose of showing the amount and condition of the property, and offered at the trial by the defendants themselves, is strong evidence that the plaintiff paid too much and was badly defrauded when she paid $1,250 for the furniture.

The record also shows that, in order to enthuse plaintiff over the prospect, the defendants now and then teleponed to her referring to this or that person, but never giving names or addresses, who had just called or telephoned with respect to renting certain portions of the house at high figures.

In further support of the plaintiff's claim that she did not receive the property she purchased, we have the testimony of certain men who were roomers of the defendants. This evidence is either in the form of direct testimony of the witnesses or in the form of a stipulation as to what

their testimony would be had they been present during the trial and testified. One of the gentlemen, a Mr. Beeman, testified that after the defendants had moved from the house the mattress left in the room of another gentleman, by the name of Mr. Nesslar, had a big hole in the center of it with a pillow stuffed therein. He also testified that the house was very short of towels and linen after the removal of the defendants, and that the roomers were compelled to purchase or borrow linen. The carpets were also badly worn and full of holes, which defects therein had been concealed by throw rugs.

The stipulation as to the testimony of the roomers Bishop and Ostrand is also very illuminating. Bishop's testimony would have been to the effect, as per stipulation, that the mattress in his room and on his bed prior to April 2, 1920, and for sometime thereafter, was a good, comfortable mattress, but that when he returned from a trip about April 15 he found, in lieu of the mattress that he had been formerly using, two dirty, old, unsanitary ticks. He refused to use the bed in that condition and he went elsewhere to sleep that night. The statement relative to the testimony of Ostrand is to the effect that draperies were removed when the defendants moved away, and that prior to their moving the equipment in room No. 1 was good.

The defendants insist most emphatically that they acted in good faith throughout the entire transaction. They are positive in their denial that the furniture and furnishings delivered to the plaintiff were not the identical ones purchased by her from them. But, as heretofore indicated, we can arrive at no other conclusion than that the plaintiff did not receive from the defendants the exact furniture that she had contracted for. The fraud of the defendants seems conclusively established.

There were other misrepresentations as to increased rents which defendants assured plaintiff the roomers were willing to pay upon a change of landladies. Defendants also misrepresented the expense of heating and lighting the

premises. They also misrepresented the value of the property. Thy told plaintiff that an experienced furniture man had examined the furniture and had declared that the property upstairs was alone worth $1,000. This was untrue.

Immediately upon discovering the situation, the plaintiff rescinded, and the defendants have accepted rescission in so far as the lease of the real estate goes. They, however, refuse to rescind with reference to the bill of sale. There is no dispute as to the value of the leasehold. In fact, it seems established that it was worth every cent that plaintiff paid for it, perhaps more. The defendants are therefore in the position of one who rescinds that portion of a transaction which is the most favorable to them. This they cannot do. The lease, bill of sale and assignment of fire insurance policies was one transaction. The defendants, having accepted rescission of a portion of it, are not permitted to refuse rescission as to the remainder.

The plaintiff has been guilty of no laches or lack of diligence in rescinding the contract after discovering the fraud, such as would estop her to demand rescission. The right to rescind on the ground of fraud must be exercised within a reasonable time after the discovery of the ground therefor. *Arnold v. Dowd,* 85 Neb. 108. What is a reasonable time depends on the peculiar circumstances of each case and is a mixed question of law and fact. *Meyer v. Fishburn,* 65 Neb. 626; 13 C. J. 616, sec. 671. It would be difficult to find a case where notification of rescission followed more promptly on the heels of the discovery of the fraud than in the instant case.

The lease and the bill of sale, together with the insurance policy and all other papers and dealings in connection therewith, are one transaction and constitute one contract, which is an entire, but not a severable, contract. The household goods were advertised for sale in the same advertisement with the offer to rent the house. Three of the plaintiff's preliminary offers were for the renting of the

house and the purchasing of the furniture. The negotiations ran along side by side. The papers were signed on the same day, at the same time, and before the same witnesses and the same notary. Items were transferred from the lease to the bill of sale, and *vice versa,* up to the last moment of the negotiations. Plaintiff regarded the whole deal as one contract. There is no dispute in the record about the value of the leasehold. If she had felt that the contract was severable, she might have held her lease, which was worth every cent of the consideration, and rescinded as to the bill of sale only, but she regarded the leasing of the premises and the purchase of the furniture as interdependent parts of the same transaction, in pursuance of her plan to operate a rooming-house. She testified specifically that she would not have taken either the lease or the bill of sale if she had not believed that the property was as represented by the parties. The lease recited that the premises were to be used as a rooming-house. That was the precise purpose for which the goods were bought. The defendants sold them to the plaintiff on that theory. Their representations to the plaintiff were based entirely on the advantages of that particular house and the particular furniture for rooming-house purposes.

"As a general rule, where two written instruments relate to the same subject-matter, one signed as a condition to the signing of the other, and both signed at about the same time, they will be construed together as constituting a single writing." *Nebraska Hardware Co. v. Humphrey Hardware Co.,* 81 Neb. 693.

"Several contemporaneous agreements between the same parties as to the same subject-matter will be construed as a whole constituting one contract." *Cutler v. Spens,* 158 N. W. 224 (191 Mich. 603).

"Where different instruments are executed at the same time, but are all parts of the one transaction, it is the duty of the court to suppose such a priority in the execution of them as shall best effect the intention of the parties. More-

over, the general rule is that, in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in course of the same transaction, are, in the eye of the law, one instrument, and will be read and construed together as if they were as much one in form as they are in substance." 6 R. C. L. 850, sec. 240. See, also, 13 C. J. 528, sec. 487.

The defendants elected and did accept rescission of the part of the contract favorable to themselves, and surrendered and abandoned all of their rights thereunder by their acts and conduct, after the plaintiff had rescinded and tendered back all of the property to them. When plaintiff left the house, the keys were left with one of the roomers, who turned them over to another roomer, who in turn took charge of the property at the request of defendants. He continued in charge until August 1. During July, 1920, the defendants leased the property to Mrs. Fitzgerald for one year, and on August 1, 1920, she took possession under this lease. By releasing the premises the defendants have consented to the rescission in so far as the lease is concerned. *Herpolsheimer v. Christopher,* 76 Neb. 352; *McKenna v. McKenna,* 118 Ill. App. 240.

The defendants, in accepting the rescission of the lease, bound themselves to rescind the whole contract. The rescission of the lease was favorable to the defendants, rather than to the plaintiff. Defendants' own witnesses testify that the reasonable rental value of the property was $125 a month, while the lease required plaintiff to pay only $120 a month rent.

"A contract cannot be rescinded in part and a part remain executed. If rescinded at all, it must be *in toto,* and the parties thereto placed *in statu quo* so far as the circumstances will permit." *Alfree Mfg. Co. v. Grape,* 59 Neb. 777. See, also, *Baker v. Thomas,* 102 Neb. 401; *Beer v. Wisner,* 74 Neb. 437; *Collison v. Ream,* 95 Neb. 29; *Baum Iron Co. v. Burg,* 47 Neb. 21.

Plaintiff purchased the property and leased the building for the purpose of going into the rooming-house business. On the strength of defendants' representations to her and a casual investigation, she paid $1,250 for the furniture, only to find when she took possession that it was totally unfit for the purpose for which she had bought it. Her testimony is corroborated by other witnesses and is contradicted only by the defendants themselves. As against the overpowering evidence of fraud in the record, stands only the categorical denial of these two parties.

The decree of the district court is reversed and the cause is remanded, with direction to enter a decree for the plaintiff granting her the relief prayed for in her petition.

REVERSED.

EDWARD F. ROBERTSON, APPELLEE, V. R. F. WALKER, APPELLANT.

FILED JUNE 12, 1922. No. 21964.

Evidence examined, and *held* to support the judgment.

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

W. H. Miller and *E. G. Caldwell,* for appellant.

A. H. Byrum and *H. W. Short, contra.*

Heard before LETTON, DEAN and DAY, JJ., BLACKLEDGE and TEWELL, District Judges.

TEWELL, District Judge.

This was an action in replevin, in which no bond was furnished by plaintiff and the property replevied was returned to the defendant and the action proceeded as one for damages.

On or about April 9, 1919, the jury in the case of Raymond Scott, a minor, by his father and next friend, against Porter R. Robertson, returned a verdict for $350 against

the defendant therein, on account of damages received by said minor on account of being struck by an automobile owned and driven by said Porter R. Robertson. On April 29, 1919, a judgment was rendered on this verdict. About April 18, 1919, Porter R. Robertson, who owned a Ford automobile, transferred it to the plaintiff, for what the plaintiff testified was a consideration of $300. On April 23, 1919, the plaintiff traded this Ford car for one Reo automobile and gave $100 in cash and a mortgage thereon for $200 in addition as a part of the purchase price. Afterwards plaintiff paid the amount of the mortgage of $200 on the Reo car. An execution was issued on the judgment above mentioned and this execution was levied on said Reo automobile about July 17, 1919, at a time when it was in the garage at the home of said Porter R. Robertson. The defendant in this action is the sheriff who levied said execution. The plaintiff in this action is a son of said Porter R. Robertson, defendant in said personal injury action. The plaintiff in this action without doubt knew that the verdict of $350 had been returned against his father in the personal injury action at the time he testified he purchased the Ford car from his father. The evidence of the defendant shows the entrance of the judgment in the personal injury action and issuance of the execution therein and the subsequent levy thereof on said Reo automobile, and also shows that the said Porter R. Robertson and his son, Edward F. Robertson, plaintiff in this action, prior to the trial of the personal injury action had stated they would "fix things" so that any judgment that might be obtained in the personal injury action would not be satisfied for want of property of said Porter R. Robertson. Aside from a meager amount of evidence on the two points above mentioned, the evidence of the defendant is confined almost exclusively to the value of the car replevied, which for lack of bond was never turned over to the plaintiff herein. There is no evidence whatsoever as to whether or not Porter R. Robertson has other property from which such judgment could be satisfied.

The testimony of the plaintiff to the effect that he paid his father $300 for the Ford car, and that he subsequently traded it for the Reo car in controversy, and paid a difference of $300 by paying $100 in cash and by executing a mortgage on the Reo car for $200 and afterwards paying the debt secured by this mortgage is undenied. The paying of this difference is corroborated by the testimony of the purchaser of the Ford car. Also the testimony of the plaintiff that subsequent to the trade he was at all times in possession of the Reo car and merely kept it at the garage of his father is undenied, except by the circumstances of the relationship of the plaintiff to the judgment debtor, and the keeping of the car in the garage of and the absence of the plaintiff from the home of the judgment debtor.

As we view the case, the instructions were in conformity to the law as declared in section 2643, Rev. St. 1913. Had there been an issue of fact upon the question of whether or not a change of possession of the car took place after the sale to the plaintiff, then the case should also have been submitted with an instruction declaring the law as stated in section 2633, Rev. St. 1913. But under the state of this record no such question of fact was involved. Under the state of the record a levy of the execution and a subsequent action in equity to clear the title to the Reo car and have it declared the property of the judgment debtor, or an answer in this replevin action for such purpose, it seems would have given the court a chance at least to have prevented what may have been a fraud.

The judgment of the district court is

AFFIRMED.

GLADYS EVELYN MORAN, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED JUNE 12, 1922. No. 22024.

1. **Street Railways:** PLACE OF ACCIDENT: QUESTION FOR JURY. Where there is testimony of persons claiming to be eye-witnesses of an

accident, who testify that the accident happened at a certain point in a city street, and it is claimed that the undisputed physical facts established that the accident happened 100 feet or more distant from the place testified to by these eye-witnesses, such physical facts being marks on the pavement of the street as if made by the dragging of the body of a person struck by a street car in such accident, such physical fact is not sufficient to take from the jury the determination of the point at which the body was struck, there being no testimony that the pavement was in such condition that it would be marked by the dragging of a body thereon from the point where the eye-witnesses testify that the dragging of the body commenced.

2. ———: ACCIDENT: GIVING OF SIGNALS: QUESTION FOR JURY. Where the circumstances testified to by a witness, who says she did not hear a signal sounded, are such, in connection with other evidence in the case, as to show that the witness in all reasonable probability would have heard the signal had it been given, and the witness recollects that she did not hear the signal and so testifies, the sounding of the signal is thereby made a question for the jury, notwithstanding there is positive and direct affirmative evidence that the signal was sounded.

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

John L. Webster, for appellant.

John O. Yeiser and *Carl T. Self, contra.*

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

WELCH, District Judge.

Plaintiff, a child five years of age, brought this action, by her father as next friend, to recover damages for personal injuries received by her by reason of being struck by a street car of defendant on September 11, 1919.

Plaintiff alleges that defendant was negligent in the operation of said street car, as it was proceeding south on Thirty-second avenue in the city of Omaha; that, as it approached Frederick street, plaintiff and two other children of the same age were crossing said Thirty-second avenue at about its intersection with Frederick street, and were

in a position where they could be seen by the motorman operating said street car for a distance of more than 200 feet; that said motorman carelessly and negligently, without giving a timely warning, continued the course of said car without slackening the speed and without considering the apparent danger of said children on account of their age and situation, and carelessly and negligently neglected to bring said car under control and stop said car, he having sufficient warning, time and opportunity so to do; that because of said situation the plaintiff became dazed and excited and unable to get out of the path of said street car, which ran into plaintiff, catching her upon the fender of said car, dragging her about 100 feet, breaking several bones of her body, and injuring her skull and face. The jury returned a verdict for plaintiff for $8,500. From judgment rendered thereon, defendant appealed.

The accident happened near 1 o'clock p. m. as the child was on her way to school. Witnesses for plaintiff who saw the accident testified that plaintiff with two other children passed them on the east side of Thirty-second avenue just south of Frederick street, going north. These witnesses were waiting there for a north-bound street car. They testified that the children crossed Frederick street to the north side thereof, then stepped off the curb on the east side of Thirty-second avenue and proceeded on a slow run in a northwesterly direction across Thirty-second avenue without stopping as they approached the street car track, the plaintiff being slightly ahead of the other two children; that, on reaching the south-bound track of defendant, plaintiff was struck by the left corner of the fender of defendant's street car, thrown upon the cushion of the fender, carried a short distance, then fell to the ground between the rails of the south-bound track and was dragged to a point south of the south line of Frederick street; that just as plaintiff was struck one of the other children pulled the other child back and they escaped injury. There were no vehicles or objects in the street which would obstruct the

view of the motorman operating said car or prevent him from seeing said children as they proceeded from the east side of Thirty-second avenue across the same.

The motorman operating said car testified that when he was at a point north of Frederick street about opposite the north side of a building on the west side of Thirty-second avenue, which the evidence shows to extend from Frederick street north about 85 feet, he saw the children standing on the east side of Thirty-second avenue south of Frederick street near the car-stop sign, as if waiting to take a street car; that the children then proceeded northwesterly across Thirty-second avenue on a slow run; that he sounded his gong; that the children stopped on the north-bound track, and just as he was about to pass them they started forward, and he immediately sounded his gong, put on the brakes of the car, and that he struck the plaintiff south of Frederick street, not north of it. The aforesaid witnesses on the part of the plaintiff were standing at said car-stop sign, and their testimony contradicts this testimony of the motorman as to the children standing near the car-stop sign, contradicts it as to the children stopping when they reached the north-bound track, and contradicts it as to the plaintiff being struck by the street car when she was on the south side of Frederick street.

It is undisputed that the car stopped at a point 40 to 65 feet south of the south line of Frederick street, and that plaintiff was then lying under the car caught in such a manner that it was necessary to raise the car to get her out. If plaintiff was struck north of Frederick street the car would have to run at least 100 feet before it stopped. One witness for plaintiff testified that it was 140 feet from the place where she was struck to where the car stopped. Evidence introduced by the defendant showed that there were indications of dragging the body of plaintiff on the pavement for 20 feet only before the car stopped. Whether or not plaintiff was struck north of Frederick street or south of it is material in determining the distance the car

ran after hitting plaintiff. This distance is material to aid in determining the speed at which the car was running, and whether or not the motorman negligently neglected to bring the car under control and stop it.

The questions whether the plaintiff was struck north of Frederick street or south of it, whether the plaintiff and the other children were standing south of that street as if waiting for a street car, and whether they stopped in the street as they reached the north-bound track, were, under the foregoing evidence, questions for the jury. The court instructed the jury by its instruction No. 7 as follows:

"If you believe from the evidence that the plaintiff and the two other children were standing on the north-bound track and out of danger, and were apparently watching the approaching car, then and in that event the motorman in charge of the car had a right to assume that the plaintiff would not suddenly start toward the track and go upon the track, unless you find there was something in the actions or movements of the plaintiff to reasonably indicate to the motorman the contrary."

The aforesaid testimony of witnesses for plaintiff was evidence of acts and movements of plaintiff which tended to show that she was not standing on the north-bound track apparently watching the approaching car, and also evidence of actions and movements which might reasonably indicate to the motorman that plaintiff might attempt to cross the track in front of his car. There is evidence that the car was going about ten miles an hour. The motorman says that he observed the children approaching the track. If the above mentioned testimony of witnesses for plaintiff is true, he should have observed them approaching, and, if they were apparently unmindful of danger, govern himself accordingly and act with reasonable promptness to avoid injury to the children. It was his duty to look out for children in dangerous proximity to the track and to use ordinary care to avoid injurying them, and stop the car, if possible, upon its appearing necessary to avoid strik-

ing a child approaching apparently oblivious to the presence of the car. Whether the plaintiff saw the approaching car or was oblivious to it and the danger was a question for the jury.

By the verdict of the jury it is apparent that the jury found that the children were running diagonally across the street and did not stop on the north-bound track and watch the approaching street car. It was for the jury to determine whether under such condition and movements of the children the motorman should have observed that there was danger of the children attempting to cross his track ahead of his car, and that there was danger in so doing. If he should have observed such danger of the children in time, he should have had his car under such control that he could stop it in time to avoid the accident. Whether the car traveled, after hitting plaintiff, only 20 or 30 feet south of Frederick street, as claimed by the defendant, or traveled from the north side of Frederick street and for a distance of from 100 to 140 feet after hitting plaintiff, was a question for the jury. The verdict being for plaintiff, the jury must have found that the car was not under control, and that it traveled after hitting plaintiff more than 30 feet. In fact, the jury must have found that plaintiff was struck north of Frederick street. Defendant contends that such finding would be contrary to the undisputed physical facts, such physical facts being the marks on the pavement of the dragging of the body of plaintiff for twenty feet, such marks being in the sand lying on the pavement. We do not understand that such physical facts conclusively establish that plaintiff was struck south of Frederick street, nor that she was struck at a point more than ten feet from where the marks commenced. The testimony of the eye-witnesses on the part of the plaintiff is that she was struck north of Frederick street, and carried or thrown a short distance after being struck before she fell to the pavement. After she fell to the pavement she may have been rolled along before she

was caught in such a manner as to drag her body and mark the pavement so as to show such dragging. She may have been dragged along where there was no sand on the pavement. There was, therefore, sufficient evidence to sustain the finding of the jury that plaintiff was struck north of Frederick street, that the car after striking her ran for 100 feet or more before stopping, that the car was not under control when it struck plaintiff, or, if under control, that the motorman had not observed the plaintiff, or, if he did observe her, that he did not attempt to stop the car as soon as he should to avoid injuring plaintiff, or that he was negligent in not observing the apparent danger of plaintiff in time to have stopped the car.

Appellant's assignment of error that the court erred in refusing to give instruction No. 2, requested by defendant, which instruction told the jury that there was no evidence of excessive speed of the street car, is covered by the foregoing conclusion that the jury could consider the distance the car traveled after striking plaintiff in determining the speed of the car and determining whether or not such speed was excessive under the circumstances and conditions as the car approached said children. The foregoing conclusions also cover the assignment of error by appellant that the court erred in refusing to give defendant's requested instruction No. 3. By this instruction appellant requested that the jury be instructed that the last clear chance doctrine was not in the case. Appellant bases its claim for this requested instruction upon its assumption that the undisputed physical facts showed that the car which struck plaintiff did not run more than 30 feet after hitting her.

Appellant also contends that the court erred in refusing to give instruction No. 9, requested by defendant. By this instruction defendant requested that the jury be instructed that plaintiff had not alleged negligence in not dropping the fender. The general allegation that defendant was negligent in the operation of said street car would include failure to drop the fender. If this general allegation was not sufficiently definite, defendant might by motion there-

for have required plaintiff to make it more definite by setting forth the manner in which defendant was negligent in the operation of its said car. The court did instruct the jury by instruction No. 9 as follows:

"You are instructed that if a sudden emergency was presented to the motorman, by reason of the action of the plaintiff in running toward the car track, and if on that account he was suddenly confronted with the choice of ringing the gong or dropping the fender, and had no time before striking the plaintiff to do both, then and in that event he cannot be found negligent by reason of his choice in ringing the gong rather than attempting to drop the fender."

We find no error in the refusal of the court to give defendant's requested instruction No. 9.

Assignment of error No. 6 charges error of the court in refusing to give defendant's requested instruction No. 5, which was as follows:

"You are instructed that the evidence in this case is insufficient to authorize or sustain a finding that the gong on the car in question was not sounded at and prior to the time of the accident, and you therefore cannot consider this question of negligence, and you cannot find the defendant negligent in this regard."

Appellant's argument in support of this assignment of error is that there was positive evidence by the motorman that he did sound the gong, and the only evidence on the part of the plaintiff in respect thereto was that of one witness who testified that she did not hear the gong and another witness who said he could not remember whether or not he heard the gong. Appellant contends that the rule of law is settled that affirmative direct evidence that the gong was sounded cannot be overcome by evidence of one or more witnesses that they did not hear or do not recollect that the gong was sounded. The authorities cited by appellant in support thereof do not establish that as an arbitrary rule. The complete rule on this point which may be gathered from all the decisions of this court thereon is probably

stated by this court in *Dodds v. Omaha & C. B. Street R. Co.*, 104 Neb. 692, and *Oliver v. Union P. R. Co.*, 105 Neb. 243, as follows:

"When there is positive and substantial affirmative testimony by a number of witnesses that a gong was sounded, the fact that there is testimony by one or more witnesses that they did not hear the gong and that it did not ring does not authorize that question to be submitted to the jury, where it is shown that the attention of such witnesses was diverted at the time the gong is said to have rung, and when their position, mental condition, and surroundings were not such as would raise a presumption that they would have heard it if it had sounded. Before their negative testimony is entitled to weight, it must appear that they had such knowledge as would justify them in speaking affirmatively in denial of the fact."

This rule is to the effect that whether the failure of a witness to hear a signal can be considered as evidence that no signal was given depends upon whether or not the facts and circumstances in evidence tend to show that the witness would probably have heard the signal had one been given. If so, the failure of the witness to hear the signal may be considered as evidence tending to show that no signal was given, though there is positive affirmative evidence that it was given. These are questions for the jury to determine. The rule as stated in 1 Wigmore, Evidence, sec. 664, is:

It is altogether possible to negative the evidence of a fact, state or condition, by "testimony based on what may be called 'negative knowledge,' *i. e.*, testimony that a fact did not occur, founded on the witness' failure to hear or see a fact which he would supposedly have heard or seen had it occurred. * * * The only requirement is that the witness should have been so situated that in the ordinary course of events he would have heard or seen the event had it occurred."

The evidence in this case shows that the witness, Mrs. Pratt, who testifies that she did not hear the gong, was not

only in position to hear it, but in a mental condition by reason of having seen the children pass her, taking notice of them as they passed, seeing them cross Frederick street and going diagonally across Thirty-second avenue, seeing the car approaching, and seeing plaintiff struck, to have heard the gong had it been sounded. She also testifies that her attention was directed to the question of whether or not the gong was sounded soon after the accident and that she remembered she did not hear it.

Moreover, the question as to the giving of a warning, which was in issue, and by the instructions submitted to the jury, was not whether the gong was sounded or any warning given. It was alleged in the pleadings that "timely warning" was not given. The instructions to the jury submitted the question whether or not a timely warning was given. The motorman testified that he sounded the gong for Frederick street when he was at a point north of that street in front of the store building. It was at that point that witnesses for plaintiff testified the plaintiff was struck by defendant's car. It was for the jury to determine whether or not plaintiff was struck at that point. If the jury determined that she was struck at that point, then the sounding of the gong at that point testified to by the motorman may not have been timely. The motorman also testified that he sounded the gong south of Frederick street just before striking the plaintiff when she was standing still looking at the approaching car. In view of the finding of the jury for plaintiff, it is apparent that the jury found plaintiff to have been struck north of Frederick street, and that she did not stand still looking at the approaching car; but, if struck south of Frederick street, it would still be a question for the jury whether such sounding of the gong was a timely warning. To have given the said instruction No. 5, requested by the defendant, in the form requested, without any reference to the time of sounding the gong, would have been erroneous. The jury might reasonably infer therefrom that whether or not the sounding of the gong was timely was not for them to determine,

but that if the gong was sounded that was sufficient.

We find no prejudicial error in the record, and the judgment is, therefore,

AFFIRMED.

ROSA KUH, APPELLANT, V. DENNIS FLYNN, APPELLEE.

FILED JUNE 22, 1922. No. 22077.

1. **Adverse Possession.** Color of title is not necessary in order to acquire title by adverse possession, but before a party may claim title by adverse possession he must for the full statutory period claim as owner, and his possession must have been under a claim of ownership.
2. **Evidence** *held* sufficient to sustain the judgment of the trial court.

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

S. T. Frum, Sears, Snyder & Glysteen and *Vail E. Purdy,* for appellant.

W. V. Steuteville, contra.

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

MORRISSEY, C. J.

Plaintiff brought this action in ejectment to recover possession of a ten-acre tract of land in Dakota county. Plaintiff alleges that at all times since July 21, 1893, she has been the owner thereof and entitled to its possession. The answer admits that defendant is in possession of the premises, denies plaintiff's ownership and right of possession and, by way of cross-petition, adds a plea of adverse possession and the statute of limitations, and pleads specially that more than 15 years before the bringing of plaintiff's action defendant entered into possession of the land; that it was then covered with underbrush and was in a wild, uncultivated state and unfenced; that defendant grubbed out the underbrush, fenced the land and brought it under

cultivation. There is a prayer that plaintiff's petition be dismissed and that title be quieted in defendant. Plaintiff filed a reply denying each of the affirmative allegations of the cross-petition. A jury was waived and the cause tried to the court. The court dismissed plaintiff's petition, made a general finding in favor of defendant on his cross-petition, and entered a decree quieting title in defendant. Plaintiff appeals.

Defendant, to maintain the issues raised by his cross-petition, proved that in 1901 or 1902 he entered into possession of the land; it was then wild and unoccupied and grown up to brush. Defendant was and is lessee of a tract of land adjoining the land in suit, and he has in a degree used the land on which he held the lease and the land in suit for the same general purposes and has kept it inclosed with a fence. In 1903 or 1904 he cleared off two or three acres and reduced it to cultivation. From year to year thereafter he continued to clear off the brush, cultivated the land so cleared, and used that portion of the land not actually in cultivation as a pasture.

Defendant, continued his use and occupation of the premises without interruption until 1920, when plaintiff demanded possession. Thus far there is no dispute in the record. Defendant earnestly contends that during this long period of time he treated the land as his own and claimed it as his own as against all the world. Plaintiff concedes that defendant was in physical possession of the premises, but she denies that he held the possession as owner.

In *Cervena v. Thurston*, 59 Neb. 343, this court has said: "To acquire real property by adverse possession it is not essential that entry should have been made under claim of ownership, if the occupancy was with intent to claim against the true owner."

And in *Knight v. Denman*, 64 Neb. 814, in the body of the opinion it is said: "While the intention to claim the land need not exist at the time of the entry, the statute will not begin to run until the possession is adverse, and

the acts and intention of the occupant are those of an owner."

It will thus be seen that this cause may not be determined alone upon the fact of occupancy, and that the intention of defendant in taking possession of the land and in occupying the same may be of controlling importance. Defendant testified that from his first entry upon the land it was his intention to claim ownership and that through his many years of occupancy he regarded the land as his own. And his neighbors testified as to his assertion of title and claim of ownership. The rule is well settled that color of title is not necessary in order to acquire title by adverse possession. But before a party may claim title by adverse possession he must for the full statutory period claim as owner. And his possession must have been under a claim of ownership.

"The fact of possession and its character, the occupant claiming to be the owner of the premises, is the test." *Gatling v. Lane,* 17 Neb. 77.

The discussion in *Knight v. Denman, supra,* makes this plain. In that case it is pointed out that a plain distinction exists between the use of wild lands by one who has color of title and a similar use by one who has no claim of right whatever. The court said:

"Color of title is a strong evidence in such cases that the acts are those of an owner. One enters upon land under color of title, intending to assert such title. He uses it because he believes himself owner and entitled to use it as such. Not so one who has no title or claim of right or title whatsoever. He may entertain a purpose of occupying as owner and appropriating the property or he may merely intend to trespass from time to time so long as the owner makes no objection."

It is conceded that defendant was without color of title. He took possession of the land and brought it under cultivation, but, although occupying the land nearly twenty years, he never paid any of the taxes which were annually assessed against it. The taxes were paid by plaintiff.

In many jurisdictions the payment of the tax assessed against the property is by statute made essential to the acquisition of title by adverse possession, but there is no such requirement in our statute. In *Bush v. Griffin*, 76 Neb. 214, the failure to pay the tax is said to be entitled to weight as tending to show that the occupant did not intend to claim title as against the rightful owner. However, the general rule as to payment of taxes is:

"Payment of taxes is not an element of adverse possession unless made so by express statutory requirement, and the fact that the owner of land held adversely by another continues to pay the taxes assessed on the land will not preclude the latter from acquiring title thereto by lapse of time." 2 C. J. 203, sec. 414.

It appears that prior to the bringing of this suit defendant offered to reimburse plaintiff for the taxes paid. Plaintiff concedes that this circumstance is not sufficient to divest a title already acquired, but urges its consideration in determining the nature of defendant's claim to the land. This was in no sense an abandonment of defendant's claim of ownership. Defendant might properly feel that plaintiff having released the land from the lien of the taxes lawfully assessed against it should recover her money back, or he had the right to buy his peace and if possible avoid an impending lawsuit.

The proof brings this case clearly within the rules announced in *Woodcock v. Unknown Heirs of Crosby*, 92 Neb. 723, and the cases therein cited, and the judgment is

AFFIRMED.

A. J. PARR, APPELLEE, V. CARL HELFRICH, APPELLANT.

FILED JUNE 22, 1922. No. 22093.

Sales: FRAUD: BONA FIDE PURCHASER. A fraudulent purchase of personal property accompanied with delivery is not void, but voidable only, at the election of the vendor, and until it is avoided the vendee has power to make a valid sale of the goods to a *bona fide* purchaser having no notice of the fraud.

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

C. G. Perry and *R. O. Canaday,* for appellant.

William A. Bryans, Jr., and *McDonald & Irwin, contra.*

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

MORRISSEY, C. J.

This is an action of replevin. Plaintiff, a resident of Denver, Colorado, was the owner of an automobile, which he advertised for sale. The automobile was in the garage at plaintiff's residence and his wife exhibited the car for sale to all persons who called to inspect it. There was no explicit designation of plaintiff's wife as agent with authority to sell the car, but their conduct and relations were such that her authority to so act is apparent. Among others who called to inspect the car were two men unknown to plaintiff's wife. These men represented that they were desirous of buying the car, inspected it, and ascertained the sum for which it could be purchased. They later returned and delivered to plaintiff's wife a purported certified check on the First National Bank of Denver for the price theretofore agreed upon, and the car was delivered to them. These men drove the car to Bridgeport, Nebraska, and sold and delivered it to defendant. Plaintiff presented the purported certified check to the bank on which it was drawn and whose certification it was supposed to bear. The check was pronounced a forgery and payment refused. At the conclusion of the testimony the court instructed a verdict in favor of plaintiff, and defendant appeals.

From the conduct of the trial and the language of the motion made for a directed verdict it may be inferred that plaintiff questions the good faith of defendant in making the purchase and is not disposed to concede him the status of an innocent, good-faith purchaser for value. We shall not review the evidence on the question of defendant's

good faith. If the *bona fides* of the transaction is not conclusively shown it was a question to be determined by the jury. *Schmelzel v. Leecy,* 104 Neb. 672.

It is well settled that when property is obtained from its owner by fraud, and the facts show a sale by the owner to the fraudulent vendee, an innocent purchaser of the property from the fraudulent vendee will take good title. The inquiry is: Did the owner intend to transfer the ownership as well as the possession of the property? If he did, there was a contract of sale. The essential thing in the passing of title to personal property is that the vendor and the vendee intend that the title shall pass, and not what induced them to have that intention. But one who has been induced by fraud to part with title to his property has his remedy either in an action because of the fraud and deceit, or he may rescind the contract and recover back the property while title still remains in the fraudulent vendee, but he cannot recover it when title has passed to a *bona fide* purchaser for value. *Homan v. Laboo,* 2 Neb. 291; *Hoham v. Aukerman-Tuesburg Motors, Inc.,* 133 N. E. (Ind. App.) 507.

As said by Shaw, C. J., in *Rowley v. Bigelow,* 12 Pick. (Mass.) 307: "Being tainted by fraud, as between the immediate parties, the sale was voidable, and the vendors might avoid it and reclaim their property. But it depended upon them to avoid it or not, at their election. They might treat the sale as a nullity and reclaim their goods, or affirm it and claim the price. And cases may be imagined, where the vendor, notwithstanding such fraud, practiced on him, might, in consequence of obtaining security, by attachment or otherwise, prefer to affirm the sale. The consequence therefore is that such sale is voidable, but not absolutely void. The consent of the vendor is given to the transfer, but that consent being induced by false and fraudulent representations, it is contrary to justice and right that the vendor should suffer by it, or that the fraudulent purchaser should avail himself of it; and upon this ground, and for the benefit of the vendor alone, the

law allows him to avoid it. The difference between the case of property thus obtained, and property obtained by felony, is obvious. In the latter case, no right either of property or posesssion is acquired and the felon can convey none. We take the rule to be well settled that where there is a contract of sale, and an actual delivery pursuant to it, a title to the property passes, but voidable and defeasible as between the vendor and vendee, if obtained by false and fraudulent representations. The vendor therefore can reclaim his property as against the vendee, or any other person claiming under him and standing upon his title, but not against a *bona fide* purchaser without notice of the fraud. The ground of exception in favor of the latter is that he purchased of one having a possession under a contract of sale, and with a title to the property, though defeasible and voidable on the ground of fraud; but as the second purchaser takes without fraud and without notice of the fraud of the first purchaser, he takes a title freed from the taint of fraud."

Two pertinent inquiries were presented on the trial of this cause: Did plaintiff, through his agent, transfer title to the automobile to his fraudulent vendees? Did defendant become a *bona fide* purchaser, without notice of the fraud? On the record presented each of these questions should have been answered affirmatively by the court, or submitted to the jury for its determination.

The judgment is reversed and the cause remanded.

REVERSED.

FRANK M. RIDINGS V. STATE OF NEBRASKA.

FILED JUNE 22, 1922. No. 22197.

1. **Information:** SUFFICIENCY: FRAUD: BANK CERTIFICATES. An information charging that defendant, the president of a bank, feloniously put forth specifically described certificates of deposit, without authority from the directors, with intent to defraud the bank, there being no deposits as certified, charges a felony. Rev. St. 1913, sec. 8658.

2. **Criminal Law:** INDORSEMENT OF WITNESSES ON INFORMATION. A district court in the exercise of judicial discretion is authorized by a recent statute to permit the names of additional witnesses to be indorsed on the information during the progress of the trial. Laws 1915, ch. 164.

3. ———: CONTINUANCE. In passing on a motion for a continuance during a trial, the presiding judge exercises a judicial discretion, and it is only for an abuse thereof that the reviewing court will interfere.

4. ———: EVIDENCE: TELEGRAMS. While a telegram delivered in the ordinary manner is not admissible in evidence without proof of the authenticity of the original, a sufficient foundation for its admission may be established by circumstances, such as subsequent acts disclosing that both the sender and the person who received it treated it as genuine and acted under it.

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

N. T. Gadd, A. M. Cary and *K. L. Hjort,* for plaintiff in error.

Clarence A. Davis, Attorney General, and *Jackson B. Chase, contra.*

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

ROSE, J.

In a prosecution by the state in the district court for Thomas county, Frank M. Ridings, defendant, president of the Farmers State Bank of Halsey, Nebraska, was convicted of putting forth certificates of deposit in violation of statute, without authority from the directors, with the intent to defraud the bank. The certificates were false, no money having been deposited as certified. In violating the statute defendant acted through E. N. Dion, a subservient cashier of the bank. To procure a reversal of the conviction, defendant, as plaintiff in error, presents for review the record of his conviction.

The overruling of a motion to quash the information and the overruling of a demurrer to it are assigned as

error. The statute under which defendant was prosecuted declares in substance, among other things, that any president of a bank who shall, without authority from the directors, "issue or put forth any certificate of deposit," with intent to defraud the bank, "shall be confined in the penitentiary not less than one year nor more than ten years." Rev. St. 1913, sec. 8658. The false certificates are definitely described in an information charging the forbidden acts and the unlawful intent. It is also charged that defendant was president of the bank, that the certificates of deposit were issued without authority from the directors, and that no deposits were made by defendant or any one else as certified. The information states in substance that defendant did, with the intent to cheat and defraud the bank, knowingly and feloniously, "procure to be issued to himself and put forth" the specifically described certificates of deposit. If the charging words, "procure to be issued to himself," accuse defendant of procuring the commission of the unlawful act as distinguished from committing the felony himself, a question not decided, the other accusing words, "put forth," in the connection used, apply to the act of defendant individually—an act forbidden by statute. It is argued that the cashier of a bank has inherent power by virtue of his appointment to issue certificates of deposit, and that the offense is not complete unless a misuse of the certificates themselves to the injury of the bank, is shown. The argument is not convincing. The issuance of certificates, without authority of the directors, with the intent to defraud the bank, is forbidden by the statute, and applies specifically to "every president, director, cashier, teller. clerk or agent of any banking company." The cashier is not mentioned in the information. Defendant is named as president, and he is at least charged with acts constituting every element of the crime of putting forth certificates of deposit, as defined by statute. The trial court did not err in ruling adversely to defendant on his motion and demurrer.

An assignment of error challenges a ruling which permitted the county attorney to indorse on the information the names of three witnesses while the trial was in progress. This was permissible under a recent statute. Laws 1915, ch. 164; *Samuels v. State,* 101 Neb. 383. What the nature of the testimony of these witnesses would be was inferable from accusations of which defendant had timely notice. The record does not show an abuse of discretion or prejudice to defendant.

It is further insisted that the district court erred in overruling a motion for a continuance on the ground that defendant was not prepared to meet the testimony of the witnesses whose names were indorsed on the information during the trial. The presiding judge exercises a judicial discretion in passing on a motion for a continuance during the trial, and it is only for an abuse of discretion that the reviewing court will interfere. The county attorney was properly permitted to indorse the names of the additional witnesses on the information, and there is nothing in the record to show an abuse of discretion in denying a continuance.

An assignment of error on which defendant confidently relies for a reversal is directed to a ruling admitting in evidence a telegram from defendant to E. N. Dion, Halsey, Nebraska, dated at Minneapolis, Minnesota, July 30, 1919, and containing, among other things, the following directions:

"Send me here five thousand certificates of deposit, seven months, and advise you have done so."

This telegram purports to be from defendant, Frank M. Ridings, the president of the bank, to E. N. Dion, its cashier. The theory of the state is that it was pursuant to this telegram that Dion sent to defendant, without any consideration, the five certificates of deposit, each for $1,000, described in the information. It is argued that this purported telegram is the only evidence connecting defendant with the issuance of these certificates, and that it was erroneously admitted without any foundation. The

point seems to be that, over the objections of defendant, the trial court admitted in evidence what Dion received as a message, without any proof that it was written or signed or authorized or sent by defendant. When the entire record is considered, it shows that both Dion, to whom the telegram was addressed and delivered, and defendant, by whom it purports to have been written, signed and sent, acted on it as genuine. There is evidence tending to show the following facts: The message appeared on a form of the Western Union Telegraph Company, which has a telegraph line at Halsey. It receives messages at the railroad station there. In the bank at Halsey the telegram was delivered by the operator, who was the agent of the Western Union Telegraph Company, to Dion, the cashier. It was received in the ordinary way. Defendant directed the cashier to issue the certificates of deposit. The latter complied and sent to defendant the certificates of deposit described in the telegram. Defendant in his own handwriting executed a receipt for the certificates of deposit and it was received by the cashier in due course of mail. Defendant received the certificates of deposit and indorsed them in his own handwriting. Direct evidence that defendant signed or authorized the original telegram is not the only method of laying a foundation for its introduction in evidence. The facts may be shown by circumstances which, in the present instance, are sufficient to convince a reasonable mind that defendant in fact signed and sent the telegram admitted in evidence. 22 C. J. 906, sec. 1109. While the foundation was not complete when the telegram was introduced, circumstances subsequently proved made it proper evidence for the consideration of the jury. Defendant was in no wise prejudiced by the order in which the testimony was introduced. The telegram, in connection with other proofs, shows that defendant acted through Dion, the cashier, that he ordered the issuance of these false certificates of deposit without making the deposits as certified, and that he accepted and indorsed them in a high-handed and lawless manner to the

injury of the bank. The felonious intent charged is a fair inference and the guilt of defendant is established beyond a reasonable doubt.

It is finally insisted that bank books and book entries were admitted in evidence without proper foundations. When all the testimony is considered, no prejudice to defendant in this respect has been found.

AFFIRMED.

WILLIAM MADDOX V. STATE OF NEBRASKA.

FILED JUNE 22, 1922. NO. 22573.

1. **Homicide:** EVIDENCE. In a prosecution for murder in the first degree, the evidence outlined in the opinion *held* sufficient to sustain a verdict for murder in the second degree.

2. **Criminal Law:** HOMICIDE: LIMITATION OF EVIDENCE. A defendant who pleads not guilty to the charge of murder in the first degree cannot limit the state's proofs to his defense of insanity or to the degree of the crime, though he says in his opening statement to the jury that he does not deny the committing of the homicide, evidence to prove beyond a reasonable doubt every element of the felony charged being admissible.

3. ———: ———: INSANITY: NONEXPERT TESTIMONY. Where accused in defense of a prosecution for murder testified to a temporary period of insanity resulting in the suspension of his mental faculties or in a lapse of memory before, during and following the homicidal act, a nonexpert witness who observed accused during that period and described his appearance, manner of speech and utterances, may state in rebuttal whether accused appeared to be rational or irrational, referring alone to what was so observed, heard and described.

4. ———: ———: EVIDENCE: WEAPONS. Where defendant pleads not guilty to the charge of murder, the shotgun and shell shown to have been used by him in committing the homicidal act are admissible in evidence.

5. ———: ———: ———: CONDUCT OF PROSECUTOR. In a prosecution for murder, the conduct of the prosecuting attorney in offering in evidence the hat knocked by the fatal shot from the head of the victim of the homicide, *held* not erroneous or prejudicial, the offer having been made in good faith and rejected.

ERROR to the district court for Thurston county: GUY T. GRAVES, JUDGE. *Affirmed.*

Mark J. Ryan and *R. J. Millard,* for plaintiff in error.

Clarence A. Davis, Attorney General, and *Jackson B. Chase, contra.*

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

ROSE, J.

In a prosecution by the state in the district court for Thurston county, William Maddox, defendant, was charged with murder in the first degree. He pleaded not guilty and was convicted of murder in the second degree and for that felony was sentenced to the penitentiary for life. As plaintiff in error he presents for review the record of his conviction.

Defendant was a farm-hand 37 years of age. He shot and killed his employer, John G. Schnier, on the latter's farm in Thurston county, June 20, 1921, where he had been employed for three months. He had made his home with his employer. Schnier's family consisted of himself, Marie Schnier, his wife, and his son, a boy 8 years of age. Defendant occupied a room on the second floor of the family home. He went fishing Saturday afternoon June 18, 1921, and returned Sunday June 19, 1921. He arose Monday morning June 20, 1921, about 10 o'clock and declined breakfast. The same day Schnier left his work in a field and went home for his noon meal. Five guests had just arrived in an automobile. They were George Korn, Lena Korn, Lillie Krohn, Arnold Krohn, and Charles Kirchner, relatives of Marie Schnier. Between noon and 1 o'clock the Schnier family, the guests and defendant ate dinner together. Shortly thereafter Schnier went in his automobile to Pender, three and one-half miles, taking with him George Korn, Charles Kirchner and defendant. Within an hour, perhaps, Schnier returned to his home with the same passengers, and in addition James H.

Parker, a new farm-hand. Schnier and Parker went promptly to the barn, a short distance from the house across a lot, and began to harness a team of horses. Defendant went through the house to his room on the second floor, got his shotgun, came down stairs, tampered with the telephone on his way out, and went toward the barn. Marie Schnier ran half way across the lot between the house and barn, shouted to her husband to run, and warned him that defendant had his gun. Schnier ran out of the barn on the opposite side toward a grove of trees, and went into a little hollow, where the hat on his head was exposed to view. The direction he had taken was observed by defendant, who walked within range, took aim and fired. Schnier was found dead where he had fallen in the edge of a corn field near the grove of trees. After the shooting defendant, still carrying the shotgun, approached George Korn, who was standing near the automobile in which Schnier's guests had arrived, ordered Korn to start the motor, and got into the rear seat. Korn obeyed. With defendant giving directions, Korn drove to a farm house several miles away, where defendant had lived for a time while working on the surrounding farm. After brief conversations with his former employers, defendant, occupying the rear seat in the automobile, directed Korn to drive to West Point. On the way there defendant was arrested and disarmed.

That the homicide occurred in the manner outlined is not disputed. The defense is insanity or a lapse of memory during which defendant, according to his testimony, remembers nothing in connection with the homicidal act or with his attempt to escape.

Insufficiency of the evidence to sustain a conviction for murder in the second degree is urged as a ground of reversal. It is insisted that manslaughter is the highest degree of homicide of which defendant could have been found guilty under any view of the evidence. This position is untenable. The homicide was not the result of a sudden quarrel or the recent exchange of harsh words. Defendant's

term of employment ended June 18, 1921. He went fishing the next day, returned to the home of Schnier a day later and was a guest of the latter until the time of the tragedy, June 20, 1921. Defendant ate dinner with Schnier, his family, and his guests, and went with him in his automobile to Pender and back, not more than two hours before the shooting occurred. Previously there had been a controversy between them over wages. It is fairly inferable from the evidence that Schnier had not paid defendant what was due; that defendant had threatened "to take it out of his hide;" that defendant had appealed to the wife of Schnier to influence her husband to make payment, threatening trouble; that the wife told defendant her husband had been unable to raise money. Defendant, without receiving his wages, had been displaced by a new farm-hand. He procured a deadly weapon and tampered with the telephone. He followed Schnier, who ran from danger. He took deliberate aim and shot and killed his employer. While armed, he immediately attempted flight in an automobile, directing the driver where to go. The evidence sustains the finding that he was not insane. The provocation of being displaced as a farm-hand without receiving his wages perhaps accounts for his escaping a conviction for murder in the first degree. There is no reason for doubt as to the sufficiency of the evidence to sustain the verdict.

Defendant criticises testimony relating to Schnier's son, to Schnier's wife, to the guests, and to the dinner party, insisting that the issues were sanity and the degree of crime, if any crime was committed. All of these persons were witnesses to some incident connected with the homicide Their names were indorsed on the information. They all testified and their relationship to or interest in Schnier were proper subjects of inquiry. Some of the testimony was given in response to preliminary inquiries about the incidents and circumstances leading up to the shooting. Other proofs supported the charge. The state of defendant's mind, as indicated by his conduct, appearance, and

utterances at the dinner preceding the homicide, was a proper subject of inquiry under the circumstances. A defendant who pleads not guilty to the charge of murder in the first degree cannot limit the state's proofs to his defense of insanity or to the degree of the crime, though he says in his opening statement to the jury that he does not deny the committing of the homicide, evidence to prove beyond a reasonable doubt every element of the felony charged being admissible. This assignment of error is clearly without merit.

Another assignment of error is directed to the conduct of the trial judge in interrupting the examination of a witness for the state to suggest:

"I think the witness could testify as to whether the defendant appeared rational or irrational."

This was followed by testimony of the nature suggested by the trial judge, to which objections are also interposed. Though the defense was insanity, no expert testified as a result of a personal examination that defendant was insane or that his mind was affected by any particular form of insanity. In answer to a hypothetical question, however, one physician testified to the opinion that defendant was insane at the time of the shooting and another that he was then sane. Defendant was a witness in his own behalf and the nature of his testimony as to insanity is indicated by the following summary: He had a brother who was insane. He had worked in mines; had permanently suffered from pneumonia; had symptoms of tuberculosis; had stomach and bowel trouble; had poor health and constantly took medicine; had distressing family troubles and brooded over them. He testified in effect that he had no recollection of any incident connnected with the homicide and that his lapse of memory continued until he recovered his mental faculties while in prison. He did not testify to any former lapse of memory or to any previous mental disturbance which unbalanced his mind or suspended its natural functions. He did, however, testify to years of industry requiring the use of his mental faculties. Any insanity in-

ferable from the evidence was temporary, covering a period of a day or two at most. There was rebuttal testimony by witnesses who had seen defendant in the meantime. It was thus shown that defendant, while in flight, asked if Schnier was dead, and, when answered "yes," said he thought so. Other incidents, conversations and utterances tending to show that defendant was in possession of his mental faculties, while committing the homicidal act and attempting to escape, were narrated by witnesses for the state. It was on rebuttal in reference to specific incidents, or utterances or appearance, during which defendant, according to his testimony, was not in possession of his mental faculties, that the trial judge suggested: "I think the witness could testify as to whether the defendant appeared rational or irrational." The facts in connection with defendant's conduct, utterances and appearance had been observed and narrated by the nonexpert witness on the stand when that suggestion was made. Whether defendant, in connection with such facts, appeared to the witness to be rational or irrational was not necessarily a question for an expert. Appearance, conduct and manner of utterance were material and competent inquiries on rebuttal. Whether defendant, tested by appearance, conduct and utterances, appeared to be rational or irrational may be stated by a nonexpert witness who observed and narrated the facts. *People v. Wreden,* 59 Cal. 392; *People v. Conroy,* 97 N. Y. 62; *People v. Taylor,* 138 N. Y. 398. The rule of evidence suggested by the trial judge in the present case and the reasons for it have been stated as follows:

"When a layman is examined as to facts, within his own knowledge and observation, tending to show the soundness or unsoundness of the testator's mind, he may characterize, as rational or irrational, the acts and declarations to which he testifies. It is legitimate to give them such additional weight as may be derived from the conviction they produced at the time. The party calling him may require it, to fortify the force of the facts, and the adverse party may de-

mand it as a mode of probing the truth and good faith of the narration. But to render his opinion admissible, even to this extent, it must be limited to his conclusions from the specific facts he discloses. His position is that of an observer and not of a professional expert. He may testify to the impression produced by what he witnessed; but he is not legally competent to express an opinion on the general question, whether the mind of the testator was sound or unsound." *Clapp v. Fullerton,* 34 N. Y. 190.

The conduct of the trial court in suggesting this rule of evidence and the rulings admitting testimony under it do not seem to be erroneous or prejudicial to defendant.

One of the assignments is in this form:

"The court erred in permitting the witness, S. M. Young, to take the witness-stand, carrying a shotgun, in admitting the shotgun and shells in evidence, and in permitting the bloody hat of the deceased to be exhibited in the courtroom before the jury."

The burden was on the state to prove beyond a reasonable doubt every element of the felony charged. For that purpose the shotgun and shell used by defendant in committing the homicidal act were admissible in evidence. It is not shown that the witness Young was not a proper person to exhibit this evidence in court or that he made any unnecessary or objectionable display in doing so. The hat was not admitted and the record does not show it was bloody or that it was offered in bad faith. An eye-witness who saw the hat on Schnier's head said in effect that it was knocked off by the fatal shot while the person of the victim was almost concealed from view. There was no prejudice in the rejected offer.

The brief of defendant contains a number of criticisms relating to rulings on evidence or to isolated parts of the instructions. All of these rulings have been examined with a complete understanding of the record. They do not contain a prejudicial error. Defendant had an impartial trial. The issues were fairly submitted to the jury. The evidence sustains the conviction. The sentence is authorized by law

and there does not appear to be a sufficient ground for reducing it.

AFFIRMED.

STATE OF NEBRASKA V. JOHN BADBERG ET AL.

FILED JUNE 22, 1922. No. 22583.

1. **Statutes:** CONSTRUCTION. It is a familiar rule that statutes *in pari materia* should be construed together.
2. **Constitutional Law:** STATUTES: CONSTRUCTION. The court will not hold a legislative act unconstitutional unless such holding is clearly warranted by a reasonable interpretation of the language of the fundamental law.

ERROR to the district court for Keith county: J. LEONARD TEWELL, JUDGE. *Exceptions sustained.*

Clarence A. Davis, Attorney General, and *C. L. Dort,* for plaintiff in error.

W. D. Oldham, amicus curiæ.

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

DEAN, J.

John Badberg and Adam Kosmick, defendants, were informed against jointly by the county attorney of Keith county and there charged with a violation of section 2, ch. 156, Laws 1921, in that they, as alleged in the first count of the information, unlawfully and feloniously maintained and had "in their possession a certain still for the manufacture of intoxicating liquor, to wit, alcohol and whiskey." In the second count defendants were charged with unlawfully and feloniously having "in their possession a certain quantity of mash for the manufacture of intoxicating liquor, to wit, eight gallons thereof." Defendants demurred to the information on the alleged ground that the act is unconstitutional. The demurrer was sustained and the defendants were discharged. Alleging er-

ror, the county attorney, under the provisions of section 9185, Rev. St. 1913, brought the case here, by leave of this court, to have determined the constitutionality of the act in question.

Section 16, ch. 187, Laws 1917, that being the section which was amended, reads:

"Any resident of this state or any corporation authorized to transact business in this state owning and operating a plant for such purpose, and paying special taxes levied by the United States internal revenue department, may, upon compliance with the requirements herein provided, manufacture and sell in or out of the state ethyl alcohol for medicinal, mechanical, scientific and other nonbeverage purposes. Such sales in the state, however, to be made only to wholesale and retail druggists, scientific institutions, and hospitals authorized under the provisions of this act to handle such ethyl alcohol."

The act as amended in 1921, being section 2, ch. 156, Laws 1921, comprises all of the above section 16 with the following provisions added:

"Except as permitted in this section it shall be unlawful for any person to manufacture any intoxicating liquor or to own, maintain or have possession of any still, or equipment for the manufacture of alcohol or whiskey or of any mash or intoxicating liquor in any stage of manufacture, or any intoxicating liquor after it has been manufactured, except in compliance with the terms of this chapter, as to manufacture and as to obtaining a permit therefor. Any person who shall manufacture intoxicating liquor in violation of this chapter or who shall have possession of any still or any part thereof or of any other equipment for making intoxicating liquor or who shall have in his possession any mash or other material being used in the process of manufacturing intoxicating liquor, or who shall have in his possession any intoxicating liquor made by him for the purpose of sale, or from which a sale has been made, contrary to the provisions of this chapter, shall, upon conviction, be fined not less than $500 nor more than $5,000 and impris-

oned not less than thirty days nor more than one year in jail for each offense.

"None of the provisions of this section and none of its penalties shall apply to persons who have obtained a permit from the United States for the manufacture of ethyl alcohol, and who have filed a certified copy of the same with the governor as provided in this chapter."

Defendants in their brief contend that the amendment is violative of section 14, art. III of the Constitution. They insist that the amendment is not germane to the section which it amends and that it adds harsh penalties for their violation. They argue: "The reasons relied on are that section 16 (2), ch. 156, Laws 1921, is purely and simply an amendatory act, not complete within itself or able to stand alone as an independent act properly titled and legally enacted."

We think the trial court erred in sustaining the demurrer. In view of our former decisions and of the great weight of authority, the act as amended is not open to the objections urged by defendants. The amendment has but one general object and it is clearly germane to the general object, scope and purpose of the prohibitory law of which it is a part and also to the section which it amends. *State v. Tibbets,* 52 Neb. 228. With respect to the section of the Constitution under discussion this is said in the body of the opinion in the *Tibbets* case: "While the requirements of this clause of the Constitution are mandatory, they are not to be exactingly enforced, or in such a manner as to hamper or cripple legislation. The title to a bill may be general, and it is not essential that it specify every clause in the proposed statute." In that case the court recognized the rule that, while the amended section of a legislative act must be germane to the original section, the constitutional provision is complied with, even though the amended act may not be strictly confined to the same limit which obtained in the original section. The point is that the amendment must have in view the same general object as that which is embodied in the original section. In the case be-

fore us there is neither duplicity nor dissimilarity in the subject-matter of the original act and the amendment. Both tend to the same end and have to do with the same subject.

"An act entitled 'An act for the suppression of intemperance,' and containing provisions for the punishment of drunkenness, prohibiting the sale of intoxicating liquors, declaring certain things nuisances, the appointment of agents, etc., does not contain more than one 'object' within the meaning of a constitutional provisions that 'every law shall embrace but one object, which shall be expressed in the title.'" 25 R. C. L. 845, sec. 91. "It would seem that any number of amendments of a code or general compilation of laws may be included in one statute, provided that all refer to some particular subject, such as 'The Revenue,' 'Decedents,' or the like." 55 L. R. A. note at page 850.

In *Webster v. City of Hastings,* 59 Neb. 563, we held that the constitutional provision in question "is intended to prevent surreptitious legislation, and forbids amendatory legislation foreign to the subject of the original act, and which would not be embraced in the title thereof." It was held in *Affholder v. State,* 51 Neb. 91, that the constitutional provision under discussion should be construed with such liberality as to admit the insertion in a legislative act of "all provisions which, though not specifically expressed in the title, are comprehended within the objects and purposes of the act as expressed in its title, and to admit all provisions which are germane, and not foreign, to the provisions of the act as expressed in its title." In *State v. Hevelone,* 92 Neb. 748, we said: "The legislature may amend a statute by appending a proviso to a section thereof, if the subject of the proviso is clearly within the title to the original act and is germane to its provisions." In the body of the opinion in the *Hevelone* case this language is used: "It is also firmly settled by this court that whatever might have originally been made a part of an act may at any time be engrafted upon it by legislation professing to be amendatory."

The defendants rely largely on *State v. Tibbets,* 52 Neb. 228. But the state points out that in the *Tibbets* case the court merely held that "the amendment must be germane to the subject-matter of the original act or section indicated." The argument in brief is that "if the amendment was germane either to the original act or the section indicated the amendment related to the same subject." In such case, the argument continues, "it would seem that the amendatory matter is germane both to the original act and the indicated section. They seem to trace back to the same generic head."

In support of its argument the state cites 25 R. C. L. 844, sec. 90: "The 'subject' of an act is the matter or thing forming the groundwork of the act, which may include many parts or things, so long as they are all germane to it and are such that if traced back they will lead the mind to the subject as the generic head. There can be no surer test of compliance with the constitutional requirement of singleness of subject than that none of the provisions of an act can be read as relating or germane to any other subject than the one named in the title. An act is not unconstitutional because more than one object is contained therein where the objects are germane to the main subject, or they relate directly or indirectly to the main subject, and have a mutual connection with and are not foreign to the subject of such act, or when the provisions of the act are of the same nature and come legitimately under one subject."

It is a familiar rule that statutes *in pari materia* should be construed together. "In the course of the entire legislative dealing with the subject we are to discover the progressive development of a uniform and consistent design, or else the continued modification and adaption of the original design to apply it to changing conditions or circumstances. In the passage of each act, the legislative body must be supposed to have had in mind and in contemplation the existing legislation on the same subject, and to have shaped its new enactment with reference there-

to." Black, Interpretation of Laws (2d ed.) sec. 104; *Dinuzzo v. State*, 85 Neb. 351.

The Constitution is not to be construed so as to destroy legislation that is not clearly inhibited by its language. The court will not hold a legislative act unconstitutional unless such holding is clearly warranted by a reasonable interpretation of the language of the fundamental law. It has been well said by a great advocate: "The letter killeth, but the spirit giveth life."

The district court erred in sustaining the demurrer of defendants. The opinion in this case under the provisions of section 9185, Rev. St. 1913, only determines the law of the case. The exceptions of the county attorney are sustained.

EXCEPTIONS SUSTAINED.

STATE OF NEBRASKA V. JOHN OPELA.

FILED JUNE 22, 1922. No. 22584.

ERROR to the district court for Keith county: J. LEONARD TEWELL, JUDGE. *Exceptions sustained.*

Clarence A. Davis, Attorney General, and *C. L. Dort,* for plaintiff in error.

W. D. Oldham, amicus curiæ.

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

DEAN, J.

It is stipulated by the parties that this case involves substantially the same state of facts and the same propositions of law that are involved in *State v. Badberg, ante,* p. 816. It is agreed by the parties that the decision in that case shall control in the present case. It follows that the district court, having sustained the demurrer in the present case, erred in so doing. The opinion in this case under the provisions of section 9185, Rev. St. 1913, only determines the law of the case. The exceptions of the county attorney are sustained.

EXCEPTIONS SUSTAINED.

HENRY PINN ET AL., APPELLEES, V. LEWIS J. PINN, APPELLANT.

FILED JUNE 22, 1922. No. 22415.

1. **County Courts:** JURISDICTION. "The county court possesses exclusive original jurisdiction in probate matters, and questions relating to the settlement of estates must be adjudicated there in the first instance." *Boales v. Ferguson*, 55 Neb. 565.
2. **Executors and Administrators:** UNADMINISTERED ASSETS. If a sum not administered is found belonging to an estate, the proper practice is to have a new administrator appointed in the county court and the fund administered.

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

F. L. Carrico and *James & Danly*, for appellant.

M. D. King, J. L. McPheely and *C. P. Anderbery, contra.*

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

ALDRICH, J.

The present controversy arises out of the following facts: Ferdinand Pinn died intestate on December 20, 1912, leaving a widow and eight children surviving him. His property consisted of a farm and personal property. The widow, Theresa Pinn, was named administratrix of the estate. During the pendency of the administration proceedings the children of the deceased made an assignment to the widow of their interest in the personal property, and also executed to her a quitclaim deed to the real estate. It is not entirely clear what the consideration was for these transfers. The decree of the court recited:

"Just what the consideration was to be is not clear. The evidence to sustain plaintiffs' contention that such consideration was that the mother was to will her property, including that provided for in such assignment to her children, share and share alike, is not clear, convincing and positive, and is insufficient to justify a decree so declaring."

The court found, however, that the assignment by the children conveyed to the widow the use and profits of the property transferred to her for her life, and did not transfer or convey the title thereto. There is no dispute concerning the real estate. In closing up the estate the county court assigned to the widow, of the personal property, $2,404.05. This amount included the portion of the estate which went to her, as well as to the children.

Theresa Pinn died in 1918, leaving a will in which she devised the farm in equal shares to six of the children, including her son, Lewis J. Pinn, and also bequeathed to Lewis all her personal property. Lewis J. Pinn was appointed executor of his mother's estate. An action was then commenced in the district court by Henry Pinn, Theresa Abrams, and Caroline Wirth, against Lewis J. Pinn individually, and as executor of his mother's estate, for an accounting of the money which Theresa Pinn had received by virtue of the assignment made by the children of their interest in the personal estate of their father to their mother. Upon the trial of this case the court found generally in favor of the plaintiffs, and ordered a reference to determine the amount which Theresa Pinn had received from the estate of her husband. The referee found that Theresa Pinn had received $3,203.20; that Christian Pinn, one of the sons, had filed a disclaimer to any interest in the estate; and that Emma Schneider, a daughter, had received and accepted her share and interest in the estate. The trial court found that a part of the $3,203.20 was a trust fund in the hands of Theresa Pinn, which by her death passed into the hands of Lewis J. Pinn, executor, and entered an order that the fund should be distributed as follows:

Estate of Theresa Pinn 1-3	$1,067.74
Augusta Winzel 1-6 of 2-3	355.91
Lewis J. Pinn 1-6 of 2-3	355.91
Caroline Wirth 1-6 of 2-3	355.91
Henry Pinn 1-6 of 2-3	355.91
Bertha Kauffelt 1-6 of 2-3	355.91

Theresa Abrams 1-6 of 2-3 ..... 355.91

The testimony is not entirely clear whether $799.15 which the referee found to belong to the estate of Ferdinand Pinn really belonged to his estate or to the estate of Theresa Pinn. The trial court apparently found that it belonged to the Ferdinand Pinn estate. If we assume that the $799.15 belonged to the Ferdinand Pinn estate, then it would seem to follow that the only court in which this fund could be distributed would be the county court, as that court has exclusive original jurisdiction in matters of probate. Rev. St. 1913, secs. 1206, 1398; *Boales v. Ferguson*, 55 Neb. 565. If a sum not administered is found belonging to an estate, the proper practice is to have a new administrator appointed in the county court and the fund administered.

It is quite clear, however, that the $2,404.05 has been distributed by the county court under an arrangement between the children and the mother that she should have the use and profits of the same. As to that amount the district court would have power to inquire with reference to the facts and order a proper accounting. There appears to be no dispute that there was paid to the widow $2,404.05. This sum should be distributed as follows:

Estate of Theresa Pinn 1-3 ..... $801.39
August Winzel 1-6 of 2-3 ..... 267.11
Lewis J. Pinn 1-6 of 2-3 ..... 267.11
Caroline Wirth 1-6 of 2-3 ..... 267.11
Henry Pinn 1-6 of 2-3 ..... 267.11
Bertha Kauffelt 1-6 of 2-3 ..... 267.11
Theresa Abrams 1-6 of 2-3 ..... 267.11

As to the sum representing the difference between $3,203.20 and $2,404.05, we find from the record that it belonged to Theresa Pinn and should be distributed as funds of her estate.

The judgment is reversed, with directions to enter a decree in accordance with this opinion.

REVERSED AND REMANDED.

WILLARD E. STEWART ET AL., APPELLANTS, V. CITY OF LINCOLN, APPELLEE.

FILED JUNE 22, 1922. No. 21873.

1. **Eminent Domain:** VALUATION OF LAND. Where land is taken from the owner by the power of eminent domain, the owner is entitled to receive the full market value of such land as of the date it was appropriated.
2. ———: ———: EVIDENCE. In such case, where the land has been enhanced in value by the construction of a public improvement, it is improper for the condemnor to show that the land bore no part of the expense of such improvement by way of assessments for benefits.
3. ———: ———: ———. Under the circumstances as shown by the record in this case, proof that the land bore no part of the expense of the public improvement *held* to be prejudicial.

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

Wilmer B. Comstock and *Frank M. Tyrrell,* for appellants.

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

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

DAY, J.

This is a condemnation proceeding in which the city of Lincoln, in the exercise of its power of eminent domain, seeks to appropriate for municipal purposes a tract of 159 acres of land owned by Willard E. Stewart. For the purpose of convenience, the owner will be referred to as the plaintiff, and the city as defendant. The commissioners appointed by the county judge to determine the value of the land taken made an award to the owner in the sum of $15,000. From this award the plaintiff appealed to the district court, where he recovered a verdict and judgment for $29,551.66. From this judgment the plaintiff has appealed.

The only question litigated was the value of the land appropriated.

It is urged that the court erred in permitting the defendant, over the objection of the plaintiff, to show by cross-examination of the plaintiff that the land in controversy had never borne any part of the burden by way of special benefits for the construction of a drainage canal which extended along the north side of a part of the land for a distance of nine city blocks, and also that the land had never been assessed for the pavement of a public highway leading from the city into the country, and which ran in close proximity to the land, cutting off a small corner thereof. The plaintiff, as a witness in his own behalf, described with considerable particularity the general character of his land and the uses to which it was adapted. Among other things, he mentioned its proximity to the business center of the city, its desirability for warehouse and other commercial purposes, its use for gardening, lumber yards, and other business projects; that the drainage canal protected it from overflow, and that a paved highway afforded a continuous road from a short distance from his land into the city.

Upon cross-examination of the plaintiff, over objection, the defendant showed that no special assessments were ever laid against any part of the land for the construction of either the drainage canal or the pavement of the highway; that in the construction of the drainage canal a part of plaintiff's land had been taken, for which he demanded and received damages.

We are inclined to the view that the court erred in permitting this line of cross-examination. It must be borne in mind that the plaintiff's land was being taken from him without his consent for a public purpose. He was entitled to receive the full market value thereof at the time it was appropriated, regardless of whether the land had borne any part of the cost of the public improvements, which admittedly had enhanced its value. As we view it, these facts developed upon the cross-examination were preju-

dicial to the rights of the plaintiff. From them the jury might well regard that the plaintiff was attempting to reap where he had not sown.

Considerable space is given in the briefs to a discussion of the value of the land in controversy. The plaintiff contends that the great weight of the testimony supports the view that the land was worth a much larger sum than that allowed by the jury. There is a great diversity of opinion as to the value of the land between the plaintiff's and the defendant's witnesses. The average estimate of the plaintiff's witnesses was above $66,500, and of the defendant's witnesses just below $12,900. In view of the fact that we have concluded that there should be a new trial, the question of the value of the land is not considered.

For the reasons stated, the judgment of the trial court is reversed and the cause remanded for further proceedings.

REVERSED.

CHICAGO BRIDGE & IRON WORKS, APPELLANT, V. CITY OF SOUTH SIOUX CITY, APPELLEE.

FILED JUNE 22, 1922. No. 21863.

Municipal Corporations: WATER-WORKS. The authority of a municipal corporation, created under the statute governing cities of the second class and villages, to contract for the construction of waterworks is measured by statute, and not by the value of the bonds voted for that purpose.

APPEAL from the district court for Dakota county: GUY T. GRAVES, JUDGE. *Reversed, with directions.*

Hirschl, Hirschl & Brooks, R. E. Evans and *William P. Warner,* for appellant.

Ward R. Evans, contra.

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

ALLEN, District Judge.

The plaintiff, the Chicago Bridge & Iron Works, a copartnership, sued the city of South Sioux City, herein called the city, a municipal corporation under the statutes of Nebraska for the government of cities of the second class and villages, to recover $1,150, with interest thereon from March 1, 1913. A jury having been waived, the case was tried to the court and a final judgment entered dismissing the action without day at the plaintiff's costs, and the plaintiff appealed.

From the record and briefs, we gather the following facts: October 15, 1912, the electors of the city voted for the issuance of bonds in the sum of $25,000, the proceeds to be used for the purpose of "erecting, constructing and maintaining a system of water-works and water supply in said village." The bonds were issued and sold through the agency of the National Company of South Bend, Indiana, of which J. F. Cole was president, sometime before April 15, 1913, for $25,311.04 net. March 3, 1913, and after their sale, the city entered into a written contract with the National Company employing it as engineer to make the necessary surveys, prepare the plans and estimates, and to superintend the construction of the plant, which it did through the instrumentality of its president J. F. Cole, for 10 per cent. of the construction cost. October 6, 1913, the city contracted with John P. Greene, in the name of J. P. Greene, to furnish the material and labor and to construct the plant for $24,710.75, but before doing so the city council, by an order entered of record, selected the type of tower, tank and riser pipe manufactured by the plaintiff and directed their use in the construction of the plant. Pursuant to such instruction, Greene contracted with the plaintiff to furnish the tower, tank and riser pipe for $3,250, and, by letter of October 14, 1913, notified the city that he had done so and directed it to pay that amount to the plaintiff in accordance with the terms of his contract with the city. The latter accepted the order and agreed to pay the plaintiff as therein requested. Thereafter the city paid the plaintiff $2,100 of the amount and

agreed at subsequent times to pay the remaining $1,150, to recover which this action was brought. Under the arrangement between Greene and the city, the plaintiff was to look to the latter for compensation for the material and work of installing the tower, tank and riser pipe, and the city agreed to pay the plaintiff that part of the cost of the plant. The tower, tank and riser pipe were received without objection and used by the city as a part of its plant and since then have been, and still are, used by it without objection or complaint. The city did not deny its liability to the plaintiff or refuse to pay until long after the completion and acceptance of the plant, nor until after the final settlement with Greene, the contractor, in which it took credit therefor.

It is admitted that the election was legal and that the bonds issued were sold in compliance with the law. There was money in the city treasury, the proceeds of the sale of the bonds, to pay the total expense of constructing the plant, including the tower, tank and riser pipe, when the latter were purchased. It is conceded that, of the $3,250 to be paid for the tower, tank and riser pipe, $2,100 was paid, leaving $1,150 unpaid.

Counsel for appellee contends that Greene's contract was *ultra vires* and void, because the city thereby incurred an indebtedness for the plant in excess of the bond issue, and that the city council had no authority to make said contract, but it does not appear that there was any deficit in the fund at the time the contract was made. It is claimed that no estimate of the appropriation was made for the indebtedness as provided by statute and that the contract was void for that reason. In his brief counsel for appellee says: "Our contention is that the Greene contract under which the plaintiff sues is illegal because it exceeds the amount of bond issue and could not be ratified by the council thereafter," and that the 10 per cent. compensation paid the National Company, or Cole, its president, under the employment contract, should be charged to the water-bond fund, and that, that sum having been paid, there was

a deficit to the extent of $1,150, a part of the price of the tower and tank, and therefore the contract of purchase of the tower and tank was *ultra vires* and void.

As a general proposition, it is admitted that a contract in excess of the statutory power of a municipal corporation is *ultra vires,* but, at the time the Greene contract was made and the tower and tank purchased and installed, the city had authority to borrow money or to issue bonds not exceeding 20 per cent. of the assessed value of the taxable property for the construction of the plant. Rev. St. 1913, sec. 5119. There is nothing in the record to show that it exceeded its authority, and a subsequent diminution or diversion of any part of the fund from the purpose for which it was voted would not render the contract *ultra vires.* A contract to be *ultra vires* must be beyond the authority of the city under any circumstances, but a subsequent change of the fund would not render it invalid. There is no provision in the contract employing the National Company, or Cole, its president, as engineer that compensation therefor should be paid from the proceeds of the bonds.

The contention of counsel for the appellee that the Greene contract was void because no estimate or appropriation was made for the indebtedness as provided by section 5187, Rev. St. 1913, is equally untenable, as the city did by ordinances 87 and 88 provide that a tax of eight mills on the dollar should be assessed against the taxable property of the city "for the payment of interest and to establish a sinking fund to pay the principal on water-bonds as the same become due." But neither an estimate nor an appropriation was necessary to the validity of the contract. *City of North Platte v. North Platte Waterworks Co.,* 56 Neb. 403, 409 *et seq.*

In entering judgment dismissing the plaintiff's action without day and in awarding the defendant costs, we think the learned trial judge erred. The judgment of the district court is therefore reversed and the cause remanded, with directions to enter judgment for the plaintiff in the sum of

$1,150, with 7 per cent. interest thereon from March 1, 1913, and for costs.

REVERSED.

ORA COX, APPELLEE, V. JOHN S. BELL ET AL., APPELLANTS.

FILED JUNE 22, 1922. No. 21943.

1. **Partnership**: DISSOLUTION: DAMAGES: PROSPECTIVE PROFITS. Where prospective profits of a partnership are speculative and conjectural, they do not afford a proper basis for measuring damages sustained by one partner because of a wrongful breach of the partnership contract by the other partner whereby the partnership is prematurely dissolved.
2. ———: ———: ———. Where one of two partners by his wrongful act has caused the premature dissolution of the partnership, and the other partner has devoted his time to the firm business, but is unable to show with reasonable certainty what the prospective profits would have been, he may, in lieu of and as a substitute for prospective profits, recover as damages the reasonable value of his time, less any sum or profit he has received from the business prior to the dissolution of the partnership.

APPEAL from the district court for Jefferson county: LEANDER M. PEMBERTON, JUDGE. *Affirmed as modified.*

Hartigan & Fouts, for appellants.

Heasty & Barnes and *Denny & Denny, contra.*

Heard before LETTON, DEAN and FLANSBURG, JJ., DAY and GOOD, District Judges.

GOOD, District Judge.

Plaintiff brought this action against the defendant for an accounting, dissolution of a partnership between the parties, and the recovery of the possession of certain real estate owned by the plaintiff and used in the partnership business. Decree was entered dissolving the partnership as of January 1, 1920, distributing the proceeds of the partnership business, and awarding possession of the real estate to plaintiff. Defendant has appealed.

Plaintiff, who was the owner of a farm consisting of 360 acres in Jefferson county, Nebraska, entered into an oral contract for a copartnership with the defendant wherein the parties were to engage in the farming and dairy business on plaintiff's farm. The partnership was to begin on March 1, 1919, at which time the defendant, pursuant to the agreement, entered into possession of the farm. The partnership agreement provided that plaintiff should furnish the farm, the material for putting the buildings in proper condition for the business, the seed for the crops that were to be planted, and one-half of the cows. Defendant was to furnish the labor and make the repairs, plant and harvest the crops, furnish half the cows, do the milking, and market the farm and dairy products. The net proceeds of the venture were to be equally divided between them.

Plaintiff in his petition alleged that the contract was to continue for one year and to terminate March 1, 1920; that the term of the partnership had expired; that defendant was holding over and retaining the use of the farm, excluding plaintiff from the business and misappropriating the partnership funds and property. He prayed for the appointment of a receiver, an accounting of the partnership affairs, the dissolution of the partnership, and for possession of the farm.

In his answer defendant admitted the making of the oral contract substantially as alleged by plaintiff, except that he claimed that the partnership was to continue for a period of five years and terminate March 1, 1924. He also alleged that plaintiff had been guilty of such breach of the partnership contract that it was practically impossible to continue the business, and prayed for damages arising from plaintiff's breach of the contract.

The trial court appointed a receiver, had the partnership property sold, awarded the possession of the farm to the plaintiff, ordered the proceeds of the sale of the partnership property divided between the parties according to their respective rights, but did not allow defendant

any sum as damages for breach of the contract. The trial court found that the partnership contract provided for a term of five years, as alleged by defendant, and that plaintiff had been guilty of such breach of the contract that it made it practically impossible to continue the partnership business, and further found that the partnership business had been a losing venture from the start; that there was no basis in the evidence to warrant a finding that there would be any prospective profits, even if the business had been continued to the end of the contract period, and, apparently, because it was uncertain as to whether there would be any profits had the partnership business been continued for the full term of five years, refused to award any damages to defendant for plaintiff's breach of the contract.

The only question for determination is: Was defendant entitled to damages for plaintiff's breach of the contract which caused the termination of the partnership, and, if so, what is the measure of his recovery?

Plaintiff contends the trial court should have found the partnership was to endure for one year only, but he has not filed a cross-appeal, and we regard that question as settled by the finding of the trial court. We may say that we have examined the record and have reached the same conclusion as the trial court that the contract of partnership was to endure for a term of five years.

The copartnership acquired a herd of 21 cows, a number of which were not fresh until the fall of 1919. Considerable work has to be done to prepare the buildings for the proper care of the dairy herd, provide an adequate water supply for the cows and the care of the milk, seeding a portion of the land to alfalfa, putting the buildings in order to properly house and shelter the cows and their increase during the winter season. The parties evidently contemplated the growth of the dairy herd by its natural increase and probably by the addition of other cows. It is evident that the parties could not have reasonably expected any substantial profits from the business for at

least a year or longer. If the future business was to be profitable it was necessary that the herd be increased to somewhere near the capacity of the farm to care for the same. It is plain that if any substantial profits were to be realized from the venture they would accrue in the later years of the business. What profits, if any, could have been made is a matter of speculation and conjecture. No one could foretell what the death rate in the dairy herd might be for a period of years, nor could any one predict with certainty whether sufficient grain and forage could be raised on the farm for the care of the herd, nor what prices would have to be paid for any feed that might have to be purchased for the live stock, nor could anyone determine what prices might be obtained for the farm or dairy products. We think the trial court was right in finding that there was no basis in the evidence for determining what, if any, prospective profits would have accrued. Where prospective profits can be shown with reasonable certainty, the loss of such profits affords a proper basis for the recovery of damages for breach of the partnership contract whereby it is prematurely terminated; but, where such profits are uncertain and speculative or conjectural, they do not afford a proper basis to measure the damages. 17 C. J. 785, sec. 112, and cases there cited. It does not follow that defendant is without a remedy because he was unable to show what the prospective profits of the partnership venture would have been had it been continued for the full contract term. Defendant devoted his time to the partnership business in the hope and expectation that the later years of it would bring him a substantial profit, and by the wrongful conduct of plaintiff he has been unjustly deprived of whatever opportunity there might have been for a realization of profits had the business been carried on for the five-year term. The evidence discloses that defendant was somewhat skilled in the dairy business and that the reasonable value of the time he devoted to the partnership between March 1, 1919, and January 1, 1920, was $90 a month, or

$900 in the aggregate. During that same period defendant received as his share of the partnership business $418.65. While the authorities are not harmonious upon the subject, we believe that the reasonable and better view is that, where one partner by his wrongful act has rendered it impracticable for the partnership business to be carried on for the contract period, and the other partner has devoted his time to the business, but is unable to show beyond mere conjecture what the prospective profits of the partnership would have been, in lieu of and as a substitute for prospective profits, he may recover as damages the reasonable value of his time, less such sum as he may have actually received from the business. 20 R. C. L. 929, sec. 145; *Webster v. Beau*, 77 Wash. 444, 51 L. R. A. n. s. 81, and note thereto. We are of the opinion that the district court should have allowed defendant damages equal to the difference between the value of his time from March 1, 1919, to January 1, 1920, when the partnership was dissolved by the decree of the district court, and the sum that he actually received from the partnership during that period. The evidence shows the value of defendant's time is $900 and the finding of the district court was that defendant had received $418.65. He should be awarded damages in the sum of $481.35.

The judgment and decree of the district court is hereby modified so as to allow defendant damages for the breach of the partnership contract in the sum of $481.35, and, as modified, is affirmed.

AFFIRMED AS MODIFIED.

STATE, EX REL. CITY OF TEKAMAH, RELATOR, V. GEORGE W. MARSH, AUDITOR, RESPONDENT.

FILED JUNE 22, 1922. No. 22769.

1. **Mandamus:** REGISTRATION OF MUNICIPAL BONDS. Where the state auditor refused to register municipal bonds for insufficient showing as to the legality of the debt funded thereby, and upon ap-

plication to this court for mandamus to compel their registration the defects in the showing are supplied, the writ will be allowed in the interests of justice, though such refusal might otherwise be approved.

2. **Municipal Corporations:** INDEBTEDNESS: RATIFICATION: BONDS. Where a municipal corporation incurred indebtedness for current expenses without having previously made an appropriation therefor, but for purposes within the general scope of its powers, and subsequently called a special election submitting to the electors a proposition to issue bonds for the purpose of funding such indebtedness, at which election a majority voted for the bonds; *held*, that the action of the city authorities was thereby ratified and such indebtedness validated, and the bonds entitled to registration.

Original proceeding in mandamus to compel respondent to register certain bonds of the city of Tekamah. *Writ allowed.*

Orville Chatt and *Herbert Rhoades*, for relator.

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

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

REDICK, District Judge.

Leave having been granted, relator brings an original mandamus action in this court to compel the state auditor to register certain bonds issued by the city of Tekamah for funding certain indebtedness of the city incurred for current expenses. The auditor bases his refusal upon the proposition that, from the certificate and showing filed with him upon the application to register, it does not sufficiently appear that the bonds were based upon a legal, valid debt against the city. The attorney general has not filed a brief for the reason, as stated by him in open court, that in his opinion the writ should be allowed.

The showing before the auditor on the point involved consists of a resolution of the mayor and council reciting the existence of an indebtedness of $50,000 for which war-

rants had been issued and were outstanding; and the precise point of objection is that it does not appear for what purpose the debt was created, nor that an appropriation was made prior to the expenditure and issue of the warrants, as required by section 5186, Rev. St. 1913.

The statutes do not define the character of evidence upon which the auditor is required to act when bonds are presented for registration, but section 381, Rev. St. 1913, provides, "if he be satisfied that such bonds have been legally issued for a lawful purpose," he shall register the same. In this state of the record it may be a debatable point whether the recital above referred to is sufficient evidence to satisfy a conscientious officer that the bonds were issued for a lawful purpose. We have held that a pleading in an action upon contract brought against a municipality must affirmatively show a compliance with statutory requisites to a valid contract that it may be invulnerable to a demurrer. *Gutta Percha & Rubber Mfg. Co. v. Ogalalla,* 40 Neb. 775; *Tullock v. Webster County,* 46 Neb. 211. It is not thought that the rule so announced should be applied to a proceeding of this nature, but that the officer may and many times must rely upon the presumption of the regularity of official action where the statute does not require a specific showing. Section 382, Rev. St. 1913, requires the city clerk to furnish the auditor with "a duly certified transcript of all the proceedings had previous to the issuance of such bonds *relative thereto,*" which would seem to include the call, notice and holding of the election, the result thereof, and ordinance providing for their issue. This was done and therefrom it appears that the bonds were "legally issued." The only other question for the auditor was whether they were issued for a "lawful purpose;" that purpose was to fund what was certified to be a "legal indebtedness" of the city. The purpose, then, was lawful as authorized by section 429, Rev. St. 1913, *provided* there was an indebtedness. We think the auditor would have been justified in registering the bonds on the face of the papers before him,

relying upon the presumption above mentioned on the question of the indebtedness.

However, there is in the record before us an affidavit signed by the mayor and clerk of the city of Tekamah, by stipulation of the parties to have the same effect as a deposition, from which it appears that "said indebtedness was incurred for the repair and restoration of the light plant and for the purchase of equipment and the repair and restoration of the streets and roads leading into the said city of Tekamah;" and that the expenditures were made by unanimous vote of the city council, and "at a time when the same was absolutely essential to save the present improvements from serious losses." It does not appear that any appropriation had been made before the expenditures and issue of the warrants. It is therefore clear that no action could be maintained upon the warrants as such. *Gutta Percha & Rubber Mfg. Co. v. Village of Ogalalla* and *Tullock v. Webster County, supra.* But the relator contends that the evidence before the auditor. plus the evidence by affidavit in this record, is sufficient to show a liability against the city upon an implied contract to pay for materials and services, the benefit of which it received and retained, even though precedent legal requirements had not been complied with—citing, *inter alia, Rogers v. City of Omaha,* 76 Neb. 187, and *Nebraska Telephone Co. v. City of Red Cloud,* 94 Neb. 6. The cases cited sustain the doctrine that, where the contract was within the general powers granted the city, and it has received and retained the benefits thereof, natural justice requires that it pay to the extent of the benefits received; but the doctrine must not be extended, and its application should be considered with particular regard to the facts of each case in which it is recognized.

We are satisfied from the record before us that the expenditures in question were within the general powers of the city (Laws 1919, chs. 181, 182), were made in good faith, that the city has had the benefit thereof and is liable therefor. While, as we have indicated, the auditor

might have registered the bonds in reliance upon the presumption of regularity of official acts, such presumption cannot prevail over established facts; and, although the absence of an appropriation does not affirmatively appear, we may safely assume its nonexistence.

What then, is the duty of the auditor? Must he require that the certificate shall show affirmatively the existence of every statutory step necessary to a valid contract; or is it sufficient if it appears that a claim exists against the city which under the laws of the state may be enforced in the courts? We hold that a claim sounding in contract, which may be enforced in the courts, is an indebtedness for the payment of which funding bonds may be issued under section 429, Rev. St. 1913, and that it is the duty of the auditor to register the bonds however the existence of the debt may be made to appear. It is probable that, if a more complete showing had been made before the auditor, he would have registered the bonds.

But there is another reason why these bonds should be registered as valid obligations. The debt, for want of prior appropriation, and perhaps other irregularities, was technically illegal, but, as above stated, was within the scope of the general powers of the city. Its illegal status resulted only from a failure of the city to proceed in a certain manner, not from a lack of power to make the contracts; the contracts were in no sense *ultra vires*. *Nebraska Telephone Co. v. City of Red Cloud*, 94 Neb. 6. Section 5184, Rev. St. 1913, whereby a prior appropriation is required, concludes: "No further appropriation shall be made at any other time within such fiscal year unless * * * first sanctioned by a majority of the legal voters." And chapters 181, 182, Laws 1919, provide that bonds may be issued on the vote of the people for the purposes for which this indebtedness was incurred. Had a vote of the people been taken in advance, there would be no question of the legality of the debt, and we have no doubt of the power of the people at an election regularly called to ratify an act which it might have authorized in the

first instance. In *Bell v. Waynesboro Borough,* 195 Pa. St. 299, where the borough had incurred an indebtedness in excess of the 2 per cent. allowed by law, and at an election subsequently held bonds were authorized to pay the floating indebtedness of the borough, including such excess, the court said: "In the present case we hold that the vote of November 7, 1899, authorizing the town council to create the indebtedness (by issue of bonds) for the express purpose of liquidating this floating debt, which had been irregularly contracted, was such a recognition and ratification of the debt as made it enforceable against the borough. It made valid that which was before illegal." See to the same effect *Roye v. Columbia Borough,* 192 Pa. St. 146. The same principle is recognized in *Marsh v. Fulton County,* 10 Wall. (U. S.) 676, though the attempted ratification in that case was by the board of supervisors and was held ineffectual.

We conclude that the bonds were entitled to registry and the writ should be allowed.

WRIT ALLOWED.

JOE BAN, APPELLANT, V. GUSTAVUS HOPKINS ET AL., DEFENDANTS: GEORGE J. MORRIS, APPELLEE: RACHAEL BAN, APPELLANT.

FILED JUNE 28, 1922. No. 22094.

Specific Performance. In a suit for the specific performance of an executory contract for the sale of real estate, the court is not bound to decree specific performance in every instance, even though the proof may show the contract was duly made. Neither is the court free capriciously to refuse a decree of specific performance where the proof demands it.

APPEAL from the district court for Douglas county: ARTHUR C. WAKELEY, JUDGE. *Affirmed in part, and reversed in part.*

Rosewater & Cotner, for appellants.

James H. Adams, contra.

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

MORRISSEY, C. J.

Plaintiff brought this action to quiet title to a parcel of ground in the city of Omaha. Certain defendants defaulted; but defendant George J. Morris filed an answer and cross-petition, praying specific performance of an executory contract made by plaintiff and his wife for the sale of the lot. Plaintiff's wife filed an answer to the cross-petition and plaintiff filed a reply. The court found generally in favor of defendant and decreed specific performance.

In 1914 plaintiff and another entered into a contract of purchase for the property with its then owner, Eliza Callahan. Subsequently plaintiff purchased the interest of his partner in the contract, and, since October, 1916, has occupied the premises in person, or by his tenants. September 12, 1916, plaintiff and his wife signed a contract for the sale of the premises to defendant Morris. The gross consideration for the premises was fixed at $3,200. A check for $25 was given the sellers as earnest money. Plaintiff agreed to assign the contract which he then held from Eliza Callahan and to execute a quitclaim deed of the property to Morris. There was a balance due on the Callahan contract, and this balance it was agreed should be deducted from the purchase price, and the difference paid plaintiff. It was also agreed that "the rents are to go to the party of the first part from and after the date of closing this transaction." It was stipulated that if title to the premises was found defective the sellers should cure the defects within a reasonable time, but in case the defects could not be cured the earnest money should be returned to the purchaser, but should the purchaser fail to comply with the terms of the contract the earnest money might be retained by the seller in settlement of any damages sustained because of the breach of the contract. The

contracting parties had been brought together by a firm of real estate brokers, and there is appended to the contract a memorandum by the terms of which plaintiff agreed to pay the brokers $50 for their services. The day succeeding the making of the contract plaintiff notified the brokers that he would not proceed with the contract and mailed them the check which had been given as earnest money. Plaintiff alleges that the record of this contract constitutes a cloud upon his title; that the real estate brokers deceived the plaintiff by representing that they were acting as his agents, while in fact they were the agents of the defendant Morris; that the contract provided that it should not be considered as a transfer of the title of the real estate, and that it was agreed that the contract should not be recorded; that plaintiff and his wife were unacquainted with business methods, and were unable to read and understand the contract; that as soon as they learned of the effect of the contract they notified Morris and his agents that they would not be bound by its provisions; and charges that the real estate brokers and defendant Morris conspired together to obtain the property for less than its true value.

Soon after executing the contract plaintiff moved on to the premises and has continued to occupy it as a home. The separate answer of Rachael Ban, the wife, sets out substantially the allegations contained in plaintiff's petition and reply, and pleads specially that she and her husband have paid the taxes annually assessed against the property, and have made repairs on the buildings; that the property has advanced in value, and that because of the failure of defendant Morris to attempt to enforce the contract he is guilty of such laches that he ought to be estopped to maintain his action for specific performance.

Plaintiff in his reply reiterates the material allegations of the petition, and asserts that since the execution of the contract the property has greatly advanced in value; that defendant Morris did not demand the enforcement of the agreement; that more than four years have elapsed since

its execution; that plaintiff purchased the property for a home for himself and family and is so using it; that in March, 1918, plaintiff offered to comply with the terms of the contract if Morris would pay him, in addition to the sum stated in the contract, $202, which plaintiff had expended on the property subsequent to the making of the contract; that Morris accepted plaintiff's offer, but later refused to perform its condition; that by reason of the conduct of Morris plaintiff had been lead to believe that Morris did not desire that the agreement be carried out; that since the making of the contract the property was greatly advanced in value, and the enforcement of the contract would be inequitable.

There is little conflict in the evidence. When plaintiff announced his repudiation of the contract and returned the check which had been given in payment of the earnest money he was promptly notified that he would be held to the contract and the check was returned to him, or to his agent. The contract was placed of record, and from time to time thereafter until the bringing of this suit defendant Morris demanded that plaintiff proceed to carry out the contract. As late as March, 1918, according to the allegations of plaintiff's petition, plaintiff offered to proceed with the contract provided Morris would compensate him for improvements he claimed to have made. It is argued in appellant's brief that because Morris did not bring an action to compel specific performance, but waited until plaintiff filed this suit, he was in reality speculating on future values. Whatever may be said of defendant's conduct in permitting the matter to remain unsettled will apply with equal force to the conduct of plaintiff. The courts were likewise open to him. Any day after defendant placed the contract of record, plaintiff might have brought the suit which he finally brought after a lapse of nearly four years. Defendant is not estopped to demand performance of the contract. *Harrison v. Rice,* 78 Neb. 654.

The conduct of the respective parties indicates that each

refrained from having resort to the courts in the hope that an amicable adjustment might be reached, and the doctrine of laches cannot be applied to one and not applied to the other. The allegations made by plaintiff and his wife as to the alleged fraud practiced upon them by defendant Morris and the real estate brokers are wholly lacking support in the evidence. Plaintiff's wife testified that when she signed the contract she had been led by her husband to believe that it was a lease. We note, however, that although she and her husband appear to be living amicably together and each is seeking the same result in this action the husband refrained from giving any testimony which would corroborate her claim. As to their claim of homestead, the evidence is insufficient to show that at the time the contract was signed they had any intention of ever occupying it as a home. The evidence leaves small room to doubt that each party, the wife as well as the husband, realized that they were entering a contract for the sale of the real estate and fully understood the terms of their agreement. There is nothing to show that they were imposed upon by the brokers, or by the purchaser. The court is not bound to decree specific performance in every instance, even though the proof may show the contract was duly made. Neither is the court free capriciously to refuse a decree where the proof demands it. On each of the general issues presented the proof preponderates in favor of defendant and supports his prayer for specific performance. In the matter of terms we feel that there ought to be a modification of the decree entered by the trial court. Under the terms of the contract, defendant Morris paid as earnest money only $25. This was paid in a check which has never been cashed. Morris has had no investment in the property. During the time intervening since the making of the contract plaintiff has occupied and used the premises. The contract provides that the rents shall go to the purchaser "from and after the date of closing this transaction."

In consideration of the terms of the contract and the

circumstances disclosed, it does not appear that plaintiff should be charged with rent for the use of the premises. In all other respects the findings and decree of the district court are approved. The cause is remanded, with directions to take an accounting and enter a decree in harmony with this opinion.

JUDGMENT ACCORDINGLY.

EVA J. MARTI, APPELLEE, V. MIDWEST LIFE INSURANCE COMPANY, APPELLANT.

FILED JUNE 28, 1922. No. 21988.

1. **Insurance:** FORFEITURE: MENTAL INCAPACITY. Where there is no plain and positive language in a contract of insurance which requires performance by the insured, personally and within a certain time, a requirement that, after the happening of an event which entitles him to exercise certain options, the insured shall furnish proofs of this fact, and exercise one of the specified options as a condition precedent to the right to recover, will not be construed to apply in cases where performance is prevented because of the insured becoming mentally incompetent to act. In such a case, the insured will not forfeit his insurance if he performs the stipulated act within a reasonable time after his mental capacity is restored.
2. ———: ———: ———: RIGHTS OF BENEFICIARY. In such a case where the insured dies without regaining ability to act, and the beneficiary, who had no knowledge of the existence of the policy, or its conditions, until some time after his death, furnishes proof within a reasonable time that the insured became incurably insane and was unable to exercise the option or furnish the proofs while the policy was in force, such beneficiary is entitled to obtain the benefits of the option provided in the policy.
3. ———: EXERCISE OF OPTION. Where no time limit is fixed in a policy within which such an optional provision must be exercised, if it is exercised within a reasonable time under all the circumstances of the case, it is sufficient.

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

Lincoln Frost and *J. W. Kinsinger,* for appellant.

T. S. Allen, contra.

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

LETTON, J.

Defendant insurance company issued a policy of life insurance to Albert F. Marti for $1,000 for the benefit of his wife, Eva J. Marti. The premium was paid for one year, beginning February 10, 1916, and the policy was delivered. The insured died on December 25, 1917, without having paid the premium due in January, 1917, so that the policy lapsed on February 10, 1917. It is alleged that the insured became totally disabled and incurably insane on or about March 1, 1916, and remained in that condition until his death. His wife was not aware of the existence of the policy and found it among his papers some time after his death. She then gave notice and proofs of death to the company, which refused to pay, mainly upon two grounds, first, that the policy lapsed on February 10, 1917, and, second, that the right to exercise certain options provided in the policy was a personal right and could only be exercised by the insured, or by some one for him during his lifetime. Other defenses set forth in the answer were, that the disability arose from a disease originating prior to the delivery of the policy, lack of proofs for more than two years after the death, and the falsity of answers made by the insured to questions in the application. The jury found for plaintiff and judgment was rendered accordingly.

The policy contained the usual provisions for forfeiture upon nonpayment of the premium, and also contained the following provision: "Should the insured, no premium being in default, become totally and permanently disabled through bodily injury or disease originating after the delivery of this policy, so that there is no work, occupation or profession, either then or thereafter, that the insured can do or follow to earn or obtain any wages, compensation or profit, and proofs of such condition are furnished

to the company at its home office to its entire satisfaction, the insured, after receiving notice from the company that it has approved the evidence submitted of such total and permanent disability, may select one of the following options: First. Retain this policy as a fully paid-up policy for its face amount, but without the extra indemnity in case of accidental death. (The other options are of no import in this case.) Without prejudice to any other cause of disability, * * * incurable insanity will be considered as total and permanent disability within the meaning of this provision."

Upon the back of the policy we find the following printed statement: "Should the insured become totally and permanently disabled, the policy becomes paid-up for its face amount at the option of the insured: that is, no more premiums are payable."

The trial court fairly submitted all defenses to the jury, other than the two principal ones mentioned, and, since the evidence was conflicting, the verdict settled these issues in favor of plaintiff.

In its brief the insurance company concedes: "That the insured became totally and permanently disabled within the meaning of the policy March 1, 1916, and remained so thereafter until his death December 25, 1917." The plaintiff bases her right to recover on the proposition that, since the insured became totally and permanently disabled upon March 1, 1916, and so remained until his death, he was incapable of giving the proofs or exercising an option, and that therefore she had the right, when she discovered the policy, to furnish the proofs required and exercise the option. The contention of the company is that the exercise of the optional provisions in such a case is personal to the insured, so that when his mental disability, or incurable insanity, rendered him incapable of making proof, or selecting an option, he, or his beneficiary, lost all benefit of the optional provisions; that provisions giving additional rights to the insured upon the happening of certain events, or the performance of certain acts

by the insured, in case of disability, are ancillary to the main purposes of the policy, which is life insurance, and are strictly construed, and that happening of the events, or performance of the acts, are conditions precedent to the obtaining of any rights thereunder; that, even though the insured is incurably insane, proofs of such condition must be furnished by the insured himself, and not by any one for him, and he must select one of the options or lose all rights under the policy, and that those conditions must be met while the policy is in force and has not lapsed on account of failure to pay the next premium due.

The general rule, where there is no positive language in the contract which requires performance by the insured personally, and at all events, is stated as follows in *Comstock v. Fraternal Accident Ass'n,* 116 Wis. 382: "It is considered that a requirement in a contract of insurance that the insured shall, after suffering loss, perform some act as a condition precedent to the right to recover therefor, does not include cases where performance is prevented without fault of the assured, because of his being incapacitated to act in the matter; that in such cases the assured will not forfeit his insurance if he performs the stipulated act within a reasonable time after a mental capacity to do so shall have been restored to him."

The parties here must be considered to have contracted with reference to this rule of construction, in the absence of any more definitely restrictive language in the contract. It was impossible for the insured to act on account of his insanity. It was equally impossible for the beneficiary to act within the year the policy was in force because she had no knowledge of its existence, or its conditions. The policy contains no limitation of time in which the proof of disability must be presented, or option exercised. The beneficiary did act within a reasonable time under all the circumstances, which is all that was required.

In *Woodmen Accident Ass'n v. Pratt,* 62 Neb. 673, it was held that strict compliance with the terms of the

policy as to election and notice are not required, when the same was impossible of performance, and that, where an accident deranged the mind of the insured so that he could not independently give notice and information regarding the accident and injury within the time stipulated, this excused him from compliance with the conditions of the policy in that regard during the existence of the disability. Though these were accident policies, the same principle applies.

Other cases relevant to the point presented are, *Grand Lodge, A. O. U. W., v. Brand,* 29 Neb. 644; *Phœnix Ins. Co. v. Holcombe,* 57 Neb. 622; *Chapin v. Ocean Accident & Guarantee Corporation,* 96 Neb. 213; *Hilmer v. Western Travelers Accident Ins. Ass'n,* 86 Neb. 285; *Midland Glass & Paint Co. v. Ocean Accident & Guarantee Corporation,* 102 Neb. 349; *Reed v. Loyal Protective Ass'n,* 154 Mich. 161; *Rathbun v. Globe Indemnity Co.,* 107 Neb. 18; *Veal v. Security Mutual Life Ins. Co.,* 6 Ga. App. 721; *Munz v. Standard Life & Accident Ins. Co.,* 26 Utah, 69; *Roseberry v. American Benevolent Ass'n,* 142 Mo. App. 552.

Complaints are made of several of the instructions, but they are based on defendant's view of the construction of the contract, and what has been said disposes of the points raised.

The case of *Thorensen v. Massachussetts Benefit Ass'n,* 68 Minn. 477, cited by defendant, in which it was held that the insured must exercise the option while the policy is still in force, is dissimilar in its facts, since it does not contain the element of insanity. Apparently there was nothing to prevent the notice being given while the policy was in force and while the insured was a member in good standing of the benefit association. Furthermore, it would be a harsh rule that would say that in a case where a man was injured, so as to be totally *non compos mentis,* within a few hours before the next payment on his policy became due, and while it was still in force, the occurrence of the very contingency he was insuring against should deprive him, or his beneficiaries, of the benefit of the con-

tract. This seems to us to be the logical result of the Minnesota case, if construed as defendants insist.

Finding no prejudicial error in the record, the judgment of the district court is

AFFIRMED.

WILLIAM I. TOOP ET AL., APPELLANTS, V. FRANK PALMER ET AL., APPELLEES.

FILED JUNE 28, 1922. No. 20805.

1. **Action:** MUTUAL ACCOUNTS. Where the pleadings as a whole, in an action wherein the jury is waived, present mutual accounts for a court of equity to adjust with a view to the termination of protracted and complicated litigation, the case may be tried and determined as a suit in equity.

2. **Parties:** NEW PARTIES. In a suit in equity, the trial judge on his own motion may bring into court a party necessary to a determination of the issues.

3. ———: DISMISSAL. Defendants who have pleaded facts entitling them to affirmative relief cannot be eliminated from the case by a mere dismissal as to them by plaintiffs.

4. **Judgment:** CONCLUSIVENESS. A question once determined in a case by a judgment on the merits is settled and cannot be relitigated in a subsequent suit between the same parties.

5. **Deeds:** CANCELATION: RIGHTS OF GRANTEE IN POSSESSION. In a proper case, defendants who are required to account for rents, while in possession of a farm under deeds canceled for fraud, may be allowed equitable credit for taxes and interest paid, for reducing liens, and for improvements made.

6. **Judgment:** SUFFICIENCY OF PETITION. A petition alleging as a mere conclusion that defendants by conspiracy and fraud cheated plaintiffs out of the rents of a farm for two years, while defendants, as shown by the petition itself, had no lease and no title and were not in possession, without stating any facts to show how the cheating was done or how defendants procured rents belonging to plaintiffs, will not support a judgment in favor of plaintiffs for such rents.

7. **Deeds:** CANCELATION: ACTION FOR RENTS: ACCOUNTING: INTEREST. In a supplemental action to recover rents, as the fruits

of a former suit to cancel fraudulent deeds executed by plaintiffs to defendants, plaintiffs may be required to account for interest which they received from a third person on money deposited by them in court for defendants, pending an appeal, as the consideration for the canceled deeds.

8. **Damages:** ATTORNEY'S FEES: EXPENSES. In the absence of statute, attorney's fees and other expenses of litigation are not recoverable as elements of damage for the wrongs of grantees who procure deeds to land by fraud and force the grantors into a court of equity to restore their title.

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

C. M. Skiles and *R. C. Roper,* for appellants.

Hastings & Coufal and *Thomas, Vail & Stoner, contra.*

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

ROSE, J.

This is an action by plaintiffs to recover from defendants rents, expenses of former litigation, and attorneys' fees, aggregating $11,821.86. The parties do not agree on the nature of the suit. Plaintiffs contend they brought an action at law to recover damages for fraud and conspiracy. Defendants insist that the suit is one in equity to adjust mutual accounts, that they pleaded equitable defenses, and that the issues were determinable under the rules of equity. The parties waived a jury. The trial judge proceeded to bring in a new party on his own motion and to determine the pleas of all litigants according to equitable principles. As a result the balance due plaintiffs, instead of $11,821.86, as claimed by them, was found to be $1,276. From a judgment in favor of plaintiffs for the latter sum, they have appealed.

Whatever the nature of this suit may be, plaintiffs are seeking to recover some of the fruits of former litigation which must be considered in connection with the claims now presented.

In a former suit in equity the title and possession of a

quarter section of farm land in Butler county, valued at $20,000, were subjects of litigation. John Toop owned the land. He died intestate July 28, 1897, leaving as his next of kin two nieces, residents of the United States, and three nephews, nonresident aliens, residing in England. The title descended to the resident heirs at law. The English kin took no interest whatever, because a Nebraska statute prohibited them from inheriting farm land in Nebraska. Except for the disqualification of alienage they would have inherited an undivided two-thirds interest. John Toop left a widow who had a life estate only. She died November 9, 1907. Thereafter the resident heirs of John Toop owned the fee and were legally entitled to possession. At first they did not know their rights and had an erroneous impression that their English kin owned two-thirds of the farm. In this state of affairs the legal title was transferred to Frank Palmer, who acted for himself and also for his associates, Alfred R. Palmer, Reed Rihart and H. L. Pence. The Palmers, Rihart and Pence afterward incorporated in the name of the Ulysses Land Company, to which the legal title acquired by Frank Palmer was conveyed. The latter, in negotiating for the land, among other inducements, had represented that he would have to buy the interests of the English kin to procure John Toop's title to the farm. Whether this was a well-grounded observation from a legal standpoint engaged the attention of this court in protracted litigation. The opinion was once judicially expressed that the Nebraska statute did not prevent the English kin from inheriting two-thirds of the land. *State v. Thomas,* 103 Neb. 147. The tide of litigation eventually changed, however, and it was finally determined that the English kin took no title and that the title to the farm land owned by John Toop descended to his two resident heirs at law. *State v. Toop,* 107 Neb. 391.

Before the question of descent was presented for adjudication, Frank Palmer procured, through the two resident heirs of John Toop, for $5,000, the legal title to the farm,

valued as it was at $20,000. The deed conveying to him an undivided one-half of the land owned by one of the resident heirs was executed by William I. Toop January 25, 1909, and the deed conveying the other undivided one-half was executed by Emily Tremlin January 27, 1909. Shortly after the execution of the deeds described, Frank Palmer went into possession for himself and his associates. Acting for himself and them, he conveyed the legal title August 30, 1909, to the Ulysses Land Company, a corportation which they organized and controlled. The corporation mortgaged the land to the Northwestern Mutual Life Insurance Company January 25, 1910, for $6,000. June 9, 1911, William I. Toop and Emily Tremlin, the two grantors who had conveyed the legal title to Frank Palmer, commenced a suit in equity to cancel their deeds; to cancel the mortgage; to recover $1,000, the difference between the consideration of $5,000 paid by Frank Palmer and the mortgage lien of $6,000; to recover the rents for the years 1907, 1908, 1909, 1910, and 1911. In that suit in equity the deeds were canceled subject to the lien of the mortgage. William I. Toop and Emily Tremlin were ordered to pay into court to be applied on the mortgage the consideration of $5,000 paid by Frank Palmer. They recovered a judgment for $1,400, the rents for 1909, 1910, 1911. The decree in equity containing these orders and judgments was reviewed by the supreme court and affirmed. *Toop v. Palmer,* 97 Neb. 802.

Settlement of the controversies between the resident heirs and Frank Palmer and his associates was further delayed by litigation to determine whether the interest which, except for the disqualification of alienage, would have descended to the English kin escheated to the state of Nebraska; but, as already stated, this phase of the controversy resulted in the final determination that the title to the farm land of John Toop was inherited by his resident heirs at law. *State v. Thomas,* 103 Neb. 147; *State v. Toop,* 107 Neb. 391.

In the present suit the plaintiffs are William I. Toop

and Emily Tremlin. They named as defendants Frank Palmer and his associates, Alfred R. Palmer, Reed Rihart and H. L. Pence. The latter was not summoned. The presiding judge, on his own motion, brought in as a party defendant the Ulysses Land Company.

The claim of plaintiffs herein consists of four items: (1) Rents for the farm for the years 1907 and 1908; (2) rents for the farm subsequent to the decree canceling the deeds, pending appeal, including the years 1912, 1913, 1914, and 1915; (3) share of urban property rents not recovered in the suit to cancel the deeds; (4) expenses of former litigation $900, and attorneys' fees therefor $4,500; total recovery sought $11,821.86.

The answers of defendants contain pleas in equity admitting the collection of rents for the farm lands for the years 1912, 1913, 1914; alleging payment of taxes, payment of interest on the mortgage, partial payment of the mortgage debt, payment for the expenses of repairs and improvements, specifying the items; seeking credit for such payments; and praying for an accounting in equity.

In determining the issues the district court applied the rules of equity to the claims of all litigants, charged defendants with the rents and gave them credit for payments, expenses and improvements.

The mere statement of the case is perhaps sufficient to show that the trial court did not err in treating the litigation as a suit in equity. There was a dispute over some of the items of rent pleaded by plaintiffs. The credits demanded by defendants, consisting of many items, were controverted. Plaintiffs are seeking to recover fruits of a former proceeding in equity. Equitable defenses are pleaded. The items of rent are of the same nature as rents recovered in the equitable action to cancel the deeds. In respect to the rents the present suit is supplemental to the former. Except for the original adjudication in equity the recovery of rents herein would be denied. Part of the relief now sought was demanded in the former equitable action. Some of the new items are based on the identical

equities established by plaintiffs in the original suit. Reduced to the final analysis the pleadings present mutual accounts for a court of equity to adjust with a view to the termination of protracted and complicated litigation.

It is asserted that the presiding judge erred in bringing into the case on his own motion as a party defendant the Ulysses Land Company. It is a corporation and there is nothing to show that its corporate existence had been terminated in any manner. It is the mortgagor that borrowed $6,000 on the strength of the title conveyed by plaintiffs to Frank Palmer. As to the lien of that mortgage the deeds of plaintiffs were not canceled in the original suit. The Ulysses Land Company collected rents and paid taxes, interest and part of the mortgage debt. For the purpose of settling this controversy and terminating litigation it was a necessary party. In a suit in equity the trial judge on his own motion had authority to make it a party defendant. Rev. St. 1913, sec. 7604; *Kaplan v. City of Omaha,* 100 Neb. 567.

It is further argued that the trial court erred in denying plaintiffs the right to dismiss the action as to defendants Alfred R. Palmer and Reed Rihart. These defendants joined in an answer in which they pleaded facts entitling them to affirmative relief. In this condition of the pleadings plaintiffs did not have the right to eliminate them as litigants. Rev. St. 1913, sec. 7656; 18 C. J. 1159, sec. 32; *Adams v. Osgood,* 55 Neb. 766.

An item challenged as erroneously allowed in favor of defendants was a payment of $250 on the mortgage debt. Though the original decree, canceling the deeds executed by plaintiffs, directed them to pay into court the consideration of $5,000 to apply on the mortgage for $6,000, the mortgage lien remained in force. The decree was superseded pending appeal. Under a threat of foreclosure, while the appeal was undetermined, defendants paid $250 on the mortgage debt. The effect of the payment was to reduce the mortgage lien to that extent. Upon the affirmance of the decree from which the appeal had been taken, the title

to the mortgaged land being thus finally restored to plaintiffs, the payment inured to their benefit. It follows that this item was properly allowed as a credit in favor of defendants.

If the position of plaintiffs is correctly understood, they assert the right to recover in the present case $1,000, the difference between the consideration of $5,000 for the canceled deeds and the mortgage by which defendants wrongfully incumbered plaintiffs' farm to the extent of $6,000. This item was the subject of litigation in the former suit in equity. In that case the trial court, instead of canceling the mortgage, or ordering defendants to pay the mortgage debt, or entering judgment against defendants for the amount of the lien, directed plaintiffs to pay into court to apply on the mortgage the $5,000 paid by Frank Palmer for the canceled deeds. There was a compliance with this order and the decree was affirmed by the supreme court as rendered, though plaintiffs took a cross-appeal. The question now presented, therefore, was determined in the former suit and cannot be relitigated; nor can any error in the affirmed judgment be reviewed or corrected in this proceeding.

Complaint is made because defendants were allowed credit for payment of taxes, of interest on the mortgage debt and of expenses of improvements and repairs. Credits for such payments as defendants made after the deeds were canceled, pending a review of the decree, are justified as a condition of the allowance in favor of plaintiffs for rents during the same period. No substantial error in these respects has been pointed out or observed.

The rejection of plaintiff's claim for a share of the rents of the urban property was proper.

Did the trial court err in disallowing plaintiffs' claim of $1,400 for rents of the farm for the years 1907 and 1908? This part of the claim for rent is without merit and it was properly disallowed. Plaintiffs themselves pleaded that defendants procured the canceled deeds in January, 1909, and shortly thereafter went into possession

of the land. It is not shown that defendants had a lease. The petition, however, contains a conclusion that defendants fraudulently received and appropriated all the rents and income for the years 1907 and 1908, but facts showing how they procured the rents before they acquired title while they were not in possession, or how the cheating was done, are not pleaded. The widow of John Toop owned the life estate and lived until November 9, 1907. How she lost the rents for the previous months of that year, how plaintiffs acquired her right to them, and how defendants by fraud and conspiracy cheated plaintiffs out of them are not pleaded in a form to support a judgment. Beside, plaintiff sued for these rents in the former proceeding to cancel the deeds. The claim therefor was not allowed. The judgment in that case was affirmed in the supreme court.

One phase of the controversy grew out of the following circumstances: In the former suit in equity the trial court canceled the deeds from plaintiffs to Frank Palmer. The latter had paid $5,000 for the land and he and his associates caused it to be mortgaged for $6,000. Defendants had title to the land and plaintiffs had $5,000 of defendants' money. In this situation the trial court in canceling the deeds ordered plaintiffs to pay defendants' money into court to apply on the mortgage. Under an arrangement not confided to defendants, plaintiffs received interest pending the appeal to the extent of $583.33 on the $5,000 after they deposited the money in court. The trial judge in the present case credited on the rents due from defendants the interest collected by plaintiffs on the deposit. The allowance of this credit is vehemently assailed by plaintiffs. There was no error in this respect. Plaintiffs are in the attitude of claiming at the same time both the use of the land and the use of the purchase money received by them for the land. The farm belonged to plaintiffs and the deposit belonged to defendants. Plaintiffs were not entitled to both the use of the land and the use of the money. Interest was paid by a bank for the use of the money just as a tenant paid rent for the use of the farm. The super-

seding of the decree canceling the deeds prevented plaintiffs from getting immediate possession of their land and delayed acceptance of the deposit by defendants. Plaintiffs having arranged for and accepted interest on defendants' money under the circumstances were answerable in equity therefor as a condition of obtaining the rents.

It is finally insisted that the trial court erred in denying the right of plaintiffs to recover as elements of damage the expenses of the suit to cancel the deeds. The items under this head consist of $900 for expenses incurred in litigation and $4,500 for attorneys' fees. Plaintiffs take the position that these items were necessary expenses of restoring the legal title acquired by defendants through fraud and that the loss is recoverable in the present suit. The position is clearly untenable. The issues in the former litigation presented questions over which litigants, counsel and the courts entertained different views. Whether an interest in the farm land escheated to the state, whether plaintiffs' alien kin inherited an interest, and whether the conduct of defendants amounted to actionable fraud were all questions open to reasonable controversy. Defendants are not wholly responsible for the litigation. They had a right to negotiate for the title. What they could not legally do was to perpetrate a fraud. Whether they did so was at first doubtful. Plaintiffs, without advice, or sufficient inquiry to ascertain their rights, carelessly deeded away their land for less than its value. When they brought their suit to cancel their deeds some of their demands for relief were unfounded and they thus increased the burden of litigation. There is no statute authorizing a recovery for the expense of litigation under such circumstances and the general rule of law is to the contrary. An expense of that kind is not an actionable consequence of the fraud pleaded and is not regarded as compensatory damage under former decisions.

AFFIRMED.

STATE, EX REL. WESTMINSTER PRESBYTERIAN CHURCH, APPELLEE, V. R. E. EDGECOMB, APPELLANT.

FILED JUNE 28, 1922. No. 22462.

1. **Municipal Corporations:** BUILDING REGULATIONS. Under chapter 213, Laws 1915, as amended by chapter 185, Laws 1919, cities of the metropolitan class are not empowered by ordinance to impose unreasonable regulations upon the owners of city lots with respect to the area which may be occupied for building purposes.

2. ———: ———: MANDAMUS. A church society, relator herein, is the owner of two adjacent city lots in Omaha. Under a city zoning ordinance the city engineer refused to issue to relator a permit for the erection of a church edifice which would cover 37½ per cent. of the surface area of the lots, the ordinance restricting such area to 25 per cent. in the zoning district in question. *Held*, that the requirement is unreasonable; and *held*, that the court did not err in granting a writ of mandamus compelling the engineer to issue a permit pursuant to relator's request.

3. ———: ———. Chapter 213, Laws 1915, as amended by chapter 185, Laws 1919, empowers cities of the metropolitan class to impose regulations by ordinance, "designed to secure the safety from fire and other dangers, and to promote the public health and welfare, including, so far as conditions may permit, provisions for adequate light, air and convenience of access." *Held*, that under the act in question it is not permissible for such cities to impose unreasonable regulations upon the owners of property with respect to the area of such real estate that they may cover by a proposed building.

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

Dana B. Van Dusen and *John F. Moriarty*, for appellant.

B. N. Robertson and *Frank L. McCoy*, *contra.*

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

DEAN, J.

The Westminster Presbyterian Church of Omaha, relator herein, obtained a writ of mandamus compelling the

chief engineer in charge of the building department of Omaha to issue to relator an official permit to build a church house or edifice on two lots in Omaha located at the northeast corner of Thirty-fifth street and Woolworth avenue. The city of Omaha, respondent herein, contends that the court erred in granting the writ and has brought the case here for review.

Under a zoning ordinance,numbered 10784, Omaha is divided into five classes of area districts, designated respectively as "A," "B," "C," "D," and "E" districts as shown by an area zone map. The church property in question is in the district designated as "E" district.

Respondent alleges that under ordinance 10784, and particularly under section 19 thereof, an owner or occupant of property within "E" district is not permitted to erect any building or buildings which will cover more than 25 per cent. of the area of such lot or parcel of ground. Respondent offered in evidence the following portions of section 19 of ordinance No. 10784:

"Section 19. In the district described as 'E' district upon the area zone map, the minimum dimensions of yards and courts and the percentage of area of lots covered by buildings shall be as follows: * * * Building Area. No plot of ground or lot shall be covered with a building or buildings exceeding 25 per cent. of the area of said lot, or plot of ground."

The ordinance in question was passed and adopted by the city council of Omaha June 29, 1920, and became effective 15 days thereafter.

The relator alleges generally, and respondent admits, that the relator is a corporation organized under the laws of Nebraska "for the purpose of maintaining Christian worship and ordinances under the government and discipline of the general assembly of the Presbyerian church of the United States of America, and constructing and maintaining church edifices and other buildings in which to assemble for the worship of God, and for the administration of such offices and services as pertain to that wor-

ship, and has since the year 1887 maintained and supported a place of worship and now maintains such place of worship in the city of Omaha;" that respondent, R. E. Edgecomb, is now and during all the time material to this action has been the duly appointed and qualified building inspector of Omaha; that he is the chief engineer in charge of the building department of Omaha, which is a municipal corporation of the metropolitan class; that relator is now and ever since November, 1919, has been the owner of the two lots in question at the corner of Thirty-fifth street and Woolworth avenue, and that they "now are occupied by the relator for church purposes, in that the Reverend M. L. Laird, pastor of said church, occupies the residence thereon as a manse or parsonage, and said described property was purchased for the purpose of occupying a portion of the balance thereof in the construction and erection and maintenance of a church building suitable and to be used for the purposes for which the relator herein was organized and upon which the relator has determined and proposes to erect such church building to be used and occupied for the purpose of maintaining Christian worship and ordinances under the government and discipline * * * of the Presbyterian church; * * * that the material (to be) used in the construction of said church edifice is brick, cement, steel, iron and stone and lumber; that the outside walls are to be constructed of brick and stone with a metallic roof; that the same is to be 115 feet by 79 feet and 3½ inches in dimensions and about 30 feet in height, and the estimated cost of the proposed structure is $74,000 and the probable time to be occupied in its erection is 12 months."

The ordinance in question was adopted pursuant to the provisions of chapter 213, Laws 1915, as amended by chapter 185, Laws 1919. The amendatory portion of the act became operative April 16, 1919, under an emergency clause. The act provides generally that cities of the metropolitan class shall have power by ordinance to regulate and limit the height and bulk of buildings; that the city

council may divide the city into districts; that the regulation as to the height and bulk of buildings and the area of yards, courts or open spaces shall be uniform. It is further provided:

"Such regulation shall be designed to secure the safety from fire and other dangers, and to promote the public health and welfare, including, so far as conditions may permit, provisions for adequate light, air and convenience of access. The city council shall pay reasonable regard to the character of buildings existing in such district, the value of the land and the uses to which it may be put, to the end that such regulation may promote the public health, safety and welfare, and the most desirable use for which the land in each district may be adopted, and may tend to conserve the value of buildings and enhance the value of land throughout the city." Section 1.

The act also provides that the city council shall have power to regulate and restrict the location of trades and industries and the location of buildings designed for specific uses, and that "Such regulations shall be designated to promote the public health, safety and general welfare. The city council shall give reasonable consideration among other things to the character of the district, its peculiar suitability for particular uses to the conservation of property values and the direction of building development in accord with a well-considered plan." Section 2.

The act in question further provides for a board, consisting of five members, to be known as a city planning commission, which board shall acquire or prepare a city plan and shall have power to carry out and maintain such city plan after its adoption by the city council, and that "The city planning commission shall recommend the boundaries of districts and appropriate regulations and restrictions to be imposed therein, and shall make a tentative report, and hold public hearings thereon before submitting its final report to the city council. The city council shall not determine the boundaries of any district or impose any regulations or restrictions until after the planning commission

has made recommendation thereon." Section 3.

In his examination the city engineer testified in substance that the city planning commission, April 12, 1921, passed and adopted a motion which in effect provided that, if the majority of the property owners within 300 feet of the proposed church site would consent to the erection of a church edifice, the city planning commission would recommend that relator's two lots "be transferred from the 25 per cent. to the 40 per cent. area district." This to the end that relator's request for a permit to occupy 37½ per cent. of the area of its lots might be complied with.

Space need not be taken to demonstrate that "safety from fire and other dangers," and "the public health, safety and welfare," would not be diminished even if the consent of the property owners within 300 feet of the proposed church edifice had been obtained. Nor do we find pretended authority in the statute, nor does the ordinance pretend to empower the city planning commission to delegate the powers conferred upon it to a majority of the property owners within 300 feet, nor could such authority be lawfully delegated. So that the motion or resolution of the city planning commission, as it stands in the record, appears to be a recommendation that relator's request be granted. Clearly the evidence of the city engineer and the recommendation of the city planning commission support the contention of the relator.

It may be noted that the city engineer further testified that he saw no reason why the church building in question, even if it covered 37½ per cent. of relator's ground, would be a greater fire menace to the city or to its health than if only 25 per cent. were covered. Besides, it fairly appears from the admissions in respondent's answer, with respect to relator's petition, that the city was charged with notice that relator purchased the property, more than four months before the ordinance was passed, for the purpose of erecting a modern church edifice thereon, and that relator held the property with that object in view.

Respondent contends that a proper exercise of the police

power warrants a refusal to issue the permit. Police power is that undefined branch of government which bears the same relation to the municipality that the principle of self-defense bears to the individual. *Barrett v. Rickard,* 85 Neb. 769. "Police power is founded upon public necessity and only public necessity can justify its exercise." *Spann v. City of Dallas,* 235 S. W. (Tex.) 513, citing Cooley, Constitutional Limitations (5th ed.) p. 248. The text reads: "And a by-law which assumes to be a police regulation, but deprives a party of the use of his property without regard to the public good, under the pretense of the preservation of health, when it is manifest that such is not the object and purpose of the regulation, will be set aside as a clear and direct infringement of the right of property without any compensating advantages."

Chicago, B. & Q. R. Co. v. Drainage Commissioners, 200 U. S. 561, is cited by relator. Mr. Justice Harlan wrote the opinion for the court. At page 592 this is said: "And the validity of a police regulation, whether established directly by the state or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose. Private property cannot be taken without compensation for public use under a police regulation relating strictly to the public health, the public morals or the public safety, any more than under a police regulation having no relation to such matters, but only to the general welfare. The foundations upon which the power rests are in every case the same. This power, as said in *Village of Carthage v. Frederick,* 122 N. Y. 268, has always been exercised by municipal corporations, 'by making regulations to preserve order, to promote freedom of communication and to facilitate the transaction of business in crowded communities.'" *Haller Sign Works v. Physical Culture Training School,* 249 Ill. 436, 34 L. R. A. n. s. 998, and note; *In re Opinion of the Justices,* 234 Mass. 597.

It clearly appears to us that the ordinance goes beyond

the scope of authority conferred by the legislature. That part of the ordinance which confines the building area to 25 per cent. of the lot is so restrictive that it is an unreasonable exercise of the power granted by the legislature, and for that reason that part of the ordinance must be held to be invalid. The objection of the city engineer having been based solely on the requirement of that part of an ordinance which we hold to be invalid, it follows that the judgment of the district court must be, and it hereby is, in all things

AFFIRMED.

ROSE, J., dissenting.

The ordinance prohibiting the owner of a lot from covering more than one-fourth of it with buildings in a residential district had its origin in an exalted conception of civic life. The goal of the city council was public improvement, leading to better, healthier, more comfortable and happier conditions. The rich were not to have a monopoly of beautiful surroundings with their wholesome effect on health, morality and usefulness. By means of the ordinance condemned the city council meant to touch the pulse of municipal power for the general welfare. Parents and children of all classes, without regard to former environments, were to breathe pure air, at least in the streets, and see flowering shrubs around private dwellings and listen to the fluted notes of birds in hedges. To some extent these privileges are already enjoyed in public parks. The æsthetic features of municipal activity for the good of the public ought to be recognized and respected. Individual rights and private property must be protected, but they are not gods of government. Ownership and control of lots among urban homes are limited by the proper exercise of police power for the general welfare. Private rights are menaced when the good of society is neglected. When courts interfere with municipal legislation to improve conditions generally they should point out a limitation of power fixed by the supreme law and find facts showing an unmistakable usurpation. In my opinion the reasoning and conclusion of the ma-

jority do not meet the proper tests. When the regulatory power of the city to enact laws for the public good is considered with the individual rights of relator, the ordinance does not seem to me to be unreasonable.

CALVIN E. WILHELM ET AL., APPELLANTS, V. CHARLES SPEEDIE ET AL., APPELLEES.

FILED JUNE 28, 1922. No. 21891.

1. **Schools and School Districts:** SCHOOL DISTRICTS: ESTABLISHMENT. Under the act "to provide for the districting of all territory into districts for consolidated and high school purposes, and to provide for the organizing and operating of the same," a new public school district may be established by the vote of the school electors in the proposed new district, where the old territory included a village in a public school district with a board of three members, though high school branches were taught therein and high school grades were available to pupils. Laws 1919, ch. 243; *State v. Richardson, ante*, p. 604.
2. ———: ———: ———. OBJECTIONS: NOTICE. Statutory notice to objectors of the time and place to be heard on their objections to proposed districting for consolidated and high school purposes, under the act of 1919, may be held sufficient, if given to the first signer of each petition, where the objections are made in the form of petitions; and such notice is effective for the purpose of presenting the objections made and of procuring changes in boundaries. Laws 1919, ch. 243.
3. **Questions** not raised by the pleadings may be disregarded on appeal.

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

Paul Jessen, for appellants.

Pitzer, Cline & Tyler and *George H. Heinke, contra.*

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

DAY, J.

This is an action for an injunction against the defend-

ants, who are the county superintendent of Otoe county *and the members of the school board of school district No.* 75, to restrain them from calling or holding an election of the school electors, residing within the boundaries of proposed district No. 7, for the purpose of voting on the question whether district No. 7 as proposed should be established. The trial court found that the preliminary proceedings leading up to the potential establishment of district No. 7 were regular, that the question of its final establishment was being properly submitted to the electors residing within the boundaries of said district, and thereupon dismissed the plaintiffs' petition for want of equity. From this judgment the plaintiffs have appealed. A bond was given and the proposed election superseded.

The proceedings leading up to the formation of the proposed district were had under the provisions of chapter 243, Laws 1919. That chapter provides in substance that all the territory of the several counties of the state shall be divided into school districts for high and consolidated school purposes; that within 20 days after the act becomes effective the county board of each county shall appoint two school electors of the county, who, with the county superintendent, shall constitute a committee to make such surveys and investigation as will determine an equitable adjustment of the bounds of districts for high and consolidated schools within the county; the county committee are required to meet and proceed to plat and establish a schoolhouse site and boundary lines of the proposed districts; that, wthin 10 days after the report is completed and the map prepared, the county superintendent shall designate a time for hearing, when any school elector may file objections to the plan as recommended; that after the hearing the committee is authorized to make such changes as it may deem advisable, and shall then transmit its final report to the county board, who shall record the same in the minutes of their proceedings. The act further provides that, after the filing of the report with the county board, 25 per cent. of the school electors of any new district

may within 40 days file a written protest with the state superintendent against the establishment of the boundaries and schoolhouse site, as fixed by the county committee; that upon receipt of such protest the state superintendent shall call a meeting in the office of the county superintendent, giving 10 days' notice of the same to the objectors, and to the members of the county committee whose work is sought to be affected, and shall send a member of his staff to investigate such complaint and make a detailed statement of the facts and conditions developed at such hearing in writing to the state superintendent, who shall then approve the boundaries established by the committee, or order a rearrangement of such boundaries, as in his judgment may seem best; that after the completion of the districting and the lapsing of time for hearing on appeals to the state superintendent, upon a petition of 25 per cent. of the electors in the proposed consolidated and high school districts, the county superintendent is directed to order an election to be held in such proposed district, upon giving 20 days' notice, at which the electors shall determine whether the district as promulgated by the state superintendent shall be established.

Section 6 of the act contains a proviso, as follows: "Provided, that if the proposed new district contains an organized consolidated or high school district, when a petition of not less than 51 per cent. of the school electors in said new district residing outside of the existing organized consolidated or high school districts shall be filed with the county superintendent, then he shall declare such territory to be so annexed, conditioned upon the approval of the board of education of said existing districts."

The record shows that, after the report of the redistricting committee had been duly filed, 25 per cent. of the electors in the proposed district filed a protest with the state superintendent. The district as proposed by the committee was designated as district No. 6, and included a territory eight miles east and west, and five miles north and south, having the school site in the village of Dunbar, and

the same site as that of the old district No. 75. Upon the hearing before the state superintendent, the boundaries of proposed district No. 6 were changed so that the district was five miles square, and the name changed to district No. 7. Pursuant to the determination of the state superintendent, the county superintendent called an election of the school electors to determine whether proposed school district No. 7 should be established. This is the election sought to be enjoined in this action.

It is first urged by the plaintiffs that the only method of annexing territory to an established consolidated or high school district is that pointed out in section 6, ch. 243, Laws 1919. It is argued that district No. 75, which was the district of the village of Dunbar, is a consolidated or high school district, and that additional territory could be added thereto only after a petition signed by not less than 51 per cent. of the school electors in the new territory proposed to be added had been filed with the county superintendent and approved by the board of education of district No. 75; and, as this procedure was not followed, the action of the state superintendent in proposing the establishment of school district No. 7 is without authority of law. This argument assumes that the record shows that district No. 75 was a consolidated or high school district. While it is true that district No. 75 teaches many of the grades of a high school, there is nothing in the record to show that it was either a consolidated or high school district as those terms were understood at that time. District No. 75 was governed by a board of three members, and lacked the requisite number of pupils to change its organization from a primary school to a high school district. The law at that time required that, in order to change to a high school district, a district must have more than 150 pupils of school age. The proof shows that district No. 75 had just 150 pupils. It seems plain, therefore, that the provisions of section 6 of the act in question did not apply to the facts in the case before us, as claimed by the plaintiffs.

It is next argued that, if section 6 of the act does not apply, the method of establishing a new district would be governed by other provisions of the act, and it is urged that no proper legal notice was given to the objectors by the state superintendent of the hearing upon the protest filed against the establishment of district No. 6, as proposed by the redistricting committee, and that the proceedings of the state superintendent in potentially establishing district No. 7 were without authority. As has been heretofore pointed out, the act provides that, whenever there is filed with the state superintendent a protest against the proposed districting of the committee, it becomes his duty to call a meeting in the office of the county superintendent of the county where the complaint is made "giving 10 days' notice of the same to the objectors, and to the members of the county committee whose work is sought to be affected." Section 4. It is further his duty to send a member of his staff to investigate the complaint, and be present at such hearing, and report in writing to the state superintendent the facts and conditions developed upon such hearing. The state superintendent is then authorized to approve the boundaries established by the county committee, or order a rearrangement of such boundaries, as in his judgment may seem best. The record shows that the only notice given of the hearing was sent out by the county superintendent stating the time and place of hearing. The notice was addressed to Chris Bade and others, and John Gess and others, but mailed only to Bade and Gess. Bade and Gess were the two men whose names headed the two objecting petitions. At the hearing a number of objectors were present, including Bade and Gess. While it is not entirely clear whether all of the objections urged in the petition were presented to the state superintendent, it is shown that some of the objectors participated in the discussion, and we think it may be presumed that the objections were considered. One of the objections was on account of the distance from the school site, and to some extent this relief was granted, as the state superin-

tendent reduced the size of the school district, which is the standard size. It is argued that, because notice was not given to each of the objectors, the county superintendent had no power to proceed. As we view it, the statute does not require that a notice be sent to each of the objectors. The objection was in the form of joint petitions, identical in form, and we think a service of notice upon the first signer was sufficient. The filing of the petitions by the objectors invoked the power of the state superintendent to act in the matter. The action of the state superintendent in promulgating a district does not become effective until it is ratified by a vote of the school electors in the district.

It is further argued that, inasmuch as 25 per cent. of the electors in the proposed district did not sign a petition requesting the county superintendent to call an election of the school electors to vote upon whether the proposed district should be established, therefore the election was illegally called. The question suggested by this argument is not properly raised by the pleadings, and for that reason is not reviewable, not having been presented to the district court.

The judgment of the district court is

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17. The giving of an instruction placing the burden of proof on the wrong party is reversible error. *Mercer v. Omaha & C. B. Street R. Co.* 532

18. Objections to the form of a verdict not made in the trial court are not available on appeal. *First Nat. Bank v. Amiot* 644

19. A verdict on conflicting evidence will not be set aside unless manifestly wrong. *Campbell v. Lincoln Traction Co.* . 648

20. An order appointing a guardian *ad litem* in proceedings for probate of a will is not a final order. *In re Estate of Isaac* . . 662

21. Questions not raised by the pleadings may be disregarded on appeal. *Wilhelm v. Speedie* 866

Attachment.

The lessee's interest in land is subject to attachment. *Gregory v. American Bank Building Co.* 507

Bailment.

1. An incoming tenant owes no duty to protect the harvested crop of a former tenant, except to refrain from wilful acts of injury. *Beauchamp v. Leypoldt* 510

2. An incoming tenant who assures an outgoing tenant that his property on the premises will be protected is a gratuitous bailee, and is liable for damages occasioned by gross negligence or bad faith. *Beauchamp v. Leypoldt* 510

Bankruptcy.

1. Assignment of a secured note *held* a voidable preference. *State v. American State Bank* 119

2. A preferred creditor is chargeable with notice of facts which a reasonable inquiry might be expected to disclose. *State v. American State Bank* 119

Banks and Banking. See LIBEL, 4, 5.

1. Where a bank officer wrongfully credited funds of a depositor to a corporation of which he was manager, his knowledge may be imputed to the bank. *State v. American State Bank* 92

2. Where a bank diverts specific funds received for the payment of notes due the bank, they may be canceled in the hands of a receiver of the bank. *State v. American State Bank* 92
State v. American State Bank 111

Banks and Banking—*Continued.*

3. Where a bank accepts specific funds for the purpose of paying notes and of refunding the surplus, the surplus may be treated as a deposit. *State v. American State Bank*..... 92
4. A bank officer's knowledge of the rights of a depositor may be imputed to the bank. *State v. American State Bank*.... 98
5. A depositor is entitled to credit for a deposit wrongfully credited to another, though the bank has passed into the hands of a receiver. *State v. American State Bank*..... 98
6. A bank's custom will not relieve a bank from an unambiguous agreement with a depositor. *State v. American State Bank* 98
7. False entries will not relieve a bank from liability to a depositor, where the bank has knowledge of the facts. *State v. American State Bank* 98
8. Knowledge of the managing officer of a bank may be imputed to the bank. *State v. American State Bank*..... 111
9. Where the manager of a bank deposits to the credit of another corporation a note payable to himself as trustee, neither the bank nor its receiver is an innocent holder. *State v. American State Bank*..... 111
10. Trust funds deposited by the trustee in a bank in the name of a corporation of which he is manager inure to the benefit of the beneficiaries. *State v. American State Bank*..... 111
11. A bank with knowledge that a note is trust property cannot become an innocent holder by assignment by the trustee to pay the debt of a third person. *State v. American State Bank* 124
12. Knowledge of the managing officer of a bank as to rights of beneficiaries of trust funds on deposit may be imputed to the bank. *State v. American State Bank*..... 129
13. Bank *held* liable to beneficiary for trust funds wrongfully paid on individual debt of trustee to the bank. *State v. American State Bank* 129
14. The corporate existence of a national bank is preserved during voluntary liquidation. *Nebraska Nat. Bank v. Union Stock Yards Nat. Bank*..... 417
15. A director and cashier of a national bank in voluntary liquidation retains his confidential relations to the corporation and its stockholders, in absence of resignation or agreement to the contrary. *Nebraska Nat. Bank v. Union Stock Yards Nat. Bank*..... 417

Banks and Banking—*Concluded.*

16. Collection and disbursement of bank funds with the consent of the liquidating agent pending voluntary liquidation *held* within the scope of the cashier's duties. *Nebraska Nat. Bank v. Union Stock Yards Nat. Bank* 417
17. Evidence *held* not to show an implied contract to compensate a bank cashier for services during its voluntary liquidation. *Nebraska Nat. Bank v. Union Stock Yards Nat. Bank* 417
18. A certificate of deposit issued by a vice-president of a bank to pay his personal obligation is a liability of the bank which must be reported to the department of trade and commerce. *Wentz v. State* 597
19. In a prosecution of a bank officer for omitting a certificate of deposit from a report of the bank's liabilities, it is no defense that he believed the certificate was not a liability of the bank. *Wentz v. State* 597
20. Where an officer of a bank, within the apparent scope of his authority, issues an instrument purporting to be the bank's obligation, it must be reported to the department of trade and commerce, if outstanding when a report is required. *Wentz v. State* 597

Brokers.

1. A petition showing on its face that a brokerage contract was not in writing is demurrable. *Gill v. Eagleton* 179
2. Broker *held* entitled to commission. *Manville v. Park* 285

Carriers.

Evidence *held* to sustain verdict for death of live stock. *Nevin v. Chicago & N. W. R. Co.* 317

Commerce.

Power to regulate railroads and telegraph companies in matters of interstate commerce is vested in the interstate commerce commission and cannot be interfered with by state laws. *Dunning v. Western Union Telegraph Co.* 422

Constitutional Law.

1. An act repealing a statute exempting property from taxation *held* not to impair obligation of contract or destroy a vested right. *State v. Rowe* 232
2. The statute prohibiting the teaching of foreign languages

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in schools is not a denial of religious freedom. *Nebraska District of Evangelical Lutheran Synod v. McKelvie* 448

3. Provisions of statute prohibiting the teaching of foreign languages in schools are within the title of the act. *Nebraska District of Evangelical Lutheran Synod v. McKelvie* 448

4. If an unrepealed act was valid when passed, the burden is on one who pleads its unconstitutionality under subsequent conditions to show its annulment. *Fisher v. Board of Regents* 666

5. The constitutional provision making the university of Nebraska a state institution and vesting its government in a board of regents *held* not to prohibit imposition of new duties on the regents. *Fisher v. Board of Regents* 666

6. The statute requiring the university regents to establish a plant for the manufacture of hog-cholera serum *held* not void as special legislation. *Fisher v. Board of Regents* 666

7. Incidental benefits to an individual or a class do not necessarily invalidate legislation for the public benefit. *Fisher v. Board of Regents* 666

8. The classification "farmers and swine-growers" is not unreasonable for the purposes of legislation for the manufacture and distribution of hog-cholera serum. *Fisher v. Board of Regents* 666

9. Statute fixing standard weights of bread *held* constitutional. *Burns Baking Co. v. McKelvie* 674

10. The exercise of police power may inconvenience individuals, increase their labor, and decrease the value of their property. *Burns Baking Co. v. McKelvie* 674

11. The legislature is presumed to act with full knowledge of all facts essential to valid legislation. *Burns Baking Co. v. McKelvie* 674

12. The burden is on assailant to prove that a legislative act is unreasonable. *Burns Baking Co. v. McKelvie* 674

13. The statute providing for issuance of school district bonds *held* not unconstitutional for failure to provide a tribunal before whom objection to their issuance can be made. *McCord v. Marsh* 723

14. Where, before levy of a tax to pay school bonds, the county board sit as a board of equalization, a taxpayer cannot complain that his property is being taken without due process of law. *McCord v. Marsh* 723

Constitutional Law—*Concluded.*

15. The statute declaring that failure to comply with an order of the department of trade and commerce to abate a nuisance is a misdemeanor *held* unconstitutional, in not providing for notice or hearing. *State v. Keller*..... 742

16. A court will not hold an act unconstitutional unless clearly warranted. *State v. Badberg*..... 816

Contracts.

1. A verbal contract to sell a majority of the stock of a bank and not to engage in the banking business in the locality is valid. *Farmers State Bank v. Petersburg State Bank*.. 54

2. The purchase of a business is a sufficient consideration for an agreement not to engage in a similar business in the vicinity. *Farmers State Bank v. Petersburg State Bank*.. 54

3. A contract must militate against the public welfare to be against public policy. *Farmers State Bank v. Petersburg State Bank* 54

4. A seller of corporate stock may agree not to engage in business competition with the corporation. *Farmers State Bank v. Petersburg State Bank*..... 54

5. A condition not expressed in a written contract that it shall become void if not signed by a third person is a condition subsequent, and parol evidence to prove the condition is inadmissible. *Gund v. Roulier*..... 589

6. Neither the mere transfer of possession of a written contract by one party to the other, nor failure to make transfer, is conclusive as to its becoming effective. *Gund v. Roulier* 589

7. Whether a contract was to be in force until signed by a third party *held* a question for the jury. *Gund v. Roulier*. 595

Corporations.

1. It is the policy of Missouri to hold contracts of foreign corporations void where made with its residents without a license. *Rhines v. Skinner Packing Co.* 105

2. A sale of stock by a Maine corporation, having authority to transact business in Nebraska, may be declared void in Nebraska, if made in Missouri in defiance of a Missouri statute. *Rhines v. Skinner Packing Co.* 105

3. Where a corporation solicits a sale of its stock in another state and there delivers it, the sale is in such state. *Rhines v. Skinner Packing Co.* 105

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4. Where a statute forbids a foreign corporation to sell or attempt to sell stock without a license, a subscription therefor is inhibited. *Rhines v. Skinner Packing Co.* 105
5. Delay in rescinding a sale caused by the seller's fraud does not prevent a rescission. *Rhines v. Skinner Packing Co.* 105
6. Tender of stock sold under a void sale *held* sufficient. *Rhines v. Skinner Packing Co* 105
7. An involuntary nonsuit in an action for the price paid upon a void sale of stock *held* erroneous. *Rhines v. Skinner Packing Co* 105
8. Fraudulent representations of manager in sale of stock *held* chargeable to the corporation and ground for rescission. *Vest v. Farmers Cooperative Elevator Co* 407
9. Evidence *held* to show that purchaser of stock acted with reasonable promptness to discover fraud and to tender back stock. *Vest v. Farmers Cooperative Elevator Co* 407
10. Promoters sustain a fiduciary relation toward the corporation and persons who become stockholders. *Nebraska Mausoleum Co. v. Matters* 618
11. Disclosure by a promoter that he was to receive a commission for sale of corporate stock *held* to call for a reasonable commission. *Nebraska Mausoleum Co. v. Matters*. 618
12. A promoter does not perform his duty to disclose what profits he is to make by making a statement which, if followed up, would enable the inquirer to ascertain the profits. *Nebraska Mausoleum Co. v. Matters* 618
13. In an action against a promoter for secret profits, plaintiff *held* entitled to recover only profits in excess of reasonable commission. *Nebraska Mausoleum Co. v. Matters* 618
14. Unless authorized by statute, a court cannot appoint a receiver for corporate property on grounds which would not be sufficient were the owner a natural person. *Furrer v. Nebraska Building & Investment Co* 698
15. The appointment of a temporary receiver for a corporation without notice to the stockholders is erroneous, notwithstanding notice to its derelict officers. *Furrer v. Nebraska Building & Investment Co* 698
16. Misconduct by officers is not ground for the appointment of a permanent receiver of a solvent corporation at the in-

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stance of minority stockholders. *Furrer v. Nebraska Building & Investment Co* 698

17. The appointment of a permanent receiver of a solvent corporation without statutory notice to interested persons is void. *Furrer v. Nebraska Building & Investment Co* 698

18. Proceedings under a void order appointing a receiver of a solvent corporation without notice to stockholders are void. *Furrer v. Nebraska Building & Investment Co* 698

19. A receiver's sale of property of a solvent corporation, at the suit of some stockholders without notice to others, is void. *Furrer v. Nebraska Building & Investment Co* 698

20. Equity will not permit corporate forms to serve as a cloak to the perpetration of a fraud. *Ehlers v. Bankers Fire Ins. Co.* 756

21. Rescission of fraudulent sale of stock affirmed. *Ehlers v. Bankers Fire Ins. Co* 756

Costs.

1. Defendants *held* liable for costs in suit to abate a nuisance. *Weingand v. City of North Platte* 17

2. Ch. 191, Laws 1919, providing for attorney's fees, does not repeal by implication sec. 6063, Rev. St. 1913. *Robertson v. Chicago, B. & Q. R. Co* 569

Courts.

1. Where one judge hears part of a compensation case and suspends the hearing pending negotiations for settlement, another judge of the same court may determine it. *Western Newspaper Union v. Dee* 303

2. Records of inferior courts must affirmatively show that they have acted within the scope of their authority. *Gloor v. Torczon* 402

3. Jurisdictional facts will not be presumed to sustain a judgment of an inferior tribunal. *Gloor v. Torczon* 402

4. The doctrine of presumptions in favor of the regularity of proceedings of courts of general jurisdiction does not apply to courts of inferior and limited jurisdiction. *Gloor v. Torczon* 402

5. Construction of federal statutes by the supreme court of the United States is binding on state courts. *Dunning v. Western Union Telegraph Co* 422

Courts—*Concluded.*

6. The county court has exclusive original jurisdiction in probate matters. *Pinn v. Pinn* 822

Criminal Law. See BANKS AND BANKING, 18-20. HOMICIDE. INCEST. INDICTMENT AND INFORMATION.

1. While a plea of not guilty stands, the court may on its own motion overrule a plea in bar not sworn to by accused. *Schrum v. State* 186
2. Instruction that evidence of other acts of intercourse was admissible as bearing upon the probability of defendant's guilt *held* prejudicial. *Schrum v. State* 186
3. The test of insanity stated. *Kraus v. State* 331
4. Insanity is a defense to crime whether manifested by insane delusion or otherwise. *Kraus v. State* 331
5. What constitutes insane delusion stated. *Kraus v. State* .. 331
6. One laboring under an insane delusion cannot be presumed capable of reasoning as a sane man with regard to the subject-matter of his delusion. *Kraus v. State* 331
7. Insanity is a question for the jury. *King v. State* 428
8. A voluntary confession *held* admissible notwithstanding a previous unsuccessful attempt to extort a confession. *King v. State* 428
9. A written confession following oral admission of guilt *held* admissible. *King v. State* 428
10. Officers are not justified in the use of brute force to extort a confession. *King v. State* 428
11. Violence in an attempt to extort a confession is condemned. *King v. State* 428
12. A voluntary confession may be made by a prisoner while handcuffed. *King v. State* 428
13. Refusal of instruction covered by one given is not error. *King v. State* 428
14. Photographs of deceased showing location of wounds *held* admissible in prosecution for murder. *King v. State* 428
15. The admissibility of a photograph in evidence is largely within the court's discretion. *Wentz v. State* 597
16. In a prosecution for omitting a certificate of deposit from a bank report, if the certificate is without the state, a photographic copy is admissible in evidence. *Wentz v. State* 597

Criminal Law—*Concluded.*

17. A verdict of guilty on one count and acquittal on two others *held* not inconsistent. *Wentz v. State* 597
18. The trial judge has discretionary power to permit names of additional witnesses to be indorsed on the information during trial. *Ridings v. State* 804
19. The granting of a continuance during trial is discretionary. *Ridings v. State* 804
20. A sufficient foundation for admission of a telegram in evidence is laid by showing that both the sender and the receiver treated it as genuine. *Ridings v. State* 804
21. A defendant who pleads not guilty to the charge of murder in the first degree cannot limit the state's proof to his defense of insanity or to the degree of the crime. *Maddox v. State* 809
22. A nonexpert witness who observed defendant's appearance at the time of the homicide may testify as to whether he appeared rational or irrational. *Maddox v. State* 809
23. Where defendant pleads not guilty, the shotgun and shell used in committing homicide are admissible in evidence. *Maddox v. State* 809
24. The state's offer in evidence of the hat knocked from deceased's head by the fatal shot *held* not erroneous nor prejudicial. *Maddox v. State* 809

Damages. SEE DEATH, 3-6.

1. The measure of damages for the destruction of a building by fire is the diminution in value of the real estate plus legal interest. *Davenport v. Intermountain R., L. & P. Co.* 387
2. Measure of damages for destruction of a growing crop stated. *Pulliam v. Miller* 442
3. Instruction on measure of damages to growing crops *held* not erroneous. *Hopper v. Elkhorn Valley Drainage District* 550
4. Verdict for $1,000 damages to automobile *held* not excessive. *Linch v. Dobson* 632
5. Verdict in personal injury case *held* not excessive. *Campbell v. Lincoln Traction Co* 648
6. Attorney's fees and expenses of litigation are not recoverable as damages in absence of statute. *Toop v. Palmer* 850

Deaths. SEE ACTION, 1, 2.

1. Secs. 1428 and 1429, Rev. St. 1913, providing that a person who wrongfully causes the death of another shall be liable to the widow or next of kin of deceased, creates a new cause of action. *Hindmarsh v. Sulpho Saline Bath Co*... 168
2. An action for personal injuries does not abate. *Hindmarsh v. Sulpho Saline Bath Co*..... 168
3. Where an action for personal injuries is revived, only damages to deceased are recoverable therein. *Hindmarsh v. Sulpho Saline Bath Co*..... 168
4. Elements of damage for personal injuries stated. *Hindmarsh v. Sulpho Saline Bath Co*..... 168
5. Where plaintiff in an action for personal injuries dies, recovery may be had only for loss of earnings during his lifetime. *Hindmarsh v. Sulpho Saline Bath Co*..... 168
6. Damages recoverable by personal representative for wrongful death stated. *Hindmarsh v. Sulpho Saline Bath Co*.... 168
7. Suicide *held* not caused by a collision. *Long v. Omaha & C. B. Street R. Co*..... 342
8. Sustaining of demurrer to petition and dismissal of case sustained. *Long v. Omaha & C. B. Street R. Co*..... 342

Deeds.

Grantees who are required to account for rents while in possession under deeds canceled for fraud *held* entitled to credit for taxes and interest paid, for reducing liens, and for improvements. *Toop v. Palmer*..... 850

Dismissal.

Plaintiff cannot dismiss defendants who have pleaded matter entitling them to affirmative relief. *Toop v. Palmer*..... 850

Dower.

Dower in rents *held* to vest though not assigned. *Dovey & Son v. Schlater*..... 735

Drains.

1. The district court acquires jurisdiction to organize a drainage district by the filing of articles of association and service of notice, and, having acquired jurisdiction, may permit additional landowners in the district to join in the articles of association. *Henderson v. Holliman*..... 67

Drains—*Concluded.*

2. A right of action against a drainage district corporation accrues when injury occurs. *Hopper v. Elkhorn Valley Drainage District* 550
3. A party who sells a right of way to a drainage district corporation may nevertheless recover damages for negligent construction and maintenance of its improvements. *Hopper v. Elkhorn Valley Drainage District* 550
4. A drainage district corporation is liable for damages caused by its negligence in construction or maintenance of its works. *Hopper v. Elkhorn Valley Drainage District* 550

Easements.

Conveyance *held* subject to easement of right of way. *McDonough v. Meany* 496

Eminent Domain.

1. Public authorities cannot take land for a highway without assessing and paying damages to the owner or providing therefor. *Weinel v. Box Butte County* 293
2. The owner is entitled to the full market value of land on the date it was appropriated. *Stewart v. City of Lincoln.* 825
3. Where the value of land condemned has been enhanced in value by a public improvement, evidence that the land bore no part of the expense of such improvement is inadmissible. *Stewart v. City of Lincoln* 825
4. Admission of evidence that land condemned bore no part of the expense of a public improvement *held* prejudicial. *Stewart v. City of Lincoln* 825

Evidence. SEE CONTRACTS, 5, 6.

1. Parol evidence is admissible to show the nature of the contract on indorsement of a past-due note. *Nebraska State Bank v. Howe* 23
2. Courts take judicial notice of statutes. *Sharpe v. Grand Lodge, A. O. U. W.* 193
3. Evidence *held* to sustain finding of relation of employer and employee. *Wilson v. Morris & Co* 255
4. Where the record fails to show that testimony was read from or based on a scientific treatise, it is not within the rule excluding such publications as independent evidence. *Brown v. Blackwood* 288

Evidence—*Concluded.*

5. Courts take judicial notice of federal statutes. *National Supply Co. v. Chicago & N. W. R. Co* 326
6. Courts take judicial notice of president's proclamations, orders of the director general of railroads, and government control. *National Supply Co. v. Chicago & N. W. R. Co.* . 326
7. Parol evidence is admissible to show that an absolute assignment of a lease was intended as collateral security. *Gregory v. American Bank Building Co* 507
8. A presumption may not be used to nullify facts shown by a judicial record. *In re Estate of Isaac* 662
9. Tests to prove the unreasonableness of standard weights for loaves of bread *held* not conclusive, in absence of proof that precautions were taken to retard evaporation. *Burns Baking Co. v. McKelvie* 674

Executors and Administrators.

1. Agreement in settlement of alimony *held* to estop the wife from allowance for support during administration of her husband's estate. *In re Estate of Holmberg* 382
2. If a sum not administered is found belonging to an estate, the proper practice is to have a new administrator appointed. *Pinn v. Pinn* 822

Food.

The use of wax-paper to retard evaporation of moisture may be required as an incident to a regulation establishing standards of weights for bread. *Burns Baking Co. v. McKelvie* 674

Forfeitures.

Forfeitures must be pleaded and strictly proved as a defense. *Sharpe v. Grand Lodge, A. O. U. W* 193

Guaranty.

1. The liability of a guarantor is limited by the precise terms of his contract. *Hunter v. Huffman* 729
2. A material change in the principal contract covered by a guaranty, without the assent of the guarantors, will release the guarantors. *Hunter v. Huffman* 729
3. Wholly immaterial changes in the principal contract will not release guarantors. *Hunter v. Huffman* 729
4. Change of loan from six months to four months *held* material, and to release guarantors. *Hunter v. Huffman* .. 729

Highways.

1. The officers of state institutions may sign a petition requesting county commissioners to proceed with paving of highways. *Brown Real Estate Co. v. Lancaster County*.... 514
2. Signature to petition for paving by board of commissioners of state institutions *held* sufficient. *Brown Real Estate Co. v. Lancaster County*..... 514
3. The board of commissioners of state institutions are the officials contemplated by the statute relating to pavement of highways. *Brown Real Estate Co. v. Lancaster County*. 514
4. There is no legal objection to including more than one road in a petition for a paving improvement. *Brown Real Estate Co. v. Lancaster County*..... 514
5. A landowner may recover so much of a special assessment paid as is shown to be illegal, inequitable and unjust. *Brown Real Estate Co. v. Lancaster County*..... 514
6. A petition to recover part of a special assessment which fails to allege that complaint was made to the county board of equalization does not state a cause of action. *Brown Real Estate Co. v. Lancaster County*..... 514
7. Petition *held* to state a cause of action for recovery of special assessment paid. *Sawyer v. Lancaster County*.... 530

Homestead.

1. The homestead right of exemption will not be considered on proceedings for confirmation of sale. *Kaley v. Eselin*.. 544
2. Objection to confirmation of sheriff's sale on the ground that the land is a homestead will not bar a subsequent action to remove the cloud caused by the sheriff's deed. *Kaley v. Eselin*..... 544
3. Where notice of claim of homestead is given the sheriff, a sale of the land without compliance with the statute is void; but the validity of the claim must be determined in a proper action, and until so determined the sale will be held valid. *Kaley v. Eselin*..... 544
4. A surviving spouse who elects to partition the homestead forfeits homestead rights. *Metzger v. Metzger*..... 613

Homicide.

1. Whether accused was under insane delusion incapacitating him from distinguishing between right and wrong *held* a question for the jury. *Kraus v. State*..... 331

Homicide—*Concluded.*

2. Instruction on insane delusion *held* erroneous. *Kraus v. State* 331
3. Evidence *held* to sustain verdict for murder in the second degree. *Maddox v. State* 809

Incest.

Prosecutrix' testimony of similar offenses is not corroboration of her testimony as to the offense alleged. *Schrum v. State* 186

Indictment and Information.

Information *held* to charge the crime of issuing certificates of deposit with intent to defraud. *Ridings v. State* 804

Infants.

1. Evidence *held* to sustain judgment committing an infant to the industrial school. *Laurie v. State* 239
2. Petition alleging delinquency *held* not to charge a crime and not to require a jury trial. *Laurie v. State* 239

Injunction.

1. The owner will not be enjoined from closing a road where there was no dedication or prescriptive right. *Stalder v. Miles* 386
2. Injunction does not lie to prevent a chiropractor from practicing without a license. *State v. Maltby* 578
3. Commission of crime will not be enjoined merely because the penalty is inadequate. *State v. Maltby* 578
4. Injunction does not lie to restrain acts violative of criminal laws. *State v. Maltby* 578
5. Injunction to restrain board of education from permitting supervised dances in high school auditorium denied. *Brooks v. Elder* 761

Insane Persons.

1. A contract of an insane person to sell land may be canceled by his heirs. *Achatz v. Bailey* 272
2. A county court may appoint a guardian *ad litem* for an infant or incompetent interested in probate of a will. *In re Estate of Isaac* 662
3. Appointment of guardian *ad litem* may be reviewed on appeal from the final decree. *In re Estate of Isaac* 662

Insane Persons—*Concluded.*

4. An order appointing a guardian *ad litem held* erroneous for want of allegation and proof. *In re Estate of Isaac*.... 662
5. An election to renounce the will and to take under the statute, filed by a guardian *ad litem*, may be set aside on appeal from the final decree, if the guardian *ad litem* was erroneously appointed. *In re Estate of Isaac* 662
6. To justify the appointment of a guardian *ad litem* on the ground of incompetency, incompetency must be alleged and found to exist. *In re Estate of Isaac*..... 662
7. A presumption that the appointment of a guardian *ad litem* was regular will not be indulged, where the record establishes the insufficiency of the proceedings. *In re Estate of Isaac*..... 662

Insurance.

1. A description in a policy as to the location of movable property is not a promissory warranty that the property will remain in the described location. *Waters v. Nebraska Mutual Ins. Co.* 1
2. An agent empowered to receive applications and to collect premiums binds the company by knowledge acquired in preparation of applications and by representations made to insured. *Waters v. Nebraska Mutual Ins. Co*..... 1
3. Evidence *held* not to show fraudulent representations as to location of insured live stock. *Waters v. Nebraska Mutual Ins. Co*..... 1
4. Question in application *held* to call for an expression of opinion, and not for a statement of fact. *Muhlbach v. Illinois Bankers Life Ass'n*..... 146
5. An untrue representation in answering a question calling for an opinion must be knowingly made with intent to deceive in order to avoid a policy. *Muhlbach v. Illinois Bankers Life Ass'n*..... 146
6. Whether an answer to a question in an application was knowingly made with intent to deceive *held* a question for the jury. *Muhlbach v. Illinois Bankers Life Ass'n*.... 146
7. Sec. 3187, Rev. St. 1913, *held* not to prevent an insurance company from defending for fraudulent representations in an application for life insurance. *Muhlbach v. Illinois Bankers Life Ass'n*..... 146
8. Statutes under which a fraternal beneficiary association is

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organized are a controlling part of contracts with its members. *Sharpe v. Grand Lodge, A. O. U. W.* 193

9. A forfeiture cannot be enforced for nonpayment of an increased rate of assessment until after notice of the change of rate. *Sharpe v. Grand Lodge, A. O. U. W.* 193

10. The burden of proving notice of increase of insurance rate is on the party claiming forfeiture. *Sharpe v. Grand Lodge, A. O. U. W.* 193

11. Evidence *held* insufficient to require submission of the defense of forfeiture. *Sharpe v. Grand Lodge, A. O. U. W.* .. 193

12. The statute providing for attorney's fees in actions against benefit associations *held* not retrospective. *Sharpe v. Grand Lodge, A. O. U. W.* 193

13. An attorney's fee, being part of the remedy only, may be taxed as costs, though the statute authorizing it was passed after the insurance contract was executed. *Sharpe v. Grand Lodge, A. O. U. W.* 201

14. Where the intent of a by-law is clearly expressed, there is no room for construction. *White v. Sovereign Camp, W. O. W.* 203

15. Amendment to by-law of benefit society *held* not to exempt a member who changed to a more hazardous occupation from obligation to pay an increased rate, nor to release him from penalty for failure to give notice of change of occupation. *White v. Sovereign Camp, W. O. W.* 203

16. An insured who has become mentally incompetent will not forfeit his insurance for failure to perform a stipulated act if he performs it within a reasonable time after his mental capacity is restored. *Marti v. Midwest Life Ins. Co.* 845

17. A beneficiary may exercise an option after death of insured, where insured was prevented from exercising it by reason of insanity. *Marti v. Midwest Life Ins. Co.* 845

18. Where a policy does not fix a time limit within which an option must be exercised, its exercise within a reasonable time is sufficient. *Marti v. Midwest Life Ins. Co.* 845

Interest. SEE JUDGMENT, 5, 6.

In an action for rent, interest on money deposited in court pending an appeal in a former suit *held* allowable. *Toop v. Palmer* 850

Judgment.

1. A judgment against defendants as partners will not be upheld where no partnership was proved. *Caman v. Schiek.* 228
2. Application to vacate judgment *held* sufficient. *Eno v. Lampshire* 265
3. A court may cause a judgment not recorded to be entered *nunc pro tunc. Calloway v. Doty* 319
4. Sec. 609 of the Code relating to time in which judgment may be modified, etc., is not applicable to a motion for entry of judgment *nunc pro tunc. Calloway v. Doty*..... 319
5. A judgment on a note bears the same rate of interest as the note. *Calloway v. Doty*..... 319
6. A judgment on a contract bears the rate of interest of the contract if more than 7 per cent. and not greater than 10 per cent. *Calloway v. Doty*..... 319
7. Defendant's default cannot be treated as an admission of allegations of fact contrary to facts of which the court takes judicial notice. *National Supply Co. v. Chicago & N. W. R. Co*..... 326
8. A petition alleging as a mere conclusion that defendants by conspiracy and fraud cheated plaintiffs out of rent of a farm for two years *held* insufficient to sustain a judgment. *Toop v. Palmer*..... 850
9. A question decided on the merits cannot be relitigated in a subsequent suit between the same parties. *Toop v. Palmer.* 850

Jury.

Where a juror stated that he had read about the case, but felt that he could render a fair verdict, *held* not error to overrule challenge for cause. *King v. State*..... 428

Justice of the Peace.

1. On error from justice to district court, a transcript setting out the judgment and a history of the proceedings *held* sufficient, though the bill of particulars was not copied therein. *National Supply Co. v. Chicago & N. W. R. Co*..... 326
2. Where a transcript is filed from justice to district court, a party not guilty of laches may suggest a diminution of record. *National Supply Co. v. Chicago & N. W. R. Co*..... 326
3. To set aside a judgment against defendant in his absence, he must move in ten days, pay or confess judgment for costs, and notify plaintiff. *Gloor v. Torczon*..... 402

Justice of the Peace—*Concluded.*

4. Every fact essential to jurisdiction must affirmatively appear. *Gloor v. Torczon* 402
5. A judgment setting aside a judgment against defendant in his absence is void if the record fails to show that defendant gave plaintiff notice. *Gloor v. Torczon* 402
6. Recital in the docket entry of a judgment that proof of a notice essential to jurisdiction was filed is not legal evidence of its filing. *Gloor v. Torczon* 402
7. A judgment of a justice setting aside a judgment against defendant in his absence *held* void on error, where proper notice to plaintiff was not filed with the justice. *Gloor v. Torczon* 402

Landlord and Tenant.

1. Unlawful detainer will not lie, where no demand for rent was made and the tenant mailed it when due. *Farmer v. Pitts* 9
2. The tenant is entitled to demand for and reasonable opportunity to pay rent, and he must neglect or refuse to pay before forfeiture can be claimed. *Farmer v. Pitts* 9
3. Stipulations for forfeiture in a lease are considered in equity as securing the rent, where the tenant pays promptly on demand. *Farmer v. Pitts* 9
4. A tenant who acts in good faith will be relieved from a technical forfeiture. *Farmer v. Pitts* 9
5. Where a lease does not fix place of payment of rent, the law fixes it upon the leased premises. *House v. Lewis* 257
6. Where a lease was silent as to the place of payment of rent, and the landlord did not apply for it at the demised premises, the tenant was not in default. *House v. Lewis* .. 257
7. The lessor of a portion of a building who remains in possession of the remaining portion is not required to make repairs, employ a watchman, and maintain a fire-alarm service for his lessee. *Blotcky v. Gahm* 275
8. The lessor is not liable for injuries to lessee's property caused by latent defects. *Blotcky v. Gahm* 275
9. Evidence *held* sufficient to warrant the direction of a verdict. *Blotcky v. Gahm* 275
10. An assignment of a lease and a separate option to repurchase may be treated as security for a debt. *Gregory v. American Bank Building Co* 507

Landlord and Tenant—*Concluded.*

11. In an action by lessee to recover damages for wrongfully withholding possession of a farm, the measure of damages is not the value of the crop produced, less cost of production and rent. *Philips v. Bossung* 658
12. Evidence *held* to show that landlord's demand for possession and threat of eviction amounted to an eviction. *Smith v. Kober* 768
13. An oral lease for five years, although unenforceable, is a sufficient consideration for labor and materials furnished by tenant. *Smith v. Kober* 768
14. A tenant who makes improvements on premises for a consideration may recover their value on failure of the consideration. *Smith v. Kober* 768
15. A tenant who makes improvements while in possession under promise of a written lease is entitled to their value on eviction. *Smith v. Kober* 768
16. In an action for rent, defendant's counterclaim for value of improvements *held* valid. *Smith v. Kober* 768

Libel.

1. In judicial proceedings, the test of privilege is not the motive of the libelant but the relevancy and materiality of the matter published. *Shumway v. Warrick* 652
2. Whatever a litigant may properly plead he may plead with or without malice, and his intent cannot be inquired into in an action for libel; and this rule applies to a protest against the issuance of a bank charter. *Shumway v. Warrick* 652
3. Published words which charge one with malfeasance in office are libelous *per se*. *Shumway v. Warrick* 652
4. The state banking board is required to investigate and determine the integrity and responsibility of persons applying for a bank charter. *Shumway v. Warrick* 652
5. A protest questioning the integrity of an applicant for a bank charter while holding public office *held* to raise a material issue for the state banking board. *Shumway v. Warrick* 652
6. An order of the state banking board on an application for a bank charter is reviewable by petition in error in the district court. *Shumway v. Warrick* 652

Licenses.

A license to cross uninclosed land may be revoked at any time. *Stalder v. Miles* 386

Limitation of Actions.

1. Where it appears from the petition that the cause of action is barred by limitations, a demurrer will lie. *Pohle v. Nelson* 220
2. Causes of action accruing 25 years before suit *held* barred by limitations. *Pohle v. Nelson* 220
3. The statute begins to run in favor of a trustee *ex maleficio* from the time of discovery of the wrong. *Abbott v. Wagner* 359

Mandamus.

1. An officer will not be compelled to approve a bond which does not comply with the statute. *State v. Slattery* 415
2. An officer will not be compelled to record approval of a bond not in compliance with the statute. *State v. Slattery*. 415
3. Where, on application for mandamus to compel registration of bonds rejected for insufficient showing, the defects in the showing are supplied, the writ will be allowed. *State v. Marsh* 835
4. The granting of a writ of mandamus compelling city engineer to issue a building permit to a church society *held* not error. *State v. Edgecomb* 859

Master and Servant.

1. The federal employers' liability act creates a liability against the employer for the negligence of a fellow employee. *O'Hara v. Hines* 74
2. Whether the handing of an electric detonator to a fellow employee was negligence *held* a question for the jury. *O'Hara v. Hines* 74
3. Compensation for injuries *held* barred by settlement. *Duhrkopf v. Bennett* 142
4. Compensation for injuries *held* barred by delay of one year. *Duhrkopf v. Bennett* 142
5. The workmen's compensation act contemplates a speedy settlement. *Western Newspaper Union v. Dee* 303
6. An attorney's fee is allowable on appeal where the employer fails to reduce the award. *Western Newspaper Union v. Dee* 303

Master and Servant—*Concluded.*

7. An attorney's fee is allowable on a compensation claim arising before the legislature authorized such a fee. *Western Newspaper Union v. Dee* 303
8. Where there is no reasonable ground for controversy over compensation, the employer is liable to statutory penalties for failure to pay. *Western Newspaper Union v. Dee* 303
9. Where there is a reasonable controversy over compensation, penalties should not be imposed. *Western Newspaper Union v. Dee* 303
10. The workmen's compensation law is not applicable to all labor. *Kaplan v. Gaskill* 455
11. Employment *held* not casual. *Kaplan v. Gaskill* 455
12. Caring for rental property *held* not the "regular business or occupation" of a junk dealer. *Kaplan v. Gaskill* 455
13. An employee repairing buildings of a person engaged in another business is not within the workmen's compensation law. *Kaplan v. Gaskill* 455
14. Occupations as pertaining to the workmen's compensation law defined. *Kaplan v. Gaskill* 455
15. "Independent contractor" defined. *Petrow & Giannou v. Shewan* 466
16. A plumber *held* to be an "independent contractor," and not an "employee." *Petrow & Giannou v. Shewan* 466
17. Directions to plumber *held* not inconsistent with his status as an independent contractor. *Petrow & Giannou v. Shewan* 466
18. Employment of plumber *held* casual. *Petrow & Giannou v. Shewan* 466
19. An automobile owner *held* liable for his son's negligence in driving the car. *Linch v. Dobson* 632
20. Father *held* liable for negligence of adult son. *Linch v. Dobson* 632

Municipal Corporations.

1. A prosecution for violation of a city ordinance, which does not embrace any criminal offense, is a civil proceeding, and does not require proof beyond a reasonable doubt. *Francisco v. State* 309
2. In a prosecution for violation of a village ordinance, evidence *held* to show that the village had authority to assume village functions. *Francisco v. State* 309

Municipal Corporations—*Concluded.*

3. Petitioners for paving who know that the paving is not being constructed on the established grades are estopped to enjoin collection of special assessments to pay for the improvement. *Kister v. City of Hastings* 476
4. City *held* not liable for death from automobile accident. *Johnson v. City of Omaha* 481
5. The constitutional provisions relating to referendum do not apply to municipal legislation. *Schroeder v. Zehrung* 573
6. A city under a home rule charter may enact any legislation not contrary to the Constitution or general statutes. *Schroeder v. Zehrung* 573
7. The referendum provisions of the home rule charter of the city of Lincoln apply only to legislative acts. *Schroeder v. Zehrung* 573
8. A resolution of the city council of Lincoln for employment of technical advisors to prepare a zoning ordinance *held* not legislative in character. *Schroeder v. Zehrung* 573
9. Where a city of the second class issues paving district bonds purporting on their face to be general obligations of the city, the city is bound for their payment. *Alexander v. Bailey* 717
10. Paving district bonds which are general obligations of the city may be refunded. *Alexander v. Bailey* 717
11. A statute authorizing a city to pave streets by implication authorizes it to contract for the performance of the work and to pay for same by a general tax levy. *Alexander v. Bailey* 717
12. The authority of cities of the second class to contract for the construction of water-works is measured by statute, and not by the value of bonds voted. *Chicago Bridge & Iron Works v. City of South Sioux City* 827
13. The voting of funding bonds to pay a debt of a city incurred for current expenses *held* to validate the debt. *State v. Marsh* 835
14. Cities of the metropolitan class cannot impose unreasonable building regulations. *State v. Edgecomb* 859
15. Cities of the metropolitan class cannot fix unreasonable regulations as to area of lots to be covered by buildings. *State v. Edgecomb* 859
16. Zoning ordinance of Omaha as to surface area of buildings on lots *held* unreasonable. *State v. Edgecomb* 859

Negligence.

1. Negligence may be proved by circumstantial evidence. *Rocha v. Payne* 246

2. Where the facts are undisputed, question of proximate cause is for the court. *Long v. Omaha & C. B. Street R. Co.* 342

3. A building must be constructed in a reasonably safe manner. *Casey v. Ford Motor Co* 352

4. Negligence and contributory negligence are questions for the jury. *Casey v. Ford Motor Co* 352

5. An instruction which ignored comparative negligence rule *held* erroneous. *Davenport v. Intermountain R., L. & P. Co.* 387

6. Evidence of conditions before a fire *held* admissible. *Davenport v. Intermountain R., L. & P. Co* 387

7. Where a petition contains both specific and general allegations of negligence, evidence of any contributory fact is admissible. *Pulliam v. Miller* 442

8. The owner of machinery is not required to use the most approved appliances. *Pulliam v. Miller* 442

9. Question of negligence in the operation of a tractor engine, causing fire, *held* a question for the jury. *Pulliam v. Miller* 442

10. "Proximate cause" defined. *Johnson v. City of Omaha* 481

11. A party is only answerable for the natural, probable, reasonable, and proximate consequences of his acts. *Johnson v. City of Omaha* 481

12. Negligence of plaintiff *held* so great as not to warrant submission of question of comparative negligence to jury. *Johnson v. City of Omaha* 481

13. Contributory negligence is an affirmative defense which must be pleaded. *Mercer v. Omaha & C. B. Street R. Co.* .. 532

14. The burden of proof upon the issue of negligence does not shift during the trial. *Mercer v. Omaha & C. B. Street R. Co.* 532

15. Wrongdoers are individually liable for joint wrongs. *Robertson v. Chicago, B. & Q. R. Co* 569

16. In an action for damages to an automobile, evidence *held* to sustain verdict for plaintiff under the comparative negligence rule. *Linch v. Dobson* 632

Nuisance.

1. An injunction to abate a nuisance and damages may be awarded in the same action. *Weingand v. City of North Platte* 17
2. Where an injunction is granted and the amount of damages is not disputed, plaintiff may recover his damages. *Weingand v. City of North Platte* 17
3. In a prosecution for keeping a place for prostitution, evidence of the general reputation of the place and persons frequenting it, together with other pertinent facts, is sufficient to warrant conviction. *State v. Leflang* 138
4. A public nuisance may be enjoined. *State v. Maltby* 578
5. The statute authorizing the department of trade and commerce to condemn a building as a nuisance *held* not by implication to require notice to the owner. *State v. Keller* .. 742
6. A finding by the state fire marshal that a building is a nuisance because liable to fire is not conclusive. *State v. Keller* 742
7. The department of trade and commerce may abate a nuisance resulting from a building liable to fire. *State v. Keller* 742

Officers.

Powers conferred on public officers are generally construed as mandatory though the language is permissive, where public welfare is concerned. *State v. Stoddard* 712

Partnership.

1. Effect of partnership deeds stated. *Schlake v. Healey* 35
2. A deed from all the members of a partnership conveys good title. *Schlake v. Healey* 35
3. Petition *held* to be a suit against defendants as partners. *Caman v. Schiek* 228
4. Evidence *held* not to sustain judgment against defendants as partners. *Caman v. Schiek* 228
5. Prospective speculative profits are not a proper basis for measuring damages for breach of a partnership contract resulting in dissolution. *Cox v. Bell* 831
6. Where, on wrongful dissolution of a partnership, the innocent partner is unable to show the amount of prospective profits, he may recover the value of his time, less any profit received before dissolution. *Cox v. Bell* 831

Payment.

1. Payments exacted from the owner of property unlawfully withheld may be avoided on the ground of compulsion, although not technical duress. *Karschner v. Latimer*..... 32
2. Evidence *held* insufficient to avoid payments on compulsion. *Karschner v. Latimer*..... 32

Pleading.

A bill of particulars alleging that coal was shipped in the year 1918 shows that the shipment was conducted by the director general of railroads. *National Supply Co. v. Chicago & N. W. R. Co*..... 326

Principal and Agent.

The testimony of an agent is admissible to establish agency. *George v. Leypoldt & Pennington*..... 395

Process.

1. Affidavit for service by publication *held* sufficient. *Cohen v. Bills* 316
2. Jurisdiction over a life tenant cannot be acquired by constructive service in a suit by remaindermen against a transferee in a county in this state other than the county where the property is located. *Abbott v. Wagner*..... 359
3. Service of summons on a defendant nonresident in a foreign state *held* not authorized. *Abbott v. Wagner*..... 359

Public Lands.

1. A homestead entryman who is entitled to a patent is owner of the land. *Schlake v. Healey*..... 35
2. A homestead entryman who is entitled to a patent may devise the land or direct his executor to sell it to pay debts. *Schlake v. Healey*..... 35
3. A homestead entryman may voluntarily subject the land to payment of debts contracted prior to issuance of patent. *Schlake v. Healey*..... 35

Railroads.

1. Comparative negligence rule stated. *Seiffert v. Hines*..... 62
2. An automobile passenger must look and listen for approaching trains and warn the driver of danger. *Seiffert v. Hines* 62
3. Evidence *held* to show negligence of plaintiff more than slight in comparison with that of defendant. *Seiffert v. Hines* 62

Railroads—*Concluded.*

4. A railroad company is not liable for defaults of the federal government. *National Supply Co. v. Chicago & N. W. R. Co.* 326
5. Railroad corporations are not liable at common law for acts of the federal director general. *Robertson v. Chicago B. & Q. R. Co.* 569

Receivers. See CORPORATIONS, 14-19.

Remainders.

1. Remaindermen may sue to protect their interests against the life tenant or his transferee. *Abbott v. Wagner* 359
2. Remaindermen, seeking to charge a transferee of the life tenant as constructive trustee, may sue in any county in the state where the transferee may be served with summons; the life tenant not being a necessary party. *Abbott v. Wagner* 359

Replevin.

Evidence *held* to sustain judgment for plaintiff. *Robertson v. Walker* 786

Sales.

1. A party who represents diseased cattle as fit for breeding purposes is guilty of fraud. *Brown v. Blackwood* 288
2. Delivery to a common carrier is not delivery to the buyer, unless the shipment is consigned to the buyer, his agent, or to his order. *Spreckels Securities Co. v. Abts Co* 279
3. Liability for loss of goods consigned to seller *held* to be limited by terms of contract. *Spreckels Securities Co. v. Abts Co* 279
4. In a sale of seed corn by sample, *held* that there was an implied warranty that the corn would be substantially the same as the sample in kind, quality, and germinating powers. *Seefus v. De Vaughn* 628
5. An affirmative refusal to guarantee the germinating qualities of seed corn negatives an implied warranty as to such qualities. *Seefus v. De Vaughn* 628
6. Instruction as to warranty in sale of seed corn *held* erroneous. *Seefus v. De Vaughn* 628
7. Purchaser *held* entitled to rescission of contract for sale of furniture and return of purchase money. *Thompson v. Jost* 778

Sales—*Concluded.*

8. Lease of rooming-house and other writings *held* a single contract. *Thompson v. Jost* 778
9. A fraudulent purchase of personalty accompanied with delivery is only voidable, and the purchaser may make a valid sale to a *bona fide* purchaser. *Parr v. Helfrich* 801

Schools and School Districts.

1. A high school district which receives a pupil from a school district which maintains no high school grades is entitled to tuition from the latter district. *State v. Dorsey* 134
2. Where a school district has become liable to a high school district for tuition of a pupil, neither the parent nor guardian of the pupil can be compelled to pay tuition. *State v. Dorsey* 134
3. School laws will be liberally construed in favor of enjoyment of school privileges. *State v. Dorsey* 134
4. A school district in a city of over 1,500 population can issue refunding bonds. *State v. Marsh* 267
5. The statute prohibiting the teaching of foreign languages in schools is a reasonable exercise of the police power, and is constitutional. *Nebraska District of Evangelical Lutheran Synod v. McKelvie* 448
6. Under ch. 243, Laws 1919, a new public school district may be established by vote of the electors in the district, where the old territory included a village in a district with a board of three members, though high school branches were taught therein. *State v. Richardson* 604
   Wilhelm v. Speedie 866
7. Notice of an election to establish a new consolidated school district by posting of notice in three places for 20 days *held* sufficient. *State v. Richardson* 604
8. Where an organized consolidated school district is only partially contained within a newly organized district, the statutory provision for consolidation by petition does not apply. *State v. Clarke* 638
9. The statutory phrase, "contains a consolidated school district," refers to a consolidated district which is wholly contained within the proposed district. *State v. Clarke* 638
10. The electors of a newly consolidated school district may provide for a government by six trustees in lieu of three. *State v. Clarke* 638

Schools and School Districts—*Concluded.*

11. The terms of trustees of a newly consolidated school district run from the date of the organization meeting and election. *State v. Clarke* 638
12. The duty of a school district board to contract with a neighboring district for instruction of pupils when directed by two-thirds majority of the legal voters is mandatory. *State v. Stoddard* 712
13. Boards of education by a two-thirds vote may issue bonds on petition signed by 51 per cent. of the qualified voters of the district. *McCord v. Marsh* 723
14. The question of the issuance of school district bonds need not be submitted to a vote of the electors at any regular or special election. *McCord v. Marsh* 723
15. A school board may appoint a committee of its members to examine a petition for issuance of bonds and to investigate the number of legal voters in the district. *McCord v. Marsh* 723
16. The record of a school board *held* a sufficient finding as to sufficiency of petition for issuance of bonds. *McCord v. Marsh* 723
17. Sec. 449, Rev. St. 1913, as amended, relating to school board elections, *held* repealed by implication by sec. 4, ch. 66, Laws 1921. *State v. Marsh* 749
18. The statutory provision providing for publication of notice of school bond election *held* directory. *State v. Marsh* 749
19. Posting instead of publication of school bond election notice *held* not to invalidate the election. *State v. Marsh* 749
20. The legislature may give school authorities unlimited control in the use of school property, within constitutional limitations. *Brooks v. Elder* 761
21. Boards of education of city school districts and the electors of rural school districts may permit the use of public school buildings for public assemblages and may fix rentals. *Brooks v. Elder* 761
22. Notice of hearing on objections to proposed districting for consolidated and high school purposes *held* sufficient where given to the first signer of each petition. *Wilhelm v. Speedie* 866

Specific Performance.

1. Specific performance may be granted against a purchaser

Specific Performance—*Concluded.*

in possession, though record title was not perfected until after suit was begun. *Schlake v. Healey* 35

2. A contract of adoption must be unequivocal and provide for a definite share of property in order to entitle claimant to specific performance. *Pohle v. Nelson* 220

3. An agreement made after decree of adoption, which provides only for services required by the decree, is void for lack of consideration. *Pohle v. Nelson* 220

4. An oral agreement to convey land must be clearly established. *Hajek v. Hajek* 503

5. Where there is direct testimony of a contract and undisputed testimony as to part performance, equity may enforce it. *Hajek v. Hajek* 503

6. In suits for specific performance, courts will be governed by the facts and merits of each case. *Goodall v. Swartsley* 753

7. Evidence *held* to sustain decree denying specific performance. *Goodall v. Swartsley* 753

8. A court is not bound to decree specific performance, though the proof may show the contract was duly made, nor can it capriciously refuse a decree. *Ban v. Hopkins* 840

Statute of Frauds. See LANDLORD AND TENANT, 13.

1. A tenant in possession under an oral lease which is unenforceable *held* entitled to value of permanent improvements. *Smith v. Kober* 768

2. A tenant under a void lease *held* to have an equitable right to compensation for improvements. *Smith v. Kober* 768

Statutes.

1. Where a statute creates a right, the conditions imposed must be fully complied with. *Duhrkopf v. Bennett* 142

2. Courts will not give a retrospective effect to a statute, unless it is clear from the language used that the legislature so intended. *Sharpe v. Grand Lodge, A. O. U. W.* ... 193

3. The rule in construing a statute or by-law is to ascertain the legislative intent. *White v. Sovereign Camp, W. O. W.* 203

4. A proviso should be construed as referring to what immediately precedes it, unless a different intention is apparent. *White v. Sovereign Camp, W. O. W.* 203

5. Courts cannot alter by construction an act which is not ambiguous on the theory that the legislature made a mistake. *State v. Marsh* 267

Statutes—*Concluded.*

6. Statutes *in pari materia* should be construed together. *State v. Badberg* 816

Street Railways.

1. Contributory negligence for failure to look and listen before crossing a street car track is a question for the jury. *Reynolds v. Omaha & C. B. Street R. Co* 26
2. Instruction on rights at crossing street car tracks approved. *Reynolds v. Omaha & C. B. Street R. Co* 26
3. A motorman must use every means that ordinary care and prudence require to avert injury to pedestrians. *Reynolds v. Omaha & C. B. Street R. Co* 26
4. Whether the speed of a street car constitutes negligence is a question for the jury. *Reynolds v. Omaha & C. B. Street R. Co* 26
5. A franchise to a street railway company will be strictly construed against the company. *Lincoln Traction Co. v. Omaha, L. & B. R. Co* 154
6. A street railway company may be compelled to permit another company to use its tracks. *Lincoln Traction Co. v. Omaha, L. & B. R. Co* 154
7. A franchise to use of streets by a street railway company without consent of the voters is invalid. *Lincoln Traction Co. v. Omaha, L. & B. R. Co* 154
8. Where a street railway company has authority to operate on streets of a city, its right is exclusive as against a company without authority. *Lincoln Traction Co. v. Omaha, L. & B. R. Co* 154
9. A street railway company operating under an irregular grant of power is entitled to protection against unlawful encroachment by another company. *Lincoln Traction Co. v. Omaha, L. & B. R. Co* 154
10. An interurban company's use of tracks of a local street railway company *held* unauthorized. *Lincoln Traction Co. v. Omaha, L. & B. R. Co* 154
11. A street railway company must use ordinary care toward persons using streets. *Mercer v. Omaha & C. B. Street R. Co.* 532
12. A street railway company and a person using a street must exercise ordinary care. *Mercer v. Omaha & C. B. Street R. Co* 532

Street Railways—*Concluded.*

13. An injury caused by the splitting of a switch which deflects a street car raises a presumption of negligence. *Mercer v. Omaha & C. B. Street R. Co* 532

14. Place of accident *held* a question for the jury under the evidence. *Moran v. Omaha & C. B. Street R. Co* 788

15. Where a witness testifies he did not hear a signal from a street car, and other evidence shows he probably would have heard it had one been given, whether a signal was given is a question for the jury. *Moran v. Omaha & C. B. Street R. Co* 788

16. Refusal of instructions *held* not error. *Moran v. Omaha & C. B. Street R. Co* 788

Taxation.

1. Where a tax deed is void on its face, a suit to redeem is not barred in five years. *Sherlock v. Gillis* 72

2. Where a tax deed issued on a private tax sale is void for failure to recite that the land was not sold for want of bidders, the owner may redeem upon payment of the delinquent taxes, interest, and penalties. *Sherlock v. Gillis.* 72

3. The Constitution exempts from taxation property or instrumentalities of the state government or its governmental subdivisions. *Droll v. Furnas County* 85

4. Bonds or warrants of governmental subdivisions are exempt from taxation. *Droll v. Furnas County* 85

5. Public property and instrumentalities of government are not subject to taxation unless by express constitutional provision. *Droll v. Furnas County* 85

6. The Constitution will not be construed so as to impede the government by compelling it to tax its own instrumentalities. *Droll v. Furnas County* 85

7. Warrants issued by a governmental subdivision of the state are instrumentalities of the government. *Droll v. Furnas County* 85

8. A tax law does not establish the relation of debtor and creditor between the taxpayer and the state. *State v. Rowe* 232

9. A tax law exempting property from taxation is not a contract preventing legislation taxing such property. *State v. Rowe* 232

Taxation—*Concluded.*

10. Owner of land *held* not entitled to have a federal mortgage deducted from the value of his land for taxation purposes. *State v. Rowe* 232
11. A tax on bank stock *held* a tax on shares of stock in the hands of stockholders, and not a tax on property of the corporation. *Creighton Nat. Bank v. Knox County* 610
12. Mortgage securities held by a bank on which the mortgagors pay taxes will not be deducted from the total value of stock for purposes of taxation. *Creighton Nat. Bank v. Knox County* 610
13. Levy of a tax on bank stock, without deducting the value of mortgage securities, *held* not unconstitutional. *Creighton Nat. Bank v. Knox County* 610
14. The raising of public funds for the manufacture and distribution of hog-cholera serum is within the taxing power of the state. *Fisher v. Board of Regents* 666

Torts.

Parties who contribute to an injury, though without conspiracy or joint concert of action, are jointly and severally liable. *Weingand v. City of North Platte* 17

Trial. See APPEAL AND ERROR. CRIMINAL LAW.

1. Where parties request a directed verdict, they waive the right to a trial of the issues by the jury. *Waters v. Nebraska Mutual Ins. Co* 1
2. Refusal of a proper instruction warranted by the evidence is error unless the matter is covered by an instruction given. *Hyndshaw v. Mills* 250
3. A verdict for plaintiff directing that the recovery be applied upon plaintiff's indebtedness to a stranger *held* error. *Hyndshaw v. Mills* 250
4. An instruction requiring proof to the jury's satisfaction is erroneous. *Hyndshaw v. Mills* 250
5. Verdict for one joint tort-feasor will not necessarily release others. *Wilson v. Morris & Co* 255
6. Failure to instruct on contributory negligence is not error, in absence of a request therefor or of evidence thereof. *Wilson v. Morris & Co* 255
7. Evidence *held* to present questions of law only. *House v. Lewis* 257

Trial—*Concluded.*

8. On error from the police court, the district court may substitute the name of the state for that of a private person. *Francisco v. State* 309
9. Special findings control the general verdict, and the court cannot set aside special findings and enter judgment on an inconsistent general verdict. *Story v. Sramek* 440
10. Instructions should be confined to the issues and evidence. *Muller v. Pratt* 473
11. A litigant is entitled to instruction with reference to his theory of the case, when pleaded and supported by competent evidence. *Beauchamp v. Leypoldt* 510
12. Where reasonable minds cannot differ on the conclusion to be reached on the evidence, there is no question for the jury. *Gund v. Roulier* 589
13. Severable matters in the verdict outside of the pleadings, proof, issues, instructions, and the law will be disregarded as surplusage. *First Nat. Bank v. Amiot* 644
14. In a suit in equity, the trial judge on his own motion may bring in a necessary party. *Toop v. Palmer* 850

Trusts.

A district court has jurisdiction to grant relief for breach of a constructive trust, though the granting of relief involves interpretation of a will admitted to probate in a foreign state. *Abbott v. Wagner* 359

Vendor and Purchaser.

1. A purchaser in possession under an executory contract cannot rescind because of defects in the title without offering to surrender possession. *Schlake v. Healey* 35
2. A purchased in possession cannot insist upon an abstract showing good record title without surrendering possession. *Schlake v. Healey* 35
3. "Sale" distinguished from an "exchange" of property. *Gill v. Eagleton* 179
4. Transaction *held* to be a sale and not an exchange of property. *Gill v. Eagleton* 179
5. Evidence *held* to show competency of vendor. *Achatz v. Bailey* 272

Waters.

Construction of a ditch along a natural waterway will not be enjoined, unless the evidence clearly shows that the water normally carried by the waterway will be diverted and discharged upon plaintiff's land to his damage. *Miksch v. Tassler* 208

Weights and Measures.

The legislature in the exercise of police power may establish reasonable minimum and maximum standard weights for loaves of bread. *Burns Baking Co. v. McKelvie* 674

Wills.

1. Property undisposed of by will passes under the laws of inheritance. *McCollum v. McCollum* 82
2. The mental capacity of a testator is tested by the state of his mind at the time he executed his will. *In re Estate of Laflin* 298
3. Evidence of temporary mental infirmaties before and after the testamentary date does not require that the jury pass on the testator's competence. *In re Estate of Laflin* 298
4. If a testator knows the extent and character of his property, the natural objects of his bounty, and the purposes of his devises and bequests, he is mentally competent. *In re Estate of Laflin* 298
5. Where evidence of mental incompetency and duress is insufficient to sustain a verdict, a peremptory instruction in favor of proponent is not error. *In re Estate of Laflin* 298
6. An oral contract for the devise of land must be clear and unequivocal. *Young v. Gillen* 311
7. A contract for the devise of land must be clearly proved. *Young v. Gillen* 311
8. Evidence *held* not to establish an oral contract for devise of land. *Young v. Gillen* 311
9. Will construed to give the surviving spouse a life estate in residue, with power to dispose of the principal as may be necessary for her support and enjoyment. *Abbott v. Wagner* 359
10. Life tenant *held* not empowered to dissipate the corpus of the estate. *Abbott v. Wagner* 359
11. Land devised to nonresident aliens incapable of taking it descends to next of kin. *Metzger v. Metzger* 613

Wills—*Concluded.*

12. Whether or not revocation of a will may be implied from subsequent changes in testator's circumstances depends on the facts of each case. *In re Estate of Bartlett*..... 681
13. A divorce by the wife subsequent to the making of her husband's will *held* not to revoke the will by implication of law. *In re Estate of Bartlett*..... 681
14. Courts will not hold a will revoked unless the record unequivocally supports revocation. *In re Estate of Bartlett*.. 681
15. A decree of divorce settling property rights *held* to revoke by implication a previously executed will. *In re Estate of Bartlett*..... 691
16. The statute specifying the methods of revocation of wills *held* to preserve the principles upon which common-law revocations were based. *In re Estate of Bartlett*..... 691
17. Under the statute, revocation of a will by subsequent changes in the circumstances of the testator devolves on the court. *In re Estate of Bartlett*..... 691