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A. FRANK KARNES V. STATE OF NEBRASKA.

FILED DECEMBER 31, 1923. No. 23417.

1. Witnesses: CROSS-EXAMINATION. In a prosecution for rape, upon cross-examination of an examining doctor, defendant's counsel, in referring to a conversation had with the prosecutrix nearly a year after the crime, asked the witness: "Did you ask her who it was? A. Yes." *Held*, that this did not authorize the state on redirect to call out the rest of the conversation which was hearsay and incompetent for any purpose.
2. Criminal Law: REQUESTED INSTRUCTION: DUTY OF COURT. Where a requested instruction as to a particular part of the evidence cannot be given as a whole, yet if it embodies a correct rule of law applicable to the facts of the case, and is not covered by the other instructions, it is the duty of the court to require counsel to prepare, or to itself prepare and give, a proper instruction on the subject.

ERROR to the district court for Franklin county: WILLIAM A. DILWORTH, JUDGE. *Reversed.*

Relihan, Relihan & Reed, F. M. Tyrrell and *W. H. Miller*, for plaintiff in error.

O. S. Spillman, Attorney General, and *R. F. Stout, contra.*

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

REDICK, District Judge.

Information charging plaintiff in error, defendant, with rape upon a female ten years of age; defendant was convicted of assault with intent to commit rape and sentenced to the penitentiary for two to fifteen years, and brings the case here for review.

The circumstances under which the crime is alleged to have been committed are as follows: Defendant is a married man 58 years old, having lived with his wife 33 years; they had one child, a son, who died several years before; they desired to adopt a girl (which was done later), and the prosecutrix was secured from the Nebraska Children's Home Society, January 17, 1922. She was eleven

years old May 8, 1922. Defendant went to Omaha to get the girl and take her to his home near Riverton, Nebraska. *En route* they stayed over night in a rooming-house at Hastings, where it was necessary to change cars, at least part of the night occupying the same bed. Next morning they left for Riverton, and arrived at defendant's home the 18th about 10:30. There was but one bedroom on the ground floor of the house, and, although there was a couch therein prepared by defendant's wife for the girl's use, she slept that night and for four or five weeks in the same bed between defendant and his wife, at the end of which period she complained to the wife that defendant had "meddled" with her, and thereafter she slept on the couch in the dining-room.

The date of the crime is laid as on or about January 19, 1922, and the circumstances detailed by the prosecutrix are that on the morning Mrs. Karnes got up early to build the fires, leaving her and the defendant in bed; that it was extremely cold, and the doors of the bed-room were closed; that defendant took indecent liberties with her person and placed his body against hers in a position appropriate for the accomplishment of the crime charged; that she wore one-piece pajamas buttoned up behind; that she could feel him close to her; questions as to penetration were not answered; the record is silent as to whether the pajamas were opened; he did the same things other mornings, but questions as to dates are not answered; there is no evidence that she made any outcry or serious objections to the proceedings. She also testified that at Hastings defendant put his arms around her and insisted that she turn over, but she refused; that he took indecent liberties with her person, and by taking her hands required her to do the same with him; no other acts of a serious nature that night are testified to.

The first assignment of error relates to the reception of evidence by defendant's wife, called by the state, that she signed the complaint initiating the prosecution for rape. No objection was made that the witness was incompetent

under the statute, and there was no dispute as to the facts testified to by her. The complaint itself was ruled out, but would have been admissible in rebuttal as affecting the credibility of the witness, who testified for her husband. Her testimony as to what crime was charged in the complaint was not the best evidence, but we cannot perceive that any prejudice resulted to defendant.

The second assignment has to do with the evidence of Dr. Amy Robinson who made a physical examination of prosecutrix in December, 1922, to the effect that she was in the condition in which a married woman would be expected to be after one year; that in the witness' opinion the girl had been "used" to that extent, etc. It appears, however, that she remained with her foster parents until shortly before the complaint was filed in November, 1922, and the date of the examination is not definitely shown, whether latter part of November or early December. The objection is that the examination was too remote, but we think not under the circumstances.

Further objection is made to evidence given by the doctor as to statements made to her by the prosecutrix at the time of the examination. On cross-examination defendant's counsel elicited the following: "Q. You had never seen her before? A. No, sir. Q. And you had not taken that into consideration when you say that some man might have done it? A. I asked her, is all, and she said, 'No;' she said, 'A man did it.' Q. And you asked her that question directly? A. Yes; I did. Q. Did you ask her who it was? A. Yes." Then on redirect: "Q. And when you asked her who did this, and she told you, who did she say?" Objected to as hearsay and not redirect, and overruled. "A. She told me, and I don't remember the man's name. She said it was the man that Miss Armstrong had told me about. I asked her if it was, and she told me all about it; and she told me that at the time in Hastings." Witness then detailed going over to the hotel with the girl to the room they staid in, but these matters are not so important in view of defendant's admission that they occupied the same bed. In answer

to the question, "What part (of the building)?" witness answered: "We went to the head of the stairs, going south, and turned directly back, going north, to the first door, and it reopened right out toward the cafeteria, where she said when he was through with her he went over to get something to eat. She told me that he hurt her until she was crying, and when he left he told her to go to sleep; and he went over there to get something to eat some time in the night when she was asleep and then came back and repeated this performance."

Motion was then repeated to strike out all testimony of such conversations between witness and the girl at Hastings as incompetent, irrelevant, immaterial, and hearsay. "The Court: You opened the door for it when part of the conversation was given. Now they are entitled to have all the conversation given which was had at that time."

Up to this point the only questions asked by defendant's counsel on cross-examination were those quoted above, and we think the learned district judge erred in the above ruling. If it be conceded that the door was opened to the first question, which is extremely doubtful, the answer last quoted above was clearly hearsay and beyond the scope of the cross-examination. Viewed as a complaint in corroboration it was inadmissible, as the details of the complaint may not be received, but only the fact, and was too remote. *Henderson v. State,* 85 Neb. 444.

"A witness for the prosecution is held to be as much the people's witness when under cross-examination as when on his examination in chief *(Campau v. Dewey,* 9 Mich. 381, 417), and the fact that he is permitted on cross-examination, on a subject entered upon in the direct examination, to detail without objection a part of a hearsay story told him, will not authorize the calling out of the rest of it against objection on the redirect examination, upon the claim that it is part of the same conversation." *Wagner v. People,* 30 Mich. 384.

The question was simply in what part of the building the room was, and did not call for any statements made by

prosecutrix. The language of Sutherland, J., in *Winchell v. Latham,* 6 Cowen (N. Y.) * 682, is applicable: "It is impossible to anticipate what the answer of a witness will be, to a general question, until his answer is given. If it is of a nature which would have been inadmissible upon a direct and specific inquiry, the course is, not to permit the inquiry to be pursued, and the evidence to be repelled by other testimony, but to exclude the answer from the consideration of the jury, so far as it was improper to have been given."

Upon recross-examination the following occurred: "Q. You don't know whether she has that or not (sexual hunger)? A. She told me she liked for him to do that thing to her, when they went out to milk; and I didn't think she was normal. Q. Is that all that was said? A. No. Q. What else was said? A. She said he did do that thing to her or with her when they went to the barn to milk. Q. This is the language that she used, is it? A. No, sir; she said that he had sexual intercourse with her when she went to the barn."

This conversation seems to have taken place at a date subsequent to the examination, was clearly hearsay, but was called out by questions of defendant's attorney. The prosecutrix did not testify to any of these facts. It has been said that the charge in question is easy to make, and difficult to prove, and so the strict rules as to hearsay evidence have been relaxed to the extent that evidence of a complaint made immediately or at the first opportunity may be received in corroboration. Whether the complaint by the girl to Mrs. Karnes four or five weeks after the time charged in the information was, under all the circumstances, entitled to any weight in this case was for the jury; but evidence of complaints or statements made the following December must be held too remote as a matter of law. The record of this case presents many instances of disregard of the plain rules of evidence, but, perhaps, in view of the fact that the most damaging evidence was elicited by defendant's counsel on cross-examination, we would be justi-

fied in refusing to interfere with the result. The defendant, however, requested the following instruction:

"You are further instructed that no statements, if any, made by Helen Karnes to Dr. Amy Robinson as to the act of sexual intercourse with the defendant would be sufficient corroboration of her testimony, if any, as to the commission of the crime of rape by the defendant."

This was a correct statement of the law as applied to the doctor's evidence and should have been given. True, the first paragraph of the same request to the effect that corroboration "must be as to the act of sexual intercourse itself" was not correct; but when an instruction cannot be given precisely as requested, it is the duty of the court to give a correct instruction on the subject of the request when not otherwise covered. *Colgrove v. Pickett,* 75 Neb. 440; *Western Mattress Co. v. Ostergaard,* 71 Neb. 575. Such an instruction was especially required in this case where so much hearsay and incompetent evidence had been received over objection. The only part of the charge dealing with this question is No. 14:

"Gentlemen of the jury, you are instructed that hearsay testimony introduced in evidence over a valid objection cannot be considered by you for any purpose in determining the guilt or innocence of the defendant."

This was not sufficiently specific and left to the jury the determination of what was hearsay, and what is a valid objection. It is not approved procedure to overrule objections and receive incompetent evidence, and trust the jury to sift out and disregard it. The proper practice is to exclude such evidence, or if, as sometimes happens, it gets before the jury, it should be stricken out or be specially referred to in the instruction to disregard it. In the present case the incompetent evidence was of such a character as to prejudicially affect the jury in the determination of the guilt of defendant of the crime charged.

Objections to instruction No. 3 are without merit; and it is claimed that the evidence is insufficient to show an intent to commit rape, or to furnish any corroboration of prose-

cutrix' testimony, or to sustain the verdict; but, as the case must be remanded, we will not discuss these questions.

REVERSED AND REMANDED.

FIRST NATIONAL BANK OF BRIDGEPORT, APPELLANT, V. FIRST NATIONAL BANK OF HARTINGTON ET AL., APPELLEES.

FILED DECEMBER 31, 1923. No. 22612.

1. **Chattel Mortgages:** MORTGAGED PERSONALTY: PRESUMPTION OF OWNERSHIP. No presumption exists that a mortgagor owns the property covered by his mortgage, as between a party to the mortgage and a stranger.
2. **Estoppel.** The doctrine that that one of two innocent persons must suffer for the wrong of a third, who made the wrong possible by parting with the possession of a chattel, operates only to protect the party who exercises ordinary care in taking a lien upon that chattel.
3. ———. Though a person wilfully cause another to believe in the existence of a certain state of things calculated to mislead him and to make him alter his previous position, the former will not be estopped to aver a different state of things against the latter unless the latter relies and acts to his injury upon the assurance of the former.

APPEAL from the district court for Cedar county: GUY T. GRAVES, JUDGE. *Reversed.*

Williams, Hurd & Neighbors and *H. E. Burkett,* for appellant.

R. J. Millard and *J. C. Robinson, contra.*

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

SHEPHERD, District Judge.

This is an action brought by the First National Bank of Bridgeport, the plaintiff below and appellant here, against the First National Bank of Hartington and the First National Bank of Coleridge, appellees here and defendants below. It is alleged in the petition that on the 20th day of Jan-

uary, 1921, and for a long time before that date, one Harry E. Dunlap was the sole owner of certain stock and farm machinery, and the half owner of certain grain and other personal property, all of the value of $3,053.81; that the defendants took possession of said property and wrongfully converted it to their own use; and that shortly thereafter Dunlap assigned his cause of action for said conversion to the plaintiff. Separately answering, the defendants generally deny the allegations of the petition, and further plead that said Dunlap held out to them and to the public generally that the property in question belonged to one J. H. Shaffer, by permitting the latter to have it in his possession and to manage it and to control it in all respects as if it were his own, etc. They further say that they lent money to Shaffer, supposing that he owned the property, and took mortgages thereon, which they afterward duly foreclosed, selling said property and properly applying and distributing the proceeds thereof. And they say that thereby said Dunlap was estopped to question said foreclosure and sale and to maintain this action. Replying, plaintiff avers that Shaffer was on Dunlap's farm, under an agreement to operate the same, by which the latter was to furnish all stock and equipment and the former was to receive as his remuneration a share of the crop and one-half of the increase of live stock. And it further avers in its replies that the operating of the farm was financed by Dunlap through it, the plaintiff bank, and that the money borrowed by Shaffer was used by him for his own benefit, and not for the common purpose or in any wise to the benefit of Dunlap. It also says that the First National Bank of Coleridge was informed before it took its mortgage, both by Dunlap and Shaffer, that the latter did not own the property and had no right to mortgage it.

Undoubtedly one may bail stock and personal property to another for the latter to use in running a farm or any other business without becoming liable to the loss of the same through its unauthorized conveyance by the bailee. *McGinley v. Brechtel*, 4 Neb. (Unof.) 552; *McClelland v. Scroggin*, 35 Neb. 536. If there is no absolute or conditional

sale feature involved, such a transaction does not come within the provision of section 2464, Comp. St. 1922. *McClelland v. Scroggin, supra.*

Such being the case, the defendants who took mortgages on the property described and afterward seized and sold it under such mortgages were required to prove, in order to successfully defend upon the doctrine of estoppel, the existence of facts in connection with the holding of Shaffer, other than that of mere possession, sufficient to mislead them in the exercise of ordinary care as to the true ownership, and also that they relied upon said facts. The mere giving over of the possession of the live stock and farm equipment to the lessee upon his farm was not enough to estop Dunlap from claiming the personalty when he learned that said lessee had fraudulently mortgaged the same to a third party, unless Dunlap did something or omitted to do something in connection therewith to mislead such third person as to its rightful ownership. No one can transfer a better title than he has. No presumption exists that a mortgagor owns the property covered by his mortgage, as between a party to the mortgage and a stranger. *Brooknau v. Clark,* 58 Neb. 610; *Rocky Mountain Fuel Co. v. Sparling Coal Co.,* 26 Colo. App. 260. The doctrine that that one of two innocent parties must suffer for the wrong of a third, who made the wrong possible by parting with the possession of a chattel, operates only to protect the person who exercises ordinary caution in taking a lien upon that chattel. The bank or the individual trusts as much or more in lending money upon chattels without careful investigation as to their title, as does the owner of such chattels in lending them to another for safe keeping or for mutual profit. *Chism v. Woods,* Hardin (Ky.) 531, 3 Am. Dec. 740.

It must be borne in mind, as the evidence discloses, that defendants well knew that farm owners and lessors were in the habit of furnishing stock and machinery to the tenant farmers who became their lessees. With this in view, and conceding for the purposes of argument that the personal property in question belonged to Dunlap and was

lent to Shaffer for his use upon his landlord's farm, what did Dunlap do or omit to do to lead the defendant banks to believe that it belonged to the tenant? From March 1, 1919, to January 1, 1921, he did nothing to indicate that any one save Shaffer had or claimed any interest in the property. During that period Shaffer bought and sold personal property and had his own bank account in the Hartington bank. Shaffer made two mortgages to the Hartington bank in 1919 and during said year that bank bought two others made by him. Shaffer made several mortgages to said bank in 1920, some of them being renewals. Shaffer sold corn by the direction of Dunlap and sent the proceeds to the latter. Shaffer made a mortgage note to the Coleridge bank January 23, 1920, covering all the 1919 corn on the place, both his share and Dunlap's share. Dunlap had access to a daily report of mortgages given in the county all through the year of 1919. It was sent to the Randolph bank where he was cashier during that period. He looked at the report for some purposes, but says that he did not examine it thoroughly and did not see the Shaffer mortgages listed. But he knew about the Coleridge bank mortgage on the corn from other sources. It seems that Shaffer had sold the 1919 corn, notwithstanding the mortgage, and the bank was pressing him. And in a letter of his under date of October 27, 1920, Dunlap wrote that he would arrange to get the money to straighten it up and told Shaffer to so advise the bank. In a subsequent letter dated November 19, 1920, he tells him to sell corn to pay the note. In none of these letters does he take Shaffer to task for mortgaging his property. In one of them he speaks of a "$2,000 note of ours" owed at Randolph. Dunlap also admits in his testimony that he wrote the Hartington bank December 6, 1920, saying that he had written Shaffer to sell corn, hogs or stock to pay the Coleridge bank. Dunlap permitted Shaffer to list the property in controversy for taxation in his own name, and failed to list it himself, though a schedule was presented to him for the listing of his personal property. It also appears that a portion of the proceeds of these mort-

gages was used by Shaffer to purchase a tractor and other machinery for use, inferably, on the farm.

All of these things in conjunction, perhaps some of them singly, would be sufficient, in the opinion of the court, to justify the submission of the case to the jury on the theory of estoppel, if it were shown in addition that because of them the defendants acted in lending their money and taking the mortgages as security. But it does not so appear from the evidence. None of the things mentioned were matters of inducement. Defendants made their loans to Shaffer because he had the property in his possession and handled it as his own on the farm. They did not take the trouble to look into the matter of ownership. They simply assumed that the property belonged to him. Though they knew that he was a renter occupying Dunlap's farm, and though Dunlap was easy to find and to be inquired of, they went ahead in apparent carelessness. Beste, the cashier of the Hartington bank, said that he attached no particular importance to the fact that Shaffer had given a small mortgage to Sorenson for machinery bought of the latter, and another to the garage man for an automobile. He acted because of the possession of the chattels by Shaffer. The Coleridge bank was content to loan on the corn because it was on the place occupied by Shaffer and in his possession. Neither defendant offered proof that it knew when it loaned that Dunlap had access to the daily report of mortgages, or that he had permitted Shaffer to list the property for taxation as his, or that Dunlap had failed to list it, or that Dunlap had any knowledge that Shaffer was making any mortgages.

In the rule relied upon by the defendants, *Merchants-Mechanics First Nat. Bank v. Cavers Elevator Co.*, 105 Neb. 321, it is stated, following *Grant v. Cropsey*, 8 Neb. 205: "Where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing

at the same time." But in that case an estoppel was denied because there was no reliance upon and injury by the act pleaded, the court continuing in the opinion: "We understand it to be the rule of law that before a person can sustain the plea of estoppel against another he must have relied upon and been injured by the facts as pleaded. *Dent v. Smith*, 76 Kan. 381."

We hold, therefore, that the trial court was in error in submitting the case to the jury on the estoppel theory.

The court also erred, as pointed out in appellant's brief, in giving its instruction No. 2, to the effect that the burden was upon the plaintiff to prove every material allegation of its petition by a preponderance of the evidence. The stipulation made by the parties on trial relieved the plaintiff of a considerable part of this burden, namely, the burden of showing that the defendants sold the property and that the value of the same was as set forth in exhibit 1. We think this was prejudicial, though doubtless a mere oversight likely to happen in the hurry of the trial.

We disagree with the appellant that the exclusive ownership of the property was conclusively established in the plaintiff. The trial court properly submitted the question to the jury. There was enough in the letters and the actions of Dunlap to abundantly justify such submission.

Since the judgment must be reversed for the reasons stated, it seems unnecessary to consider the other assignments of error.

REVERSED AND REMANDED.

JOHN R. KELLY, APPELLEE, V. JOHN H. WEHN, APPELLANT.

FILED DECEMBER 31, 1923. No. 22642.

1. **Trial**: DIRECTION OF VERDICT. Where different minds can arrive at only one conclusion from the undisputed facts of the case, reasoning honestly and rationally, the court may direct a verdict consistent with that conclusion.
2. **Banks and Banking**: SALE OF STOCK: DIRECTION OF VERDICT. In this case the vendor and the purchaser of 52 shares of stock

in a bank agreed that the vendor would take up 52 per cent. of any notes and shortages among the assets of the bank in case the purchaser could show that the same were worthless and uncollectible by a subsequent time stated. *Held*, that the evidence was sufficient to show beyond dispute that a sufficient showing was made in this regard to make the vendor liable to the purchaser for 52 per cent. of certain notes and shortages sued upon, and that the trial court was justified in directing a verdict in favor of the purchaser and against the vendor therefor.

APPEAL from the district court for Morrill county: RALPH W. HOBART, JUDGE. *Affirmed.*

Williams, Hurd & Neighbors, for appellant.

Eugene Burton and *Robert Reddish, contra.*

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

SHEPHERD, District Judge.

The appellee, John R. Kelly, was the plaintiff in the district court, and the appellant, John H. Wehn, was the defendant. The former sued the latter to recover 52 per cent. of the face value of worthless assets—notes and shortages—of the Angora State Bank. It seems that Wehn owned 52 per cent. of the capital stock of said bank and sold it to Kelly under the following contract in writing:

"Angora, Nebraska, August 13, 1919.

"Received of J. R. Kelly of Angora, Nebraska, one thousand dollars, being part of first payment on purchase price of fifty-two shares of the capital stock of Angora State Bank of Angora, Nebraska, as follows: Fifty-two shares at actual value plus two thousand dollars premium, actual value to be determined as follows: All earnings of whatsoever nature to be computed to date and all expense and interest owing to be deducted; which result to be added to capital stock and surplus determines the actual value. Balance of purchase price to be paid on or before September 15, 1919.

"It is understood and agreed that J. H. Wehn, as selling party hereto, will take up 52 per cent. of any notes in bank

at date of transfer, which purchaser can show is worthless and uncollectible by October 15, 1919.

"It is understood and agreed that the purchaser will use his best efforts to collect without cost as they become due all rediscounts of seller. J. H. Wehn as selling party hereto agrees to pay 52 per cent. of any shortages which may be found and, should any shortages appear, seller will have the right and privilege to examine and audit any books and accounts that he may desire in connection with such shortages.

"J. H. Wehn agrees that he will not reengage in the banking business in Angora, Nebraska, within a period of five years. Upon full and complete payment being made as above provided, J. H. Wehn agrees to resign his position as vice president, also as director, and procure the resignation of J. W. Wehn as director and to assign his and J. W. Wehn's stock to the order or J. R. Kelly.

"J. H. Wehn,
"J. R. Kelly."

Following the execution of this contract, Wehn made and delivered to Kelly a written statement under date of September 12, 1919, of the assets and liabilities of the bank, including as assets under the name of loans and discounts all of the notes of the bank and a claim for $4,874.65 against the Fred L. Case estate. Kelly paid Wehn $9,344.48 for the stock according to the contract and then, having found by October 15, 1919, as he alleges, worthless notes and shortages among the assets of the bank amounting to practically $13,245.02, and having vainly demanded settlement therefor from Wehn, he brought the said action against said Wehn for 52 per cent. of such sum, or $6,885.84. Wehn denied all the material allegations of the lengthy petition, except the existence of the bank, his official connection with it, his ownership of 52 per cent. of its stock, the making of the said contract of sale, and the making of said written statement under date of September 12, 1919. He also appropriately and sufficiently pleaded all the defenses argued in his brief and hereafter considered in the

opinion. The court upon the conclusion of the trial directed a verdict in favor of the plaintiff, Kelly, and against the defendant, Wehn, for 52 per cent. of the amount due September 12, 1919, on the following notes and accounts, less payments and credits thereon:

No.	Maker	Date	Due	Principal	Amt. due Sept. 12, 1919, after deducting credits
1.	Mary Bowers,	Sep. 23, 1918,	Demand,	$ 15.00	$ 16.45
2.	R. M. Carnine,	May 18, 1918,	Demand,	77.06	87.20
3.	J. W. & C. L. Van Horn,	Sep. 17, 1918,	Demand,	75.00	82.50
4.	C. L. Van Horn,	Jun. 26, 1918,	Demand,	1,793.50	1,972.75
5.	C. L. Rowen,	Oct. 4, 1918	Apr. 4, 1919,	3,000.00	1,961.80
6.	C. L. Rowen,	Oct. 4, 1918,	Apr. 4, 1919,	1,000.00	1,094.50
7.	B. E. Maybell,	Sep. 21, 1918,	Demand,	1,192.00	571.30
8.	Carl E. Philpott,	Jun. 24, 1918,	Dec. 24, 1918,	150.00	168.30
9.	A. D. Hutchinson,	Jun. 24, 1918,	Dec. 24, 1918,	150.00	168.30
10.	A. L. Gillespie,	Apr. 15, 1918,	Demand,	57.85	53.80
11.	A. L. Gillespie,	Jun. 25, 1918,	Dec. 25, 1918,	150.00	168.30
12.	Carl F. Rowen,	July 20, 1918,	Demand,	10.00	11.15
13.	C. L. Rowen,	Jan. 27, 1919,	July 29, 1919,	325.00	117.60
14.	G. T. Rowen,	Nov. 14, 1918,	May 14, 1919,	977.50	901.00
15.	G. T. Rowen,	Dec. 4, 1918,	Feb. 4, 1919,	25.00	29.25

16. H. B. Thompson, Jan. 16, 1919,	May 20, 1919,	135.60	144.40
17. E. L. Case, July 20, 1918,	Demand,	581.00	581.00
18. Fred L. Case, Oct. 19, 1918,	Demand,	1,700.00	1,700.00
19. E. L. Case, Overdraft		1,481.44	1,481.44
20. Fred L. Case, Shortage		747.21	747.21
21. Fred L. Case, Shortage		365.00	365.00

As the defendant, appellant, says in his brief, the contentions of the parties upon this appeal resolve themselves into two main questions to be decided by this court, first, the effect to be given to the written contract before quoted, and in the second place whether or not defendant had a right to have the facts determined by a jury.

The evidence showed that the defendant bought the described 52 shares of stock in said bank from Fred L. Case, and that the first 12 notes above listed were made during the administration of the bank's affairs by said Case. It shows also that the next four notes were made to said bank during the defendant's administration, and that the last five items, consisting of notes, shortages, and overdrafts, except the Fred L. Case note, which was made during defendant's administration, were made while Case himself was in charge. The evidence also shows that these last five items were carried on the books of the bank by the defendant as a claim for $4,874.65 against the Fred L. Case estate. The evidence further shows that, after Case sold to the defendant and before defendant sold to plaintiff, Case died and defendant was appointed as one of the administrators of his estate, and continued to act as such until its final settlement; that while acting as such administrator defendant took from the bank the first 12 notes above listed, substituted copies therefor, and filed the originals in the county court of Morrill county attached to a claim against the estate

for 52 per cent. of the amount due on said notes, which he claimed to be due him on the contract he had with Case, made when he purchased the 52 shares of stock from the latter to assure him against loss; that his claims on all of said notes were allowed and paid in whole or in part by the estate; that there was also filed for the bank a claim against said estate for $4,874.65 on the last five items mentioned, and that this claim was allowed in full, but that the bank recovered thereon only about 25 per cent. of the amount, for the reason that the estate was insolvent. The plaintiff testified that on September 12, 1919, the time he paid defendant for his stock, defendant admitted to him orally and in writing that said first 12 notes were worthless and uncollectible; that the three Rowen notes were worthless and uncollectible except for some security, which was to be sold in a few days, but which would not be sufficient to pay the notes in full; and that the said claim of $4,874.65, consisting of notes, overdraft, and shortages, would be paid in full in 30 days. He also testified of his own knowledge that all of these assets were worthless.

Defendant did not testify at all in regard to the value of any of these items. In fact, he refused to be cross-examined upon the subject. But he did testify that he had not told the plaintiff that the $4,874.65 would be paid in 30 days, and that similarly he had not told plaintiff that all of said notes were worthless. But it is in evidence that he not only filed the said paper against the estate, but that he paid over to plaintiff the 25 per cent. which was collected by that means. A letter written by the defendant also appears in evidence. It is as follows:

"Angora, Nebraska, Sept. 12th, 1919.

"To Directors of Angora State Bank,
"Angora, Nebraska,

"Dear Sirs:

"I enclose you herewith two statements of the condition of the Angora State Bank, viz., one of Oct. 8, 1918 (condition of bank at time of my taking charge), one of Sept.

12, 1919 (condition of bank at time of my turning control to J. R. Kelly).

"In connection therewith I might say the claim account represents claims against the estate of Fred L. Case, as follows: $3,762.44 represents notes which Mr. Case was wholly responsible for, $1,112.21 represents shortage in accounts of the bank during Mr. Case's administration. These claims have been allowed and will shortly be paid.

"Of the notes in the bank on October 8, 1918, which I have been unable to collect or satisfactorily renew are the following: Mary Bowers dated Sept. 23, 1918, $15, R. M. Carnine dated May 18, 1918, $77.06, J. W. Van Horn dated Sept. 17, 1918, $75, C. L. Van Horn dated June 26, 1918, $1,793.50, C. L. Rowen dated Oct. 4, 1918, $3,000, C. L. Rowen dated Oct. 4, 1918, $1,000, B. E. Maybell dated Sept. 21, 1918, $1,192, Carl E. Philpott dated June 24, 1918, $150, A. D. Hutchinson dated June 24, 1918, $150, A. L. Gillespie dated April 15, 1918, $57.85, A. L. Gillespie dated June 25, 1918, $150, Carl F. Rowen, $10. Of the above notes payments have been made on them as follows: On the C. L. Van Horn note $200, on the B. E. Maybell note $699.50, also there is about $1,500 recovery on the Rowen notes. I have a claim for my share of loss under these notes against the Case estate by virtue of a contract assuring me against any loss.

"On October 1, 1918, Mr. Fred L. Case charged the following notes to loss, which notes are registered for collection in this bank as the property of the stockholders of record Oct. 1, 1918; Vernon E. Chapman $25, Harry Barber $50, Vernon E. Chapman $20, Roy Castell $110, Wm. Varley $367.20, Ida Fetters $184, M. E. Devore $75, L. C. Piatt $800. Of these I had nothing to do with, they being charged out just prior to my taking charge.

"Of the notes which I have made or renewed and on which there is a chance of loss are H. B. Thompson $135.60, chattel mortgage on four milch cows, no loss if we can locate these cows, C. L. Rowen $325, C. M. on 12 yearling heifers, G. T. Rowen $977.50, C. M. on 8 horses and 8

cattle; are selling the Rowen stuff within a few days, will not pay out by about $200.

"In my opinion the rest of the paper of the Angora State Bank is good.

"In getting at the actual value of the stock of this bank, the accrued interest on all notes was figured to Sept. 11 and amounted to $1,669.31. The interest owing on the time certificates of deposit amounts to $151.22, making a net uncollected profit of $1,518.09, which amount added to the net profit as shown by statement attached makes a value of $141.24 per share less the uncharged loss as above set forth. There is no unpaid expense or other claim that I know of.

"It has lately come to my knowledge that some of the parties interested in the Angora State Bank are dissatisfied and inclined to cause someone trouble. In connection therewith would like to say that I took over this bank when it was insolvent and on the rocks, through mismanagement and neglect of those interested; by the liberal use of private funds and careful nursing and work I believe that I have stood it on its own feet and made a real bank out of it, without one bit of help or assistance of any one interested therein excepting L. D. Carnine. I have transferred my stock to J. R. Kelly of Bancroft, Nebr., and placed in his hands my resignation as vice-president and director, and pass on with the hope that the Angora State Bank will prosper and grow.

"Yours truly,

"J. H. Wehn."

This letter and the other facts and circumstances brought out by the testimony, in connection with the fact that the defendant did not offer any proof as to the value of the assets in question and was unwilling to be interrogated thereon, was sufficient, we think, to show the defendant, according to the literal terms of the contract of sale, that said assets were worthless and uncollectible. In other words, we take the view that the undisputed evidence was such that plaintiff was entitled to recover all that the district

court awarded him by its direction. Where different minds can arrive at only one conclusion from undisputed facts, reasoning honestly and rationally, the court may direct a verdict consistent with that conclusion. *Knapp v. Jones*, 50 Neb. 490; *Shiverick & Co. v. Gunning Co.*, 58 Neb. 29; *Rogers & Bro. v. Marriott*, 59 Neb. 759.

Defendant strongly contends that the rule of *caveat emptor* applies to a sale of corporate stock, and that, hence, as a general rule, a seller of such stock does not warrant its qualities or value. But this rule can have no application in the case at bar, because in connection with the sale of capital stock of a concern an express warranty may be made as to the value of its assets. This was decided in *King v. Day*, 104 Neb. 353.

The defendant also argues that, in order to show him that the notes and accounts were worthless and uncollectible, it was necessary for the plaintiff to reduce the same to judgment, and produce an unsatisfied execution against the makers. Considering that said notes were long past due before the stock was sold to the plaintiff, and considering also what the defendant himself did with respect to the same and the estimate placed by him upon them in the above quoted letter, and considering further the other testimony referred to, it is quite obvious that the placing of these notes in judgment would have been futile. When it is clear that judgment and execution would be worthless, it is not necessary for the plaintiff in a case like this to reduce warranted or guaranteed claims to judgment. In addition to this, it must be true that it was not within the contemplation of the defendant in making the contract of sale that this should be done. For the time to elapse, a period of 30 or 35 days, would not be sufficient to enable plaintiff to place all of these notes in judgment.

The judgment appears to have been right, unless indeed a larger one might have been properly directed by the trial judge, and it is therefore approved by this court and

AFFIRMED.

CLIFFORD C. SUTTON, APPELLEE, V. JOHN BARTON PAYNE, DIRECTOR GENERAL, APPELLANT.

FILED DECEMBER 31, 1923. NO. 22654.

1. Carriers: LOSS OF BAGGAGE: LIABILITY. The definition of baggage to be found in the Hannegan baggage tariff is simply declaratory of the common-law definition of such baggage. And where the railroad company would be required to pay for the loss of such baggage under the common law, the director general will be required to pay for baggage lost by him during the period of federal control.
2. ———: ———: DAMAGES. *Held*, in this case, that where a workman took with him a kit of tools for the purposes of his journey, and upon his return checked the same as baggage, the railroad receiving them and issuing its check therefor, and where such tools were lost in transportation, the railroad company, or the director general since the loss occurred under federal control, will be required to pay full value for such tools up to the limit agreed upon.

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

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

Sears & Horan, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE and GOOD, JJ., REDICK and SHEPHERD, District Judges.

SHEPHERD, District Judge.

Plaintiff's action was to recover the value of mechanic's tools checked as baggage and lost while in possession of the defendant. There was no question as to the facts. The director general admitted receiving the tools, which were in a hand-satchel or kit, at Schleswig, Iowa, and issuing a baggage check for the same, also that the said tools were lost in transit. The case was tried in the municipal court at Omaha. Judgment was for the plaintiff, appellee, in the sum of $100. The district court refused to review this judgment and the case is brought here by the defendant, appellant.

The time in question was during the period of federal control. The Hannegan baggage tariff, promulgated by the director general, was in force. This tariff defined personal baggage as "wearing apparel, toilet articles and similar effects in actual use and necessary and appropriate for the wear, use, comfort and convenience of the passenger for the purpose of the journey, and not intended for other persons nor for sale." It provides also that the same "must be inclosed in receptacles such as trunks, valises, telescopes, suitcases, leather hat boxes and satchels, provided with handles, securely locked and otherwise fastened, and made of material of sufficient strength and durability and of a quality to withstand the rapid handling and piling incident to its transportation." It then provides that other enumerated articles may be accepted and checked for transportation in the baggage service, upon a limit of liability on the part of the carrier of $25 for each of such articles. Among these enumerated articles is a tool chest. We agree with the trial court that a kit of tools does not fall within the exceptions of the tariff, and that if appellee could recover at all he was entitled to recover the full value of his property up to the $100 which the parties agree upon as the maximum of recovery.

The whole contention of the appellant is that the court was holding contrary to the provisions of the Hannegan tariff, and was therefore in error in the rendition of its judgment. This is not a surprising view to take when one considers only the language of the definition above given. But the courts have uniformly and for a long time given to the term "baggage" the precise definition which is found in the Hannegan baggage tariff. In other words, this baggage tariff which is relied upon by the appellant is merely a statement of the common-law definition of baggage. *Bomar v. Maxwell*, 9 Humph. (Tenn.) 620; *Kansas City, Ft. S. & G. R. Co. v. Morrison*, 34 Kan. 502; *Dibble v. Brown*, 12 Ga. 217, 56 Am. Dec. 460; *Kansas City P. & G. R. Co. v. State*, 65 Ark. 363, 41 L. R. A. 333; *Chicago, R. I. & P. R. Co. v. Collins*, 56 Ill. 212.

Hand tools carried by a workman for the purposes of a journey have always been held to constitute baggage within the meaning of these tariff regulations and within the meaning of the common-law definition of baggage so reenacted in the Hannegan tariff. *House v. Chicago & N. W. R. Co.*, 30 S. Dak. 321; *Grzywacz v. New York C. & H. R. R. Co.*, 134 N. Y. Supp. 209; *Texas & N. R. Co. v. Russell*, 97 S. W. (Tex. Civ. App.) 1090; *Porter v. Hildebrand*, 14 Pa. St. 129; *Davis v. Cayuga & S. R. Co.*, 10 How. Pr. (N. Y.) 330; *Missouri K. & T. R. Co. v. Meek*, 33 Tex. Civ. App. 47; *Hannibal Railroad v. Swift*, 12 Wall. (U. S.) 262; *Railroad Co. v. Fraloff*, 100 U. S. 24; *Hopkins v. Westcott*, 6 Blatchf. (U. S.) 64.

The case of *Hannibal Railroad v. Swift*, 12 Wall. (U. S.) 262, dealt with a very similar question. This was a decision of the supreme court of the United States, and the question involved arose in regard to the surgical instruments of a physician. The supreme court held that such instruments were baggage. It follows in logic that if the instruments which a physician takes with him on a journey for the purpose of performing an operation are baggage, and the physician may recover the entire value, unless otherwise limited, of such instruments, then the ordinary mechanic who takes tools upon his journey may also recover the full value of the same, unless otherwise limited.

We are of the opinion that the judgment of the district court was right, and it is

AFFIRMED.

MARY SHANNON V. STATE OF NEBRASKA.

FILED DECEMBER 31, 1923. No. 23396.

1. **Criminal Law: SANITY: BURDEN OF PROOF.** One who is charged with crime is presumed in the first instance to be sane. But when that presumption has been rebutted, it devolves upon the state to show by evidence beyond a reasonable doubt that the accused was capable of distinguishing between right and wrong

with respect to the act committed in order to secure his conviction. *Held*, in this case, that there was sufficient evidence to justify a jury in so finding.

2. ———: WEIGHT OF EVIDENCE. "The jury must determine the weight of evidence adduced, and its estimate thereof will not be interfered with, unless it is clearly wrong." *Whitman v. State*, 42 Neb. 841.

3. ———: INSANITY: INSTRUCTION. A direction to the effect that the law recognizes no form of insanity, or uncontrolled impulse or temper, even though the mental faculties be disordered or deranged, which will provide immunity from punishment for a criminal act, so long as the person committing the act has the capacity to know what he is doing and to understand that his act is wrong, is not erroneous, particularly if the court directs in connection therewith that one who has the power of mind to distinguish between right and wrong with respect to the criminal act at the time of committing it is to be regarded as legally sane, and held criminally responsible.

4. ———: INSTRUCTIONS. "Where the court on his own motion has correctly instructed the jury on all the issues presented by the record and evidence in a criminal case, it is not error to refuse to give the instructions requested by the defendant." *Reed v. State*, 75 Neb. 509.

ERROR to the district court for Douglas county. CHARLES A. GOSS, JUDGE. *Affirmed: Sentence reduced.*

Jamieson, O'Sullivan & Southard and *Charles P. Rapp*, for plaintiff in error.

O. S. Spillman, Attorney General, Marcus L. Poteet and *Lester L. Dunn, contra.*

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

SHEPHERD, District Judge.

Mary Shannon, the plaintiff in error, a vigorous young married woman of 38, broke into the quarters of an aged neighbor in the night-time and told her that she had come to finish her. In the struggle that ensued, as her victim attempted to push her away and to expel her from the house, plaintiff in error bit her finger so badly that her

arm became infected and subsequently had to be amputated. It appeared that Mrs. Booth, the old lady assailed, had incurred the enmity of Mrs. Shannon by protesting when the latter beat her rugs so that the dust fell from them upon some newly-washed curtains which were drying upon the line, or so Mrs. Booth testifies.

Mrs. Shannon denies this incident, and says that she had scarcely any acquaintance with Mrs. Booth, and bore her no ill will whatever. She testified that she was not addicted to the use of liquor, but that on the occasion in question, owing to the fact that she was suffering from cramps and from painful menstruation, she had bought some corn liquor, and had drunk about a pint and three-quarters of it during the day preceding the assault. In consequence, she says, her mind was a blank from the time that she took her last drink, about 7 or 8 o'clock in the evening, till she found herself in jail the next morning. The liquor was bootleg stuff containing 1 per cent. of fusel-oil, and very dangerous. A doctor testified that having taken it as she said, Mrs. Shannon would be unable to distinguish between right and wrong.

Plaintiff in error was duly charged with the crime of mayhem, and was tried, convicted and sentenced to five years in the penitentiary. She comes here assigning the following errors. (1) The verdict was contrary to law; (2) contrary to the evidence; (3) not sustained by sufficient evidence, the "same being less than proof of the defendant's guilt beyond a reasonable doubt;" (4) the court erred in giving its ninth instruction; (5) in refusing to give instruction 1 requested by the defendant; (6) in refusing to give instruction 2 requested by the defendant; (7) in refusing to give instruction 6 requested by defendant; (8) the state failed to prove the sanity of the accused beyond a reasonable doubt; (9) the state failed, after the defendant had interposed the defense of alcoholic insanity, to prove the sanity of the accused by evidence beyond a reasonable doubt; (10) the sentence is excessive.

While other errors are set forth in the petition in error,

it is expressly stated in defendant's brief that she relies for reversal only upon the foregoing.

In the main the contentions of the plaintiff in error are two. First she asserts that the state stands in the position of one who rests his case upon a rebuttable presumption, completely rebutted. This would, if true, be sufficient to entitle her to reversal and discharge. When the defendant proved by her expert testimony, opinion evidence though it was, that the bootleg whiskey which she had taken robbed her of power to distinguish between right and wrong and rendered her an unconscious actor in the assault upon Mrs. Booth, it devolved upon the prosecution, if it had not already adduced affirmative proof of defendant's sanity at the time of said assault, to make such proof upon rebuttal. Such is the doctrine of the cases cited by the plaintiff in error. Such, in effect, was also the eighth instruction of the trial court, as follows:

"The defendant in this case has interposed the defense of temporary insanity, caused by the use of alcoholic stimulants. Upon this point you are instructed that the law presumes that every person is sane and it is not necessary for the state to introduce evidence of sanity in the first instance. When, however, any evidence has been introduced tending to prove that the condition of the mind of the accused was such, at the time of the commission of the act charged, that she could not be held legally responsible for her act, then the burden is upon the state to establish the fact of the accused's criminal responsibility for her act, the same as any other material fact to be established by the state beyond a reasonable doubt to wararnt a conviction. The evidence upon this point you should consider the same as any other evidence introduced in the case, giving to it such weight as in your judgment it should receive."

This instruction is strictly according to the Utah case, *State v. Brown*, 36 Utah, 46, upon which the plaintiff in error depends. But in that case it is said that all of the evidence, apart from the presumption, was to the effect that the accused was insane. In this case it is not so. Mrs.

Shannon herself testified that a month or two before she bought and drank a pint of the same kind of liquor without becoming drunk. Mrs. Booth testified that Mrs. Shannon swore at her and threw slop on her steps, and that in addition to dirtying her curtains she told her that she did it purposely. There was enough in the case of the state in chief to indicate that the accused meditated the punishment of Mrs. Booth and prepared herself by resorting to liquor to administer it. If so, she could not escape the consequences on the plea that the liquor made her wild, because the premeditated intent goes through to the act. *Kraus v. State*, 102 Neb. 690.

Anyway, if supporting evidence be adduced, sufficient in connection with the presumption to sustain a finding that the accused knew what she was doing and had understanding enough to determine whether it was right or wrong, then and in such case the question of whether or not she was capable of forming an intent was for the jury. It is for the court to say, we think, only when it can decide with certainty, and as a matter of law, that the evidence on the point is so lacking in probative force that the jury should not be permitted to declare that it is convinced beyond a reasonable doubt of the truth of the charge.

But there was rebuttal tending to prove the sanity of the defendant. It must be remembered that the desk sergeant at the station testified that when Mrs. Shannon was brought in, the following conversation was had between them:

"A. I asked her what was the matter that she bit this woman's finger, and she says, 'Well, I had trouble there;' I turned to the captain at the time, and I says, 'This charge ought to be changed to mayhem;' and this Mrs. Shannon says, 'Well,' she says, 'Mayhem be damned; I ought to have knocked her head off.'"

This conversation indicates a memory and understanding of what had transpired, and a mind that could measure what she had done with what should have been done. It evinces not merely knowledge of what she was doing in her

attack upon Mrs. Booth, but also, though we may not agree with her conclusion, a perception in regard to the right or wrong of it. Taken in its entirety, what she said strongly tends to show her mental capacity. But, more than this, it indicates a settled intent to injure, and a motive for doing what she did. We do not overlook the fact that the conversation referred to occurred perhaps 30 minutes after the assault. But there is nothing in the record to indicate that the passage of so short a time would make any appreciable difference in the mental state of the accused, and in the absence of proof to the contrary we must consider it the same.

In addition to this, the conversation of the accused with her brother in the morning after argues a memory of what she had done. She wanted her brother to get her out. "You can't tell what will happen," she said. This was before she had been arraigned on the charge against her. Inferentially it may be said that she knew what she was doing when she broke in and assaulted Mrs. Booth, and was apprehensive of the consequences. She remembered her act, realized that she had performed it knowingly, and feared, as she said to her brother then or later, that they would send her "over the road this time."

Conceding then the rule contended for, it does not seem applicable in the instant case. There was rebuttal testimony supporting the presumption of sanity which was at once sufficient to take the case to the jury and to justify the verdict returned. "The jury must determine the weight of evidence adduced, and its estimate thereof will not be interfered with, unless it is clearly wrong." *Whitman v. State,* 42 Neb. 841. There was evidence enough adduced to justify the jury in finding that Mrs. Shannon was sane.

The giving of instruction 9 of the court's charge is another assignment of error made prominent, not only in the brief, but upon oral argument. The instruction is assailed as a misstatement of law, and also as leading the jury to believe that, if the accused knew what she was doing, she should be convicted. In regard to the latter,

she relies upon *Knights v. State*, 58 Neb. 225. But the vice of the instruction in *Knights v. State* was that it was therein stated that, in order to escape conviction, the evidence must show a condition of mind incapable of understanding the nature of the act done. The court very properly said that a person thoroughly insane, and not able to distinguish between right and wrong with respect to the thing about to be done, might know perfectly well the nature and consequences of the act—that the fire would consume, the blow bruise, the bite lacerate, etc. Nothing of the kind was charged in the instruction here.

The next contention touches a real fault in the instruction, but not a fatal one. For while the court instructed the jury in one part of said instruction that they should acquit the defendant if they found that at the time of committing the act she was unable to distinguish between right and wrong, and while this was not of itself a complete and correct instruction in a case like this, the court afterward in said instruction stated the proper rule, viz., that the defendant might be convicted if the jury found that she was capable of distinguishing between right and wrong with respect to the act charged. *Kraus v. State*, 108 Neb. 331. And the last sentence of the instruction practically repeats the correct rule, as follows: "The law recognizes no form of insanity, or uncontrolled impulse or temper, even though the mental faculties be disordered or deranged, which will furnish one immunity from punishment for an act declared by the law to be criminal, so long as the person committing the act had the capacity to know what he was doing and the power to know that his act was wrong." We have seen that the doctrine of *Knights v. State, supra*, is not applicable to this sentence as directing a finding against the accused, if she knew what she was doing; and we should now observe that the statement is not only unexceptionable as a statement of law, but a bar to any misconception on the part of the jury. The power to know when an act is wrong necessarily involves knowledge of what is right with respect to such act. A comparison of the right and wrong

of a thing is what gives rise to a knowledge that it is wrong. See fifth paragraph of syllabus of *State v. Brown, supra.*

Instruction 9 cannot be said to be a model one, but we are convinced that the jury were not misled by it, and that no substantial miscarriage of justice occurred because of it.

The complaint of the accused that the court was in error in refusing to give instructions 1, 2, and 6, tendered by her, is equally without merit. The error in the case of *Latimer v. State,* 55 Neb. 609, was not repeated in the case at bar. In this case the court did not predicate the right of Mrs. Shannon to an acquittal upon a derangement of mind equivalent to insanity or total lack of reason.

In instruction 5 of the charge of the court the jury were told that it was essential that the state prove an intent on the part of the accused to maim and disfigure. Instruction 7 of the charge defines the intent necessary to conviction. Instructions 8 and 9, already discussed, deal with the matter of intent as affected by the intoxication established by the evidence. Every point in the requests referred to, so far as pertinent, was presented to the jury in these instructions given by the court upon his own motion. "Where the court on his own motion has correctly instructed the jury on all the issues presented by the record and evidence in a criminal case, it is not error to refuse to give the instructions requested by the defendant." *Reed v. State,* 75 Neb. 509.

Enough has been said to show that the trial court did not err in any of the respects referred to and relied upon. It is obvious from the foregoing discussion that we are of the opinion that the verdict was not contrary to law and the evidence, but was sustained by the evidence. It remains to consider the tenth assignment, that the sentence was excessive. We are sensible that five years in the penitentiary is a grievous punishment to one who is not, as we assume, of the criminal class, though her crime was a crime of violence. It is not probable that she intended the ultimate result of her crime. Such result could not, in fact, have been within her contemplation. We are inclined to

temper justice with mercy, and her sentence will be reduced to two years.

No error appearing in the record, the judgment of the district court, as above modified is affirmed.

AFFIRMED: SENTENCE REDUCED.

JOHN TASICH V. STATE OF NEBRASKA

FILED DECEMBER 31, 1923. No. 23461.

1. **Contempt: INFORMATION: VERIFICATION: SUFFICIENCY.** An affidavit charging an accused with constructive contempt of court, if made by a county attorney, is sufficient to confer jurisdiction, if the complaint of such affidavit be sufficiently direct and positive in its charging part, even though the verification of said affidavit be made upon information and belief. *Belangee v. State*, 97 Neb. 184, overruled in so far as it conflicts with this rule.

2. ———: **SUFFICIENCY OF EVIDENCE.** *Held*, in this case, that the evidence fully supports the judgment that the accused was guilty of constructive contempt of court in attempting to corrupt a juror during the progress of a case then upon trial, and that a sentence of six months in the county jail therefor was not excessive.

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

E. R. Leigh, for plaintiff in error.

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

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

SHEPHERD, District Judge.

This action was on an information for constructive contempt. The defendant, John Tasich, plaintiff in error in this court, was charged with attempting to corrupt a juror in order to obtain a verdict of acquittal for his brother, Joe Tasich, who was on trial for shooting with intent to kill. Trial was had to the court. Plaintiff in error was found

guilty, and was sentenced to six months in the county jail of Douglas county.

The evidence fully supports the conviction. During the trial of Joe Tasich before referred to, the plaintiff in error went quite directly from the courtroom to the flour mills where the juror in question was employed and accosted the sales manager, one Pravitz, telling him that his brother was on trial that day and that the mills had a man by the name of Bastain on the jury. He wanted to talk to Bastain and explain to him that his brother was not present at the shooting. Pravitz went to Bastain's room to take the matter up with him, but the latter, who was duly regardful of his juror's duty, told him that it would not be lawful for him to discuss the matter. Thereupon Pravitz returned to his own office, where Tasich, the plaintiff in error, was waiting, and informed him that Bastain was not in, but that he would see him and tell him about it. Tasich asked him to tell Bastain to come to his house that evening in order that he might explain to him. He also suggested to Pravitz that he would come to Pravitz's house that evening, and that together they could go and see Bastain about it. To the credit of Mr. Pravitz it should be said that he did not attempt to advise Bastain of what Tasich said to him. Tasich was a customer of the mills, and for the rest it may be said that in all probability the sales manager did not see fit to repulse him harshly or to dismiss him peremptorily, though well understanding his design. It further appears that plaintiff in error had been present in court during the trial of his brother, where he could hear the instructions of the judge warning the jury not to permit outsiders to talk to them about the case. More than that he was himself personally called to the bench and admonished by the judge not to interfere with the proceedings by talking to the witnesses, and by threatening them. It is quite obvious that the trial judge was justified in finding that Tasich was guilty as charged. The evidence was such as to convince the judge or jury that this was the case.

From the foregoing it will be clear that the court finds

no merit in the contentions of the plaintiff in error that the judgment was contrary to law, and was not sustained by the evidence. This disposes of assignments 1 and 2 relied upon for reversal.

The main assignment of error is to the effect that the information was not verified positively, but only upon information and belief, and was accordingly not sufficient in law to confer jurisdiction upon the court to punish plaintiff in error for contempt. In the case of *Belangee v. State*, 97 Neb. 184, it was held that an affidavit alleging material facts on information and belief does not give a court jurisdiction in a contempt proceeding. The case is in point. But we are not inclined to adhere to the rule therein announced, because it is not supported by the weight of authority, not well reasoned, and not in accord with the tendency which now obtains in Nebraska to minimize the force of merely technical defenses in criminal practice. In said case there is a strong dissenting opinion, concurred in by two of the other justices of the supreme court, which is entirely persuasive to us in its reasoning. A part of that opinion is as follows:

"The opinion assumes that the evidence is sufficient, and disposes of the case on the insufficiency of the information. The statute makes the acts charged a crime that may be punished by indictment or preliminary examination and information and jury trial, or as a contempt of court. Section 8238, Rev. St. 1913, provides that punishment for contempt shall not be a bar to indictment and trial by jury.

"In this case there was no indictment nor preliminary examination. The information states the facts constituting the contempt of court, and then says: 'In contempt of the said district court, and its dignity.' It is a proceeding for contempt. It contains some allegations that would be necessary in an indictment, and probably some other surplusage, but this would, of course, not invalidate the information, if otherwise sufficient. The allegations of the information are positive, but the verification by the county attorney is upon belief. The opinion holds it void because

of the form of the verification. The question naturally arises: How can a prosecution for contempt in such case be instituted? It will rarely, perhaps never, happen that one person will of his own knowledge know all the facts necessary to constitute the offense. It would seem that the statute which provides that 'the party, upon being brought before the court, shall be notified of the accusation against him, and have a reasonable time to make his defense' (Rev. St. 1913, sec. 8237), does not contemplate any very formal proceeding. This statute seems to be all that there is in the statutes in regard to information or proceeding for constructive contempts. It may be that this court in some earlier cases has gone too far in adding formalities. The cases cited in the opinion, *Ludden v. State,* 31 Neb. 429 (violation of an injunction), the prosecution was to enforce property rights, and neither the affidavits nor evidence showed that the defendant had anything to do with violating the injunction; *Herdman v. State,* 54 Neb. 626 (injunction); *Gandy v. State,* 13 Neb. 445 (attempt to bribe witness); and *Hawthorne v. State,* 45 Neb. 871—all hold that the information must state the facts positively; that is, the 'accusation' against the defendant, of which he must be notified and have time to make defense (section 8237), must be in direct and unequivocal terms, and not guesswork. None of them holds that it must be positively verified, and in one of them *(Gandy v. State)* it would seem there was no verification at all, but that fact is not discussed.

"If knowledge of an attempt to bribe jurors comes to the court, it may, and should, direct the prosecuting attorney to investigate, and, if sufficient evidence is found, prosecute. The county attorney cannot make the verification under this decision, and there is no provision to compel witnesses who knew the facts to make complaint. It would seem, then, that proceedings for contempt in such cases are done away with by the opinion. There remains the slow and doubtful prosecution by indictment or preliminary examination, but this leaves the court helpless for the

time being. He might adjourn the term until a grand jury or examining magistrate could act."

It is certain that a trial court should not be reduced to this extremity. Contempt proceedings are not only salutary but necessary upon occasion. Yet it is extremely difficult to get the citizen to sign a charge against another citizen. The charge naturally and properly becomes the duty of the county attorney. Nevertheless, as in most criminal cases, the county attorney has no personal knowledge of the facts and cannot make an affidavit except upon information and belief. Must the proceeding fail because of the lack of positive verification? Positive verification can serve no purpose except to give weight to the statement of fact. Such verification is, and should be, only for the private citizen who makes affidavit. But the county attorney, being by the nature of his office careful not to proceed unless upon investigation he finds that there has been an offense and unless he is advised of evidence to prove it, may be trusted not to act with unwarranted haste, and yet be relied upon to act if the need exists.

It is entirely another matter where the charge against the defendant in constructive contempt proceedings is not directly and positively made, or where the charge is not sufficiently defined to apprize the defendant of what he is required to meet in making his defense. In the case of *Ludden v. State,* 31 Neb. 429, it was stated in the jurisdictional affidavit that affiant believed that Ludden participated in the violation of the injunction. In that case this court found that such an averment in the affidavit was not in the nature of a direct charge, and was not sufficient to confer jurisdiction upon the court. And it also found that it appeared from the record that Ludden was not a party to such violation of the order of the court. In *Gandy v. State,* 13 Neb. 445, the court said: "In the case at bar there is not a single fact alleged showing an attempt on the part of the defendant to improperly influence jurors. That is, there is no statement of what he did. The information therefore fails to state an offense." In the case of *Haw-*

thorne v. State, 45 Neb. 871, the syllabus was as follows: "In a proceeding to punish for an alleged contempt, not committed in the presence of the court, the affidavit upon which the proceeding is based is jurisdictional, and it must affirmatively disclose sufficient facts to show that the case is one over which the court has jurisdiction." The trouble with the affidavit in the *Hawthorne* case, as in the *Gandy* case, was that the showing did not go far enough in the matter of stating facts to support a charge of constructive contempt. And in that case, as in the *Ludden* case, this court declared in its opinion that there had been no wilful disobedience of a lawful order, and that no contempt of court had been committed.

In the case at bar the guilt of the accused is certain, and the danger to the administration of the law resulting from such a thing as he attempted is so great as to warrant summary action on the part of the trial court, to the end that the court's proceedings may be respected and effective. The charge in the case at bar was full and complete, so that the defendant knew exactly the nature of the offense which he was called upon to meet. And it was directly and positively made in the language of the affidavit, though the affidavit was verified only upon information and belief. We are of opinion that it was not the intention of the legislature to require the affidavit to be made upon oath when made by the county attorney, and that the supreme court should not to this extent curtail the power of county attorneys and trial courts to effectively perform their functions. In the case of *Creekmore v. United States,* 237 Fed. 743, L. R. A. 1917C, 845, the court said: "Many states have laws providing for compulsory affidavits, but our attention has not been called to any such federal statute. To say that voluntary affidavits must be obtained before the public prosecutor can start such proceedings is to say that one of the most heinous offenses known to the law, that of 'jury fixing,' shall go wholly unpunished. Confronted by such a danger, we have no hesitancy in holding that the public prosecutor can file an information for contempt, positive

and specific in its charges, and verify it upon information and belief, and, while such information may not justify the issuance of a warrant of arrest, it is not void, and where a rule is issued upon such information that defendant show cause, and upon the hearing, upon the testimony of sworn witnesses, the evidence shows the defendant guilty, he may be so adjudged, and that a warrant of arrest issued upon the conclusion of the case is upon 'oath or affirmation,' as provided in the fourth amendment to the Constitution."

Our own court, in the case of *Bee Publishing Co. v. State*, 107 Neb. 74, has taken much the same view. The following is from the opinion: "Another feature may be noticed. The verification of the charge by the prosecuting attorney closes with the statement: 'The facts set forth in said information are true to the best of my knowledge and belief.' Defendants argue that, unless the complaint is verified positively, the court is without jurisdiction. The argument is not tenable. They cited *Herdman v. State*, 54 Neb. 626, and *Belangee v. State*, 97 Neb. 184. But in those cases the court did not, as in the present case, order the county attorney to institute the prosecution. It may be noted, however, that the charge in the information, in the present case, is set forth in positive and direct terms. In some cases, in this and other states, this has been held to overcome the defendants' somewhat technical objection. *Emery v. State*, 78 Neb. 547."

While the court refers in the above case to the order to the county attorney to institute the prosecution, it is certain that, if it had regarded a positive verification of the affidavit as jurisdictional, the mere order of the trial court to institute the proceeding would not have been enough to avoid the rule. In other words, the case is an authority for the proposition that, if the charge be direct and positive, the affidavit will be sufficient to confer jurisdiction, even though it be upon information and belief.

In the federal case referred to, some weight was given to the fact that such an objection as is here depended upon was not raised prior to the trial. The same thing

happened in the case of *Johnson v. State,* 53 Neb. 103. And in *Emery v. State,* 78 Neb. 547, the court said:

"It appears that the complaint in this case is sufficiently positive and certain in its charging part, and the fault, if any, lies in the verification. But this defect, if it be such, was waived, for we find that the accused made no objection to the complaint, but filed his answer of not guilty, together with a general denial, and immediately announced his readiness to proceed with the trial. In fact the record shows that this question was raised for the first time by him in his motion for a new trial. The objection, therefore, comes too late, for one cannot object to the verification of a complaint after he has been arraigned and pleaded not guilty, unless such plea has been withdrawn."

This also argues to the effect that positive verification is not to be deemed jurisdictional, provided that the complaint be positive in its charging part. And it shows further that this court has not been disposed to attach weight to an objection of the kind made after trial. In this connection it is proper for us to consider section 10186, Comp. St. 1922.

"No judgment shall be set aside, or new trial granted, or judgment rendered, in any criminal case on the grounds of misdirection of the jury, or the improper admission, or rejection of evidence, or for error as to any matter of pleading or procedure, if the supreme court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred."

The judgment of the district court and the sentence imposed by it were just and right and should be affirmed. Furthermore, the court is disposed to hold, and does hold, that a rule regarding the verification of the affidavit by the county attorney in cases of constructive contempt of court be adopted in consonance with the reasoning of the dissenting opinion in the case of *Belangee v. State, supra.* If the affidavit be made by the county attorney, and if the complaint thereof be sufficiently positive and certain in its charging part, the affidavit will be deemed to confer juris-

diction upon the court, even though it be verified only upon information and belief.

AFFIRMED.

JAMES SANCLAER, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

FILED DECEMBER 31, 1923. No. 23796.

1. **Criminal Law: PAROLE: TIME SERVED.** Where a convict in the penitentiary is paroled, breaks his parole, and is retaken after a lapse of time, such time will not be counted as time served on his sentence, notwithstanding the declaration of his breaking or violating parole is not made by the prison authorities till after the retaking of the prisoner.
2. **Habeas Corpus: RETURN OF WRIT: PRIMA FACIE EVIDENCE.** The return of the writ of habeas corpus in this case considered as *prima facie* evidence of the cause of the prisoner's detention.

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

Mulfinger & Webb and *Arthur B. Jaquith,* for appellant.

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

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

SHEPHERD, District Judge.

This case depends largely upon the construction to be given to the words, "the date of his declared delinquency" found in section 9159, Rev. St. 1913 (Comp. St. 1922, sec. 10256). The pertinent part of the section in question is as follows:

"If any prisoner shall violate the conditions of his parole or release as fixed by the prison board, he shall thereafter be treated as an escaped prisoner owing services to the state, and shall be liable, when arrested, to serve out the unexpired term of his maximum possible imprisonment, and the time from the date of his declared delinquency to the date

of his arrest shall not be counted as any portion or part of time served."

Sanclaer was sent to the penitentiary for grand larceny on a sentence for an indeterminate term of from one to seven years. He was received there on the 1st of August, 1916. On the 12th day of February, 1918, he was paroled upon his own application, pledging himself as a condition of his parole that he would in all respects obey the law, conduct himself honestly, and avoid evil associations. He violated his parole in less than a month, on the 9th day of March, 1918, to be exact, committed a crime in Iowa and was sent to the reformatory of that state therefor. Two years and seven months after breaking parole, October 7, 1920, he was returned to the penitentiary here. On the 4th day of May, 1922, he applied to the board for a discharge, admitting the fact of his delinquency in the following words: "I was sentenced to one to seven years July 1, 1916, paroled February 12, 1918, violated condition of parole March 9, 1918, returned as parole violator October 7, 1920." He alleged also that his term of imprisonment had expired under the law. The board passed upon his application May 9, 1922, made a formal finding and declaration that he became delinquent on the 9th day of March, 1918, and ordered that the time from March 9, 1918, to October 7, 1920, should not be computed as time served.

The application of the prisoner having been thus denied, he brought this action in habeas corpus in the district court for the third judicial district for his release. The district court found against him, whereupon he comes here for review.

It is obvious that there are no appealing equities in favor of the petitioner. He makes his application on the letter of the law, insisting that he was serving sentence while in violation of his parole, and that only the time from the date upon which his delinquency was declared and made of record to the time of his return to the penitentiary can be counted as not served, that is to say, no time at all. To support this, the attorneys make an extended and able, but

highly technical, argument. We think it cannot be sustained. The law of section 9159 is to be read into the sentence. The intention of the legislature is perfectly clear. If a convict breaks his parole, he is liable to serve out his maximum term, and the time of his escape, computed from its beginning to its end or time of retaking, is to be considered as not served, so that the serving of the petitioner's sentence in this case began August 1, 1916, ran to March 9, 1918, when he broke parole, began again on the 7th of October when he was retaken or arrested, and then ran on to complete the full maximum period of seven years, to practically March 1, 1925.

The argument that the "declared time" of the section means the *time when declared* is ingenious but not at all persuasive. The statute should be construed as if it read *from the date of his delinquency, as afterward declared, to the date of his arrest.* The time in the mind of the legislator was the time when the prisoner runs, breaks, violates —becomes delinquent. Any other view looks past the purpose of the statute to a strained construction in favor of the convict. The matter of the declaration is comparatively a matter of bookkeeping, which should be done speedily, but may be done at leisure. The statute prescribes no time for making it.

Petitioner contends that, since the declaration of his delinquency was not made till May 9, 1922, and since section 10260, Comp. St. 1922, provides that a prisoner who performs his duties faithfully and has no infraction of rules recorded against him is entitled to diminution of sentence, he had the benefit of good time by operation of law, and that thereby his sentence had expired before the making of said declaration. But this section referred to is broad enough in its provisions to save the state. It says, *in hæc verba,* "and who performs in a faithful manner the duties assigned to him in an orderly and peaceable manner." No requirement as to record is attached to this clause. The prison authorities are obviously allowed a discretion in this regard. But, aside from this, the prison record shows a clear infraction

of the regulations of the penitentiary. This appears in the return to the writ, "Escaped 3-9-18."

We are of opinion that the return to the writ was evidence and *prima facie* proof of the things recited therein. Section 10294 Comp. St. 1922, so provides. The holding *In re Thomsen*, 1 Neb. (Unof.) 751, is not to the contrary, as it applies to a different state of facts, bringing it within the exception. In the case at bar the warden was holding the petitioner under a commitment upon sentence that had not been served out, not upon the order of the board declaring the date of petitioner's delinquency. The fact that his delinquency existed automatically excluded the time covered by his escape and postponed the time of his release, though not lengthening his maximum term. The time of declaring that delinquency, and of recording it, was, as we have seen, unimportant.

We hold that the declaration of the board of pardons was tantamount to a declaration by the pardon board, the former succeeding the latter in the function of making said declaration.

All of the authorities cited in the petitioner's brief have received due attention and examination. But, because of differences in fact and statute, they do not apply. We are satisfied by the reasons above given that the judgment of the district court was right, and it is

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1924.

STATE OF NEW MEXICO, APPELLANT, V. FIRST NATIONAL BANK OF WAUSA: GERMAN BOND & DEVELOPMENT COMPANY, INTERVENER, APPELLEE.

FILED JANUARY 15, 1924. No. 22607.

1. Appeal: AFFIRMANCE. Where in a law action a jury is waived and trial is had to the court, and an examination of the entire record discloses no prejudicial error, the judgment will be affirmed.
2. Held, that the record is free from error.

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

W. J Connell and *Harry S. Bowman,* for appellant.

P. H. Peterson and *W. A. Meserve, contra.*

Heard before MORRISSEY, C. J., ROSE, DEAN and GOOD, JJ., SHEPHERD, District Judge.

MORRISSEY, C. J.

The state of New Mexico, as successor to the territory of New Mexico, filed its petition in the district court for Knox county praying judgment against the First National Bank of Wausa, as the successor to the Farmers State Bank of Wausa, on a check reading as follows:

"Wausa, Neb., December 29, 1909.

"Pay to Carey Act Land Board of New Mexico, or order, $2500.00 Twenty-five hundred and no/100 dollars.

"To the Farmers State Bank, Wausa, Neb.

"German Bond & Development Co.

"by P. H. Peterson, Treasurer."

This check was certified, December 29, 1909, by T. A. Anthony, cashier of the Farmers State Bank. The check was duly indorsed by the Carey Act Land Board, the payee, a board which may be said to have been representing the plaintiff state, and presented for payment to the certifying bank, July 31, 1915. Payment was refused and the usual protest proceedings were then had. The check was delivered to the Carey Act Land Board of New Mexico soon after its date in connection with an application made for the segregation of certain lands within the territory of New Mexico in accordance with an act of congress, commonly called the "Carey act," and the provisions of the laws of New Mexico accepting the provisions of the federal act. These acts contemplated the development of irrigation projects and the reclamation of arid lands. The rules adopted by the Carey Act Land Board required the organization of a corporation under the laws of New Mexico, and required parties applying to enter into a contract and bond with the territory to construct an irrigation project according to plans to be approved by the territorial engineer, and also required applicants to agree to indemnify the territory for any expenses that it might incur in procuring maps and plats from the United States government. Plaintiff alleges that after the application for the segregation of lands, which was made by three individuals said to be acting for the owners of the check in suit, was filed, the territory expended for such plats and maps the sum of $1,100, and that no part of that sum has been paid by the applicants. The final allegation is that the parties, signing the application, with which was deposited the check, duly organized the corporation as required by the terms of the application, but never thereafter proceeded with the development work or entered into any contract or bond with the territory to construct the irrigation project mentioned in their application.

Defendant's answer admitted the execution of the check; that it is the successor to the Farmers State Bank; that

certain parties representing the drawer of the check made application to the territory of New Mexico for the segregation of lands under the acts mentioned in plaintiff's petition, and that, in order to comply with the rules and regulations of the Carey Act Land Board of New Mexico, the drawer of the check caused it to be made payable to the Carey Act Land Board, caused it to be certified, and then delivered it to the parties who were about to make application for segregation; that these parties delivered the check together with their application to the Carey Act Land Board; that the clause in the application reading, "and also further to insure the expense the territory may be to in getting the maps and plats from the United States government, and agrees to pay the territory in cash such last amount, whenever the same can be ascertained," was written into the application without the knowledge, consent or authority of the drawer, and that the drawer had never authorized the applicants, or any of them, to charge the check in suit or its proceeds with the performance of such a promise; that the Carey Act Land Board had no authority under the laws of the United States or under the laws of the territory of New Mexico or its rules and regulations to require of any applicant such an agreement. The answer denies that the application was ever accepted by the Carey Act Land Board, or that the parties making the application and depositing the check, or the drawer of the check or any of them, were ever called upon to comply with the application; that the land applied for was never segregated, and that the board never acted upon the application. It is denied that the territory of New Mexico or its board was able to comply with the application or to do and perform the things imposed by the act of congress and the laws of New Mexico, or to accept and carry out the terms of the application, but, on the contrary, did on July 18, 1911, dismiss and reject the application, and at once became obligated to return to the applicants, or to the true owners, the check in suit; that, August 13, 1911, the board

finally disclaimed any interest in the check, or the funds evidenced thereby; that the drawer of the check notified plaintiff of the terms and conditions under which the check had been deposited, and notified defendant that the Carey Act Land Board, acting for plaintiff, had dismissed the application, and demanded payment from the defendant.

The drawer of the check, by leave of court, intervened, set out substantially the same matters contained in the answer of defendant, and asserts ownership in itself of the check in suit, and the sum represented thereby. It is asserted that, under an agreement between the intervener and the parties making the application to the Carey Act Land Board for the segregation of lands, it was agreed that the check should be returned to the intervener on the failure of the board to act favorably on the application; that the clause contained in the application requiring the applicant to make good to the territory the cost of procuring maps and plats was inserted in the application without the knowledge, consent or authority of intervener, and that no person had authority to charge the check or the fund represented thereby with the performance of such promise; that the promise is void because the Carey Act Land Board had no authority at law to exact such agreement or promise. The petition of intervention substantially reiterated each and every allegation contained in the answer of defendant, and there was a prayer for judgment in its favor for the amount of the check.

The reply, so far as material here, denied the allegations of the answer to the effect that the parties making the application were not authorized to charge the check or its proceeds with the cost of procuring maps and plats, and denied that the board was without authority of law to exact such a promise or agreement. And the answer to the cross-petition puts in issue the same questions raised by the pleadings filed by the original parties.

The cause was tried to the court without a jury, and

from a judgment dismissing plaintiff's cause of action, plaintiff has appealed.

The provisions of our statute relating to bills of exchange and the effect of the certification of a check are urged upon our consideration. We do not deem it essential, however, to a determination of this case to enter upon a discussion of these statutory provisions. If the Carey Act Land Board was without authority to exact a promise or agreement in connection with an application to segregate the land, or if, having received the application and the check, plaintiff, through its proper officers, failed or refused to act upon the application, but, on the contrary, refused to go forward, and disclaimed interest in the check, or fund which it represented, the trial court was surely warranted in entering a dismissal of plaintiff's cause of action. We are not pointed to any provision of the law, either federal or state, empowering the Carey Act Land Board to make the requirement relied upon to charge the check with the amount said to be expended in procuring maps and plats. Neither are we pointed to any evidence showing that plaintiff accepted the application. In short, after a thorough examination of the record, we find ample support for the judgment of the district court, and the judgment is

AFFIRMED.

DAVID C. HAGER, APPELLEE V. SILAS H. BURNHAM, JR., ET AL., APPELLANTS.

FILED JANUARY 15, 1924. No. 22627.

1. **Appeal:** AFFIRMANCE. When, in a suit for rescission and a recovery of the money paid, defendants admit that they conducted the negotiations that culminated in the contract, but deny that they were acting as principals and assert that they were mere agents for another, and the identity of the principals to the contract must be determined from an inspection of memoranda supplemented by oral testimony, it becomes a question of fact, and the finding of a jury thereon will not be disturbed when the verdict is in accord with the evidence.

2. **Evidence:** ADMISSIBILITY. It is not improper for a trial court to admit in evidence a contract or memorandum which supplements or explains another contract or memorandum properly in evidence, when the two are interdependent and both were made with reference to the same general transaction.
3. **Trial:** INSTRUCTIONS. The instruction complained of has been examined and found free from error.

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

Harry A. Reese and *Bruce Fullerton*, for appellants.

G. E. Hager, contra.

Hall, Cline & Williams, amici curiæ.

Heard before MORRISSEY, C. J., DEAN, DAY and GOOD, JJ., REDICK, District Judge.

MORRISSEY, C. J.

This is an action at law brought to rescind a contract which plaintiff alleges was made between him and defendants. The cause was tried to a jury, and from a verdict and judgment in favor of plaintiff, defendants appeal.

For cause of action, it is alleged that defendants, through their duly authorized agent, represented to plaintiff that defendants were the owners in fee of certain lands, water rights and irrigation ditches in Wyoming; that the irrigation project was then in course of completion, and that water rights for the land, for which application was made by plaintiff, had been acquired from both the federal and state governments; that the irrigation system was then supplying enough water to irrigate all the land within the project, and that all such land had been segregated under the Carey act; that defendants had secured from the state of Wyoming the right to make contracts for the land described, and for water rights from the irrigation system mentioned; that all of the lands were fit for cultivation and were irrigable and were then ready to be seeded; and that defendants were reliable persons and financially responsible. There was the further allegation that defendants' agent represented one of the defendants to be the same man who was then at the head of

one of Nebraska's large banks, and that, by reason of his connection with this bank, defendants were financially able to maintain an effective farming organization, and that they would cultivate the land purchased by plaintiff, he, however, to pay defendants the necessary expenses of farming the land; that in the course of five years the net income from the land would largely, if not wholly, pay the cost of the same; that defendants had made arrangements whereby they could secure a loan upon the land from the United States Federal Land Bank for one-half of the purchase price, thus making it unnecessary for plaintiff to withdraw this amount of money from his mercantile business, except during a brief period while the necessary negotiations for the loan were being conducted; that all money pertaining to the cropping of the land would be handled by the First Trust Company of Lincoln, and that this company had agreed to act as trustee in that connection; that the land was worth not less than $250 an acre; that the climate was well adapted to the raising of wheat, oats, corn, barley, and alfalfa, and that similar lands were selling for $300 an acre and paying 10 per cent. on that valuation. It is alleged that plaintiff, relying upon these representations, made application for the land described in his petition and purchased the water rights for such land for the sum of $6,327.50, and paid one-half thereof in cash and gave his promissory note for the balance. It is alleged that all of the representations set out were false; that they were made with the fraudulent purpose of inducing him to enter into the contract; and that, as soon as he learned of the fraud that had been perpetrated, he tendered back to defendants whatever he had received under the contract, notified defendants of his intention to rescind the contract, and demanded the return of his money and note.

Defendants' answer admits that defendants are a partnership; admits that they entered into a contract with plaintiff for the sale of the water rights described in his petition, but asserts that defendants were not acting as principals, but only as agents for the Lake View Canal

Company. It is admitted that the land was represented as irrigable and to be within the district segregated by the United States government under the Carey act. It is denied that defendants represented themselves to be the owners in fee of the land; that it was income producing; that the irrigation ditches were completed; or that defendants by any means or in any manner misled or defrauded plaintiff; and the answer also contains a general denial.

Taking up the assignments of error in the order presented in appellant's brief, we are urged to hold that the verdict and judgment are contrary to the evidence, and that there is a failure of proof of any of the material allegations in the petition. In connection with this assignment, it is necessary to call special attention to the point made in defendants' concluding assignment of error, viz., that the action cannot be maintained against defendants for the reason that, in entering into whatever contract or agreement was made with plaintiff, defendants were acting only as the agents of a corporation known as the Lake View Canal Company, and that this corporation was the real party to the contract, and that as mere agents defendants are not liable in an action for rescission of the contract. Without undertaking to say what would be the proper rule if the record supported the contention of defendants, we will consider the evidence upon which plaintiff relies to support his claim that his contract was with defendants, not as agents, but as principals.

Plaintiff has testified that he entered into the agreement with defendants through their agent Mr. White. The agency of White is not denied. In the bill of exceptions we find two exhibits which plaintiff alleges were furnished him either by defendants or their agent White. Exhibit No. 1, called a cropping contract, was executed in the name of defendants by their agent White. Exhibit No. 2, which appears to be an application for the land, "and water from the Lake View Canal Company," is addressed to defendants, not as agents, but apparently as principals, and, although it contains numerous provisions, there is nothing in the body

thereof to indicate that plaintiff is directing his application to any person or corporation other than the parties first addressed. The blank forms used were confessedly prepared and furnished by defendants, and the names of defendants are prominently displayed and there is a total absence of any suggestion that they were acting as mere agents; the money was paid to defendants, and the note was delivered to them, or to Mr. White, their agent. In addition to this, there is the uncontradicted testimony of plaintiff that Mr. White represented defendants to be the principals. White, the agent, was not called as a witness, and plaintiff's testimony as to the representations made by him stands without contradiction.

Defendants' relationship to the contract was, under the pleadings and evidence, one of the questions which it was proper to submit to the jury, and the jury found the defendants to be principals acting in their own right, and the evidence is ample to sustain that finding. Throughout appellants' brief this is the question most persistently urged, and most of the argument is based upon the assumption that the defendants are not liable because they are merely sales-agents. With this as a premise, it is argued that this action in rescission cannot be maintained. Holding, as we do, that the finding of the jury on this point is sustained by the evidence, it is unnecessary to further discuss that subject. However, in connection with this point, we do not overlook defendants' objections to the introduction in evidence of exhibit No. 1, the cropping contract. It is claimed by defendants that all matters connected with this exhibit had been fully adjusted before this suit was instituted. It is admitted that whatever contract was made in relation to the cropping of the land was made with defendants as principals, and not as agents. And it is said that that was an dependent transaction, entirely separate and apart from the main contract in suit, exhibit No. 2, and that it was, therefore, prejudicial to defendants to permit its inspection by the jury. A consideration of the two exhibits, together with the uncontradicted testimony of plaintiff, brings us irresistibly to the conclusion that the exhibits are interdependent.

The trial court evidently took the view that there was one general agreement between the parties, and that exhibit 1 was admissible to show, in part, the nature of that agreement and in this he was clearly right. We shall not set out extended excerpts from the evidence given in support of the numerous charges of fraud, but it has been examined and found sufficient to support the verdict.

In stating the issues, the court set out the substance of the petition, substantially in the language of the petition. It is claimed that this submitted to the jury many questions upon which no evidence had been offered. With this conclusion we can not agree. The instructions were proper under the pleadings and the evidence. There is no error in the record, and the judgment is

AFFIRMED.

FRED BROWN V. STATE OF NEBRASKA.

FILED JANUARY 15, 1924. NO. 23374.

1. **Criminal Law**: EVIDENCE OF FLIGHT. Evidence of flight of an accused person immediately after the alleged criminal act may be received in a prosecution.
2. ———: ACCUSED AS WITNESS. A person charged with crime shall, at his own request, but not otherwise, be deemed a competent witness. If he become a witness (except perhaps as to cross-examination about extorted confessions) he should be treated as any other witness.
3. ———: ELECTION. Unless there has been abuse of discretion of the district court, a judgment of conviction will not be reversed because the state was not required to elect upon which count of the information the prosecution would proceed.
4. ———: ADDITIONAL INSTRUCTIONS. It is not error to give additional instructions at the request of the jury after they have retired to consider their verdict.
5. **Evidence** examined, and *held* to support the verdict.

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

Jamieson, O'Sullivan & Southard and *Organ & Delitala,* for plaintiff in error.

O. S. Spillman, Attorney General, and *Mason Wheeler, contra.*

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

LETTON, J.

An information was filed against defendant, containing three counts. The first charged that he feloniously did carry off, decoy, entice away, secrete, and imprison one Jean Jenkins for the purpose of compelling the said Jean Jenkins forcibly and against her will to have and submit to sexual intercourse with him. On this count alone he was convicted and now seeks to reverse the judgment.

It is first assigned that the court erred in allowing the state to make proof of defendant's flight when the flight had been fully admitted in the record. We have repeatedly held that it is entirely competent to permit proof of the flight of an accused person, it being a circumstance tending to show guilt. That the state was allowed, while proving the flight of the defendant, to show circumstances occurring during the flight is also complained of. The circumstances in evidence would lead an ordinary person to believe that defendant was aware that he had been guilty of a heinous crime and was seeking to avoid arrest. Some of this evidence was merely cumulative, and while it would have been better not to have introduced so much evidence of this nature, still we think this did not prejudicially affect the defendant, since the jury were properly instructed as to the reason why evidence of flight is permissible, and that such flight is a circumstance not sufficient of itself to establish guilt, but which the jury may consider in connection with all the other evidence in the case to aid them in determining the question of the guilt or innocence of the accused.

It is next assigned that the court erred in allowing the state to introduce evidence of previous convictions when no foundation was laid for the introduction of any such evi-

dence in manner and form as provided by law. The brief does not call the attention of the court to that portion of the record in which this evidence was introduced and there is no argument or explanation of the assignment. We do not understand what is meant by "when no foundation was laid for the introduction of such evidence." Section 8848, Comp. St. 1922, provides: "A witness may be interrogated as to his previous conviction for a felony. But no other proof of such conviction is competent except the record thereof." This section applies to any witness in a case and is for the purpose of affecting his credibility. By section 10139, Comp. St. 1922, a person charged with crime shall, at his own request, but not otherwise, be deemed a competent witness. If he becomes a witness (except perhaps as to extorted confessions, *Cross v. State*, 142 Tenn. 510, 9 A. L. R. 1354), he should be treated as any other witness. *Heldt v. State*, 20 Neb. 492; *Comstock v. State*, 14 Neb. 205; *Commonwealth v. Tolliver*, 119 Mass. 312; *State v. Werner*, 144 La. 380, 6 A. L. R. 1601, and note on page 1608.

It is complained that the court erred in refusing to compel the state to elect upon which count of the information it would rely. This is a matter under the discretion of the district court. *Stevens v. State*, 84 Neb. 759; *Krause v. State*, 88 Neb. 473. Much of the evidence was applicable to all the counts. There was no abuse of discretion, and since defendant was convicted upon only one count he suffered no prejudice by the refusal of the court to require the election.

After the jury had retired and had been deliberating for a long time, a written request was sent to the court for further instructions. This is assigned as error. It is said that these instructions were repetitions of the instructions already given. In one sense they are repetitions. The instructions first given were somewhat general in their application to the evidence, while those given by the court at the request of the jury cover certain points about which it is evident the jury were uncertain as to the applicable law. It is the duty of the trial court to aid the jury to determine the guilt or innocence of the accused by plain and clear in-

structions, and if the jury are in doubt as to the meaning of instructions given, it is entirely proper for them to request, and for the trial court to give, additional explanatory instructions.

That the court refused to discharge the jury after they had been deliberating for nearly 40 hours is complained of. This was also a matter within the discretion of the trial court. The jury were first instructed on October 17. The additional instructions were given on October 18, and the verdict was rendered on October 19. The jury deliberated for some time after the additional instructions were given. There was testimony as to which there was a sharp conflict. For the jury to consider all the evidence (which is contained in a bill of exceptions of over 1200 pages) must necessarily have required a lengthened period of deliberation. This assignment is not well taken.

Misconduct of the attorney representing the state during the trial is said to have occurred. It is not pointed out where any such misconduct is shown by the record, and there is no argument on this point.

It is urged that the verdict is not supported by the evidence. The story of the complaining witness is, that about 6:30 on the evening of May 27, 1922, Jean Jenkins, a young married woman, about 20 years of age, and another young woman, named McManaman, stood at the corner of Twenty-fourth and Cuming streets, in Omaha, waiting for a street car, intending to go to Krug Park. At this time the accused drove up in his automobile and offered to take them to the park. Neither of these women had any previous acquaintance with defendant. They accepted the invitation and entered his car. Mrs. Jenkins and her husband both testified that she had an engagement to meet her husband at the park that evening. She testifies further that defendant drove beyond the park, refused to stop the car, threatened them, and took the women to a small house or shack which stood in a sparsely settled locality several miles to the west; that he drove the car into the shack, which had wide doors, fastened the doors, placed a chain around the neck of each

girl, forced them to go into a hole about four feet deep, six feet long and four feet wide, which was dug beneath the floor, and that later he there criminally assaulted each of them. The next day he permitted them to go into the attic, threatening to kill them if they made any outcry; that one of them attracted the attention of a man named Boyd who was driving nearby, and requested him to call the police. About this time the accused saw Boyd, and by force compelled him to enter the shack, where he chained him to the automobile. Boyd escaped and called police officers who released the girls. Brown fled. His flight was attended by a number of spectacular exploits before he was finally arrested. It was shown on cross-examination that these two women were of easy virtue who supported themselves by prostitution.

The story of the accused is that he had become acquainted with Jean Jenkins sometime before, and had met her at a negro dance house in Omaha frequented by both white and colored people; that he danced with her there; that at his invitation she had repeatedly gone with him to his place for sexual intercourse, and that he had paid her for such trips; that he met her at the corner where she stood, by appointment; that he did not expect the other girl, but that he was willing to take them both; that some time after arriving at the shack the girls went to the attic and found a lot of what he termed "phoney jewelry;" that they thought it was genuine and had been stolen by him; that they attempted to extort money from him by threatening to have him arrested, and that he then put the chains around them, expecting to release them at a time when he could safely escape. He denies specifically the story of the girls as to the sexual intercourse.

Even if Mrs. Jenkins had been at Brown's place before, and had met him by appointment that night, still, if after she arrived at the shack he secreted or imprisoned her for the purpose of compelling her to consent to the act of sexual intercourse, and, in furtherance of such purpose, did or threatened to do any injury to her person, this would be a

direct violation of section 9560, Comp. St. 1922. The evidence is sufficient, if the jury disbelieved Brown and believed the evidence of Mr. and Mrs. Jenkins and Katherine McManaman, to establish his guilt of the crime charged. His own testimony establishes that he was guilty of the crimes of false imprisonment and of assault. As to his guilt of the graver crime charged there was a conflict of evidence. After long deliberation the jury resolved this conflict against the defendant, and we cannot say that there is not sufficient evidence to support the verdict. The brief filed by plaintiff in error fails to point out the pages of the record upon which the errors assigned appear. Though the brief is defective and in violation of the rules of court, in view of the gravity of the case we have examined the record. The statute is a harsh one and the penalty severe. t was passed immediately after the kidnapping of young Cudahy by Pat Crowe, and it would seem that its drastic provisions have since been effective in the prevention of such crimes, except in this instance. We find no prejudicial error in the record.

AFFIRMED.

SAM MARO V. STATE OF NEBRASKA.

FILED JANUARY 15, 1924. No. 23515.

1. **Intoxicating Liquors: INFORMATION: SUFFICIENCY.** In section 3252, Comp. St. 1922, the adjective phrase "for the manufacture of alcohol or whiskey" qualifies the words "still or equipment," as the case may be, and is descriptive of the apparatus; and a charge that a person is unlawfully in possession of a certain equipment commonly known as a "still," "made and designed" for the purpose of making and manufacturing intoxicating liquor, is sufficient as against a general demurrer.
2. **Criminal Law: INSTRUCTIONS.** It is not error to refuse a tendered instruction which states to be a fact that which circumstantial evidence tends to disprove.

ERROR to the district court for Douglas county: CARROLL O. STAUFFER, JUDGE. *Affirmed.*

Organ & Delitala, for plaintiff in error.

O. S. Spillman, Attorney General, and *Lester L. Dunn, contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE and GOOD, JJ., REDICK and SHEPHERD, District Judges.

LETTON, J.

The first count of an information which was filed against plaintiff in error charged that he "did then and there wilfully, knowingly and unlawfully have in his possession * * * a certain equipment commonly known and described as a 'still,' made and designed for the purpose of making and manufacturing intoxicating liquor, without the said Sam Maro having first obtained a permit from the United States government for the manufacture and sale of ethyl alcohol." In a second count he was charged with the unlawful possession of intoxicating liquor. He was convicted upon the first count, and seeks to reverse the judgment.

A demurrer was filed to the first count on the ground that it fails to allege that the still was intended to be used by the accused for the manufacture of intoxicating liquor. The demurrer was overruled. This ruling is assigned as error.

A portion of section 3252, Comp. St. 1922, is as follows: "Except as is 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." A later provision of the section is to the effect that its provisions shall not be applicable to persons who have obtained a permit from the United States for the manufacture of ethyl alcohol.

The adjective phrase "for the manufacture of alcohol or whiskey" qualifies the words "still or equipment," as the case may be, and is descriptive of the apparatus. The purpose of the statute in this regard is to place an obstacle in the way of one who might otherwise be led to the unlawful manufacture of liquor and thus to deprive him of the means with which to violate the law. It is pre ed that

a person in the possession of such a still or equipment has it for the purpose of manufacturing intoxicating liquor in violation of law, although he may show that it was not kept for an unlawful purpose. Comp. St. 1922, sec. 3273. The words "made and designed" in the information are merely amplification, and surplusage. The only charge necessary is that the accused "unlawfully has possession of any still or equipment for the manufacture of alcohol or whiskey."

The demurrer was properly overruled.

There was no prejudicial error in the instructions given by the court, or in its refusal to give instructions No. 1 and No. 3, tendered by defendant. Instruction No. 1 ignores the provision of the statute that the possession of a still is presumptive evidence that it was intended to be used for the manufacture of intoxicating liquor, and is unlawful, unless the accused "shall satisfactorily account for and explain the possession thereof, and that it was not kept for an unlawful purpose." Comp. St. 1922, sec. 3273. Instruction No. 3, tendered by defendant, is erroneous in that it states as a fact that the evidence introduced by defendant shows that he had rented the part of the house in which the stills and liquor were found. The circumstantial evidence tends to discredit this, and the question was one for the jury. The residence of defendant was searched; the officers found two stills and 40 gallons of whiskey hidden in the basement. In order to explain the presence of these articles, defendant testifies that about the first of April, 1922, he had rented the basement to one John Marto, a stranger, for $5 a month; that Marto slept in the basement; that in August Marto told him he intended to use the basement for the purpose of making whiskey; that defendant refused to let him use it for that purpose; and that Marto then said he would move out. The search was made on August 18. The basement had outside doors and windows, and there was a bed in it. There was a hole in the basement wall, large enough for a man to go into, where bricks were left out when defendant built a porch in March, 1922. The porch is about four inches from the ground. He testifies that he left the

opening so that he could go under the porch in order to repair it. One of the stills and the whiskey were hidden in this hole. There is access to the basement from the inside of the house. There was a kitchen cabinet or a set of shelves in front of the hole under the porch. Defendant admitted going into the basement for food supplies, saying that every time he needed tomatoes he went there. The other still was found in a hole in the floor, which was covered with boards and dirt. The stills looked as if they had not been used for some time. There was testimony that defendant asked one of the officers to leave him one of the stills.

We are satisfied that the evidence is sufficient to support the verdict, and that the stills were intended to be used, and probably had been used, in the unlawful manufacture of intoxicating liquor. *Blevins v. State*, 109 Neb. 183. It was a very peculiar circumstance, to say the least, that the cupboard in which defendant's fruit and tomatoes were kept stood directly in front of the hole in the wall where one of the stills was concealed. The jury were justified in refusing to believe that the stills were the property of and in the possession of a tenant. *Nash v. State*, 110 Neb. 712.

AFFIRMED.

LYMAN G. WHEELER, APPELLEE, V. CITY OF OMAHA, APPELLANT.

FILED JANUARY 15, 1924. NO. 22622.

1. **Municipal Corporations: "OFFICIAL BONDS."** In the Omaha charter the provision that the cost of all official bonds shall be paid from the general funds of the city includes premiums paid by a policeman for his bond as such. Rev. St. 1913, sec. 4172.

2. **———: "CLAIMS:" POLICEMEN'S BONDS: PREMIUMS.** Under the Omaha charter the premium paid by a policeman for his official bond is a claim which must be filed with the comptroller as a condition of allowance by the council. Rev. St. 1913, sec. 4395, Comp. St. 1922, sec. 3712.

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

Dana B. Van Dusen and *John F. Moriarty,* for appellant.

Baker & Ready, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE and GOOD, JJ., REDICK and SHEPHERD, District Judges.

ROSE, J.

This is an action to recover premiums paid by policemen of the city of Omaha for their official bonds. The individual claim of plaintiff, a policeman, and the claims of other policemen assigned to him aggregate $6,640, for which judgment is demanded. Liability of the city of Omaha, defendant, is asserted under chapter 3 of the city charter, relating to official bonds, one provision thereof being in this form:

"Unless otherwise specified by this chapter, all official bonds shall be executed by one or more surety or guaranty companies of recognized or established responsibility and the cost thereof shall be paid from the general fund of the city." Rev. St. 1913, sec. 4172.

Liability of the city was denied on the ground that the term "official bonds" as thus used does not include the bonds of policemen. From a judgment in favor of plaintiff for $6,640, defendant has appealed.

Does the charter require the city to pay the premiums? In arguing the negative of the question, counsel for the city refer to a number of statutory provisions to show that policemen are not within the class of officers mentioned in that part of the statute quoted. The position thus taken, when the entire charter is considered, does not seem to be tenable. A policeman is an officer. He is required to give an official bond. The term "all official bonds" is general. The charter contains no specific limitation excluding official bonds of police officers. This view is in harmony with former impressions of the official status of policemen under the Omaha charter. *Rooney v. City of Omaha,* 104 Neb.

260, 105 Neb. 447. In so holding the trial court did not err.

The judgment, however, must be reversed for the reason that plaintiff did not file his claim with the city comptroller. The charter provides that "all claims against the city must be filed with the city comptroller." Provision is also made for an appeal from the council's disallowance of a claim. Rev. St. 1913, sec. 4395, Comp. St. 1922, sec. 3712. The claim of a policeman for premiums paid for his official bond clearly falls within the expression "all claims against the city." The filing of the claim with the comptroller is made a condition of allowance by the council. Plaintiff did not comply with these provisions of the charter and was not entitled to a recovery in this action. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED.

MARK COLBURN, APPELLEE, V. JAMES C. DAVIS, DIRECTOR GENERAL, APPELLANT.

FILED JANUARY 15, 1924. No. 22562.

1. Carriers: ACTIONS: LIMITATION. "A provision in a bill of lading requiring actions for loss or damage to be brought within two years and one day after the delivery of the goods or the lapse of a reasonable time for delivery is reasonable and valid." *Ellis v. Davis*, 260 U. S. 682.

2. ———: ———: ———: QUESTION OF LAW. "The reasonableness of the limitation of time to sue specified in the bill of lading is a question of law." *Ellis v. Davis*, 260 U. S. 682.

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

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

Brogan, Ellick & Raymond and *John U. Loomis, contra.*

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

DEAN, J.

Plaintiff sued to recover from James C. Davis, director general of railroads, $213.33, the agreed value of two head of live stock alleged to have been lost from an interstate shipment of two carloads of cattle, consisting of 56 head, which were shipped by plaintiff from Sterling, Idaho, to Omaha, Nebraska. Plaintiff recovered a verdict and judgment for the amount claimed, and defendant appealed.

The cattle were shipped from the initial point February 28, 1918, and the shipment, less the two missing animals, was sold at Omaha March 7, 1918, which was the date of its arrival. The petition was filed January 10, 1921, so that almost three years elapsed between the date of the arrival and sale of the shipment and the date of beginning the action.

The bill of lading in suit contains this among other provisions:

"All actions to recover any claims or damages shall be commenced within two (2) years after the completion of the transportation herein provided for, or in case of failure to make delivery, then within two (2) years after a reasonable time for delivery has elapsed, and a failure to comply with any of the provisions of this clause of the contract shall be a bar to the recovery of any and all such claims or damages, any statute of limitations to the contrary notwithstanding."

The director general pleaded the foregoing provision of the bill of lading and contends that the action is barred because it was not begun within the time limited by the contract.

The main question before us was decided, in a similar case by the supreme court of the United States in *Ellis v. Davis*, 260 U. S. 682, in an opinion by Mr. Justice Holmes. In that case the bill of lading contained this provision:

"Suits for loss, damage or delay shall be instituted only within two years and one day after delivery of the property, or in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed."

The court there held that the provision requiring actions for loss or damage to be brought within the time named in the bill of lading is reasonable and valid.

In the *Ellis* case, as in the case before us, plaintiff relied upon the federal transportation act of February 28, 1920 (41 U. S. St. at Large, ch. 91, sec. 206 (a), pp. 456, 461). But the *Ellis* case had not been decided when this case was tried and the learned trial court, in the absence of that decision, held that the federal transportation act controlled the facts involved here.

In respect of the claim of the plaintiff in the *Ellis* case Mr. Justice Holmes observed:

"We find it unnecessary to consider other defenses besides the contract limitation, as we agree with the courts below that that disposes of the case. The main objection urged is that the contract is overridden by section 206 (a) of the transportation act, Feb. 28, 1920, ch. 91, 41 U. S. St. at Large, 456, 461, giving actions in cases like this against an agent designated by the president, and providing that they may be brought within the periods of limitation now prescribed by state or federal statutes, but not later than two years from the date of the passage of the act. The contention is supported with some ingenuity but we think it enough to observe that the general purpose was to limit not to extend rights of action and that we cannot suppose that it was intended to invalidate existing contracts good when made. * * * The statutes of the states where the goods were shipped and the suit was brought do not affect the contract, and the reasonableness of the limitation is a matter of law."

With plaintiff's argument that the director general did not sufficiently plead the contract limitation we do not agree. As hereinbefore noted the limitation in the bill of lading upon which defendant relies was aptly pleaded in the answer and in the absence of a motion for a more specific statement the plea was sufficient.

It may be added that plaintiff complied with a provision in the bill of lading which stipulates that the shipper shall

serve notice of loss on defendant within 90 days after the loss is discovered. This notice was served within 60 days after the date of delivery of the shipment. So that it appears that plaintiff knew of the loss in ample time before the expiration of the period within which to begin suit under his contract.

Other defenses are urged by defendant which we do not find it necessary to discuss in view of the rule announced in the *Ellis* case, which controls the decision here.

The judgment is reversed, with directions that the suit be dismissed.

REVERSED AND DISMISSED.

MARIE K. DONNELLY, APPELLANT, V. SOVEREIGN CAMP, WOODMEN OF THE WORLD, APPELLEE.

FILED JANUARY 15, 1924. No. 23442.

1. Contracts: FORFEITURE. Forfeitures are odious in law and are not favored by the courts, and will not be enforced unless the facts which purport to require such drastic action come clearly and plainly within the provisions of the law or of the contract, as the case may be.

2. Insurance: POLICY: CONSTRUCTION. A certificate of life insurance, issued by a fraternal beneficiary association, and the laws of the association under which it was issued, together with the laws of the state which were applicable thereto, should, from a fair construction of all the language used, be so construed as to make effective, if possible, the purpose for which the dues were paid and the certificate of insurance was issued.

3. ———: CONSTITUTION AND BY-LAWS: CONSTRUCTION. The rule is that the constitution or a by-law of an order that purports to be a beneficiary association will be strictly construed against it where, under its constitution or a by-law, there appears an attempt to work a forfeiture. *Meyer v. Supreme Lodge K. of P.*, 104 Neb. 505, on rehearing, 104 Neb. 511.

4. ———: CHANGE OF RATES: NOTICE. Where a change or amendment is made in the constitution, laws or by-laws of any fraternal beneficiary society making, fixing, changing or raising the schedule of rates of insurance, or periodical contribution, by members, for the payment of benefit or death claims, such pro-

posed change shall not be effective until 90 days from and after due notice thereof shall have been given by the proper officer or officers of the governing body of such fraternal beneficiary society through its official paper, and also "by notice thereof to the local lodges or societies by mail to the proper officers of such local orders." Comp. St. 1922, sec. 7903.

5. ———: DIRECTION OF VERDICT. The evidence examined, discussed in the opinion, and *held*, that the court erred in directing a verdict for the defendant fraternal beneficiary association.

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

Will H. Thompson and *Byron G. Burbank*, for appellant.

Gaines, Van Orsdel & Gaines and *D. E. Bradshaw, contra.*

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

DEAN, J.

This is the second appearance in this court of this case. Plaintiff, who is the daughter of the insured, seeks to recover $2,000 on a fraternal beneficiary certificate of life insurance issued by defendant to her father, H. W. Sawyer. The certificate also provides for the payment of $100 for a monument. Mr. Sawyer died July 26, 1918. When the evidence was submitted the court sustained defendant's motion for judgment and dismissed the action. Plaintiff appealed.

At the former trial plaintiff recovered judgment for the full amount named in the certificate. Defendant appealed from that judgment and it was reversed and the cause remanded for a new trial. The case was again tried and is now here for review on plaintiff's appeal. The issues involved in the former case need not be discussed here. They are fully detailed in the former opinion. *Sawyer v. Sovereign Camp, W. O. W.*, 105 Neb. 395.

Before the case was reached for trial the second time, the plaintiff and beneficiary therein, Mrs. Cathryn Sawyer,

widow of the insured, died. The action was subsequently revived in the name of her daughter, who is her sole heir and is now plaintiff.

The material facts upon which our decision is based are substantially these: A fraternal beneficiary certificate was first issued to the insured November 23, 1899. He was then 22 years of age. November 13, 1902, a second or renewal policy was issued wherein his wife, Cathryn Sawyer, was named as beneficiary. That appears to be the sole change in the renewal policy. When the insured died he was 41 and for 19 years he had continuously paid dues to the defendant association. For seven months before his death he was a switchman in the employ of the Union Pacific railroad and worked at its yards at Omaha, and, while acting in that capacity, was swept to the ground by an overhead wire from the top of a moving freight car. He never regained consciousness. About two hours after the accident he died.

Briefly the defense is that the insured violated an amended law of the defendant association in that shortly before he died he changed from a nonhazardous occupation to that of a railroad switchman, which defendant's amended 1917 laws purport to rate as hazardous. It is not denied that such change was made without notifying defendant, nor is it denied that the insured did not pay the additional dues of 30 cents a month on each $1,000, as the amended section of the law purports to provide, for the seven months preceding his death, namely, a total of $4.20, in addition to the regular dues which were paid up to and including the month of his death. Defendant contends that the insured, under his contract of insurance, came within the provision of the 1917 amendment, and that, because of his alleged failure to comply with its requirements in the respects noted, the defendant association is not liable under the beneficiary certificate, and on that ground defendant refused payment. The plea is, in brief, that the fraternal beneficiary certificate in suit has been forfeited.

Defendant also points out and stresses the fact that plain-

tiff's application for admission to the order, under date of October 12, 1899, so far as applicable here, has this provision printed on the back of the application: "Persons engaged in the following classes of business or employment, to wit: * * * conductors and brakemen on railway freight trains, railway baggagemen, expressmen, switchmen, hostlers and other similar railway and steamship employees, * * * may be admitted to membership, if accepted by the sovereign physician, but their certificates shall not exceed two thousand dollars ($2,000) each and their rate of assessment shall be 30c on $1,000, in addition to the regular rate, while engaged in either of said hazardous occupations; the same emergency fund dues are paid as in the ordinary occupations."

The above indorsement on the application which relates to "hazardous occupations" is written in the present tense and evidently refers to a person who, at the time the application was made, was actually engaged in a hazardous occupation. There is nothing in the language there used, nor has our attention been directed to any law of defendant, then in force, to indicate that persons who at that time were, or thereafter might become, engaged in the occupations there denominated "hazardous" should give notice of such employment, nor was there any provision for automatic forfeiture therefor. And it is to be noted that it was in the 1917 amendment that the requirements for notice and for forfeiture first appeared in defendant's laws.

Plaintiff argues that the forfeiture clause was not binding upon the insured at any time. The claim for exemption from forfeiture is based in part on the fact that the insured became a member in 1899, and that subdivisions c, d, and e of section 56 of the laws of the order, pursuant to the terms therein expressed, fairly brought him within a nonforfeitable class. The subdivisions in question were adopted some time prior to 1917, but the date of adoption does not appear in the record. They provide:

"(c) Every applicant admitted to membership prior to September 1, 1901 shall pay the same rate as pre-

scribed for members admitted on or after September 1, 1901: Provided, they may elect to continue paying the same assessment they are now paying, and vesting in the Sovereign Camp, Woodmen of the World, authority to deduct from the amount to be paid their beneficiaries such deficiency as a compilation may show exists between the amount paid by them and the amount paid by the members entering the society on or after September 1, 1901. The assessments collected according to the foregoing tables of rates (of defendant society) shall be known as the Sovereign Camp fund. (d) Provided, that failure to pay the advance rate on or before October 1, 1915, by any member, shall be construed as an acceptance of the option for a lien to be entered against his certificate. (e) In event the insured has not paid his annual assessment in advance but has paid instalments of his assessments and dues up to and including the month of his death, the Sovereign Camp shall deduct from the amount of his certificate the balance due for the instalments to cover the entire annual assessment."

Fairly construed and reasonably interpreted, the foregoing subdivisions c, d, and e of section 56, when considered together, apply to any fraternal beneficiary certificate issued by defendant prior to September 1, 1901, and this would of course include the certificate sued on. And there is nothing to show, nor does defendant contend in its brief, that the subdivisions in question were ever repealed. It seems clear that one whose membership dated from 1899, as in the present case, was in a class to whom the drastic provisions for forfeiture contained in the 1917 amendment, in respect of change of employment and the like, had no application, and that the beneficiary of such member would be entitled to the full amount named in the beneficiary insurance certificate less the sum of 30 cents a month for each $1,000 of insurance for the time that the insured was engaged in the hazardous occupation, and that such sum would constitute a lien in favor of the defendant association to be deducted from the fund represented by the face of the insurance certificate.

So interpreted the foregoing subdivisions, and particularly subdivision (e), exemplify real fraternalism. But to give meaning to defendant's argument would make of no effect a provision of its own law and would make a mockery of much that is vital in the expression "fraternity." An accepted definition of "fraternity" follows: "That mutual interest and affection which is characteristic of the fraternal relation; brotherly regard and sympathy for others." Century Dictionary. And "fraternity" is the fundamental expression of all mutual, fraternal insurance associations.

For a further plea against forfeiture, plaintiff argues that the publication of the amended laws in defendant's official paper does not comply with the mandatory provisions of the statute. So far as applicable here, the act in question which applies solely to fraternal beneficiary associations, after providing that a representative form of government and the like shall be maintained, reads:

"Provided, however, whenever any proposed change or amendment in the constitution or by-laws of any such society, making, fixing, changing or raising the schedule of rates of insurance, or periodical contribution, by members, for the payment of benefit or death claims, or the creation of a reserve in any beneficial society authorized to transact business in this state shall be proposed or promulgated by the governing body of such society, such proposed change shall not be effective until 90 days from and after due notice of such change shall have been given by the proper officer or officers of such governing body to the members of such society through its official paper, and by notice thereof to the local lodges or societies by mail to the proper officers of such local orders." Comp. St. 1922, sec. 7903.

The "Sovereign Visitor" is the official paper of the defendant association. It is printed once a month. A copy of the October, 1917, number is in the record and contains five or six columns of printed matter which pertain to the defendant association. The closing section, which refers to the printed matter, follows: "Section 165. This constitution and laws, by-laws and rules of order, as amended and

adopted at this 1917 session of the Sovereign Camp, shall be in full force and effect on and after October 1, 1917, except as herein provided." It is not argued that the words "except as herein provided" are applicable to the present case. But section 165 is a manifest misdescription of the matter which goes before. Obviously it is not the "constitution and laws, by-laws and rules of order" of the defendant association, but is nothing more than the purported "amendments." Section 165, if intended as a certificate, is a misnomer. Evidently it means nothing. Clearly it is a loose expression and does not relate to that which precedes it.

The publication of that which purports to be the "amendments" does not comply with the plain provisions of the statute. How could the amended laws become effective October 1, 1917, when they did not appear in the official publication until the October, 1917, issue, which is printed sometime in October, under a law which provides that they "shall not be effective" until 90 days after such publication? But in defiance of section 7903, the changes in the by-laws, according to the terms of the printed publication, are proclaimed to "be effective" even before they appeared in the official publication, instead of 90 days thereafter. The bald recital that the amended laws "shall be in full force and effect on and after October 1, 1917," is an idle proclamation. The argument that the amendments became effective 90 days after they first appeared in print is not tenable, in view of the legislation in this state, and of the decisions affecting fraternal beneficiary insurance associations, all of which require strict compliance with the statute, and more particularly when a forfeiture is threatened or is about to be imposed. Plaintiff's argument that "section 7927 is analogous to section 7903" in its requirement in respect of verification by signature is not without force. *Tomson v. Iowa Traveling Men's Ass'n,* 88 Neb. 399, and cases cited.

The name of no officer of the governing body appears in connection with the publication. Whether the matter which purports to be "amendments" was published by

authority of any officer or officers of the governing body does not appear. In extenuation of this apparent default defendant argues:

"It will be observed that the above section (7903) applies only when it is proposed by an amendment to change or raise the schedule of rates, and there is not the slightest proof in this record, nor is such the fact, that the laws adopted in July, 1917, changed the schedule, the rates or assessments in the slightest."

Defendant's argument is not persuasive. Section 7903 refers to "any proposed change or amendment, * * * making, fixing, changing or raising the schedule of rates of insurance, or periodical contribution, by members." It seems that to adopt an amendment providing for the imposition of an additional assessment of 30 cents on each $1,000 of insurance materially "changed the schedule" as affecting the insured. And to impose a forfeiture of a beneficiary certificate on account of the nonpayment of such additional assessment also "changed the schedule" as affecting the insured and raised "the schedule of rates." But altogether aside from this, can it be said that the additional thirty-cent monthly assessment was not included in the term "periodical contribution" as used in the act and preceded by the disjunctive " or ?" Surely publication as contemplated by section 7903 is mandatory.

So far as the foregoing statutory requirements in respect of publication are involved here, it plainly appears that they were not observed by defendant. It appears to us that, in view of the statutory language, there should be a certificate over the hand of the proper officer or officers of the governing body of the defendant society authenticating material matter in its published laws which, if not complied with by a member, might work a forfeiture of his insurance certificate. The burden of proof is upon defendant to establish every material fact which tends to substantiate its claim for a forfeiture. Where a fraternal insurance association seeks to work a forfeiture of a beneficiary insurance certificate issued to one of its members, the law should first

be strictly complied with, because it is fundamental that a presumption will never be indulged in favor of a forfeiture.

Another feature must be noticed in respect of section 7903. Notwithstanding the mandatory requirements of the statute, there is an entire absence of evidence which tends to show that any of the officers of the governing body or any other person, sent the required statutory notice of the amendments "to the local lodges or societies by mail to the proper officers of such local orders." In respect of sending out printed matter generally, such as notices and the like, the sovereign clerk testified: "I have the direction of sending all the papers out and all other matter of that kind, and it is under my supervision, and I have a man, under my supervision, that sends it out." "Q. Now, is there a direction given by you to your office force there with reference to mailing these amendments to the officers of the local lodges? A. Certainly, they would not mail it if they did not get directions. Q. What is that? A. I say certainly. Q. But what directions would you give them? A. I just simply tell them that they are to mail them out and who they are to mail them to. Q. And that is to people in your employ? A. Yes. Q. Now, whether they deposit them in the mail or not, you don't know of your own personal knowledge? A. Of course not." Elsewhere in the record it appears that the sovereign clerk gave the name of an employee who it was said had personal charge of the mailing of the publications, notices to the local lodges, and the like, but his evidence does not appear in the record. From the record it appears that the amendments in question have never become "effective" in the statutory sense.

Forfeitures are odious in law and are not favored by the courts, and will not be enforced unless the facts which purport to require such drastic action come clearly and plainly within the provisions of the law or of the contract, as the case may be. A certificate of life insurance, issued by a fraternal beneficiary association, and the laws of the association under which it was issued, together with the laws of

the state which are applicable thereto, should, from a fair construction of all the language used, be so construed as to make effective, if possible, the purpose for which the dues were paid and the certificate of insurance was issued. The rule is that the constitution or a by-law of an order that purports to be a beneficiary association will be strictly construed against it where, under its constitution or a by-law, there appears an attempt to work a forfeiture. *Meyer v. Supreme Lodge, K. of P.*, 104 Neb. 505, on rehearing, 104 Neb. 511.

The questions upon which our decision rests in this appeal were not presented nor decided in the former appeal. The former case was, of course, as therein observed, decided upon the record as it then stood. *Sawyer v. Sovereign Camp, W. O. W.*, 105 Neb. 395.

From a review of the facts which are herein discussed, we conclude that the court erred in directing a verdict in favor of defendant. The judgment is therefore reversed and the cause remanded for further proceedings in accordance with law.

REVERSED.

REDICK, District Judge.

I concur on the ground of insufficient publication of the amendment of 1917 and the failure to mail notices thereof to the proper officers of the local lodges.

ENOS T. HUGHES, GUARDIAN, ET AL., APPELLEES, V. MARGARET LANGDON, DEFENDANT: DANIEL KELLY ET AL., APPELLANTS.

FILED JANUARY 15, 1924. No. 22563.

1. **Limitation of Actions: GUARDIAN AND WARD: ACTION ON BOND.** Where a ward dies, his guardian is "discharged" within the purview of section 8515, Comp. St. 1922, which provides that no action shall be maintained against the sureties on the guardian's bond unless it be commenced within four years from the time the guardian is discharged.

2. **Descent and Distribution:** ACTION BY HEIR. Where there are no debts owing by an estate of a decedent, and nothing remains but the formal statutory proceedings to settle the estate, and there is no administrator, or the administrator refuses to bring an action, the only heir is entitled to bring the action in his own name, or it may be brought in the name of his guardian.

3. **Guardian and Ward:** ACTION ON GUARDIAN'S BOND: LIMITATIONS. When a person under guardianship dies leaving as his only heirs at law his widow, who is the guardian, and a minor son, and where the guardian has come into possession of money belonging to the ward, and on the termination of the guardianship makes no accounting of the trust, and where 11 years after the death of the ward the guardian is appointed administratrix of her ward's estate, and in the estate matter it is judicially determined that the widow and the minor son are the only heirs at law and entitled to share equally in the estate, and where the administratrix in fraud of the son's rights fails to require an accounting of her doings as guardian, and as guardian fails to make an accounting, and as administratrix is discharged, and where the amount due to the son in the guardianship proceeding is determined by the court, *held*, that the son is "the person entitled to bring the action" as that term is used in the exception clause of section 8515, Comp. St. 1922, providing that, if at the time of the discharge the person entitled to bring the action be out of the state, or under any legal disability to sue, the action may be commenced at any time within five years after the return of such person to the state, or after the removal of such disability. Also *held*, that where the son was under legal disability the cause of action in his behalf against the sureties upon the guardian's bond is not barred by the statute of limitations until five years after the disability is removed.

4. ———: ACCOUNTING: DECREE: CONCLUSIVE ON SURETY. "The order and decree of the county court as to the amount due from the guardian to his ward upon the final accounting and settlement of the guardian is final and conclusive upon the sureties upon the guardian's bond." *Langdon v. Langdon*, 104 Neb. 619, followed.

5. ———: JUDGMENT AGAINST SURETY. Judgment may not be rendered against the sureties on a guardian's bond in excess of the penalty named in the bond.

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

Doyle & Doyle, Halligan, Beatty & Halligan and *Hall, Cline & Williams*, for appellants.

Anthony E. Langdon and *William R. Patrick, contra.*

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

DAY, J.

Enos T. Hughes, as guardian of the estate of William K. Langdon, incompetent, and also in his capacity as administrator *de bonis non* of the estate of Michael J. Langdon, deceased, brought this action on a guardian's bond executed by Margaret Langdon, guardian of the estate of her insane husband, Michael J. Langdon. Daniel Kelly and Michael C. Kelly, brothers of Margaret Langdon, signed the bond as sureties. Process was served on the two Kellys only. Pending the action, defendant Michael C. Kelly died, and the action was revived against him in the name of his administrator, the First Trust Company of Lincoln, Nebraska. The trial resulted in a judgment in favor of the plaintiffs and against both defendants, for $14,741.58. Defendants appeal.

The record discloses the following facts: On April 10, 1888, Margaret Langdon was duly appointed guardian of the estate of her insane husband, Michael J. Langdon. On the same day she executed and delivered to the county judge her bond as such guardian in the penal sum of $12,000, which was signed by her brothers, Daniel and Michael C. Kelly, as sureties. She entered upon the duties as such guardian, and continued to act as such until the death of her husband, which occurred April 22, 1891. At the time of his death Michael J. Langdon left surviving him, as his heirs at law, his widow, Margaret Langdon, and a minor son, William K. Langdon, about 5½ years of age. Nothing was done concerning the administration of the estate of Michael J. Langdon until December 12, 1902, at which time Margaret Langdon was duly appointed administratrix of

the estate. The record fails to show what, if anything, Margaret Langdon did as administratrix. It does appear, however, that at a later period she was discharged as administratrix. Shortly thereafter the mother and son moved to Oklahoma, while the son was still a minor; the son never returning to the state of Nebraska until 1915. On June 5, 1907, William K. Langdon, who was then about 21 years and 9 months of age, was declared insane, and was sent to the state hospital at Nevada, Missouri, where he remained until April 22, 1915. During this period he was not confined entirely within the institution, but was under its supervision and control. After being released he returned to Nebraska in August, 1915, and filed a motion in the matter of the guardianship of his father, Michael J. Langdon, asking that his mother, the guardian, be cited to appear in court and render an accounting of her doings as such guardian. A citation was duly issued by the county court of Lancaster county, in which the guardianship was pending. On March 25, 1916, upon a full hearing, that court found that, after deducting all proper charges in the guardianship, there remained in the hands of the guardian, and unaccounted for, $7,790.26, which with interest from the date of the death of the ward, Michael J. Langdon, amounted to $21,377.57. The court found that one-half of this sum belonged to the widow of Michael J. Langdon, and the other half to William K. Langdon, the son. Shortly thereafter William K. Langdon was again committed to the state hospital. In May, 1916, Patrick J. Langdon was appointed guardian of the estate of William K. Langdon, incompetent. Patrick J. Langdon died soon after instituting the present action, and Enos T. Hughes was appointed guardian in his stead. The record also shows that on proper application to the county court the discharge of Margaret Langdon as administratrix of the estate of Michael J. Langdon, deceased, was set aside, and on December 15, 1915, Patrick J. Langdon was appointed administrator *de bonis non*. Upon the death of Patrick J. Lang-

don, Enos T. Hughes was duly appointed administrator *de bonis non*, who has since prosecuted this action commenced by Patrick J. Langdon as guardian and as administrator *de bonis non*.

The main question presented by this record is whether the action was barred by the statute of limitations.

Defendants urge that the statute of limitations began to run April 22, 1891, the date of the death of Michael J. Langdon, and as the action was not commenced until September 3, 1918, the four-year statute of limitations applicable in such cases had long since run. In support of their contention the defendants rely upon section 8515, Comp. St. 1922, which is as follows:

"No action shall be maintained against the sureties in any bond given by the guardian unless it be commenced within four years from the time when the guardian shall have been discharged: Provided, if at the time of such discharge the person entitled to bring such action shall be out of the state, or under any legal disability to sue, the action may be commenced at any time within five years after the return of such person to the state, or after such disability shall be removed."

It will be noted that this section of the statute contains two clauses, the first announcing the general rule, and the second the exception. The first clause in clear and unmistakable language declares that no suit may be maintained against the sureties on a guardian's bond unless commenced within four years from the time of the discharge of such guardian. The question is at once suggested, when is the guardian deemed to be discharged within the meaning of the term "discharge," as used in the statute? By the great weight of authority in states having similar statutes, the guardian is discharged by the happening of any event by which the guardianship is brought to a close. Thus, the removal, resignation, or death of the guardian, the death of the ward, the arrival of the minor of age, and perhaps other events, will operate to discharge the guardian. *Loring v. Alline*, 9 Cush. (Mass.) 68; *Probate Judge v.*

Stevenson, 55 Mich. 320; *Paine v. Jones*, 93 Wis. 70; *Berkin v. Marsh*, 18 Mont. 152.

In construing this statute this court in *Goble v. Simeral*, 67 Neb. 276, held that a guardian is discharged within the purview of the section when the ward becomes of age. It was also held that the statute of limitations in actions upon guardians' bonds begins to run from the date of the discharge of the guardian, and not from the time when a cause of action has accrued upon final settlement of the guardian's accounts. The rather anomalous situation of the bar of the statute running in favor of the sureties, before a cause of action accrues, is considered in a satisfactory manner in the *Goble* case.

We come now to consider the exception clause of the statute, in its relation to the facts of this case. That clause provides that, if at the time of the discharge of the guardian the party entitled to bring the action be out of the state, or be under any legal disability, the action may be commenced at any time within five years after the return of such person to the state, or after the disability is removed.

Who is the person entitled to bring the action, as that term is used in the statute? Ordinarily the person entitled to bring an action is he who is entitled to the fruits of the litigation. When Michael J. Langdon died, his property, subject to the payment of debts, descended to his heirs at law. The widow, who had been his guardian, and the minor son were the only heirs. She was in possession of a sum of money as guardian which in law, there being no debts, belonged to herself and her son in equal shares. It was her duty as guardian to make a report of her trust, and to turn it over, at least the part belonging to the son, to the proper persons. If an administrator had been appointed, he would have been a proper person to receive the money. None was appointed, or at least not until 11 years after the ward's death; but the administrator was not the only proper person to receive this money, or to bring an action for its recovery. When all the debts of an estate are paid, and nothing remains to be done except the formal

statutory proceedings to settle the estate, the only heir may bring an action in equity to recover assets of the estate. And this is true when there is an administrator who refuses to bring the action. *Prusa v. Everett*, 78 Neb. 251 (opinion on rehearing).

In the case before us, no administrator was appointed until 1902, at which time the widow was named as administratrix. She made no accounting to herself as administratrix of her trust as guardian. While the record is not entirely clear, it appears that her actions as administratrix were purely nominal for the purpose of fixing heirship, the county court decreeing that the heirs were the widow and the minor son. When it was sought to open up the estate in 1915, the county court found that the administratrix had fraudulently and wrongfully failed to make a full and true report as administratrix, and the discharge of the administratrix was set aside, and an administrator *de bonis non* appointed. Under the circumstances presented by the record, we hold that William K. Langdon was the person entitled to bring the action, in so far as it affected the share of the estate coming to him in the hands of the guardian. The county court found on the citation of the guardian that she had $10,688.78 in her hands belonging to William K. Langdon. If it be considered that William K. Langdon was the "party entitled to bring the action," what was the reason for the long delay in bringing it? The record shows that while he was a minor he removed to Oklahoma, and soon after becoming of age he was declared insane, sent to a state hospital in Missouri, and remained there until the spring of 1915, returning to Nebraska in August of the same year.

It thus appears that William K. Langdon was under the disability contemplated by the statute, the effect of which was to extend the time for bringing the action. The disability was removed in 1915. The action was commenced in 1918, and is not barred by the statute of limitations.

It is contended by the defendants that the evidence was not sufficient to support the judgment. The record shows,

however, that upon the final accounting and settlement of the guardian's accounts the county court found, as hereinbefore stated, that the guardian had in her hands $10,688.78 belonging to William K. Langdon.

In *Langdon v. Langdon,* 104 Neb. 619, it was held: "The order and decree of the county court as to the amount due from the guardian to his ward upon the final accounting and settlement of the guardian is final and conclusive upon the sureties upon the guardian's bond."

It is also urged by the defendants that they will suffer a great hardship by being required to respond on a bond after the lapse of more than 30 years. The defendants had it in their power, however, to require the guardian to make an account of the trust immediately following the death of the ward. At that time there was coming to the guardian from the estate of Michael J. Langdon sufficient funds to have protected the bondsmen.

As stated before, the judgment against the two sureties was for the sum of $14,741.58. The penalty in the bond given by the defendants was $12,000. It is difficult to see on what theory the judgment could exceed the penalty in the bond. If plaintiffs will remit from the judgment as of the date it was rendered all above $12,000 within 20 days, the judgment will be affirmed. Otherwise, it will be reversed, and the cause remanded for further proceedings.

AFFIRMED ON CONDITION.

The following opinion on motion for rehearing was filed July 18, 1924. *Judgment of district court reversed.*

1. **Syllabus Approved.** Upon rehearing, the proposition of law as stated in the syllabus of the former opinion, *ante,* p. 508, approved.

2. **Limitation of Actions:** ACTION ON GUARDIAN'S BOND: DISABILITY. The legal disability which may be considered in determining whether an action on a guardian's bond is barred by the limitation fixed by section 8515, Comp. St. 1922, is that only which existed at the time of the discharge of the guardian. A disability subsequently arising will not operate to extend the

period for bringing the action beyond the time fixed by the removal of the disability originally existing.

3. ———: ———: ———. In the instant case, the disability shown to exist at the time of discharge of the guardian was that of minority, which was removed upon the minor attaining majority in the year 1906, more than five years prior to the commencement of the action, and hence the action is barred by the statute of limitations.

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

BLACKLEDGE, District Judge.

This case is before us for a second consideration. An opinion was heretofore adopted which is reported, *ante*, p. 508, and upon motion for rehearing further argument was ordered and we are now to determine the status of the case upon final consideration.

The questions involved depend for their solution upon the construction to be given to the statute which provides the period within which actions may be commenced upon the bond of a guardian, section 8515, Comp. St. 1922, which reads as follows:

"No action shall be maintained against the sureties in any bond given by the guardian unless it be commenced within four years from the time when the guardian shall have been discharged: Provided, if at the time of such discharge the person entitled to bring such action shall be out of the state, or under any legal disability to sue, the action may be commenced at any time within five years after the return of such person to the state, or after such disability shall be removed."

The facts stated in the former opinion need not be here repeated except in so far as they appear necessary to a discussion of the propositions which are reexamined. The transactions which gave rise to this case occurred prior to the death of Michael J. Langdon, which event was on April 22, 1891. At and before his death his wife, Margaret Langdon, was his guardian, and this suit is upon her bond

as such guardian. Nothing in the way of administration of the estate of the decedent was had until December 12, 1902, nearly 12 years after the death.

There are three propositions urged for our consideration, which are: First, whether the "discharge" of the guardian contemplated by the statute under consideration is that which may occur upon the filing of his final account and his discharge or removal by the county court, or whether it is the termination of the guardianship which takes place upon the death or arrival at majority of the ward. There is much discussion and conflict of decision by the different courts upon this proposition. This court upon a full consideration of the question, in an opinion by a jurist of recognized ability and renown, has held that the discharge, within the meaning of this statute of limitations, takes place upon the termination of the guardianship, and that, as to the sureties, the period of limitation begins to run on such date, and not from the time when the cause of action has accrued upon final settlement or accounting by the guardian. We think no good would be accomplished by further consideration of the question, and hold that the former opinion in this case was right upon that proposition. *Goble v. Simeral*, 67 Neb. 276; *Gronna v. Goldammer*, 26 N. Dak. 122, Ann. Cas. 1916A, 165, note 170-183.

Second, that the "person entitled to bring such action" in this case means William K. Langdon, for whose benefit it is alleged this case is prosecuted. Appellants contend that the administrator of the estate of the deceased ward is the only person who could maintain the action, and that, therefore, the condition or situation of William K. Langdon, in so far as concerns his absence from the state or legal disability, is immaterial. The argument would be of governing force if there existed a positive requirement of law that in all cases of death of persons under guardianship an administrator should be appointed. There is no such requirement, and in this case the fact is that for 12 years next following the death of the ward no administrator was appointed. True, the administrator, where one has been

appointed, is entitled to sue for and collect the assets of the estate; yet the position of appellants is, at least in part, foreclosed by the holding in *Prusa v. Everett* (on rehearing), 78 Neb. 251, to the effect that the heir may sue where the administrator refuses so to do. The case of *Cox v. Yeazel*, 49 Neb. 343, although denying the right to the heir to sue in that instance, recognizes his right to do so if there be no demands against his decedent ancestor and there has been no administration, or the administration has been closed. The principle is also recognized by the decisions in *Cooley v. Jansen*, 54 Neb. 33, to the effect that the right of the administrator to possession of the property of the decedent arises, primarily, from its being subject to the payment of his debts; and in *Schick v. Whitcomb*, 68 Neb. 784, wherein the heir was allowed to maintain a partition action upon the allegation that the proper debts and charges against the estate had been paid. We hold, under the facts of this case as stated, and where it is not shown that there was any debt of the decedent, nor any necessity for the administration of his estate, and no administrator was appointed or applied for, that the heir who was entitled to the proceeds of the demand in question should, in our determination of this question of limitation, be considered the person entitled to bring the action.

It is plain, of course, that, if none other than the administrator can sue, the statute of limitations began to run at least upon the appointment and qualification of such administrator, and, being put in motion, continued to run until its term was complete and the cause became long since barred. The second and third administrators would take the business of the estate in the condition in which it was left by their respective predecessors in office, the whole administration being considered a continuous proceeding. *Trumble v. Williams*, 18 Neb. 144; *Brown v. Jacobs*, 24 Neb. 712; Comp. St. 1922, sec. 1466. This disposes of any claim of right by plaintiff herein to maintain the action in the capacity of administrator *de bonis non* of Michael J. Langdon.

Considering now, third, the question of the legal disability of William K. Langdon, the proposition urged upon the reargument seems to be somewhat divergent from the theory upon which the case was tried and submitted in the district court. In the former opinion we held that, where the son was under disability, the cause of action in his behalf was not barred by the statute until five years after the disability was removed. This, we think, is a proper statement of the law. The difficulty seems to be in its application to the facts of the case, as to which it now appears that both court and counsel overlooked a material element. In the former submission, appellants grounded their argument largely upon the proposition that none but the administrator could sue, and that the four-year period fixed by the principal clause of the statute under consideration effectively barred the action; while appellee contended that the legal disability of William K. Langdon by reason of nonage, his mental incompetency existing from and after the time when he attained his majority, and his absence from the state, served to bring the action within the terms of the statute. The plaintiff tendered an instruction, the statements of which were incorporated into the third instruction given by the court, to the effect that plaintiff was entitled to recover upon proof of the execution of the bond, and that William K. Langdon had at all times since reaching his majority been mentally incompetent to transact business or have the care and management of his property.

It is said in the former opinion that the disability was removed in 1915, which date would authorize the maintenance of this present action. It is now urged that in order to reach such date there has been a "tacking" of disabilities unauthorized by law, in that the period of insanity or mental incompetency was added to the period of minority; and that the absence from the state is not material to be considered.

We are convinced of the correctness of appellants' position in this regard. The date from which the statute operates, we have held, is of that of the discharge of the guardian

by death of the ward, April 22, 1891. Under the plain terms of the statute, which will admit of no construction, the disability, in order to be effective, must exist "at the time of such discharge." Many courts have held that a disability subsequently arising, even before the removal of the first, will not serve to extend the time beyond the removal of the originally existing disability. *Hogan v. Kurtz*, 94 U. S. 773; *McDonald v. Hovey*, 110 U. S. 619; *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) *129; *Cozzens v. Farnan*, 30 Ohio St. 491; *Roelefsen v. City of Pella*, 121 Ia. 153. It is not disputed that William K. Langdon resided and was within the state at the time of the death of his father. His subsequent absence and return to the state, at whatever time, would be immaterial. He was then also a minor and attained his majority in 1906. In 1907 he was declared insane and committed to a state hospital at Nevada, Missouri, from which insitution he was discharged in 1915. He returned to Nebraska, for a brief period that same year, during which time he instituted in his own name the proceedings in county court which eventually furnished the basis for this suit, which was commenced September 3, 1918. Therefore, the only disability under which he is shown to have stood at the time of the discharge of the guardian was that of minority. This was removed when he became of the age of 21 in the year 1906, and this we find to be the correct date of the removal of his disability as affecting this suit. Such date was more than five years prior to the commencement of this action.

There is some basis in the evidence for the contention that the mental incompetency of William K. Langdon existed for some considerable period prior to the date when he was declared insane in 1907; but there is no issue raised in the pleadings that it existed at the time of the death of his father, and the theory upon which the case was tried, as indicated by the instruction tendered and given, to which reference has been made, was based upon his absence from the state and disability existing "at all times since reaching his majority."

That paragraph of the former opinion in which it is stated that the disability was removed in 1915 will therefore be withdrawn. The conclusion to which we have come upon further examination of the case, as herein expressed, makes it necessary that the judgment of the trial court be reversed and the cause remanded, which is accordingly done.

REVERSED.

ROSIE TADY, APPELLANT, V. J. J. WARTA, APPELLEE.

FILED JANUARY 15, 1924. No. 22609.

1. **Physicians and Surgeons: NEGLIGENCE: SUFFICIENCY OF EVIDENCE.** In an action against a physician for malpractice, where the acts charged as negligence require in their performance the exercise of professional skill and knowledge, *and are such with respect of which a layman can have no knowledge at all*, the jury may not draw the inference of negligence without the aid of expert testimony as to the quality of such acts to guide them; in such case the doctrine of *res ipsa loquitur* has no application.
2. ———: ———: ———. Evidence examined and *held* insufficient to require the submission to the jury of the question of negligence.
3. **Trial: DIRECTION OF VERDICT.** By overruling defendant's motion for a directed verdict at the close of plaintiff's case, the court is not precluded from sustaining a similar motion at the close of all the evidence.

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

George H. Merten, for appellant.

Smith, Schall, Howell, Howard & Sheehan, contra.

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

REDICK, District Judge.

Action against a physician for malpractice. Defendant was a specialist, known as an oculist and aurist, and was employed by plaintiff to treat her for sinus trouble. An

operation being necessary in the judgment of defendant, for the purpose of treating an infected antrum from which plaintiff was suffering, he used a sharp steel chisel about five inches long, placing it in the nostril and driving it through the antrum bone by the use of a small steel mallet. In doing this a small piece was broken off the point of the chisel and remained imbedded in the bone. Plaintiff testifies that the instrument was broken while the doctor was removing it, when he gave it a twist and a jerk, while defendant claims it broke after he had tapped it two or three times with the mallet. The negligence charged is: (1) That the use of the chisel and mallet was unnecessary and an improper method of treatment; (2) the breaking of the point of the chisel. At the close of plaintiff's evidence defendant moved for a directed verdict, which was denied; but at the close of all the evidence defendant's motion to discharge the jury and dismiss the case was sustained. Motion for new trial having been overruled, plaintiff appeals.

The first error assigned is the sustaining of defendant's motion to dismiss the case. Plaintiff contends that, looking upon the plaintiff's evidence in the most favorable light to plaintiff, as we must do for the purpose of this question, there was sufficient evidence to go to the jury as to defendant's negligence. Thus viewing the evidence, the following facts appear:

The chisel was driven through the maxillary bone in which it was imbedded; that in taking out the chisel the doctor twisted it and jerked it; that the point was broken off and extended partly into the sinus. Two specialists who afterwards treated plaintiff drained the antrum without the use of a chisel. These doctors called by plaintiff testified that the method adopted by defendant was one of the usual methods, and not an improper one; that the instrument will break occasionally without any fault of the operator; that might be caused by an undiscoverable defect in the instrument; the fact that it broke does not indicate lack of care. One of them expressed the opinion

that in the present case the breaking was a mere accident.

The claim that the method of operation was improper must fall in view of the testimony of the experts that it was one of the usual methods, and its selection was a matter for the exercise of the doctor's judgment; and, even though he was mistaken (which was not shown), no liability attaches under such circumstances.

Plaintiff argues that the jury may logically infer from the fact that the chisel broke that defendant negligently used too much force with the mallet. He says: "From said evidence it is just as consistent, logical, and sensible to infer that the instrument broke because the blows struck by the mallet were too severe, as to infer a defect in the instrument. But, no matter which inference be taken, it is still a question for the jury to determine which inference should be drawn. * * * For this court to hold, or to infer, from the above quoted evidence that there was a defect in the instrument is a mere guess." Is it any less a guess for the court or jury to hold that the breaking was caused by too much force? An inference must be based upon some fact from which it properly may be drawn; there is no evidence that the instrument was defective or as to the amount of force used in striking it, so that neither suggested inference is reached by a logical deduction from facts proved, and both would be mere guesses; the evidence furnishes no standard by which the jury may select the proper inference. The breaking of the instrument might have been caused by a defect therein, by use of too much force, by negligence of defendant, or by a mere accident, and the evidence points to neither one of these possibilities in preference to the others. If the instrument broke at the second or third tap of the mallet, it would afford an inference that more force was used than the instrument would bear, but the amount of force to use was for the judgment of the doctor, and the fact affords no inference of negligence unless the doctrine of *res ipsa loquitur* is applicable; that it is not applicable seems well settled.

In *Ewing v. Goode*, 78 Fed. 442, in an action for mal-

practice in removing a cataract from plaintiff's eye, Judge Taft (then circuit judge) said: "If the maxim, *res ipsa loquitur*, were applicable to a case like this, and a failure to cure were held to be evidence, however slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art, for they would have to assume financial liability for nearly all the 'ills that flesh is heir to.'" And at page 444: "Again, when the burden of proof is on the plaintiff to show that the injury was negligently caused by defendant, it is not enough to show the injury, together with expert opinion that it might have occurred from negligence and many other causes. Such evidence has no tendency to show that negligence did cause the injury. When a plaintiff produces evidence that is consistent with an hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to establish neither (citing cases)." It was held in that case: "Upon questions involving a highly specialized art, with respect to which a layman can have no knowledge at all, the court and jury must be dependent upon expert evidence; and, when there is no such evidence to support an allegation depending upon such a question, there is nothing to justify submitting the issue to the jury."

No expert in this case has given it as his opinion that the breaking of the instrument was caused by negligence, but they attribute it to accident such as sometimes occurs without fault of anyone. While it may be proper to infer that the breaking was caused by excessive force or by the twisting and jerk, the question still remains whether, in view of the operation being performed, those were negligent acts, and this was a question not within common knowledge, but one exclusively for experts.

"What is proper and usual practice in examining and treating an injury, and what constitutes ordinary care by a physician, can only be shown by expert testimony." *McGraw v. Kerr*, 128 Pac. 870 (23 Colo. App. 163). See, also, *Adolay v. Miller*, 60 Ind. App. 656, where it was

observed: "There is no evidence from any physician who has given the jury any standard by which the fact in dispute could be properly determined, and, since the jury is not permitted to draw the conclusion of unskilfulness from the result of the operation or treatment, it seems to us to permit the jury to determine the case without some competent evidence as a standard from which it might be determined whether the services rendered by appellees were done with reasonable care and skilfulness would be to permit a determination of that question from mere speculation and conjecture." In *Miller v. Toles,* 183 Mich. 252, it was held that there must be expert testimony tending to show malpractice, or the jury may not draw inferences of negligence. To the same effect: *Zoterell v. Repp,* 187 Mich. 319; *Houghton v. Dickson,* 29 Cal. App. 321. The rule is not without exceptions, as where the treatment is so outrageous as to furnish of itself an almost conclusive inference of negligence, such cases are well illustrated by the remarks of Weaver, J., in *Evans v. Roberts,* 172 Ia. 653: "If a surgeon, undertaking to remove a tumor from a person's scalp, lets his knife slip and cuts off his patient's ear, or, if he undertakes to stitch a wound on the patient's cheek, and, by an awkward move, thrusts his needle into the patient's eye, or, if a dentist, in his haste, leaves a decayed tooth in the jaw of his patient, and removes one which is perfectly sound and serviceable, the charitable presumptions which ordinarily protect the practitioner against legal blame where his treatment is unsuccessful are not here available." The kind of operation, the instruments proper to be used, the amount of force necessary in driving the chisel, the proper method of extracting it, were all questions of special knowledge involving special professional skill and attention, failure to exercise which could only be determined by experts. We conclude there was no evidence warranting the submission of the case to the jury.

A further contention of appellant is that, the court having overruled defendant's motion for a directed verdict at the close of plaintiff's case, it was thereby established

that a *prima facie* case had been made and the court could not thereafter sustain such a motion. No court is required to persist in error, and, if he concludes that a former ruling was wrong, he may correct it at any time while the case is still in his control.

Error is assigned upon the ruling of the court striking out certain evidence of plaintiff as to a conversation with defendant the day after the operation, in which he said: "I worried my head off about you, I know we did more than we should." The witness was interrupted at this point by the motion: "Plaintiff contends that the statement was an admission against interest and should not have been stricken." The words above quoted came at the close of a long rambling answer of the witness (three-fourths of a typewritten page). The sentence is not complete, and, standing by itself, is not intelligible. No offer of what it was expected to prove by a complete answer was made; in this state of the record we cannot say that the ruling was error.

Finding no error in the record, the judgment is

AFFIRMED.

WILLIAM WIDENER ET AL., APPELLANTS, V. W. E. SHARP ET AL., APPELLEES.

FILED JANUARY 15, 1924. NO. 22743.

1. Insurance: FRATERNAL BENEFICIARY ASSOCIATIONS: FORM OF GOVERNMENT. A fraternal beneficiary association is required by the laws of this state to have a representative form of government as thereby defined. *Held*, that a lodge system with local lodges that elect delegates to representative lodges, which in turn elect delegates to a supreme lodge where such delegates are the possessors of the entire voting power, complies with the statute.
2. ———: ———: SELECTION OF REPRESENTATIVES. An edict which requires delegates to the supreme lodge to be selected by the representative lodge from the members of that lodge present at the session electing them is not unduly restrictive nor contrary to the representative principle.
3. ———: ———: REPRESENTATIVE DISTRICTS. Where the prin-

ciples upon which the districting is to be accomplished are stated in the edict, the fixing of the boundaries of representative districts in accordance with such principles may be delegated to an executive committee.

4. ———: ———: SELECTION OF REPRESENTATIVES. Restricting to a certain class the selection of delegates to a representative lodge is not unreasonable, where the selection of persons composing such class is within the control of the members.

5. ———: ———: ———: APPOINTMENT TO FILL VACANCY. The power of appointment of a delegate to the supreme lodge, upon a failure of a representative lodge to elect, is properly lodged in the illustrious protector.

6. ———: ———: RATES. The table of rates of assessment examined, and *held* not to be unnecessarily high, nor oppressive, since the rates are not more than sufficient to enable the society to comply with its contracts and obligations.

7. ———: ———: INCREASE OF RATES. Representation made to prospective members by officers and agents of a fraternal benefit association, that their rates of assessment should never be increased, and the fact that the rate of assessment due from the members at the time of their admission to the society was written upon their benefit certificates, does not preclude the legislative body of such organization from thereafter enacting a new table of rates, so long as the new rates are not discriminatory and are not more than is necessary to enable the society to meet all its agreements and obligations to its members.

8. ———: ———: EXPENSES: DISCRIMINATION. Undue discrimination is not shown because a certain percentage of the assessments of all members is taken and applied for the expense of operating the society.

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

J. C. McReynolds, for appellants.

Hainer & Flansburg and *O. B. Clark, contra.*

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

REDICK, District Judge.

This is a suit for an injunction. Plaintiffs are members of the Royal Highlanders, a fraternal beneficiary associa-

tion organized under the laws of Nebraska. It is required by statute to have a representative form of government. It has a lodge system with a ritualistic form of work. Its lodges are called "castles" and its laws "edicts." Its law-making body meets in regular session quadrennially. It raises funds to pay benefits and expenses by requiring members to pay assessments and dues. Defendants are its principal administrative officers and its executive committee. The purpose of the suit was originally to perpetually enjoin defendants from enforcing a new table of rates adopted by the supreme legislative and governing body of the association at a special session held at Denver in October, 1919. The case was tried in the district court for Lancaster county and resulted in a decree dismissing the suit for want of equity, and upon appeal to this court the judgment was reversed and remanded, with directions that the injunction be made perpetual. *Widener v. Sharp*, 106 Neb. 654. The only point, however, decided in that case was that the laws of the society did not provide for special meetings of the supreme governing body, called the executive castle, and, therefore, the October, 1919, meeting, being special, had no authority to transact business.

Subsequently, in September, 1921, a regular meeting duly called was held at Denver, at which the new rates attempted to be established at the special meeting were approved and reenacted. Thereupon leave was granted to file supplementary pleadings, in which the new rates as established in September, 1921, are alleged to be void. On the issues raised by the pleadings the case was tried to the court, resulting in a decree again dismissing the case, from which decree plaintiffs appeal.

The objections to the assessments are presented under four heads: (1) That the Royal Highlanders have not a representative form of government. (2) That the rates adopted are unnecessarily high, oppressive, unjust, illegal, and discriminatory. (3) That the proportion of the monthly assessments set aside for the purpose of paying the expenses of the order is grossly excessive and discriminatory.

(4) That such rates are retroactive and discriminatory as between the various ages and classes of membership.

We will take up the first proposition, and at the outset it will be useful to take a general survey of the form of government established and provided by the laws or edicts of the society. The supreme governing body is called the "executive castle," composed of 15 officers and 25 delegates elected by representative castles; delegates to which are in turn elected by tributary castles. While the officers are members of the executive castle, the voting power (since the *Lange* and *Briggs* cases, cited later) is vested solely in the elected delegates, and this was true at the commencement of this suit. Delegates to the representative castle were elected by the full membership of the order at meetings of the tributary castles (corresponding to local lodges).

It thus appears that every member of the society had a voice in the selection of delegates to the representative castle, which in turn, representing the voter, selected the delegates to the executive castle. It is not seriously contended that a society so constituted is not possessed of a representative form of government within the definition of section 3294, Rev. St. 1913, as follows:

"A 'fraternal beneficiary society' is hereby declared to be a corporation, society or voluntary association, formed or organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit. Each such society shall have a lodge system, with ritualistic form of work and representative form of government. Any such society shall be deemed to have a representative form of government when it shall provide in its constitution and laws for a supreme legislative or governing body composed of representatives elected either by the members, or by delegates elected directly or indirectly by the members, together with such other members as may be prescribed by its constitution and laws: *Provided*, the elected members shall have not less than nine-tenths of the vote, nor less than the votes required to amend its constitution and laws; and *provided, further*, the meetings of the supreme or

governing body and election of officers, representatives or delegates, shall be held as often as once in four years."

It is true that defendants, the principal administrative officers and the executive committee, have a voice in the proceedings of the executive castle, but their right to be heard there is permitted by statute. They are familiar with the business and the conditions of the fraternity and are the custodians of records and data essential to consideration of proposed legislation. The restriction of the voting power to the elected delegates obviated the objections, based upon the composition of the executive castle, which were discussed in *Lange v. Royal Highlanders*, 75 Neb. 188, and *Briggs v. Royal Highlanders*, 84 Neb. 834, and 85 Neb. 830, because at the time those decisions were rendered the edicts of the society permitted the nonelected officers to vote in the executive castle, and it was upon this ground that we held the society to be without a representative form of government.

Notwithstanding the society had an apparent representative form of government, as we have shown above, the plaintiffs insist that it is only in form, and that the provisions of the edicts whereby the title of the elected delegates to the executive castle may be traced to the votes of the entire membership are rendered nugatory, or nullified, by certain other edicts of the society which in effect deprive the member of any substantial participation in the selection of delegates to the representative castle, and, consequently, of the delegates to the executive castle, and prevent the establishment of a representaitve form of government in fact. The edicts attacked are:

"Section 197. When Executive Committee May Amend. During the interim between sessions of the executive castle, should any cause arise for an immediate change of some edict or the adoption of a new edict be found necessary, the executive committee may enact such edict or amendment by a two-thirds vote of all members. Such edict or amendment shall be binding and in full force and effect as soon as approved and published, and shall remain an edict until

the next session of the executive castle, when, if approved by a majority vote of all members present and entitled to vote, the same shall become a permanent edict of our fraternity."

"Section 63. When Instituted. At the second regular meeting of the executive committee in the year during which any regular session of the executive castle is to be convened, the chief secretary shall submit a statement containing the name, number and location of every tributary castle of the Royal Highlanders, which statement shall show the number of beneficial members in good standing in each tributary castle, as shown by the records of his office, on the first day of January of such year. From this statement the executive committee shall divide the entire jurisdiction of the fraternity into twenty-five or more districts, as nearly as possible of equal membership. These districts shall be arranged with regard to geographical location of the tributary castles therein, with the aim in view to make each district as compact as may be consistent with transportation facilities. The executive committee shall also designate a place and time for holding each district meeting, which must be during the months of May, June, July and August of the same year. When these districts shall be established the chief secretary shall notify each tributary castle of the fraternity to which district convention it shall send its representatives. Each district convention shall be known as a representative castle of the Royal Highlanders."

"Section 176. Eligibility to Election as Representative. Only beneficial members in good standing who have filled the position of illustrious protector, secretary-treasurer or counselor of a tributary castle, for at least three months, and have not resigned, or had their office declared vacant, shall be eligible to be elected as representatives or alternates to representative castles: *Provided*, that in case of the election in a new tributary castle, organized within three months of January 1st of the year in which a representative castle convenes, these officers shall be eligible although they

have not served three months. Any member of the executive castle shall be eligible as a representative."

"Section 64. How Composed. The representative castle shall be composed of the representatives from the tributary castles located within its jurisdiction and the officers of the executive castle residing therein."

"Section 66. Eligibility as Representative to the Executive Castle. Representatives or alternates thus elected shall be elected from the members present at the session of the representative castle electing them."

"Section 69. Officers. Any executive officer of the executive castle present and ranking in the order named in section 22 of these edicts shall be the ex-officio chairman of the representative castle."

"Section 70. Quorum. Three representatives shall constitute a quorum in a representative castle."

"Section 71. Failure to Convene. In case any representative castle should fail to elect a representative and alternate for lack of a quorum or otherwise, the most illustrious protector shall appoint an eligible member of such representative district to represent such representative castle in the convention of the executive castle."

"Section 173. Manner of Election. The following shall be the manner of electing representatives from tributary castles to represent such castles at the representative castle:

"During the month of March of each year in which a regular session of the executive castle is to be convened, the chief secretary shall send a statement to each tributary castle secretary-treasurer entitled to representation in a representative castle, which statement shall show the number of members in good standing January 1, of such year, in such castle. At the first regular meeting of the castle, after receipt of this statement, each tributary castle shall elect by ballot one eligible beneficial member to represent the castle at such representative castle, and an additional eligible beneficiary member for each additional hundred members, or major portion thereof, after the first hundred shown to have been in good standing January 1, of such year."

"Section 19. Eligibility to Office. Any officer of the executive castle in good standing and representatives from the representative castles, whose credentials shall have been approved by the executive castle, and who have been members of the executive castle, and participated in at least one former session of the same, shall be eligible to hold any elective or appointive office of the executive castle, except the position of most illustrious protector, chief secretary, and chief treasurer. Only members of the executive castle who have served as members of the executive committee shall be eligible to be elected to the office of most illustrious protector, chief secretary, or chief treasurer."

The above sections are quoted in the order in which they appear in the brief of appellant, but our discussion of them will pursue a different order, as a number of them may be disposed of without extended consideration.

We begin with section 197. This deals with an attempted delegation of power to the executive committee to amend the edict, but whether valid or not, we are unable to perceive what connection there is between the performance of duties by the executive officers and the manner of their selection, which is the material consideration upon the question now under discussion. If this section is invalid, the courts may restrain the enforcement of any edict promulgated under it, but the question has not yet arisen.

Section 176 has to do with the eligibility of delegates to the representative castles. The claim here is that the right of the member to vote for the delegate is unduly restricted; but it is common knowledge that in all representative governments certain qualifications for office may be prescribed, which may exclude a good proportion of the voters. For example, no one may be elected congressman who has not attained the age of 25 years, and been a resident of the United States 7 years, and no one may be a senator of the United States unless he has attained the age of 30 years, and been a resident of the country for 9 years. So the restriction may be to certain classes, as, for instance, none may be elected as judge of the district or supreme courts of this state without

he be regularly admitted as an attorney at law. We need not pursue this subject further, but dismiss it with the observation that, while the selection of delegates is restricted to certain officers and ex-officers of the tributary castle, the members have full power to change such officers, and when selecting them they in effect select the class from which delegates are taken later on; full control is thus found to exist in the membership. A further contention is that this section makes eligible as a representative any member of the executive castle; but the context clearly implies that the candidate must be a member of the tributary lodge and must be elected thereby.

Section 63 confers upon the executive committee the power to divide the entire jurisdiction of the fraternity into 25 or more districts, and it is claimed that this was an unlawful delegation of legislative power by the executive castle. It is undoubtedly true that legislative power is vested in the executive castle and must be exercised by it; but the question before the representative bodies in the enactment of the law is whether or not the proposed law should be enacted in the judgment of the legislature. The legislature exercises its judgment and discretion, and, in accordance therewith, enacts the law, and, having done so, it may delegate to executive or administrative bodies authority and discretion to be exercised in the execution of the law. In *State v. Chittenden*, 127 Wis. 468, it was held:

"Authority which, by the Constitution, is vested in the legislature, is the power to make law. It may be exercised, leaving in the particular instance to some other agency the duty of determining questions of fact essential to the application thereof. The former involves legislative, the latter administrative discretion."

And, quoting from *Cincinnati W. & Z. Ry. v. Clinton County*, 1 Ohio St. 77, 88:

"The true distinction, therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and

in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."

By section 63, in question, the executive castle in its legislative capacity decided that the jurisdiction should be divided into districts "as nearly as possible of equal membership. These districts shall be arranged with regard to geographical location of the tributary castles therein, with the aim in view to make each district as compact as may be consistent with transportation facilities." The executive castle having determined the principles upon which the division of the jurisdiction into districts should be accomplished, it was entirely competent to provide that the actual boundaries of the districts might be determined by the executive committee, acting, of course, in accordance with the principles laid down, and that in so doing they were performing merely administrative duties. The distribution of the membership and the transportation facilities were matters subject to change over comparatively short periods of time, and it would be impractical to attempt by a general law to anticipate these changes, and it was quite appropriate to vest in some other body administrative discretion in the execution of the law. The fact that these districts were to be marked by a committee " which had been selected by the unrepresentative body," as remarked in the *Briggs* case, 84 Neb. 834, 838, is not material to the question of delegation of power; and we are not disposed to ascribe to such fact an importance which might result in leaving the society with no adequate method of selecting an executive castle to take necessary steps to bring the society within the law; moreover, this feature will disappear when such action is taken.

Section 69, providing that an elective officer of the executive castle shall preside over the representative castle, does not seem to be inconsistent with representative form of government; the vice-president of the United States, an elective officer, presides over the deliberations of the senate, and it has never been contended, as far as we are informed,

that any principle of representative government was thereby violated.

Section 173. The objection to this edict is that no time is fixed in which notice shall be transmitted before the regular meeting at which tributary castles shall elect a representative, and it is argued that the chief secretary might withhold the notice until one minute before the convening of the tributary castle, and then deliver it to the secretary-treasurer of the castle, or withhold it, accordingly as it should appear that the members present would elect a representative agreeable to the executive castle, or the reverse. We do not think, that, for the purpose of declaring this edict void, we are justified in presuming that officers of the association charged with the performance of certain duties will act dishonestly or fraudulently. A proper construction of the edict in question requires that the notice be sent within a reasonable time before the meeting at which the election is to be held; and, if any such conduct as suggested were attempted, the courts would furnish ample protection to the members.

Section 19, prescribing qualifications for officers of the executive castle, is not unduly restrictive for reasons similar to those referred to in the discussion of section 176.

Section 70 will probably bear the construction contended for by defendant, that the word "representative" refers to those elected; but this question is not now important.

Section 71. This provision for the appointment by the illustrious protector of a representative in case of failure of an election is consonant with correct principles, and a corresponding provision is to be found in the statutes or Constitutions of all the states; without some such provision the district would be without representation in the executive castle.

There is nothing in what we have thus far said which is inconsistent with the decision of this court in *Briggs v. Royal Highlanders*, 85 Neb. 830, 834, as was there said:

"It will be understood that representative government does not necessarily mean democratic control in the sense

that all the members shall at a precise time individually express their will in selecting the officers and agents essential for the management of the affairs of the order, but it does imply supreme and ultimate sovereignty in the individuals constituting the units of the society."

These requisites are met, as expressly provided for by statute, when its constitution and laws provide "for a supreme legislative or governing body composed of representatives elected either by the members, or by delegates elected directly or indirectly by the members." Rev. St. 1913, sec. 3294.

While the decision of the matters just discussed is not absolutely essential to the disposition of this case, we have expressed our opinion regarding them, in view of the number of cases brought to this court presenting similar considerations as touching the form of government of various fraternal organizations, with a view to the settlement of some of these questions and a discouragement of fruitless litigation, expensive and disturbing to those societies and their members alike. The enactment of invalid edicts not interfering with the ultimate control of the society by the vote of its members, while subject to inquiry and relief by the courts, does not in any sense strip the organization of its legal character by destroying its representative form of government, if it has one.

The remaining edicts to which objection is made in connection with the first proposition are 64 and 66 and may be considered together. The first point requiring consideration is that by section 64 representative castles are composed, not only of delegates elected by the members, but officers of the executive castle residing within the jurisdiction of the representative castle.

Counsel for plaintiffs argue that said section confers the right to vote in the representative castle, upon officers of the executive castle residing in the jurisdiction of the representative castle, and that the delegates to the executive castle are not, therefore, elected either by the members of the society or their representatives, but that such delegates

are elected by a body composed only in part of the representatives of the members of the society. We do not think the contention is well founded. The argument is persuasive, and would be entitled to great weight if this were a direct proceeding by the state, involving the vital question of the right of the society to do business; but here the contest is between a member and the society, and the question in a sense arises collaterally, and our decision should not extend beyond the full protection of the rights of the plaintiffs and other members. The power of a legal body, when necessary, to increase rates within reasonable bounds cannot be disputed, and if *in fact* the acting body has been selected in accordance with the representative principle, we would not feel justified in adopting a doubtful construction of this edict which, in the end, would result only in the postponement of lawful action, and thereby imperil the ultimate value of all outstanding certificates of the society. Section 64 does not, in terms, give a vote in the representative castle to officers of the executive castle. The record shows that the chief officers of the society have always construed the section as denying the voting privilege to executive castle officers, except where they were regularly elected by a tributary castle as delegates to the representative castle; that such privilege has never been exercised; and that the elective members of the executive castle, which adopted the increased rates, were selected by the elected members exclusively of the tributary castles, the resident members of the executive castle not voting. More recently an edict has been adopted which, in express terms, withholds from executive castle officers, residing in the jurisdiction of a representative castle, the power to vote therein unless regularly elected members thereof. In addition, section 192 of the edicts makes the laws of Nebraska, relating to fraternal beneficiary associations, a part of the society's edicts, and further provides that such statutes shall, in all respects, control, and that any edict or part of an edict, in conflict therewith, shall be null and void. Under this state of facts, we are clearly of the opinion that section 64 should not be construed to give a

voting power in the representative castle to those executive castle officers who may be residing in its jurisdiction. It is a cardinal rule that, where a by-law of a society is susceptible to two constructions, the one making it a valid law and the other invalid, the former is to be preferred.

Section 66 is severely criticised because it restricts the representative castle to its own membership in the selection of delegates to the executive castle. But it must be remembered that the members of the tributary castle are aware, when they select their delegates to the representative castle, that the membership of the executive castle must be made up from the delegates to the representative castle. The same reason that applies to the restricted list of members who are eligible as delegates to the representative castle, is likewise applicable to the restricted list of eligible delegates to the executive castle.

The record shows that the representatives to the executive castle of 1921 were selected by the representatives to the representative castle who were, in turn, selected by the members of the society. The edict, changing the rates, was enacted by a body that was representative in character. It does not appear that the society did not have a representative form of government when the edict was adopted.

Plaintiffs strenuously contend that the new table of rates is unnecesarily high and oppressive, and is therefore illegal. The record discloses that the rates are not more than sufficient to enable the society to comply with its contracts. When the members of fraternal beneficiary societies undertake to conduct their business on inadequate rates for insurance, they sooner or later find it necessary to raise the rates to a point somewhat higher than what would have been an adequate rate in the first instance, or the alternative of insolvency and failure. We are satisfied that the new table of rates is not unreasonably high.

Counsel for plaintiffs argue that the society cannot change its rates of assessment, by reason of representations made to prospective members by officers and agents of the society, and because the rate of assessments due from the

members was written upon their certificates. It is obvious that such facts and representations could not bind the society, nor prevent the members in their legislative body from enacting a new table of rates, so long as the new rates were not discriminatory and were not more than was necessary to enable the society to meet all its agreements and obligations to its members. *Case v. Supreme Tribe of Ben Hur*, 106 Neb. 220; *Fowler v. Sovereign Camp, W. O. W.*, 106 Neb. 192.

Plaintiffs complain that the new rates are discriminatory, because a certain percentage of the monthly assessments was diverted to the general fund and used for expenses, and, since the older members pay a larger assessment, they are required to pay an undue proportion of the costs of running the society. The older members will pay, ordinarily, for a shorter time, as their expectancy is less, so, while they pay more from each assessment, they make correspondingly fewer payments. The precise question was decided by the court in *Fowler v. Sovereign Camp, W. O. W., supra.*

We find no reversible error, and the judgment of the district court is

AFFIRMED.

DAVID NORRIS, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED JANUARY 15, 1924. No. 22639.

1. Waters: SURFACE WATERS. Surface water is deemed the common enemy, and the landowner may repel it even to the damage of his neighbor, if the means employed by him be not negligent. But he may not be negligent in the use of means, and he may not lawfully gather even surface water in a body and cast it upon his neighbor, to the latter's damage.

2. ———: DIVERSION. One who permits a second party to divert a continuously flowing stream of water from its natural course and cast it upon his land cannot in turn cast it upon the land of a lower proprietor by means of a ditch which he has a prescriptive right to use for the purpose only of draining spring and flood waters naturally falling or flowing upon his land.

3. Appeal: INSTRUCTIONS: HARMLESS ERROR. This court will not reverse because of instructions which are erroneous, but not prejudicially so. *Held*, in this case, that the error of the trial court in instructing the jury, if any, was not prejudicial, and therefore not reversible error.

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

C. A. Magaw, Thomas F. Hamer and *Thomas W. Bockes*, for appellant.

E. H. Evans, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE and GOOD, JJ., REDICK and SHEPHERD, District Judges.

SHEPHERD, District Judge.

In the eighties the Union Pacific Railroad Company dug a ditch south of its track, extending from its borrow pits to a natural waterway which meandered through plaintiff's land or leasehold. This ditch passed the plaintiff's leasehold on the west and was constructed to take care of spring and storm water coming down on the south side of the track. There seems to be no doubt that the company acquired a prescriptive right to have and maintain it for that purpose. Nor did it damage the plaintiff or bring any protest from him so long as it was maintained for that purpose; for the spring water was comparatively little in quantity, and the storm water came down in the spring time and did not interfere with plaintiff's use of his land for raising and making hay. And, as a matter of fact, up to 1914 the ditch steadily filled up, partially with growing trees and partially with earth and rubbish.

On the other or north side of the company's tracks were the Pawnee springs, flowing a great deal of water the year around, which water naturally went to the east in a swale or draw to a point some distance past the land of the plaintiff. But in 1907, or thereabout, certain interested persons on that side who wished to get rid of such water constructed

a waterway, called the "Bull ditch," leading this spring water out of its natural course to a culvert under the company's track some 700 feet west of the company's ditch, above described. Passing through said culvert, the body of this north-side water went east in the borrow pits along the south side of the track. This brought a considerable continuously flowing body of water to the lip of the said company ditch, but, because it had filled up, as aforesaid, the water flowed on a mile to the east and plagued the little town of Maxwell. The town protested, and the company in 1914 cleaned out and enlarged said company ditch, whereby the water from the Pawnee springs no longer vexed the town, but, entering the mouth of said ditch and flowing thence to plaintiff's leasehold, was discharged upon the latter's hay lands, to their great damage.

This was the basis of plaintiff's suit. Appropriate pleadings were filed in the district court, and upon trial plaintiff recovered a judgment against the defendant for $583.62.

Three assignments of error are presented in the brief of the appellant: First, that the evidence was not sufficient to sustain the judgment; second, that the court erred in giving its fifth instruction; and, third, that the verdict and judgment are contrary to the instructions of the court.

Upon examination of the briefs and record, it becomes apparent that the case turns upon the question of law involved in the giving of said instruction five in conjunction with the instruction following—instruction six. The latter is as follows:

"You are instructed that the law does not make it the duty of the defendant to do anything with such water as may have been unlawfully diverted upon its right of way by some other persons, from the so-called 'Bull ditch.' The defendant may allow such water to flow as it would flow if defendant did nothing. The defendant also had the right to maintain the ditch along the west side of plaintiff's premises, it having been there for such a period of time as to give the defendant a right by prescription to maintain the same and having been erected long prior to the so-called

'Bull ditch.' If you believe from the evidence that the erection of the so-called 'Bull ditch' by third persons was the proximate cause of the damage to the plaintiff's crops, rather than an enlargement of the ditch along the west side of plaintiff's premises by the defendant, then you will find for the defendant. The defendant had the right to clean out and maintain said ditch along the west side of plaintiff's premises."

The former, so far as pertinent to the question, reads:

" That defendant, by and on account of cleaning out and enlarging the ditch which flows along the west side of plaintiff's leased premises, so increased the flow of water in said ditch along the west side of plaintiff's premises, that the leasehold and crops of the plaintiff were damaged to an extent greater than they would have been damaged had not such increased flow been brought about by said cleaning and enlarging."

The complaint of the defendant company, appellant in this court, is that the instruction is prejudicially erroneous, in that it charges the defendant with the consequences of cleaning out the ditch, though by instruction six the jury were told that it was lawful for it to do so; in other words, in that it in substance charges as unlawful what was said to be lawful in the next instruction.

This would seem to be true at first blush. But it is to be remembered that this is not a case of fighting surface water, as many of the cases cited by the defendant are. In such cases the landowner may repel the enemy even to the damage of his neighbor, if the means employed by him be not negligent. But in the case at bar the defendant permitted the north-side owners to divert a continuously running stream from a swale, wherein it was naturally flowing past the plaintiff's leasehold on the north side of the track, to its borrow pits on the south side. And then it proceeded to cast such diverted water upon the plaintiff's land by opening and enlarging the ditch in controversy. The railroad company was thus guilty of an unlawful act for which it is not to be excused because the north-side owners were first guilty of

an act equally unlawful. Except in the exercise of the power of eminent domain, water flowing in a well-defined water-course, whether swale or creek, in its primitive condition, may not be lawfully diverted to the lands of an adjoining proprietor where it was not wont to run according to natural drainage. *Kane v. Bowden*, 85 Neb. 347. This is a case very much in point. The owner dug a ditch and turned water upon his neighbor, and the latter dug another, casting such water upon the land of the plaintiff. The court said, in substance, that the fact that the constructor of the first ditch was unlawfully diverting water to the defendant's land would not justify him in deflecting said water to plaintiff's land. And it cited *Roe v. Howard County*, 75 Neb. 448, 456, in which the rule was announced as follows: "The rule relating to gathering of surface water in a ditch and discharging it in a volume on the lands of another has been well settled in this state. While one may fight surface water and protect his premises against it by the use of reasonable means, he cannot collect it in a large body and flow it onto the land of a lower proprietor to his injury."

The defendant claims to have had a prescriptive right to open and enlarge its ditch, or at least to clean the same out. It may have had such a right for the purpose of caring for spring and flood waters coming down on the south side of the railroad track; but not for the purpose of caring for a stream of water unlawfully diverted from its natural course on the north side and unlawfully cast upon the defendant. A right by prescription attaches only to the use originally enjoyed, and does not extend to a use of different character, or to one of the same character requiring greater room. "A prescriptive right is not enlarged by an enlarged use during the period of prescription enjoyed by those who claim it, but is measured by the extent of the use at the commencement of the period." *Behnisch v Cedarburg Dairy Co.*, 180 Wis. 34. And, as the appellee logically argues, it is perfectly plain that an enlarged use, such as is contended for in the instant case, stands in exactly the same legal status as an attempted user for a definite and distinct purpose, be-

cause a certain use may not be an annoyance, but any enlargement may be such in proportion to the enlargement.

The contention of the defendant is that it was incumbent upon the plaintiff, in order that a recovery might be had upon the petition, to prove the particular damage resulting from the enlargement. There is no question that the ditch was not only opened, but considerably enlarged. In effect this is answered, we think, by what has been said in the preceding paragraphs. The defendant had a right to use the original ditch to carry away surface water. After a lapse of years it cleaned out and enlarged said ditch, not to make it a drain for surface waters, but to make it a bed for a river. In a small degree this is exactly what was accomplished by the act of the defendant.

It appears from the evidence beyond dispute that before this was done plaintiff was able to make hay upon his land profitably and comfortably. Then he could go straight to town across his land. Afterward, much of his hay land was destroyed, and he had to go three miles around to town. There is no doubt in the mind of this court that the verdict was according to law, and that the evidence fully sustains the same.

It appears that the two instructions referred to are in part conflicting, and that the same may have been somewhat confusing to the jury. But the conflict and the confusion, if any, were certainly to the prejudice of the plaintiff, rather than to that of the defendant. There may have been error in the instructions in the form in which they were given, but, if there was, it was not prejudicial.

There being no prejudicial error in the record, we are of opinion that the judgment of the lower court should be affirmed, and it is so ordered.

AFFIRMED.

HELEN C. JOHNSON, V. STATE OF NEBRASKA.

FILED JANUARY 15, 1924. No. 23479.

1. **Criminal Law: MISDEMEANORS: TRIAL.** Persons jointly charged with the commission of a misdemeanor, as distinguished from a

felony, may be tried together in the same trial, in the discretion of the district court and upon its order.

2. ———: ———: COMPLAINT: TECHNICAL ERRORS. Errors in a misdemeanor complaint which are merely technical, but do not result in any disadvantage to the accused and do not lead to any miscarriage of justice, will be disregarded upon review in this court.

3. ———: INTOXICATING LIQUORS: PROOF. The existence of liquor and its intoxicating quality may be proved beyond reasonable doubt, though not seen, through sense of smell by experts, coupled with further circumstantial evidence and an admission on the part of the accused respecting bottles said to have contained such liquor, that said bottles had been broken because she did not know what was in them and did not want to take any chances.

ERROR to the district court for Adams county: WILLIAM A. DILWORTH, JUDGE. *Affirmed as modified.*

J. E. Willits, for plaintiff in error.

O. S. Spillman, Attorney General, Richard F. Stout and *Herbert W. Baird, contra.*

Heard before ORRISSEY, C. J., ROSE and GOOD, JJ., REDICK and SHEPHERD, District Judges.

SHEPHERD, District Judge.

The plaintiff in error, Helen C. Johnson, and her husband were charged in a first count with having and keeping intoxicating liquor for beverage purposes, and in a second count with having and keeping intoxicating liquor for sale. The husband was found not guilty of either charge, but the jury convicted the plaintiff in error on the first count, that is to say, on the count charging her with having and keeping such liquor for beverage purposes.

The evidence of the state was to the effect that the deputy sheriff, the chief of police and a patrolman went to the house of the plaintiff in error with a search warrant to look for liquor; that, meeting them at the kitchen door, she at first refused to let them in, telling them that she was giving the children a bath and that they would have to wait a minute;

that thereupon she hurried back into the kitchen, and a crash of breaking bottles sounded so loudly as to be plainly audible both at the back and front of the house; that immediately afterward she told them that they could come in and search all they wanted to; that upon entering they found her standing at the sink with her hand bleeding from broken glass, the room redolent with the fumes of alcohol, and the sink and broken bottles in it smelling strongly of intoxicating liquor. The patrolman, who had slipped around to the front during the parley in the rear, testified that he found the front door locked, and that, peering through a window and under its curtains, he saw the plaintiff in error snatch something from what he took to be a kitchen cabinet, and then heard the crash of breaking glass. He further testified that two unbroken bottles were found in the kitchen, which smelled of alcohol. The chief of police and the deputy sheriff testified that they had conducted many raids for the discovery of intoxicating liquor and were acquainted with the odor of such liquor, and one or both of them said that the contents of said broken bottles smelled like intoxicating liquor or hootch—the home-made stuff. They concluded that such was the case.

On defense the plaintiff in error swore that she was dressing a child after having bathed it, when the knock of the officers came at the back door; that she told them to wait till the babies were dressed—"told him just a minute and I would let him in the front door;" that she started to go to the front door, and as she passed through the kitchen to get there she accidentally hit a drain-board upon which a couple of bottles were standing and knocked them into the sink; that there was nothing in the bottles, and no intoxicating liquor in the house; that she leaned down to pick up glass from the floor and cut her finger; that the broken bottles had possibly been used to carry coffee for lunches; that (in substance) she could not tell where the two unbroken bottles came from or what they were used for; that there were no alcohol fumes from the sink or in the house; and that she had never been arrested before in connection with

any liquor charges. It is to be noticed, however, that on cross-examination she told a somewhat different story of her movements after the coming of the officers, saying that she was returning to the bathroom when she jarred the bottles into the sink, rather than going to the front room to let the officers in by the front door.

A Mrs. Mason was there at the time, and testified that she had seen no liquor there, and had smelt no alcohol or anything of the kind. The husband of the accused said that the chief of police told him upon leaving the house that he had found no booze. On rebuttal the chief testified that plaintiff in error told him that the bottles were broken because she did not know what was in them and did not want to take any chances.

We see no reason why those who are familiar with intoxicating liquor may not identify hootch or home-made whiskey, under circumstances like those which obtain in this case, by smelling it. Nor do we see why such identification, in connection with the other significant facts testified to, should be insufficient to justify the jury in finding that the broken bottles contained intoxicating liquor. It was established in *Burrell v. State*, 25 Neb. 581, that no chemical analysis is necessary to entitle one who is ordinarily well qualified to judge of the character of alcoholic liquor, and who has the opportunity to observe the same, to testify as to its nature and intoxicating quality. Whiskey, whether home-made or otherwise, is an intoxicating liquor, and is so defined by section 3237, Comp. St. 1922. The full text of the section is as follows:

"The words 'intoxicating liquor' or 'intoxicating liquors' as used in this act, shall be construed to embrace all malt, fermented, vinous or spirituous liquors, wine, porter, beer, ale or any intoxicating drink, mixture or preparations of like nature, and all malt or brewed drinks, and all mixtures or preparations, whether patented or not, which will produce intoxication, and, in addition thereto, such liquors of a different character and not hereinbefore enumerated capable of use as a beverage containing over one-half of one

per centum of alcohol. Natural persons, unincorporated associations of persons, partnerships and corporations shall be deemed persons. All forms of the pronoun he shall be held to stand for persons as herein defined irrespective of gender.

" The term ' private dwelling-house ' shall mean a separate dwelling with a separate door for ingress and egress exclusive of outbuildings, and used exclusively as a private residence and not connected by doors or otherwise with any place of business except doctors,' dentists' and veterinary surgeons' offices and not connected with any factory, shop, warehouse, club, or other place or building. The term shall include a room or a suite of rooms actually used as a residence in an apartment house or block separated by walls from all other rooms in such building and without any door or other opening whereby a communication may be had with other rooms except doors entering into the main hallway."

By section 3247 of said statutes it is to be presumed that plaintiff in error had such liquor in her possession in violation of law. This presumption was entertained and held sufficient to sustain a conviction in *Yeoman v. State*, 81 Neb. 244, and in *Steinkuhler v. State*, 77 Neb. 331. The same cases hold that the possession of liquor in the dwelling of the accused raises a presumption of illegal intent. We therefore conclude that there was enough in the record to take the case to the jury, and to sustain the verdict returned.

The election required and made in the case of *Kanert v. State*, 92 Neb. 14, and the rule announced there furnish no guide in the case at bar. Because of the different facts in that case it is not applicable. There is no merit in defendant's contention that an election was made in this case to prosecute the defendant upon a different charge than that upon which she was found guilty. Similarly we hold that defendant's assignment that the first count of the complaint was fatally defective is without merit. It is true that the word " his " is used in a place where only " her " or " their " could possibly have been meant. No misconception on the part of the jury and no miscarriage of justice occurred by

reason of the error, and it would be making too much of refinement and too little of common sense to regard it as reversible error. Section 10186, Comp. St. 1922, fits this case, and is as follows: " No judgment shall be set aside * * * for error as to any matter of pleading or procedure, if the supreme court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred."

There was no error in the court's refusal to give the plaintiff in error and her husband separate trials. The provision upon which she relies applies only to trials for felonies, while the offense charged against her was a misdemeanor. Neither was there error on the part of the trial court in its instruction in which it said that the plea of not guilty casts upon the state the burden of proving all of the material allegations of the charge beyond a reasonable doubt. The argument is that this is tantamount to an instruction that the burden of proof shifts. It is, in fact, as we view it, tantamount to an instruction that the law presumes the innocence of the defendant and places the burden of proving his guilt upon the state from the very beginning of the case. The objection is super-critical.

We have no hesitation in saying that it was improper for the court to permit the county attorney to ask the officer whether he had ever been called upon to search the residence before, and whether he had ever received complaints regarding the residence of Mr. and Mrs. Johnson. But the defendant is not in a position to avail herself of it. Her own attorney, inquiring in that behalf, elicited from her testimony to the effect that she had never before been arrested upon a liquor charge. And, besides this, we do not think that the error could have misled the jury. On the contrary, we are convinced that no miscarriage of justice occurred and that the verdict of the jury was right.

The court gave a proper instruction in regard to the testimony of police officers and detectives, and there was no error in refusing to give instruction No. 1 requested by the defendant upon that point. The instruction in regard to

reasonable doubt (No. 7) is not approved, but it is not reversibly prejudicial. It is as follows.

"You are instructed that the defendant is presumed to be innocent until he has by sufficient proof been proved to be guilty, and it is the duty of the jury to give to the defendant the full benefit of this presumption and acquit him, unless the jury, from the evidence, believe that he has been proved guilty in manner and form as charged in the complaint beyond a reasonable doubt. A reasonable doubt is what the words imply—a doubt founded in reason; a doubt growing out of the evidence or want of evidence in the case; not a mere possibility of the defendant's innocence."

The jury were not called upon to justify the acquittal of the defendant, if it had seen fit to acquit her, as counsel complains. And since the instruction in its first sentence advises the jury that the state must produce sufficient proof to convict, and that they must indulge the presumption of defendant's innocence and acquit her unless such proof has been made, we do not believe that the jury could have been misled by the after part of the same. No miscarriage of justice resulted from the latter part of the instruction and the judgment will not be reversed because of it. Comp. St. 1922, sec. 10186. Th einstruction may also stand under *Goemann v. State* 94 Neb. 583, in which the late Justice Sedgwick said:

"The instruction of the court defining a reasonable doubt is complained of. In that instruction the court said that a reasonable doubt 'is an actual, substantial doubt arising either from the evidence or want of evidence in the case.' The instruction is quite comprehensive, and, when considered as a whole, we do not think the language complained of was misleading."

Both the plaintiff in error and her husband were prosecuted in the same case, and, of course, a portion of the costs of that case must be regarded as made by reason of the additional party. Some costs were made in the docketing and journalizing and serving of process incident to trying the husband of the plaintiff in error in the case in which she

was convicted. It cannot be said, therefore, that all of the costs incurred were necessary in the prosecution of the plaintiff in error. But by the sentence pronounced upon her she is required to pay the entire bill of costs. We think that her complaint in this particular is well founded and that she is entitled to relief. This can properly be afforded by a reduction of the sentence in this court, and we believe and hold that she should be required to pay only one-half of the costs of the prosecution and that the sentence should be reduced accordingly. No further error is to be found in the record, so far as we are able to determine by a careful investigation of the same, and, as modified, the judgment of the lower court will be affirmed.

AFFIRMED AS MODIFIED.

WALTER BENNETT V. STATE OF NEBRASKA.

FILED JANUARY 15, 1924. No. 23530.

1. **Rape.** The carnal knowledge of a female person under the age of 15 years is a rape, whether or not it be with her consent, provided the offender be more than 18 years old.
2. ———: CORROBORATIVE EVIDENCE. Corroborating evidence of the principal fact or ultimate act in a rape case may be circumstantial.
3. **Criminal Law:** HARMLESS ERROR. Error not prejudicially erroneous, whether in the giving of instructions or in the reception of evidence, is not sufficient to work a reversal.
4. **Rape.** SUFFICIENCY OF EVIDENCE. *Held*, in this case, that the evidence was ample to sustain the verdict and judgment in the district court.

ERROR to the district court for Douglas county: CARROLL O. STAUFFER, Judge. *Affirmed.*

Raymond T. Coffey, for plaintiff in error.

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

Heard before MORRISSEY, C. J., LETTON, ROSE, DAY and GOOD, JJ., SHEPHERD, DISTRICT JUDGE.

SHEPHERD, District Judge.

The charge was that the defendant, plaintiff in error in this court, was guilty of rape upon one Leona Roesnick, a female child of the age of 14 and previously chaste. A careful examination of the entire record convinces us that the evidence was sufficient to justify the jury in finding therefrom that the defendant enticed the girl to his house and there had illicit sexual intercourse with her. There was corroboration in the testimony of Leona's sister who witnessed the act, also in the fact that Leona disclosed what had transpired to her father a few days afterward, and otherwise. There was, however, no force used and the defendant was not guilty of forcible rape. The defendant was charged in due form, pleaded not guilty, was tried and convicted, and was sentenced to three years of imprisonment in the state penitentiary.

Defendant relies for reversal upon eight assignments of error, viz.: 1. Verdict contrary to law and to the evidence, and not sustained by sufficient evidence. 2. There was no sufficient corroboration of the evidence of the prosecutrix. 3. The court erred in overruling defendant's motion for a directed verdict at the close of the state's case, and again after all the evidence had been received. The court erred in giving its third, eighth, thirteenth, and fourteenth instructions.

The fact that the prosecuting witness went with the defendant to his home, and was there for several hours, is agreed to. It seems fairly certain that she was persuaded to go with him by the prospect of being taken to a picture show, or given a chance to earn some money by washing dishes for the defendant; and the latter insists that he did not misuse her in any way, but gave her and her little sister, who was with her at the time, something to eat, and paid her for some little housework which she did for him. But she testified that he laid her upon the bed, raised her skirts, opened her underclothing, and then proceeded to lie upon her and commit the sexual act. The little sister referred to testified that she saw him do this twice. The prosecutrix

said that he did it five times during the afternoon. Without pursuing the nauseating story further, it may be observed that the evidence bore details sufficient to prove penetration, though defendant insists that there was a total failure of proof in this respect. He further insists that nothing of the kind happened because he had hernial affliction which made it possible for him to have an erection, and destroyed all desire on his part for sexual intercourse. A physician, who had operated upon him after his arrest, considerably supported him in his statement, but another, called on the part of the state, swore that he had examined him, and that his condition was not such at all, giving very good reasons for his conclusion.

Further, it should be said that, while the defendant utterly denied it, the probation officer testified that he had admitted to her, upon being haled into juvenile court, that at the time of the described visit to his house he had sat upon the bed with the prosecuting witness and hugged and kissed her.

It is undisputed that the girl was 14, and the defendant in the neighborhood of 60. The evidence was ample to support the verdict, though a verdict of conviction on a charge of felony. The judgment and sentence of the lower court should therefore be affirmed, unless there was error in the admission of testimony, or unless there was no sufficient corroborating evidence, or unless the court erred in its instructions; for, by our law, the carnal knowledge of a female child under the age of 15 amounts to a rape, if the offender be of the age of 18 or upwards. *Witty v. State*, 105 Neb. 411; *Wood v. State*, 46 Neb. 58.

The brief of the plaintiff in error, defendant, refers to no instance of error complained of in the reception or rejection of evidence, and to nothing in the conduct of the case falling under the head of errors occurring upon trial. No reversal can be had upon this assignment.

There is hardly more to the assignment that the court erred in holding that there was sufficient corroboration. For, as is evident from what has been before stated, there

was corroboration of the evidence of the complaining witness to quite an unusual degree. It is not necessary, or possible, that the corroboration extend to the ultimate fact of the rape, the penetration. Even testimony showing opportunity is corroboration which in some cases has been held sufficient. In the case of *Kotouc v. State*, 104 Neb. 580, it was said that "corroborating evidence of the principal fact may be unnecessary. *Hammond v. State*, 39 Neb. 252. Corroboration may consist of circumstantial evidence." In the *Kotouc* case, *supra*, it was held, in the matter of the rape of an orphan 14 years old, that testimony of a search which her brothers made for her, while she was absent from her former home awaiting accouchement, was admissible to corroborate her evidence.

This naturally brings us to the assignment that the court was in error in giving his eighth instruction. Said instruction was on the express point last considered, and told the jury, in substance, that there must be some testimony corroborating the prosecuting witness in order to warrant a conviction, but that it was not essential that she should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. The instruction went on to state that, if she was corroborated as to material facts and circumstances tending to support her testimony, such corroboration would be sufficient. We can find no error in this instruction.

Another assignment is that the court erred in limiting the evidence of the commitment of the prosecuting witness to the Good Shepherd's Home to the question of her credibility. This appears in the thirteenth instruction. It is argued with some force that, inasmuch as the state produced the witness Dr. Marcha Young to testify that she had found Leona to have a ruptured hymen and much congestion of her private parts shortly after the latter had confessed to her father, and inasmuch as this was corroborative of Leona's testimony, the limitation referred to had the effect of giving conclusive weight to the testimony of said witness. But the reason for the limitation given by the court

in said instruction was that any moral delinquency, incorrigibility, or unchastity on the part of the prosecutrix would not affect the guilt of the defendant, if it were found by the jury that she was under the age of 15 years. Furthermore, the testimony of Dr. Young was only a small part of the corroborating evidence. And, in the third place, the mere fact that the girl had been previously sent to the Good Shepherd's Home would be no evidence in itself of her lack of chastity. And, finally, the court is of the opinion that it was incumbent upon the defendant, if he would avail himself of the point urged, to have offered an instruction bearing upon the situation. The court adopted the express language of all instructions offered by the defendant, though refusing them *pro forma*. For these reasons, we are of opinion that there is no merit in the contention of the defendant upon this assignment.

A further contention of the defendant is that the court committed reversible error in giving its instruction numbered 3, as follows:

"By the words 'reasonable doubt,' used in this charge, is meant an actual, substantial doubt of guilt arising in your minds from the evidence or want of evidence in the case. If, after a careful and impartial consideration of all the evidence, the jury have an abiding conviction of the guilt of the defendant, and are fully satisfied to a moral certainty of the truth of the charge made against him, then you are satisfied beyond a reasonable doubt." *Gammel v. State*, 101 Neb. 538.

But we think that the succeeding part of the instruction is enough to cure the error. For in that part the court puts it clearly that the jury can be satisfied, beyond a reasonable doubt, only if it has an abiding conviction of the guilt of the defendant, and is fully satisfied to a moral certainty of the truth of the charge made against him, after a careful and impartial consideration of all the evidence. The jury is thus told that, in order to be convinced beyond reasonable doubt, it must be convinced from the evidence, and not from any lack of evidence. We think that this

brings it within the rule announced by Judge Sedgwick in *Goemann v. State*, 94 Neb. 583. The language used by the late justice was as follows:

"The instruction of the court defining a reasonable doubt is complained of. In that instruction the court said that a reasonable doubt 'is an actual, substantial doubt arising either from the evidence or want of evidence in the case.' The instruction is quite comprehensive, and, when considered as a whole, we do not think the language complained of was misleading."

This case stands unreversed, and the reasoning seems applicable in the case at bar. And particularly should this view obtain, because the court in its second instruction told the jury that the plea of not guilty by the defendant cast upon the state the burden of establishing, by evidence, all of the material allegations and elements contained in said information. We do not think that the instruction misled the jury, and are convinced that no miscarriage of justice occurred by reason of the same, or by the verdict returned. Consequently, the judgment should not be set aside. Comp. St. 1922, sec. 10186.

No argument is made in the brief of the defendant as to instruction fourteen. Examining the same, no error is apparent.

The verdict and judgment seem to be right, and, no reversible error appearing in the record, the judgment of the district court is

AFFIRMED.

ROSE HILES ET AL., APPELLANTS, V. FRED G. BENTON, SHERIFF: HARRY J. HILES, INTERVENER, APPELLANT: CITY LOAN & INVESTMENT COMPANY, INTERVENER, APPELLEE.

FILED JANUARY 15, 1924. No. 23545.

Execution: LIFE ESTATE. A devise, quoted as follows: "All the rest and residue of my property * * * I give and bequeath to my son, Harry Hiles, * * * so long as he shall live, but

> without power or authority to sell, mortgage, or to in any manner incumber any part of the real estate that I leave and in which I give and bequeath to him a life use. That there may be no mistake or misunderstanding as to my intention and purpose, I here state that it is my purpose and intention that my son, Harry Hiles, shall have the use of my real estate during his life, without power and authority to sell, mortgage, or to in any manner alienate said use for any purpose"—is effectual to prevent the devisee from voluntarily conveying or incumbering any of the property therein mentioned, and is also effective to prevent the sale of the same upon execution duly issued upon a judgment obtained against him.

APPEAL from the district court for Dawson county: J. LEONARD TEWELL, JUDGE. *Reversed, with directions.*

Hainer, Craft, Edgerton & Frazier, and *T. M. Hewitt*, for appellants Rose Hiles, *et al.*

Beeler, Crosby & Baskins, for appellant Harry J. Hiles.

W. A. Stewart, Fred C. Foster, O. K. Perrin and *S. M. Kier*, for appellee.

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

SHEPHERD, DISTRICT JUDGE.

Judgment having been obtained against appellant Harry J. Hiles, an execution was duly issued thereon and levied on the life use of said Hiles in certain lands devised to him by his father. Injunction was brought to prevent sale on said execution; the contention of the plaintiffs being that under the will said interest was not subject to alienation, even by a creditor. The district court held that the use was subject to execution, and also that a contract by which Hiles had attempted to convey his interest, or a portion thereof, to his wife before the levy was made was in fraud of creditors and void.

The main contention is that the life interest, or life use, or life estate received by Hiles, regardless of what it may be called, is not subject to sale under execution, because such sale is inhibited by the provisions of the will

of Hiles, deceased; the appellants insisting that the will expressly provided against any alienation whatever, voluntary or involuntary. The particular provision of the will of the elder Hiles was as follows:

"All the rest and residue of my property * * * I give and bequeath to my son, Harry Hiles, * * * so long as he shall live, but without power or authority to sell, mortgage, or to in any manner incumber any part of the real estate that I leave and in which I give and bequeath to him a life use. That there may be no mistake or misunderstanding as to my intention and purpose, I here state that it is my purpose and intention that my son, Harry Hiles, shall have the use of my real estate during his life, without power and authority to sell, mortgage, or to in any manner alienate said use for any purpose."

There is no evidence in the record extrinsic of the will to show what was the intention of the testator, and none to assist the court in determining how the provision quoted should be construed. None was offered. There is nothing to show that the testator had any peculiar or particular understanding of the meaning of the words and phrases employed by him in the drafting of his will, and nothing to indicate that any one learned in the law had advised him that the language used would be given any special or settled construction. The provision under consideration must be interpreted by well-known rule from the text itself.

Regardless of the English rule, past or present, we hold in this case that a testator may convey or devise land for the benfit of his son in such wise that the latter may have all of the rents and profits of the same for life, and yet provide that it may neither be sold by his son, nor by his son's creditors, for debt or for any other purpose. We are not bound by the view that certain technical words in wills or deeds which import a fee will be held controlling so as to peremptorily discard whatever words of qualification may follow. Such may have been the implication of *Loosing v. Loosing*, 85 Neb. 66, but in *Kluge v. Kluge*, 103 Neb. 534, and *Grant v. Hover*, 103 Neb. 730, and other com-

paratively late cases, this court has plainly said, following the Nebraska statute, that it is the intention of the testator which will govern, and not the mere letter of his language. The court stands upon this ground, again approving the statement of Judge Sullivan in *Weller v. Noffsinger*, 57 Neb. 455:

"No rule of law is better settled, or more in accord with good sense, than that which requires the intention of the testator to be ascertained from a liberal interpretation and comprehensive view of all the provisions of the will. No particular words, no conventional forms of expression, are necessary to enable one to make an effective testamentary disposition of his property. The court, without much regard to canons of construction, will place itself in the position of the testator, ascertain his will, and, if lawful, enforce it."

Commenting further upon the point, which has been the subject of much discussion in the consultation room, Judge Redick submits the following, which seems to the writer particularly apropos:

"The rigid rule of the common law that, where an estate has been conveyed or devised directly to the grantee or devisee, all subsequent restrictions upon the nature or quality of the title, or upon the manner of the enjoyment of the estate, are void, has been relaxed by the provision of our statute that any instrument conveying or creating any interest in real estate shall be construed so as to effectuate the intention of the testator gathered from the language of the will, provided only that such construction is not violative of any rule of law. It occurs to me that the rule of law here spoken of does not include legal rules of construction in conflict with the very rule of construction sought to be established by the statute, for this would be a *felo de se;* and this consideration alone seems to me a sufficient reason for rejecting the common-law rule as applied to the instrument in question, which clearly evinces the intention of the testator to secure to his son, during life, the full beneficial use of the property in question. The logic of the opinion

of Justice Miller in the case of *Nichols v. Eaton*, 91 U. S. 716, seems unanswerable."

Did Hiles, Sr., intend, not only to prevent his son from voluntarily disposing of the estate granted to him, but also to place that estate beyond the reach of creditors by execution upon judgment? This inquiry is ably argued to a negative conclusion in appellee's brief. Let us consider the language that he employed in his devise to Hiles, Jr. The fundamental rule is that the words of a will are to be given their plain and ordinary meaning, because that is the way to get at the intention of the user of them. He knows nothing of particular legal meanings attaching to certain words, nothing at all of canons of construction. He gets his knowledge of words from the common word book of the people, the dictionary. The plain and ordinary meaning of the word "alienate" is, "To convey or transfer to another, as title, property, or right; to part voluntarily with the ownership of." This is the definition of Webster. Notice the word "voluntarily." It is not only possible, but probable, that this is what the testator meant when he wrote into his will the provision in question. This court should aid a testator or grantor in giving to his deed or will that construction which he obviously intended it to have. But it should not be disposed to extend the meaning of his language to the point of including all that some one else might have meant by it. It should not be disposed to extend said meaning so as to defeat the honest claim of a creditor, when it is not clear that such was the intention of the testator. In 2 C. J. 1035, alienation is defined as follows:

"The passing of a thing from another, or the separation of two things; a transfer by conveyance; a transfer of the title of property; the transfer of the property and possession of lands, tenements, or other things, from one person to another; the voluntary and complete transfer of property from one person to another; the act by which the title to an estate is voluntarily resigned by one person and accepted by another in the forms prescribed by law; the act by which

title to real property is voluntarily transferred by one person and accepte l by another; a mode of obtaining an estate by purchase, by which it is yielded up by one person and accepted by another. In its broadest sense, alienation comprises any method wherein estates or property are voluntarily resigned by one man and accepted by another; whether that be effected by sale, gift, marriage, settlement, devise, or other transmission of property by mutual consent of the parties. In other words, the term embraces every mode of passing real estate by the act of the parties, as distinguished from passing it by operation of law."

In *Butler v. Fitzgerald*, 43 Neb. 192, the court construed the word "aliened" as it is ordinarily understood, and as it was defined by Webster, and by the foregoing excerpt from Corpus Juris. It may be argued that the testator was at great pains to make his restriction against alienation all-inclusive, iterating and reiterating to that end. Iterating and reiterating what? Simply that his son shall not alienate. If alienate means to voluntarily dispose of, the repeating of the word, by saying, "in any manner alienate said use for any purpose," adds nothing except to include other forms of voluntary disposition than those already mentioned. It does not supply the element of involuntary alienation or disposition. Not only should we not read into Hiles' will something that he was unwilling to put there himself, but we should read nothing into it that he *might* have been unwilling to put there. He did not see fit to provide that the life estate willed to Hiles, Jr., should not be accessible to his son's creditors upon judgment obtained and execution issued, and, applying the rule with fidelity, the court cannot properly do so.

The foregoing argument is entirely persuasive to the writer, but the majority of the court is clearly of opinion that the intention of the testator was to provide against the alienation here attempted, as a species of voluntary alienation on the part of his son.

The prevailing view is that, conceding that the word alienation necessarily involves the idea of a voluntary act,

we are not confined to the question of whether or not the devisee executed a conveyance for the purpose of accomplishing the alienation, but may consider all of the things he did in bringing about the result, that is to say, his voluntary purchase of the airplane and the sale upon execution which was the final consequence of that voluntary act. Suppose the devisee purposely permitted the taxes to accumulate on the property, and the property to be sold to a third person, by whom he caused it to be conveyed to his appointee, would not this be considered a voluntary alienation, leaving out any consideration, of course, of the rights of the public? Is there any difference between that situation and the present one? The devisee voluntarily incurred a debt, which act on his part is the basis of the claim of appellees under the execution. The better holding, and the one which we adopt, is that the testator intended to protect the life estate in the hands of the devisee against any voluntary alienation by him, and that any alienation which has for its basis the voluntary act of the devisee is within the restriction.

The trial court found for the appellees solely upon the common-law rule first above discussed and disapproved. The judgment is reversed and the cause remanded to the district court for decree in accordance with this opinion.

REVERSED.

GOOD, J., dissents.

ROY ROHRER V. STATE OF NEBRASKA.

FILED FEBRUARY 13, 1924. NO. 23375.

1. **Criminal Law: INSTRUCTIONS.** When on the trial of one charged with a felony the evidence offered by the state is largely of a circumstantial character, and defendant tenders an instruction, and requests that it be given to the jury, dealing with the subject of circumstantial evidence, it is proper for the court to refuse to give the instruction where on its own motion it has charged the jury substantially as requested.

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

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

Jamieson, O'Sullivan & Southard and *Organ & Delitala*, for plaintiff in error.

O. S. Spillman, Attorney General and *Mason Wheeler, contra.*

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

MORRISSEY, C. J.

Defendant prosecutes error from a judgment of the district court for Douglas county, wherein he was convicted of the crime of stealing an automobile, and sentenced to a term of confinement in the state penitentiary.

The evidence offered by the state was largely, if not wholly, circumstantial in its nature. Defendant's counsel tendered an instruction, and asked that it be given the jury, defining the character of the evidence and its probative force. The trial court refused to give the instruction and the ruling thereon is urged as the first assignment of error. We find, however, that in the instructions given by the court on its own motion the substance of the requested instruction was given to the jury. The rule is well settled that:

"Where the court on its own motion charges the jury substantially as requested, it is not error to refuse to restate those principles of law." *Strong v. State*, 106 Neb. 339.

The second assignment questions the sufficiency of the evidence to sustain the conviction. We shall not undertake even to summarize it, but it has been examined and found abundantly sufficient.

The judgment is

AFFIRMED.

RICHARD C. HARRIS, APPELLEE, V. CENTRAL POWER COMPANY, APPELLANT.

FILED FEBRUARY 13, 1924. NO. 23679.

1. **Appeal:** LAW OF THE CASE. A question necessarily involved in the determination of a cause, presented by the record, and expressly decided, will be held to be the law of the case during its future course of procedure, unless it is found to be manifestly wrong.
2. ———: ———. The rule announced in our former opinion, *Harris v. Central Power Co.*, 109 Neb. 500, *held* to be the law of the case.
3. ———: INSTRUCTIONS: HARMLESS ERROR. "An instruction given by a court to the trial jury, which, if wrong, could not have been prejudicial to the party complaining, will not be examined upon a hearing on appeal." *Nichols & Shepard Co. v. Steinkraus*, 83 Neb. 1.

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

Pratt, Hamer & Beynon, for appellant.

Sinclair & McDermott, contra.

Heard before MORRISSEY, C. J., ROSE AND GOOD, JJ., REDICK AND SHEPHERD, DISTRICT JUDGES.

MORRISSEY, C. J.

This case is before us on the second appeal. The issues are fully set forth in *Harris v. Central Power* Co., 109 Neb. 500. On the first trial the court directed a verdict in favor of defendant. Plaintiff appealed and the judgment was reversed. On the second trial the court, excepting in one particular which will be noted later, submitted the cause to the jury under the rules announced in the former opinion. From a verdict and judgment in favor of plaintiff, defendant appeals.

In an able brief, appellant presents the law which he conceives to be applicable to the case and earnestly insists that we again review the opinion heretofore written and an-

nounce a different rule. This we are unable to do. It has long been the settled rule that a question necessarily involved in the determination of a cause, presented by the record, and expressly decided will be held to be the law of the case during its future course of procedure, unless it is found to be manifestly wrong. *First Nat. Bank v. Gibson*, 74 Neb. 236. We are satisfied with the rule announced in our former opinion and it is held to be the law of the case.

One other matter is urged for our consideration. It is claimed that instruction No. 15 is inconsistent with instruction No. 17, and appellant says these two instructions cannot be reconciled. Perhaps this is true, but instruction No. 17 is a correct statement of the law as announced in our former opinion. If either instruction is erroneous it is instruction No. 15, and, if prejudicial to either party, it is prejudicial to plaintiff, who is not complaining. "An instruction given by a court to the trial jury, which, if wrong, could not have been prejudicial to the party complaining, will not be examined upon a hearing on appeal." *Nichols & Shepard Co. v. Steinkraus*, 83 Neb. 1.

The record is found free from error and the judgment is

AFFIRMED.

PETERS TRUST COMPANY ET AL., RECEIVERS, APPELLANTS, V. R. D. KLEPPINGER, APPELLEE.

FILED FEBRUARY 13, 1924. No. 22662.

Contracts: VALIDITY. The contract of sale, the main provisions of which are set forth in the opinion, examined, and *held* not to be void for lack of mutuality.

APPEAL from the district court for Gage County: LEONARD W. COLBY, JUDGE. *Reversed.*

George W. Wertz and *E. O. Kretsinger*, for appellants.

F. A. Safranek and *F. A. Dutton, contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE and DAY, JJ., REDICK, District Judge.

LETTON, J.

On September 29, 1920, the Wells-Abbott-Nieman Company entered into a contract with the defendant to sell 200 48-pound sacks of flour at the rate of $12.60 a barrel. The contract was in writing, was signed by the plaintiff's salesman and by the defendant, subject to confirmation by the plaintiff. It was afterwards confirmed, and 25 48-pound sacks were shipped, and received by the defendant. He later refused to receive the remainder of the flour purchased. This action is for damages for breach of the contract.

After the contract had been introduced in evidence, plaintiff attempted to show by the salesman that he had a telephone conversation with defendant early in December, 1920, in the course of which conversation the defendant refused to give shipping directions for any more flour, and refused to receive any more flour under the contract. This evidence was excluded by the trial court. A letter from the defendant to the plaintiff, dated December 11, 1920, was received in evidence. This letter contains a direction not to ship, and a refusal to take, any more flour under the contract. All testimony offered by the plaintiff to establish the amount of its damages was rejected. At the conclusion of the evidence on behalf of plaintiff, defendant moved that the jury be instructed to return a verdict for the defendant. This motion was sustained, and a verdict and judgment rendered accordingly.

We are unable to determine from the record the ground upon which this instruction was based. The only matter in the bill of exceptions which may throw light upon or explain the view of the trial court is a remark made in ruling upon the admissibility of evidence. When an objection to a question, made by defendant, was sustained, the following colloquy took place. "Mr. Kretsinger: The answer doesn't plead lack of consideration." "The Court:

But from a careful examination of that contract there is no obligation to deliver a pound of flour—they can change it or put it off to suit themselves."

We have not been favored with a brief or an oral argument on the part of the appellee stating or explaining the theory of the trial court. In the brief of the appellant it is said that when the peremptory instruction was given it was stated by the trial judge that the contract was not a mutual contract, was unilateral, was unfair to the defendant, and was void. Is the contract void upon its face for want of mutuality? Its provisions are lengthy, and it is unnecessary to set them forth in full. It recites:

"Wells-Abbott-Nieman Company, Schuyler, sells, and R. D. Kleppinger, of Liberty, Nebraska, buys the following commodities, subject to the terms and conditions stated herein and printed on the back hereof, which terms and conditions are binding on both parties to this contract and cannot be modified except by written consent of both parties, and no verbal conditions, warrants or modifications are valid."

The description of the property sold and the terms of payment then follow, with other provisions as to weights and package differentials that are not essential to the disposition of this case. By its terms the plaintiff sells and the defendant buys a specified quantity of flour to be delivered f. o. b. Liberty, Nebraska, and plaintiff is directed to ship 25 sacks at once. It is provided:

"That the commodities covered by this contract shall be order shipped within sixty (60) days from the date of the contract, unless a shorter time is herein specified; that the buyer shall furnish to the seller, not less than fourteen (14) days prior to the expiration of the contract period, such specifications and instructions as will permit the seller to ship: Provided, however, that the seller, on contracts covering a period of more than fourteen (14) days, shall have not less than fourteen (14) days from receipt of complete shipping instructions within which to make shipment."

Other provisions as to delivery are also found in the con-

tract, but none inconsistent with those quoted. The contract possesses all the incidents and elements of a contract of sale of goods for future delivery. The seller sells and the buyer buys goods at a fixed price and definite terms of payment, and the goods are to be delivered at a certain place upon shipping directions to be given by the buyer. It is neither unilateral nor void, so far.

Is there lack of mutuality in the provisions with reference to damages for a breach of the contract? Following are its provisions in this respect:

"Buyer's Nonfulfillment of Contract. That upon failure one the part of the buyer to furnish shipping instructions when due, or upon his failure to perform any other obligation under this contract, the seller may, upon notice to the buyer by telegram or letter addressed to the buyer's last known place of business, exercise the following options (a), (b), or (c):

"(a) To cancel that portion of this contract on which there has been a default.

"(b) To terminate that portion of this contract on which there has been default, with an entry charge to be paid by the buyer of fifty cents (50c) per barrel on flour and one dollar ($1.00) per ton on feed; and, in addition, the buyer shall pay to the seller such loss, damage and expense as may arise through his failure to carry out the provisions of this contract, less any freight included in the contract price, which shall be the difference between the contract price and the seller's cost of replacement at date of cancelation. For the purpose of this contract the seller's cost of replacement shall be determined at the option of the seller by either of the following methods: (1) The seller's cost of manufacturing and preparing for shipment an equal quantity of the commodities covered by this contract. (2) The price at which the seller could purchase an equal quantity of the commodities covered by this contract.

"(c) Extend the shipping period for thirty (30) days, invoicing to the buyer as a carrying charge for fifteen cents (15c) per barrel on flour and thirty-five cents (35c) per ton

on feed for thirty (30) days or a fraction thereof; demand draft covering such invoice as provided herein may be made upon buyer when shipping instructions are due. Such extension of shipping period is not to be effective until buyer has honored draft against him for carrying charges herein mentioned. In the event that draft for carrying charges is not paid by the buyer on presentation, the seller shall then have the right to exercise clauses (a) or (b). At the end of any extended period seller shall again have the right to exercise clauses (a), (b), or (c).

"In the event that the buyer shall fail or refuse to pay for any shipment under this contract in accordance with the terms thereof, then the seller shall resell such shipment and the buyer shall pay all loss, damage and expense arising from such refusal, and the seller shall have the right of exercising options (a), (b), or (c) on the remaining portion of this contract.

"Seller's Nonfulfilment of Contract. That if the seller shall fail to make shipment in accordance with the terms and conditions of this contract, the buyer may, upon notice to the seller by telegram or letter addressed to the seller's home office, exercise either of the following options, (d), (e), or (f), with the understanding and agreement that the seller shall not be responsible for failure to ship according to the terms and conditions of this contract, where such failure is caused by any fires, strikes, labor difficulties, failure of carriers to furnish facilities, or other acts of carriers or other causes beyond the control of seller: Provided, that when such failure does exist the seller shall perform this contract within a reasonable time, in any event, not to exceed thirty (30) days from the termination of cause or conditions resulting in seller's inability to perform.

"(d) To cancel that portion of this contract on which there has been default.

"(e) To terminate that portion of this contract on which there has been default, with an entry charge to be paid by the seller of fifty cents (50c) per barrel on flour and

one dollar ($1.00) per ton on feed, and, in adddition, the seller shall pay to the buyer only such loss as results from the difference between the contract price and the market value of the commodities covered by this contract on the date of default at point of sale: Provided, that should there be no established market value at point of sale on such date of default, then seller's cost of replacement on such date shall be deemed the market value.

"(f) Extend the shipping period for thirty (30) days, it being understood that, at the end of the extended shipping period, the buyer shall again have the right to exercise options (d), (e), or (f)."

Under these provisions the liquidated damages to be paid by the buyer or by the seller, as the case may be, in case of breach of the contract, are practically reciprocal, and as nearly equal as the differing circumstances in the case of a breach by one party or the other would warrant. There is no lack of mutuality in the contract in this respect.

The trial court sustained objections to nearly all the other evidence offered by the plaintiff to show a breach of the contract, and the amount of damages sustained by the seller on that account. Complaint is made of the exclusion of this evidence, as well as of the peremptory instruction. We are satisfied that the court erred in the exclusion of much of the offered evidence. It is apparent that the rulings upon the objections to evidence and the instruction to the jury were based upon a misapprehension of the terms of the contract. The only questions raised or decided here are those relating to the mutuality of the contract.

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

REVERSED.

CITIZENS STATE BANK, APPELLEE, V. STATE BANK OF OELRICHS, APPELLANT.

FILED FEBRUARY 13, 1924. No. 22664.

1. **Appeal:** ADMISSION OF EVIDENCE. Under the facts in this case,

it was not prejudicial error to admit in evidence as corroborating testimony an unsigned written memorandum made in pursuance of a conversation between the parties, more especially since the court instructed the jury, "that, if the understanding was that no agreement was to be binding until a contract in writing had been made out and signed, then the contract not having been signed, there would be no contract."

2. Contracts: PROOF. A promise may be proved either by express words, or by evidence of such facts and circumstances, together with the words used by the parties at the time, from which reasonable persons in conducting the ordinary affairs of business, but with special reference to the particular matter in hand, would be justified in inferring such a promise.

3. Evidence examined, and *held* to support the verdict.

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

E. F. Dougherty and *Corey & Sunderlin,* for appellant.

Crossman, Munger & Barton, contra.

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

LETTON, J.

The Citizens State Bank of Chadron brought this action against the State Bank of Oelrichs, a South Dakota bank, to recover for the expense of feeding and caring for certain cattle belonging to August T. Englebert, upon which the Oelrichs bank held a chattel mortgage. Three causes of action were set forth in the petition, but only one was submitted to the jury, which was, whether the feed and services were furnished under an express contract. Plaintiff recovered a judgment, and defendants appeal.

There is no dispute that the feed was furnished and that the reasonable value of the same was $2,570.30. A promise by the defendant to pay for it is denied.

The facts are that a partnership, Bailey Brothers & Englebert, and certain of the partners as individuals, owned several hundred head of cattle in a herd which were cared

for by the owners, near Oelrichs, South Dakota. Plaintiff had a mortgage for about $18,000 upon 496 head of these cattle, and also owned a number of them. August T. Englebert, one of the partners, owned individually 107 head. He was indebted to the Oelrichs bank, defendant, in a balance of over $5,000, upon a promissory note secured by a chattel mortgage on these 107 head. There being a scarcity of feed in the locality of Oelrichs, an arrangement was made between the Citizens State Bank and the owners of the cattle upon which this bank had a mortgage, whereby the cattle described in its mortgage, or what were left of them, were to be shipped from Smithwick, South Dakota, to Merriman, Nebraska, and the Citizens bank was to finance the feeding of the cattle until shipped and sold. The cattle were shipped to Merriman under this agreement. But when A. L. Johnson, president of the Citizens bank, went to Merriman to see the cattle, he found 81 head belonging to Englebert, on which plaintiff bank had no lien, and on which there was a mortgage to the defendant State Bank of Oelrichs. Plaintiff had no knowledge that these 81 head of cattle had been shipped to Merriman until about two weeks after they had arrived there. When this was ascertained, Johnson, for the plaintiff, telephoned to Mr. Bennett, the cashier of the Oelrichs bank, informing him of the fact, and asked him if the Oelrichs bank would pay its *pro rata* share of the feed bill. He said he would consult the president of the bank and advise him later. They arranged at that time that Bennett and he should go to Merriman to look over the cattle. The parties met at Merriman and talked to Englebert who was in charge of all the cattle. Bennett knew that 81 head of the cattle mortgaged to the Oelrichs bank were being fed and cared for at the expense of the plaintiff bank. There is a sharp conflict in the evidence as to what conversation occurred between the representatives of the two banks at that time and place, Johnson testifying that he told Bennett he would make out an agreement that the Oelrichs bank would pay its *pro rata* share of the feed, and send it to him for signature; that

Bennett said, "All right, send it along and he would look it over." Bennett testifies that he said he had no authority to agree to this without consulting Mr. DuMoulin, the president of the Oelrichs bank. Upon Johnson's return to Chadron, a written agreement was drawn up, providing in substance that the plaintiff should furnish the money for the feeding of the cattle, and that each of the respective owners of the cattle who were named in the agreement, and the Oelrichs bank, should pay his or its *pro rata* share of the expenses. This writing was sent to the Oelrichs bank, but was not signed nor returned. Mr. Johnson severed his connection with the plaintiff bank on January 1, 1920, Mr. Schwieger then becoming president. Schwieger testified that Mr. Bennett was in the Chadron bank some time after this, while the cattle were still at Merriman, and that he there unequivocally promised that the Oelrichs bank would pay its share of the feed bill. Bennett testified that in this conversation he said they would pay the feed bill if they could get a note from Englebert, and if the plaintiff bank would reconvey to Englebert a 160-acre tract of land in South Dakota upon which there was a mortgage of $28,000. As to this deed, Englebert testified that he had agreed with the plaintiff bank that it should pay the Oelrichs bank debt secured by mortgage on the 81 head, and that he should make a new note and mortgage to the Citizens bank, and also convey his interest in this land to it as additional security. This is denied by Johnson, who says that the deed was given as additional security on the debt to the plaintiff bank since a large number of cattle included in the mortgage which that bank held against the partnership had died or had disappeared. The 81 head were shipped back to South Dakota. After this there was a conference in the bank at Oelrichs between the respective owners of all the cattle that had been fed at Merriman, and the mortgagees (plaintiff bank and the Oelrichs bank), and the *pro rata* share of the expenses per head was ascertained. Mr. Schwieger and Mr. Birdsall, representing the plaintiff bank, both testified that Bennett again agreed specifically that

the Oelrichs bank should pay its *pro rata* share of the feed. This is again denied by Bennett. There is some corroboration of the testimony of Schwieger and Birdsall. The whole matter was submitted to a jury under an instruction which fairly states the issue as to whether there was an express promise to pay the *pro rata* share of the feed consumed by the 81 head upon which the Oelrichs bank had a mortgage. The jury found for the plaintiff.

Defendant insists that the verdict is not sustained by the evidence; but, although in sharp conflict in some respects, it is sufficient to support a verdict.

It is also assigned that the court erred in overruling a motion of defendant at the conclusion of plaintiff's testimony to dismiss the action and direct a verdict against the plaintiff. Defendant did not stand upon this motion, but elected, upon its being overruled, to introduce its evidence and submit the matter to the jury. This constituted a waiver of the right to complain of this ruling of the court. *Baker v. Racine-Sattley Co.*, 86 Neb. 227.

The court permitted the written memorandum which had been submitted to but not signed by the defendant to be admitted in evidence, and this is assigned as error. In this connection the court instructed the jury:

"You are instructed that, if the understanding was that no agreement was to be binding until a contract in writing had been made out and signed, then the contract not having been signed, there would be no contract. But if the terms of the contract were all agreed upon at Merriman, and a binding promise made by defendant bank to pay its *pro rata* of the expense and feed, then the fact, if shown, that it was intended that such contract should be expressed in writing and signed, and which was not done, would not prevent the oral contract from taking effect."

This memorandum corroborated in some respects the testimony with respect to the nature and character of the transaction between the parties and tended to show the nature of the parol contract. We cannot see how its admis-

sion was prejudicial. *Carstens v. McDonald*, 38 Neb. 858; 22 C. J. 896, sec. 1093; *Hazer v. Streich*, 92 Wis. 505.

Complaint is made of a number of the instructions as being confusing and inconsistent. Separated from the context, perhaps one or two of the instructions are subject to this criticism, but instructions are not to be considered in this manner. When the charge is taken as a whole it fairly and clearly submitted the issues in the case to the jury.

Complaint is made that instruction No. 6 tells the jury that a promise may be proved either "by evidence of an express promise made by the defendant to make such payment, or by evidence of such facts and circumstances, together with the words used by the parties at the time, from which reasonable persons in conducting the ordinary affairs of business, but with special reference to the particular matter in hand, would be justified in inferring such a promise." And it is said that this was decidedly improper. Mr. Williston says:

"Though assent must be expressed in order to be legally effective, it need not be expressed in words. In the early law of assumpsit stress was laid on the necessity of a promise in terms, but the modern law rightly construes both acts and words as having the meaning which a reasonable person present would put upon them in view of the surrounding circumstances. Even where words are used 'a contract includes not only what the parties said, but also what is necessarily to be implied from what they said.' And it may be said broadly that any conduct of one party, from which the other may reasonably draw the inference of a promise, is effective in law as such." 1 Williston, Contracts, sec. 22a.

Many cases may be found to support this proposition in addition to the cases cited in the text.

The supreme court of Wisconsin has said: "The question of whether there was an implied contract was not, necessarily, solvable from the undisputed evidence, but from the preponderating evidentiary inferences from facts established directly and circumstantially, there being conflict-

ing inferences even as to many of the minor facts." *Wojahn v. National Union Bank*, 144 Wis. 646, 664.

Complaint is made that the court refused to give instruction No. 3, that there could be no recovery unless there was an express contract upon the part of the Oelrichs bank to pay a share of the feed and expense bills, and that, as it was not the owner of the cattle, the fact that it knew the Citizens State Bank of Chadron was spending money upon the cattle and permitted it to expend money for the care of the cattle does not make it liable for any part of such expense. By instruction No. 7 the jury were told that the mere fact that the Oelrichs bank had a mortgage upon a portion of the cattle and knew that they were being fed at the expense of the plaintiff would not raise any implied promise to pay the plaintiff. And the necessity of proof by a fair preponderance of the evidence that a contract had been made by it to pay for the feed before defendant bank would be liable was embodied elsewhere in the charge. The real question in the case is one of fact and the jury determined it upon conflicting evidence. We see no reason to interfere with the verdict.

AFFIRMED.

MARY A. MYERS, APPELLEE, V. LOWRY C. GUERNSEY ET AL., APPELLANTS.

FILED FEBRUARY 13, 1924. No. 22690.

Licenses: MOTOR VEHICLES: BONDS: LIABILITY. Where, as a condition precedent to the issuance of a taxicab driver's license, a bond for the benefit of any person injured by the wilful misconduct of the licensee is required by a city, a person so injured may bring an action on the bond, joining both principal and surety as defendant.

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

T. S. Allen and *Burr, Brown & Dibbble*, for appellants.

McCarty & Hager, contra.

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

LETTON, J.

Plaintiff, a girl about 16 years of age, was riding, as the guest of the owner, in a Ford sedan automobile, proceeding eastward on D street, in the city of Lincoln. At the intersection of D street with Sixteenth street, the sedan was struck, about the middle of the car, by a taxicab driven by the defendant Guernsey. Plaintiff sustained personal injuries requiring medical and hospital care. This action was brought against Guernsey as principal and against the Ætna Casualty & Surety Company as surety to recover damages for such injuries.

Under an ordinance of the city, the defendants executed a bond with the city of Lincoln as obligee, "and for the benefit of any person or persons injured or damaged by the fraud or wilful misconduct of said above named principal." The bond is conditioned that Guernsey shall observe all the statutes of the state and ordinances of the city pertaining to the business of taxicab driving, shall pay all damages which may be adjudged against him under the ordinances of the city, shall indemnify and save the city harmless from damage or injury on account of neglect or default of the principal, "and shall indemnify and save harmless any person injured or damaged by the fraud or wilful misconduct of said principal." Plaintiff recovered judgment, and the surety company appeals.

It is unnecessary to review the evidence. While there is a sharp conflict as to the facts, it is sufficient to sustain the verdict.

The principal contentions of the surety company are that the bond is an indemnity bond, that therefore it cannot be joined with Guernsey in the action, that judgment must first have been obtained against him and execution returned unsatisfied before an action on the bond against the surety will lie. The bond was given for the purpose of obtaining a license for the principal to operate a taxicab. The furnishing of the bond was a condition precedent to the granting of the license. It was recognized by the authorities of the

city that careless and reckless persons, if permitted to drive taxicabs, are apt to become sources of great danger to others using the streets. The natural consequence of wilful misconduct on the part of a driver would be injury and damage to persons or property. The bond was required in order to insure the payment of any such damages suffered. The surety knew the conditions and that the license would not issue without the bond. It became a party to the transaction for its own pecuniary benefit. When contracts are made between two persons for the benefit of a third, the person for whose benefit the contract is made may sue directly upon the instrument. The obligation here is a direct obligation to the person injured as well as to the city. The principle as to joinder is the same as applies to an action against a contractor and the sureties upon his bond, in cases where he has failed to pay debts incurred by him in the construction of a building, and the bond requires him to pay all debts and obligations incurred for labor and material in such construction; and as applies to bonds given to secure liquor licenses. *Sample & Son v. Hale*, 34 Neb. 220; *Lyman v. City of Lincoln*, 38 Neb. 794; *Doll v. Crume*, 41 Neb. 655; *Hauth v. Sambo*, 100 Neb. 160. We see no reason why the principal defendant and the surety cannot be joined in the action. To hold otherwise would merely postpone the day of reckoning and hinder and delay the injured person in the satisfaction of her just demands.

It is said that such a construction would make the surety company a principal, and not a surety; but since there can be no liability upon the part of the surety unless and until the principal has been adjudged to be guilty, and since, if application had been made to the court before the entry of judgment on the verdict, the judgment might have provided that the property of the principal should be exhausted before the property of the surety should be seized, there is no force in this contention. *Drexel v. Pusey*, 57 Neb. 30.

We find no reversible error in the other points complained of.

AFFIRMED.

ROBERT FRANCIS V. STATE OF NEBRASKA

FILED FEBRUARY 13, 1924. No. 23683.

1. **Larceny: THEFT OF AUTOMOBILE: ACCESSORIES.** Prior to the taking effect of chapter 89, Laws 1923, a party charged with the theft of an automobile could not be convicted upon evidence tending to show that he was merely an accessory.
2. **Criminal Law: ACCESSORIES.** Under the common law, those who are not present or so near as to be able to afford aid and assistance when an offense is committed are ordinarily not principals but merely accessories.
3. ———: **PRINCIPALS.** Since chapter 89, Laws 1923, went into effect, one who aids, abets or procures another to commit any offense may be prosecuted and punished as if he were a principal.

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

Albert & Wagner and *Sorensen & Bollen,* for plaintiff in error.

O. S. Spillman, Attorney General, and *Harry Silverman, contra.*

Heard before LETTON, ROSE and DEAN, JJ., ELDRED and REDICK, District Judges.

LETTON, J.

Plaintiff in error was convicted of larceny of a Ford sedan automobile. The car had been placed by the owner in his garage, in the village of Platte Center, on the night of December 30, 1922. The door of the garage was locked. The next morning the car was missing. He next saw it in the garage of one Garrett, at Creston, Iowa, where he took possession of it and drove it home.

The evidence tends to prove that the car was stolen by a brother of the accused, and that accused knew of the larceny and by prearrangement went to Creston, Iowa, where the car had been taken by his brother, and where he aided his brother in selling the stolen car. There is no evidence that he was at or near the garage on the night that the car

was stolen or that he assisted in any way to steal the car, though it indicates that after the car was stolen he became aware of that fact. The brothers were together before the car was stolen and afterwards, but the accused never had the car under his control or in his possession until after it had been taken to Iowa.

Three contentions are made by defendant. First, that there is no proof that the owner of the stolen car did not consent to the taking of the property, and that this is indispensable to a conviction. The owner testified that he placed the car in his garage and locked the door. The next morning he found the door open and the car gone, and he immediately took steps to ascertain its whereabouts and procure its return. Under these circumstances it would strain our credulity to believe that the owner consented to having the car taken. The circumstantial evidence is sufficient to establish nonconsent. *Nixon v. State*, 89 Neb. 109. It is next argued that, even if defendant did aid in selling the stolen car in Iowa, he could not be convicted as a principal but only as an accessory, which is another and substantive offense. Unless the defendant took some active part in the theft, as the statute was at the time of the theft, he could not be convicted of larceny.

Under the rule of the common law as to the crime of larceny which it is to be regretted was in force in this state at the time the car was stolen and until chapter 89, Laws 1923, took effect, since defendant was neither actually nor constructively present at the time of the commission of the offense, he was not guilty of larceny. In *Skidmore v. State*, 80 Neb. 698, the present writer, sixteen years ago, called attention to the folly of the old technical rule and said: "The legislature of this state has seen fit to abide by the ancient and technical distinctions"—and suggested a reform which has just been accomplished. By the act referred to, one who aids, abets or procures another to commit any offense may be prosecuted and punished as if he were a principal. Defendant was fortunate that the amendment was not in force until some months after the offense was committed,

since the evidence is ample to have convicted the accused of the offense of being accessory to the crime of larceny. He was not charged with this crime. He was indicted for one crime and convicted of another, which cannot be lawfully done. A fuller discussion may be found in *Skidmore v. State, supra,* and *Guignon v. State,* 101 Neb. 587.

REVERSED AND REMANDED.

PETER O'SHEA, APPELLEE, V. NORTH AMERICAN HOTEL COMPANY: AMERICAN SURETY COMPANY, APPELLANT.

FILED FEBRUARY 13, 1924. No. 23716.

1. Insurance: ATTORNEY'S FEES. Under sections 7810, 7811, Comp. St. 1922, in an action upon a policy of insurance of the character described therein, a district court, or an appellate court, upon appeal, when judgment is rendered against an insurance company, is authorized to allow the plaintiff and to tax as costs against such defendant a reasonable sum as an attorney's fee.
2. ———: ———. When, on appeal by the company, a judgment against an insurance company is wholly reversed, no attorney's fee may be allowed to the attorney for appellee for services in the supreme court.
3. ———: ———: POWER OF DISTRICT COURT. A district court is not authorized to make an allowance for attorney's fees in the supreme court to be taxed as costs.

APPEAL from the district court for Douglas county: ARTHUR C. WAKELEY, JUDGE. *Affirmed on condition.*

Montgomery, Hall & Young, for appellant.

Brogan, Ellick & Raymond, contra.

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

LETTON, J.

This is a controversy over the amount of an allowance of attorney's fees against defendant, the American Surety

Company, made to the attorneys for plaintiff. The facts and the issues involved in the main case are fully set forth in *O'Shea v. North American Hotel Co.*, 109 Neb. 317, to which reference is made.

The original petition was based upon the theory that plaintiff was entitled to recover from defendant a bonus of $5,000, which he had paid the hotel company, and the market value of three lots which had been donated to it, in consideration for building a hotel in Scottsbluff, which was not completed. The surety company set up a number of defenses not common to both defendants. At the first trial the defendants convinced the court that the theory as to the measure of damages, upon which the petition was framed, was incorrect, and that the recovery, if any, should be based upon loss of profits on the sale of real estate in the vicinity. Plaintiff amended the petition to conform to this ruling of the trial court. A number of motions and demurrers were filed and considered by the trial court. The case was tried upon the issues raised by the amended petition and answers thereto, and a large volume of evidence was produced. Judgment was rendered against both defendants. An appeal was taken to this court, and exhaustive briefs were filed. The judgment of the district court was reversed, the court holding, in substance, that the true measure of damages was the value of the lots given by the plaintiff to the hotel company, and the amount of the bonus, with interest. The record then did not show who was responsible for the change in theory. The cause was again tried in the district court and plaintiff recovered a judgment of $13,206.22 against each defendant. A motion for the allowance of attorney's fees to plaintiff's attorneys was made, and from an allowance of $3,406.22 as attorney's fees to plaintiff's attorneys this appeal has been taken.

Specific findings were made by the district court as to the value of the services, at different stages of the litigation. The first finding is that the value of the services up to the end of the partial trial, in 1920, was $500; that the services at the second trial were of the reasonable value of $1,000;

that the value of the services performed in the supreme court of Nebraska upon the appeal was $600; and that the value of the services from the date of the issuance of the mandate of the supreme court to the rendition of the final judgment and overruling of the motion for a new trial, was $1,306.22. It will be observed that the latter allowance is exactly 10 per cent. of the amount of the judgment. These estimates of value were based upon the testimony of two members of the firm of attorneys applying for the allowance, who valued the services at $6,000, and on the testimony of a member of the firm of attorneys who defended the case for the appellant, who testified that the reasonable value of the services was $1,000.

It is difficult to determine from the record just how far the services performed were necessary as against the surety company alone, disassociated with the defense made by the hotel company. During a part of the litigation the same counsel acted for both defendants, and there was a community of interest during the whole proceedings, since, in order to recover against the surety company, default and damages had to be proved against the hotel company, and a successful defense by the hotel company would relieve the surety company.

The allowance made in the district court for the services of counsel in this court must be disallowed. The supreme court alone has power to make an allowance for the value of services on appeal. Moreover, since the surety company succeeded in reversing the former judgment, there is no authority in the statute, sections 7810, 7811, Comp. St. 1922, for the allowance of attorney's fees in this court. *Chicago & N. W. R. Co. v. Nye-Schneider-Fowler Co.*, 260 U. S. 35. Deducting the $600 allowed for services in this court, the allowance made for services in the district court is $2,806.22. This is about 21 per cent. of the amount of the judgment.

Considering the large number of motions, demurrers and other pleadings filed, the vigorous defense made, the nature of the litigation, the importance of the questions presented, and also considering the fact that the trial court must be

considered to be more familiar with the standard of compensation for legal services in the forum in which the services were rendered, than this court, we do not feel justified in holding that the ruling of the trial court as to the value of services in the district court was excessive or unreasonable. Nor in the face of such a finding can we assent to the claim of appellee that we should consider the whole sum allowed as a proper recompense for services in the district court alone.

The judgment of the district court is reversed unless a remittitur of the sum of $600 as of the date of the final allowance be made within 20 days. If this is done, the judgment, as so modified will stand.

AFFIRMED ON CONDITION.

STATE, EX REL. CLARENCE A. DAVIS, ATTORNEY GENERAL, V. FARMERS STATE BANK OF HADAR, APPELLEE: NEBRASKA STATE BANK OF NORFOLK, APPELLANT.

FILED FEBRUARY 13, 1924. NO. 22629.

Banks and Banking: CONVERSION. The cashier of a bank cannot legally pay his individual note with other notes belonging to the bank, and the payee in such an individual note may be held liable for conversion if, with knowledge of the facts, he accepts payment in that manner.

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

R. J. Shurtleff, for appellant.

Charles H. Kelsey, and *Webb Rice, contra.*

Heard before LETTON, ROSE and DAY, JJ., ELDRED and REDICK, District Judges.

ROSE, J.

This is a controversy between B. N. Saunders, receiver of the Farmers State Bank of Hadar, an insolvent corporation, and the Nebraska State Bank of Norfolk, claimant.

In a proceeding by the state to wind up the affairs of the Farmers State Bank, insolvent, the Nebraska State Bank, claimant, made a demand for the payment of $14,995 out of the bank guaranty fund. The demand was based on 12 certificates of deposit, each issued by insolvent banks while transacting a commercial banking business and assigned by the payee to claimant.

In an answer to the petition of claimant, the receiver admitted the validity of the certificates of deposit and the assignments to claimant, but pleaded a set-off aggregating $5,145.50 and interest, based on claimant's conversion of three promissory notes belonging to insolvent. By formal reply claimant contested the set-off.

Upon a trial of the issues raised by the pleadings, the district court sustained the set-off and made it the basis for an order directing the receiver to apply in partial satisfaction of insolvent's indebtedness to claimant $5,375.68, including interest. The latter has appealed.

The validity of the set-off is the question presented for review. The conclusion of the district court is clearly right. While insolvent was conducting a commercial banking business, its cashier, acting for himself alone, borrowed from claimant $5,000 July 19, 1920, payable in 90 days, and evidenced the indebtedness by his individual note. He never paid this obligation. After the note matured repeated demands were made for payment, resulting in broken promises by the maker. The president of claimant, representing his bank, went to the bank of insolvent December 17, 1920, and received from its assistant cashier, in absence of the cashier, three promissory notes aggregating $5,100, which were subsequently held by claimant instead of the 5,000-dollar note. These three notes were the property of insolvent and were at the time known by claimant to be such. Afterward the amount due on the three notes was paid to claimant and the unpaid note for $5,000 fell into the hands of the receiver. The effect of the transactions was to pay the individual debt of the cashier with the property of the bank for which he acted, claimant having at the time actual

knowledge of all material facts. The data and book entries which the officers of both banks made tended to show closed transactions between the banks, but the controversy is to be determined according to the true import of what was done, with the knowledge of claimant that it was getting notes of the Farmers State Bank of Hadar, now insolvent, to pay the individual note of the latter's cashier. Of course, this could not legally be done. *Mendel v. Boyd*, 71 Neb. 657. In allowing the set-off the trial court directed the receiver to return to claimant the unpaid note for $5,000 and administered justice between the parties.

Ratification and estoppel are urged to defeat the set-off, but are not sustained by the evidence.

AFFIRMED.

JACOB WEBER, APPELLEE, V. ETHEL M. WILEY ET AL.: FARMERS BANK OF STAPLETON, APPELLANT.

FILED FEBRUARY 13, 1924. No. 22638.

1. Judicial Sales: BIDDING: RELIEF IN EQUITY. In refusing to require compliance with a bid at a judicial sale, a court of equity may consider changed conditions affecting values, if due to an unreasonable delay in confirmation, when caused by a suitor or the sheriff, but a mere delay of short duration, incident only to litigation, is not necessarily a ground for such equitable relief.
2. Appeal: REVIEW. A question not presented to the district court may be disregarded on appeal.

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

Hoagland & Carr, for appellant.

George N. Gibbs, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE and GOOD, JJ., REDICK and SHEPHERD, District Judges.

ROSE, J.

This is a suit to foreclose a mortgage for $4,066 on a section of land in Lincoln county. Jacob Weber, plaintiff,

was mortgagee. Benjamin F. Wiley and Ethel M. Wiley, his wife, were mortgagors. The former died February 17, 1919. Ethel M. Wiley, Claudia Wiley and Nola Wiley, minor children of mortgagors, and Ethel M. Wiley, administratrix of the estate of Benjamin F. Wiley, deceased, were sued as defendants. May 12, 1920, the district court rendered a decree of foreclosure subjecting the mortgaged land to the payment of the debt, $4,317.14, including interest. Under this decree the sheriff offered the land for sale March 28, 1921, accepted a bid of $4,701 by the Farmers Bank of Stapleton and received at the time from it a cash payment of $701. March 28, 1921, defendants, on the ground of inadequacy of price, objected to confirmation. The objections were submitted to the district court July 6, 1921. The sale not having been confirmed October 31, 1921, the bank then made an application for relief from its bid and for the return of its cash payment of $701. This application was overruled December 2, 1921, the sale confirmed and compliance with the bid ordered. The bank has appealed.

Did the district court err in requiring the bank to comply with its bid? The principal grounds upon which the bank applied for relief, though presented in detail at considerable length, may be summarized as follows: The bank had a claim against the estate of Benjamin F. Wiley, deceased, and to prevent a loss had arranged in advance for a resale of the mortgaged land at a price in excess of its bid of $4,701. The bid was made March 28, 1921, pursuant to a representation that the sale for purposes of confirmation would be considered by the district court May 16, 1921. Objections to confirmation were interposed by defendants. The issues were not determined until December 2, 1921. In the meantime the bank lost the rentals by delay. Conditions changed. The land depreciated in value until it was not worth the bid. The prospective purchaser upon a resale, on account of stringency in the money market and the fall in prices, could not procure a loan on the land and refused to buy it from the bank. The latter was in no wise responsible for these conditions or for the delay. Under the circumstances it was

inequitable to overrule the application of the bank for relief from its bid and for the return of its cash payment of $701.

These propositions, thus condensed, were ably presented in argument, but they do not seem to entitle the bank to the equitable relief sought. The district court found the issuable facts in favor of plaintiff and against the bank. There does not seem to be a sufficient reason for a different view of the merits of the controversy. In refusing to require compliance with a bid at a judicial sale, a court of equity, as argued by counsel, may consider changed conditions affecting values, if due to an unreasonable delay in confirmation, when caused by a suitor or the sheriff, but a mere delay of short duration, incident only to litigation, is not necessarily a ground for such equitable relief.

While the showing by the bank tended to prove that the value of the land, after confirmation had been delayed until December 2, 1921, was less than the amount of the bank's bid, the evidence on behalf of defendants in support of their objections to confirmation indicated that the purchase price at the sheriff's sale was inadequate. The evidence will not support a finding that the sheriff or a suitor represented to the bank, before or during the sale, that confirmation would be considered by the district court May 16, 1921. The filing of objections to the sheriff's sale on account of inadequacy of price was the exercise of a legal and equitable right. A reasonable delay incident only to an adjudication of the objections does not necessarily constitute a ground for relieving a bidder from his obligations as such. Besides, the bank itself concedes that it could have consummated its purchase as late as July, 1921. The objections to confirmation were submitted to the district court July 6, 1921, but not adjudicated until December 2, 1921. From all the circumstances it seems more logical to hold, therefore, that the delay which prevented the bank from reselling the land at a profit was incidental to litigation in Lincoln county under conditions not attributable to the sheriff or to any suitor. Considered from the standpoint of the entire record, the decree of the district court seems to be correct.

It was suggested in argument that the bank should be relieved from its bid on the ground that it was without authority to purchase the land. This was not a ground of relief pleaded in the application below, and for that reason is disregarded on appeal.

AFFIRMED.

SAM COOK V. STATE OF NEBRASKA

FILED FEBRUARY 13, 1924. No. 23520.

1. **Indictment and Information:** DUPLICITY. "Where a statute makes either of two or more distinct acts connected with the same general offense, and subject to the same measure and kind of punishment, indictable separately and as distinct crimes when committed by different persons, or at different times, they may, when committed by the same person at the same time, be coupled in one count as constituting one offense." *United States v. Fero*, 18 Fed. 901; *Hubert v. State*, 74 Neb. 226.
2. **Rape:** CONSENT. "Under an information charging rape by force upon a female child under the age of 18 years and not previously unchaste, a conviction may be had, even if the act was committed with the consent of the female child. *Hubert v. State*, 74 Neb. 226." *Baxter v. State*, 80 Neb. 840.
3. **Criminal Law:** HARMLESS ERRORS. In a criminal prosecution, mere errors in rulings on evidence or in giving or refusing instructions, if without prejudice to accused, are not grounds for reversing a conviction.

ERROR to the district court for Thurston county: GUY T. GRAVES, JUDGE. *Reversed, and remanded for resentence.*

A. R. Oleson and *Hiram Chase*, for plaintiff in error.

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

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

ROSE, J.

In a prosecution by the state in the district court for Thurston county, Sam Cook, defendant, was convicted of rape. For that felony he was sentenced to the penitentiary

for an indeterminate period not more than twenty nor less than three years. As plaintiff in error he presents for review the record of his conviction.

As a ground for reversal it is argued that the district court erred in submitting the case to the jury. Is the point well taken? Carnal knowledge of prosecutrix by defendant, forcibly and against her will, or carnal knowledge of her with her consent, he being over 18 years of age and she being under 18 years of age and not previously unchaste, is defined by statute as rape. Comp. St. 1922, sec. 9551. The district court permitted the jury to acquit defendant or to find him guilty, if the evidence showed beyond a reasonable doubt that he committed the carnal act in either way. The argument on behalf of defendant is directed to the proposition that there could be no lawful conviction in any event. His theory appears to be that the information charges carnal knowledge of prosecutrix without force, and that the evidence is insufficient to sustain a conviction, if violence is considered an element of the crime. It is also argued that error in the submitting of a dual issue resulted in a conviction by a general verdict of guilty, while an acquittal might have followed the submitting of a single issue. The position seems to be untenable. Force and carnal knowledge against the will of the prosecutrix were charged in an information containing a single count. It was also charged that prosecutrix was under 18 years of age and not previously unchaste, and that defendant was over 18 years of age. The information and evidence were sufficient to sustain a conviction under either provision of the criminal law. Only one act of carnal knowledge was charged or proved. The time, place and parties were the same, no matter how the carnal act was committed. In any event there could only be one conviction and one punishment. One trial should be sufficient, if defendant violated the law in either of the ways condemned by statute. The modern view of a prosecution like this has been adopted in the following language:

"Where a statute makes either of two or more distinct acts connected with the same general offense, and subject to

the same measure and kind of punishment, indictable separately and as distinct crimes when committed by different persons, or at different times, they may, when committed by the same person at the same time, be coupled in one count as constituting one offense." *United States v. Fero*, 18 Fed. 901; *Hubert v. State*, 74 Neb. 226; *Johnson v. State*, 88 Neb. 328.

In *Baxter v. State*, 80 Neb. 840, the rule is stated thus: "Under an information charging rape by force upon a female child under the age of 18 years and not previously unchaste, a conviction may be had, even if the act was committed with the consent of the female child. *Hubert v. State*, 74 Neb. 226."

In the information the words charging force may be disregarded as surplusage, if there is no proof of violence. *Baxter v. State*, 80 Neb. 840.

For the reasons given this assignment of error is overruled.

One of the assignments of error challenges a specific ruling on evidence. The question presented arose under the following circumstances: The state adduced proof that prosecutrix was not previously unchaste. She was herself a witness on the affirmative of that issue. Another young woman, who admitted her husband had procured a divorce from her, and that she was in custody of the sheriff for fighting with her brother, testified on behalf of defendant to incidents implying the unchastity of prosecutrix. The latter, testifying in rebuttal, was permitted to say that she knew the general reputation of the witness mentioned as to "immorality," and that it was bad. Proof of the immorality of a witness whose character is not an issuable fact is admitted by some courts to impeach his veracity, and is rejected by other courts to confine evidence of collateral facts within reasonable bounds, but it does not now seem necessary to determine which is the better rule, since there is no substantial reason for an inference that defendant was prejudiced by the ruling or the testimony of which he complains. The witness whose character was at-

tacked collaterally had testified to incidents implying the unchastity of prosecutrix. Other witnesses not so impeached testified to similar incidents, but the jury refused to infer unchastity therefrom. Besides, the witness whose character was collaterally assailed admitted facts casting suspicion on herself and, in addition, manifested ill will toward prosecutrix. The direct proof of defendant's guilt, if believed, was too convincing to suggest that the jury, in considering the case on its merits, were influenced, to the prejudice of defendant, by the collateral attack on the character of one of his witnesses. The error, if any, is not sufficient ground for a reversal of the conviction.

Complaint is made of other rulings on evidence and of rulings in giving and in refusing instructions, but an examination of these assignments fails to disclose any error entitling defendant to a new trial.

The district court did err, however, in pronouncing judgment under the indeterminate sentence law, which does not apply to punishment for rape. Comp. St. 1922, sec. 10248. The sentence should have been for a definite term, and for the error alone in imposing an indeterminate sentence, the judgment is reversed and the cause is remanded for a correct sentence on the verdict already rendered by the jury.

REVERSED, AND REMANDED FOR RESENTENCE.

JOHN T. MATHEWS V. STATE OF NEBRASKA.

FILED FEBRUARY 13, 1924. No. 23365.

1. **Criminal Law:** QUESTIONS FOR JURY. Disputed questions of fact, and of the credibility of witnesses as well, are for the jury.

2. ———: DYING DECLARATIONS. It is elementary that a dying declaration is admissible in homicide cases, and where such declaration has been received in evidence, under circumstances which make it proper to be so received, a subsequent statement may likewise be communicated to the jury without proof that it was made with knowledge of impending death, where it is so closely connected with the dying declaration, in point of time and substance, that it may properly be said to be a continuance thereof.

3. ———: ———. "Dying declarations, to be admissible in evidence, must be made under a sense of impending death. But it is unnecessary that the deceased should have stated at the time of making the same that he was about to die. It is sufficient if this state of mind appears from other testimony." *Fitzgerald v. State*, 11 Neb. 577.

4. ———: ———: INSTRUCTIONS. Defendant offered four separate instructions which in substance informed the jury, in differing forms of expression, but all of the same import, that dying declarations "are not entitled to the same weight as evidence as sworn statements made from the witness-stand in open court, for the reason that the defendant has had no opportunity to cross-examine the witness, and you have not had the opportunity of seeing and hearing her testify and of observing her conduct and demeanor on the witness-stand." *Held*, that it was not error to refuse the instructions.

5. ———: NEW TRIAL: NEWLY DISCOVERED EVIDENCE. "It is not error to overrule a motion for a new trial on the ground of newly discovered evidence, where it does not appear that such evidence, if introduced on a retrial, would probably change the result reached on the first trial." *Kerr v. State*, 63 Neb. 115.

6. Homicide: DYING DECLARATIONS. "In a prosecution for homicide in procuring an abortion under section 6 of the Criminal Code (now section 9547, Comp. St. 1922), dying declarations of the deceased may be admitted in evidence, under the same conditions and limitations as in prosecutions for murder or manslaughter." *Edwards v. State*, 79 Neb. 251.

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

Wharton & Waldron and *Magney & Magney*, for plaintiff in error.

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

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

DEAN, J.

Dr. John T. Mathews is a practicing physician residing at Omaha. An information was filed in Douglas county,

under section 9547, Comp. St. 1922, charging him with having produced an abortion upon the person of Loretta McDermott, an unmarried woman, on or about December 27, 1922, in Douglas county, from the effects of which she died January 4, 1923, at Omaha. Defendant was convicted and sentenced to serve a term of five years in the penitentiary. Alleging reversible error, he brings the record here to have it reviewed.

Miss McDermott was a school teacher, aged 24, residing with her father and four or five brothers and sisters on a ranch in Rock county, near Bassett. Late in December, 1922, she left her home for Fremont, where she visited a few days, and on Christmas afternoon she went to Omaha and visited at the home of a friend, Mrs. Nina Henry, who resided at 602 North Twenty-third street. Mrs. Henry testified that Miss McDermott left her home, to go down town, the morning of December 27, about 9 o'clock, and did not return until about 10 or 11 the morning of the 28th, when she came home in a taxicab; that she was then ill and had cramps and vomited and was up and down all that night; that her condition was such that on Friday, the 29th, at noon, she called Dr. William R. Strickland, of Omaha, by telephone to come to her home to give Miss McDermott professional attention.

Dr. Strickland, on the part of the state, testified that he went to Mrs. Nina Henry's residence Friday afternoon, December 29, in answer to Mrs. Henry's telephone call, and upon arrival he found Miss McDermott in bed and very ill; that he called the next morning, and finding her no better had her taken to the Lord Lister Hospital the same day; that he found she had been pregnant two or three months and had recently undergone an operation to effect a premature expulsion of fœtus, and that she had consequently aborted; that an abnormal condition of the kidneys was discovered which was induced by administering bichloride of mercury, that being a drug much used by abortionists. He also testified that when he discovered Miss McDermott's condition she gave a written statement at the hospital, in

respect of the operation, which was written down by him. The statement follows:

"Omaha, Neb., Dec. 31, 1922.

"I, Loretta McDermott, believing myself to be in a dying condition of my own free will make the following statement of my present condition. I was operated on by Dr. Mathews with offices in the Paxton Block, on Wednesday, Dec. 27 for the purpose of producing an abortion.

"LORETTA MCDERMOTT.

"Witnesses: { W. R. STRICKLAND, M. D.
MISS J. ROMINGER, Student Nurse."

Miss Rominger testified that before the statement was signed the patient told her she knew she was very ill and that she was going to die unless something could be done; that owing to her weakened condition she requested the doctor to write the statement, and when it was read to her by him she said it was all right and signed it in their presence.

To avoid needless repetition, it may be observed here that Dr. S. McClenaghan, Dr. S. E. Isaacson, and Dr. E. C. Henry, who is not related to the witness Mrs. Nina Henry, were called in consultation by Dr. Strickland, and they corroborated the material evidence submitted by him in respect of her condition, and in respect of the fact that an abortion had been committed and that the kidneys were seriously affected by the ingredients which were administered to bring it about. With perhaps one exception the physicians above named participated in the *post mortem* which took place the day after Miss McDermott died.

Joseph W. Fleming, a real estate dealer, residing at 3562 Woolworth Avenue, Omaha, formerly lived in the vicinity of the McDermotts' Rock county home and had been acquainted with the family 25 years. January 3, which was the day before she died, Mr. Fleming accompanied Loretta's father to the hospital and she talked with him there about 20 minutes in the presence of a nurse. He testified that a priest had been there and had just left. He further testified:

"Q. And did you have any conversation with her then about her condition? A. I did. Q. Just tell the jury what that conversation was. A. Well, I asked her father to leave the room, Pat McDermott, and then I went over and sat down on the bedside and took her by the hand; she rather put her hand out to me, and she said, 'Joe, I am going to die,' and I said, 'Well, Loretta, if that is God's will,' I said, 'If there is anything—is there anything that I can do for you, or anything that you want to tell me?' * * * Then she said to me, 'Joe, I will tell you it all, but don't tell Dad, for God's sake don't tell Dad.' * * * Then I said, 'Who sent you here?' And she said, 'A friend,' but would not tell me their name. And I says, 'Who was your doctor?' And she says, 'Doctor Mathews, in the Paxton Block.' I says, 'Where did you meet him?' And she says, 'I met him at his office,' And I says, 'Where did you go?' She says, 'I went to 2602 Cuming street.' I says, 'Did he go with you?' And she says, 'No, I went alone and he came later, * * * he did it alone and he used instruments.' * * * I says, 'Who paid for the operation?' She says, 'I paid $25 to Doctor Mathews and I gave him my check for the balance.' "

The next morning about 9 o'clock Miss McDermott died at the hospital.

Dr. Henry was called by the state. He testified, *inter alia*:

"Q. Now, Doctor, what would you say was the cause of death? A. I thought that some poison had been introduced into the womb that she had absorbed that caused her death. Q. Could you tell from your examination whether or not this girl had been pregnant? A. Well, she had all the earmarks of a pregnancy. * * * Q. Did you ever talk to her about how she got in that condition, what had happened to her? A. Yes. Q. About when was that? A. I cannot give you that date; Tuesday or Wednesday, I think. Q. Tuesday or Wednesday? A. The first day or so I didn't talk to her about her condition at all. Q. Just tell the jury what she said to you about

how she got in that condition Tuesday or Wednesday. A. We were trying to find out what this poison could have been, so she told us she had been taken to some house and an operation had been done on her, that she had not been given an anæsthetic and that the womb had been washed out after the operation. Q. Did she say who performed the abortion or the operation? A. She did. Q. Who did she say? A. Doctor Mathews."

A check written by Miss McDermott for $100 is in the record. Omitting a monogram and other immaterial matter the check reads:

"Basset, Neb., Dec. 27, 1922.

"State Bank of Bassett: Pay to the order of Cash $100.00, one hundred and no-100 dollars.

"LORETTA MCDERMOTT."

In respect of the check, Mrs. Henry testified that the day after Miss McDermott's death she called at Dr. Mathew's office and asked him if he was holding a check of Loretta McDermott; that he produced the check, which is in evidence, and she asked him to indorse it, but he refused, and for that reason she would not take it; that she went away and returned to his office alone about noon and handed him a $20 bill and five $1 bills; that defendant gave her the check and said: " 'Did you notice the check was for $100?' I told him no, I didn't, and I started back, and I says, 'Well, I can't take the check then.' He stood a minute, and he says, 'Well, I suppose the poor girl could not give any more money.' " It appears that she then took the check and went down stairs and handed it to Detective Ford, who was in waiting. Elsewhere in Mrs. Henry's evidence it appears that, when she paid the $25 to Dr. Mathews and obtained the check from him he had not yet found out that Miss McDermott died the day before.

The house at 2602 Cuming street, referred to by Mr. Fleming as being the place where Miss McDermott told him the operation was performed, is a large two-story residence occupied by a family named Sieverling.

A street-car conductor who lives across the street testi-

fied that he knew defendant and his car, which bore the monogram "J. T. M.," and that in the 18 months preceding the date of the operation he saw defendant at the Sieverling place "on the average of every other day" and sometimes twice a day; that the doctor would frequently leave his car and enter the Sieverling house "with a handbag" and remain an hour and a half or two hours; that he saw the car at the Sieverling residence when he returned from his run at 8:14 in the forenoon of December 28, and that it remained there about an hour and a half. His wife testified that, subsequent to April, 1921, she saw defendant at the Sieverling residence on an average of three or four times a week, and that each time he remained there about an hour and a half; that sometimes the doctor's car "would drive up there and Mrs. Sieverling and sometimes just a lady and sometimes a lady and a man would get out. * * * I have seen it come with girls and young couples." Referring to the fatality that attended the McDermott operation, she said that she had not seen Dr. Mathews or any other doctors at Mrs. Sieverling's house "since this came out in the newspapers."

The evidence of the conductor, and of his wife, in respect of the frequency of the visits of the defendant to the Sieverling house was corroborated by at least three witnesses, and their evidence will be reviewed briefly. A witness who lived four doors west testified that, on the morning of December 28, she saw a man who carried a doctor's case enter the Sieverling residence and remain there about an hour, and that he left about 10:30. Another who lives two doors east testified that she saw the defendant at Sieverling's "about two years and a half ago," and since that time "on an average of every other day" and sometimes twice a day; that she saw him there on the 28th or 29th of December between 9 and 10, but did not know which day; that his car had the monogram "J. T. M.;" that he sometimes left his car in the Sieverling garage and generally stayed about two hours; that she saw Mrs. Sieverling ride in defendant's car several times; that four or five times she had "seen

them with young ladies in the car," but that she never saw young ladies come in the doctor's car without him or without Mrs. Sieverling. The evidence of another near neighbor was that, soon after the Sieverlings moved into their house, the interior was changed so that a person could go up-stairs "without going through the down-stairs part of the house;" that he saw defendant at the Sieverling house probably a hundred times in the last two years, and that when defendant parked his car in the rear at the garage he entered the house by the back door most of the time.

Mrs. Sieverling, on the part of defendant, testified that she and her husband and her grandson lived at 2602 Cuming street about three years; that defendant was their family physician for about 20 years, and that he was not at her house December 27 or 28, 1922. She denied that she ever knew Loretta McDermott or that she was ever at her house. Her evidence in respect to the number of times defendant called at her home in the past two years was evasive. Once she said 10 times, and again that it might have been 20 times or 25 times, and that he never stayed over 30 minutes. Mr. Sieverling and several other persons, said to be roomers at the house, testified that Loretta McDermott was not there December 27 or 28, nor at any time, nor was any person there answering her description. There was also some corroborative evidence by two witnesses in respect to defendant's testimony concerning the alleged visit at his office of a person who was said to have called himself a "Dr. Hansen." It may be added that on almost every material fact defendant introduced evidence opposed to that introduced by the state. The conflict, however, is more apparent than real, and, in our judgment, the jury were justified in so considering it. Anyhow, it is elementary that disputed questions of fact, and of the credibility of witnesses as well, are for the jury.

The defendant testified in his own behalf and denied practically all of the material evidence submitted by the state. He denied that he ever saw or heard of Miss McDermott, and testified that he was the family physician of the Siever-

lings; that Mrs. Sieverling had a chronic stricture of the bowel which required him to go frequently to her home; that he had no record and could not tell how many times he gave her treatments in the last two years; that he did not remember prescribing for other persons at her residence, nor that he ever treated any serious cases there; that a few days before his arrest he "called incidentally at her request to stop and see her new piano."

In respect to the $100 check, defendant testified that it was handed to him Friday, December 29, about 3 o'clock at his office by a stranger who said he was Dr. Hansen of Ainsworth, Nebraska, and that he had a patient who came to Omaha and he had advised her if she did not get along well to see defendant; that the stranger said, "She has been a little unfortunate and I think she is all over it, but I advised her if she had any trouble to see you," and that he, defendant, was to do whatever was necessary; that he told Hansen he would not guarantee hospital expenses, and that Hansen said he would leave her check with him, and if she needed any attention the patient would take up the check and pay her expenses therefrom; that she might come and get the check or he, Hansen, might send for it; that he, defendant, called a man in his office as a witness and said: "This is Dr. Hansen and he wants to leave a check in my care, and I want it understood that I have no interest in this check, that it is simply left with me however until the party to whom it belongs may come for it, the party that signed her name, or the party that the doctor may send for it," that he called another man to come "where he could hear. I think he heard our conversation. It was open and above board." He testified that Hansen left and said he was going out of town. The witness gave a description which he said fitted Dr. Hansen and said he tried but failed to locate him.

In respect to Mrs. Henry's visit to his office and her testimony in regard to obtaining Miss McDermott's check, and the $25 in currency which she said she paid to defendant on the same date, defendant's version is that Mrs. Henry

came to his office, January 5, and told him she was a friend of the party who signed the check and that she was sent to get it from him; that upon her assurance that she was entitled to receive it he handed it to her; that he refused to endorse it, and she, for that reason, handed it back and went away; that she returned later and he gave the check to her; that, as she started for the office door, she put out her hand as though to shake hands, and she "fumbled" something into his hand; that a part of it "stuck in my hand and part fell on the floor;" that she then rushed away and he picked up the money which fell to the floor and called Mrs. Henry and said: "This money does not belong to me, I have no interest in that check, but she was gone and out of hearing and out in the hall, and out of my sight anyway. So I put the money in my pocket." From his evidence it appears that immediately thereafter he was arrested.

Three newspaper reporters were called by the state in rebuttal of some of the defendant's evidence. Albert Namen represents one of the Omaha dailies. He testified that on the day of the arrest defendant told him that Dr. J. R. Howland gave him the $100 check with which to take care of a sick patient, and that defendant said Miss McDermott was the patient to whom Dr. Howland referred. Mr. Pat Boyle, a newspaper reporter, testified that he was at the Paxton Block about noon January 5, 1923, shortly before defendant's arrest; that defendant was seated in his car at the curb when he, the witness, arrived at the office building; that he saw him get out and go into the lobby and talk with Mrs. Henry; that he heard him tell her to go up to his office and that he would be there in about ten minutes; that subsequently he talked with the defendant and was told by him that the doctor from whom he obtained the check was from the up-state country; that he got a $25 consultation fee from Mrs. Henry for consulting with the doctor from whom he obtained the check, and that he then thought Mrs. Henry said she was the doctor's wife. Fred Durr is a police reporter for an Omaha paper. He testified that he talked with the defendant January 6, the day after his arrest; that

he asked him whether he knew the name of the doctor from whom he received the check, and was told that he did not; that defendant told him the $25 was tendered to him by a lady who wanted to obtain possession of the check on the ground that the patient had gone home, and that the $25 was a consultation fee from the doctor who first saw him in regard to his patient.

Defendant objected to the evidence of Dr. Henry and of Mr. Fleming, hereinbefore referred to, on the ground that it was repetitious and cumulative, and that all of the statements "were substantially to the same effect and were in reality all one," and that its effect upon the jury was much greater than if given only once by a single witness. The statements, however, were made separately by the declarant to both witnesses, while she was at the hospital and only two or three days after she made the dying declaration which was reduced to writing. And it is apparent that the evidence of Mr. Fleming, as reflecting Miss McDermott's declarations, contained material matter which is not found in the written declaration nor in Dr. Henry's evidence. From his evidence it appears that, after declaring she was going to die, she gave him the street number of the house where the operation was performed; that she went there alone; that he performed the operation alone; that he used instruments; that she paid $25 and gave her check for $100 for the balance. To Dr. Henry she said that she had not been given an anæsthetic. So that the evidence complained of was not repetitious.

Defendant's objection is not well taken. It is elementary that a dying declaration is admissible in homicide cases, and where a dying declaration has been received in evidence, under circumstances which make it proper to be so received, a subsequent statement may likewise be communicated to the jury without proof that it was made with knowledge of impending death, where it is so closely connected with the dying declaration, in point of time and substance, that it may properly be said to be a continuance thereof.

In respect of the competency of dying declarations an ac-

cepted authority says: "A proper predicate must be laid for the introduction of the declaration; it is generally a sufficient predicate to show, by the repeated assertions of the declarant, that he was about to die; it may be laid by showing that the surrounding circumstances were of such a character as to satisfy the court that the declarant believed that he would die; such belief is indicated by sending for a priest; religious expressions are often conclusive as showing his abandonment of hope; anxiety about his business affairs is an element of such predicate. In the absence of a statement in words of the declarant himself, it will be sufficient if the surrounding facts indicated that he was conscious of the certainty of his death. In aid of this, the court may take into the consideration the bodily condition of the declarant, his wounds, his conduct, his language, and his statements, and all facts from which a conclusion may be deduced of his consciousness of approaching dissolution at the time." 1 Wharton, Criminal Evidence (10th ed.) sec. 275c.

"Dying declarations, to be admissible in evidence, must be made under a sense of impending death. But it is unnecessary that the deceased should have stated at the time of making the same that he was about to die. It is sufficient if this state of mind appears from other testimony." *Fitzgerald v. State*, 11 Neb. 577. See *Rakes v. People*, 2 Neb. 157; *Collins v. State*, 46 Neb. 37. And in this state a dying declaration is admissible in a prosecution for homicide which results from procuring an abortion. On the latter point the subject is discussed in *Edwards v. State*, 79 Neb. 251, and the rule which is applicable to this class of cases is there stated at some length and authorities are cited in its support. Discussion of that subject is therefore unnecessary here. *Fields v. State*, 107 Neb. 91, is a case which involves an illegal operation wherein a letter, written by the victim shortly before death, and before the operation was performed, was received in evidence, but on the ground that it showed a conspiracy to commit an unlawful act and was therefore a part of the *res gestæ*.

Defendant offered four separate instructions, which were

refused, which in substance informed the jury, in differing forms of expression, but all of the same general import, that dying declarations "are not entitled to the same weight as evidence as sworn statements made from the witness-stand in open court, for the reason that the defendant has had no opportunity to cross-examine the witness, and you have not had the opportunity of seeing and hearing her testify and of observing her conduct and demeanor on the witness-stand."

The court did not err in its ruling. "It is proper to refuse to instruct that dying declarations are not entitled to the same weight as would be the testimony of deceased if he were a witness testifying in court; since it would be a comment on the evidence." *State v. Reed,* 137 Mo. 125. See, also, 1 R. C. L. 542, secs. 86, 87, 88 and 89. To the same effect is Hughes, Instructions to Juries, sec. 180, where it is added that "a charge that dying declarations should be received with great caution is likewise improper."

The court did not err in overruling defendant's motion for a new trial, nor was error committed in overruling the application for a new trial on the ground of newly discovered evidence. The verdict is clearly supported by the great weight of the evidence on every material point, and we are convinced that, even if the evidence of the affiants should be introduced by defendant on a retrial, it is not at all probable that the result would be changed. In *Kerr v. State,* 63 Neb. 115, we held: "It is not error to overrule a motion for a new trial on the ground of newly discovered evidence, where it does not appear that such evidence, if introduced on a retrial, would probably change the result reached on the first trial." To the same effect is *Ogden v. State,* 13 Neb. 436.

Other assignments of alleged error have been urged which we have considered but do not find it necessary to discuss nor to decide.

Reversible error does not appear in the record. The judgment is

AFFIRMED.

FRANK AMBROSE V. STATE OF NEBRASKA.

FILED FEBRUARY 13, 1924. NO. 23383.

1. Criminal Law: VARIANCE: REVIEW. Where complaint is made in a criminal prosecution that there is a variance between the complaint which was filed at the preliminary hearing and the information on which defendant was tried, we are precluded from an examination and a decision of the question unless the complaint is made a part of the record.
2. ———: PRELIMINARY EXAMINATION. It is elementary that, where it is claimed in a criminal prosecution that no preliminary examination has been had, the question should be raised by a plea in abatement.
3. ———: INCOMPETENT EVIDENCE. In the absence of objection by a defendant in a criminal prosecution, reversible error cannot ordinarily be predicated upon the introduction of incompetent evidence, where the court, when its attention was directed thereto, promptly sustained a motion to strike the objectionable matter from the record and cautioned the jury that such matter must not be considered by it in arriving at its verdict.

ERROR to the district court for Saline county: RALPH D. BROWN, JUDGE. *Affirmed.*

Robert R. Hastings and *Bartos & Bartos*, for plaintiff in error.

O. S. Spillman, Attorney General, and *Mason Wheeler, contra.*

Heard before MORRISSEY, C. J., ROSE, GOOD and DEAN, JJ., SHEPHERD, District Judge.

DEAN, J.

Defendant was convicted of arson in Saline county under section 9591, Comp. St. 1922, and was sentenced to serve an indeterminate sentence in the penitentiary of from 1 to 20 years. Alleging error he brings the case here for review.

For a few months prior to December, 1922, defendant conducted a shoe-repair shop at Crete in a small two-room frame building where he lived and also carried on his trade. On the morning of December 1, shortly after 5 o'clock, a

fire was discovered in defendant's rooms. Four or five witnesses testified that while the fire was in progress bundles of burning rags and burning papers were found scattered about the rooms, and that they detected an odor of burning kerosene. Some of the charred rags were in evidence and at the time of the trial it appears that they still retained the same odor.

Two druggists testified that on the day before the fire defendant purchased two gallons of floor oil at their respective stores which he told them was to be used to oil his floors. The same witnesses testified that defendant bought more oil than was necessary for his floor space. From the evidence of one or both of the druggists it appears that burning floor oil emits only a slight odor and that it bears no similarity to the pungent odor of burning kerosene. Another witness testified that he saw pools of oil on defendant's floor the night before the fire.

State Fire Warden Hartford, by whom the house was examined two or three days after the fire, testified that he found charred rags on top of an oil stove, and that the floor was burned where the burned rags were found, and that he detected the odor of kerosene on the rags. He further testified that he found a 5-gallon can containing about 1½ gallons of kerosene in one of the defendant's rooms.

Mr. Oborne is a baker whose place of business is in a frame building about 10 or 12 feet from defendant's shoe shop. He testified that a few days before the fire defendant came to his bakery, and, after introducing the subject of fires generally, told him that he, defendant, had no cause to worry about fires because he had insurance and was safe if he burned out; that defendant then advised him to take out more insurance, and he did so on defendant's advice because defendant said that they were "going to go up in smoke." It appears that defendant had two insurance policies, namely, one for $800 on stock and shoe-repair machinery and one for $200 on household goods.

Defendant is 49 years of age. He has a child about a year old that for about four months had been kept for him in

the daytime at the Friml home. They were his neighbors. At night he kept the child at his own place. But the evening before the fire he took the child to Mrs. Friml's home and asked her to keep it overnight. At the trial he explained, that, having just oiled his floor, he did not want to keep the child there lest the odor of oil should cause it to become ill. It appears that, with perhaps one or two exceptions, that was the only time that the child was elsewhere than at defendant's place overnight during the time he lived at Crete.

Defendant denied that he knew anything about the origin of the fire. He testified that, shortly before 5 o'clock on the morning of December 1, 1922, he was aroused from his sleep by a knock at his door; that he called out, "Who's there?" and a voice answered that his baby was sick; that he did not recognize the voice but did not think it was the voice of his wife; that, without making further inquiry of his caller, he immediately got up and went to the home where the child was, and Mrs. Friml told him the child was not ill, and that some one must be fooling him. In respect of the papers, which were found scattered about on the floor, defendant explained that they were placed there because he did not want to get the oil on his shoes.

It is argued that there is a variance between the complaint which was filed at the preliminary hearing and the information on which defendant was tried, and that defendant therefore had no preliminary examination. But we are precluded from an examination of that question because the complaint to which exception was taken is not in the record. It is elementary that, where it is claimed in a criminal prosecution that no preliminary examination has been had, the question should be raised by a plea in abatement. *Cowan v. State*, 22 Neb. 519. It is also argued that the court erred in giving the eleventh instruction on its own motion. The instruction complained of has to do with circumstantial evidence, and need not be reproduced here, inasmuch as it is a verbatim copy of an instruction which is set out and approved in *Smith v. State*, 61 Neb. 296, 305, and followed in *Lamb v. State*, 69 Neb. 212. Reversible

error cannot be predicated on this assignment of alleged error.

Complaint is also made that the state interrogated defendant to some extent in respect of a former fire in his place of business which occurred about a month before the fire which is involved in the present case. The examination was permitted to go on, without objection, until finally defendant moved to strike out the objectionable matter. The court promptly sustained the motion and it was stricken from the record and the jury cautioned not to consider it. In the absence of objection by a defendant in a criminal prosecution, reversible error cannot ordinarily be predicated upon the introduction of incompetent evidence, where the court, when its attention was directed thereto, promptly sustained a motion to strike the objectionable matter from the record and cautioned the jury that such matter must not be considered by it in arriving at its verdict.

From a review of the record, we conclude that there is sufficient competent evidence to support the verdict. Reversible error does not appear.

The judgment is

AFFIRMED.

GEORGE F. MCGUIRE, APPELLEE, V. PHELAN-SHIRLEY COMPANY ET AL., APPELLANTS.

FILED FEBRUARY 13, 1924. NO. 23546.

1. **Master and Servant: COMPENSATION FOR INJURY: VENUE.** A resident of Nebraska entered into a contract in this state with a Nebraska corporation, having its principal place of business in Omaha, to perform certain labor for the corporation in Iowa as its employee. While engaged in the allotted work in Iowa the employee incurred serious injuries. *Held*, that, under the employers' liability act, the subsequent proceedings for compensation are maintainable in Nebraska.

2. ———: WORKMAN'S COMPENSATION LAW: CONSTRUCTION. The workmen's compensation act is one of general interest, not only to the workman and his employer, but as well to the state, and it should be so construed that technical refinements of in-

terpretation will not be permitted to defeat it. *Parson v. Murphy*, 101 Neb. 542, L. R. A. 1918 F, 479.

3. ———: ———: INJURY: TIME OF OCCURRENCE. When latent injuries from an accident do not at first indicate disabilities which are compensable, an injured employee is not necessarily deprived of compensation under the workmen's compensation act (Comp. St. 1922, sec. 3056) for failure to demand his rights under the act before such rights can reasonably be ascertained. Accidents resulting in injuries which prove to be progressive in their nature sometimes belong to this class. *Selders v. Cornhusker Oil Co.*, *ante*, p. 300.

4. ———: ———: FINDINGS: REVIEW. In actions under the workmen's compensation act, we have uniformly held that a finding of the district court on an issue of fact will not be set aside where there is sufficient competent evidence to support it. *Miller v. Morris & Co.*, 101 Neb. 169; *Anderson v. Kiene*, 103 Neb. 773; *Selders v. Cornhusker Oil Co.*, *ante*, p. 300.

5. ———: ———: PENALTY. When a suit is brought under the employer's liability act and the facts disclose a reasonable basis for controversy, in respect of the nature of the employee's injury, and as to whether it is permanent or is progressive in its nature, the employer is not subject to the penalty for waiting time provided by section 3048, Comp. St. 1922.

APPEAL from the district court for Douglas county: WILLIAM G. HASTINGS, JUDGE. *Affirmed.*

Kennedy, Holland, DeLacy, & McLaughlin and *Edward J. Svoboda*, for appellants.

J. J. Friedman, contra.

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

DEAN, J.

In this suit plaintiff seeks to recover compensation from defendants under the employers' liability act for injuries sustained at Silver City, Iowa, where, as an employee, he assisted in operating a ditching machine of the Phelan-Shirley Company, a general construction company, hereinafter called the company. The General Accident, Fire &

Life Assurance Corporation, hereinafter called the insurance company, carried the company's accident insurance and is a codefendant. When the case was heard in the district court, on appeal from the award of the compensation commissioner, which was in plaintiff's favor, the award was affirmed except as to the payment of a penalty for waiting time which was disallowed by the district court. The judgment involved here comprises the following items, namely, $15 a week for 300 weeks less $70 compensation which was formerly paid by defendant, $12 a week for the remainder of plaintiff's life, and $200 for hospital bills less $132 which the company paid before the action was begun. An attorney's fee of $250 was also allowed by the court. From the judgment in plaintiff's favor and from the allowance of an attorney's fee defendants appeal. Plaintiff prosecutes a cross-appeal from the court's disallowance of the payment of a penalty for waiting time.

Defendant's argue that, because the contract of employment was to be performed in Iowa and the accident happened there, it follows that plaintiff's suit should have been brought in Iowa, and that it cannot be maintained in Nebraska even though plaintiff is a resident of Nebraska and the company has its principal place of business in Nebraska and the contract of employment was made in Nebraska.

The workmen's compensation act provides, *inter alia*, that it "shall apply * * * to every employer in this state employing one or more employees, in the regular trade, business, profession or vocation of such employer." Comp. St. 1922, sec. 3029. The legislature did not provide that the act should have the effect contended for by the company, under the facts before us, and we have no desire to import to it a meaning which is not supported by its language. *Kennerson v. Thames Towboat Co.*, 89 Conn. 367; *State v. District Court*, 139 Minn. 205; *Pierce v. Bekins Van & Storage Co.*, 185 Ia. 1346; *North Alaska Salmon Co. v. Pillsbury*, 174 Cal. 1. There are jurisdictions which hold to the contrary, but the reasoning does not appeal to us and we prefer the rule here announced.

The workmen's compensation act is one of general interest, not only to the workman and his employer, but as well to the state, and it should be so construed that technical refinements of interpretation will not be permitted to defeat it. *Parson v. Murphy*, 101 Neb. 542, L. R. A. 1918 F, 479. We think the proceeding is maintainable in this state.

In respect of plaintiff's employment, it appears that on December 15, 1919, he entered into a written contract with the company, at its office in Omaha, and by its terms he agreed to superintend the dismantling of a "drag line machine" at Silver City, Iowa, and also to superintend its removal to Indianola, Iowa, to be there used in excavating a ditch in Warren county. The contract provided further that all excavating was to be superintended by plaintiff, and that when the ditch was completed plaintiff should superintend the moving of the machine "to the nearest shipping point, or elsewhere, as directed" by the company. Besides his salary of $150 a month for labor and superintendence, while engaged in moving, plaintiff was to receive a stipulated sum for each cubic yard of earth removed, and a bonus of $300 if the ditch was completed and accepted on or before December 1, 1920, by the proper officers of the county.

When the machine was dismantled and loaded on the cars at Silver City, plaintiff, with other members of the company's crew, was engaged in removing the debris from about the boarding camp preparatory to moving away. Shortly before this, perhaps the same day, the roof of the camp building was removed and was left leaning against a tree. While plaintiff, in the course of his employment, was picking up tar paper and rubbish in the vicinity of the leaning roof, it fell on him, injuring his head and crushing his body to the ground.

The company contends, that, even though the action is maintainable in this state, liability does not attach, under the facts and the law, and that the suit should be dismissed. The argument, *inter alia*, is that plaintiff did not give "no-

tice of the injury * * * as soon as practicable after the happening thereof." Nor was the claim for compensation made within six months after the injury, all as required by section 3056, Comp. St. 1922.

The position seems to be untenable. The statute does not require in every instance that the employee shall give notice of his injury or present his claim for compensation within six months from the date of the accident. The accident and disability may not be simultaneous. Accidents frequently occur where the true nature of the injury and the resulting disability are not discernible for a considerable time even with the aid of scientific skill. When latent injuries from accidents do not at first indicate disabilities which are compensable, an employee is not necessarily deprived of compensation under the workmen's compensation act (Comp. St. 1922, sec. 3056) for failure to demand his rights under the act before such rights can reasonably be ascertained. An accident resulting in an injury which proves to be progressive in its nature belongs to this class.

The rule was recently discussed in *Selders v. Cornhusker Oil Co., ante,* p. 300. In the *Selders* case it was held that compensation would not be denied an employee even though his claim for compensation was not made within six months after the date of his injury, where there was competent evidence to support the court's finding that the disability was progressive in its nature and was not discoverable until after the statutory six months had elapsed. In the present case there is sufficient evidence to bring plaintiff's claim within the rule. The injury to plaintiff, now a hopeless cripple, was shown to be progressive in its nature, and it resulted in permanent disability which was not reasonably discoverable in time to serve notice or to file a claim for almost two years after the date of the accident.

We do not agree with defendants' argument that the judgment is not supported by the evidence. The effects of the injury, as discovered by two examining physicians shortly before the trial, clearly show that it is progressive and permanent, and that such injury to the head might, in all like-

lihood, vitally affect memory. One of the physicians testified that "cases of fracture of the bone or vertebra, where there is a disability for two or three weeks, and then the man apparently feels all right and can go about and do ordinary labor, and then after a period of, say two or three years, he will become completely disabled." Another physician made two examinations, the first about two months before the trial and the second only a few days before. He testified that a man "receiving a knock on the head" might be able to remember one thing and not be able to remember another; that, if there is a destruction of certain groups of brain cells, "one is never able to remember certain events that have been associated with those particular nerve groups or nerve cells; therefore a person could never recall it. * * * He could remember some facts and he could not remember other facts;" that the injury to his back "might produce modified paraplegia or weakness of the lower extremities; * * * not a total paralysis but a weakness; what we call a paresis rather than paralysis, * * * interfering with motion and with his strength."

Certain letters are in the record which were addressed to the company and also to the insurance company soon after the accident, to which plaintiff's name was signed, and in the letters the writer protested that plaintiff should not have been compelled to quit work. But there is evidence going to show that the letters were written by plaintiff's wife without his authority and without his knowledge. There is also evidence tending to prove that his return to work, about three weeks after the accident, was at the earnest solicitation of the company, and that the insurance company either consented thereto or made no protest against it.

In actions under the workmen's compensation act we have uniformly held that a finding of the district court on an issue of fact will not be set aside where there is sufficient competent evidence to support it, and that appears in the present case. *Miller v. Morris & Co.*, 101 Neb. 169; *Anderson v. Kiene*, 103 Neb. 773; *Selders v. Cornhusker*

Oil Co., ante, p. 300. The rule to which we adhere is well settled in this state.

In respect of plaintiff's cross-appeal from the finding of the district court in the matter of the disallowance of waiting time, we conclude that plaintiff's objection is not well taken and the cross-appeal is therefore denied. The circumstances in connection with the injury and its subsequent progressive development made the final result appear to be somewhat uncertain, for a time, as to whether the injury was permanent. Hence defendants should not be charged with the statutory penalty for waiting time under section 3048, Comp. St. 1922.

Another point may be noticed briefly. Defendants argue that, in view of the fact that the $70 payment of compensation, hereinbefore referred to, was made by it, March 1, 1920, plaintiff's claim is barred because he did not begin his action within one year thereafter, pursuant to section 3061, Comp. St. 1922. So far as applicable here the statute provides:

"In case of personal injury, all claim for compensation shall be forever barred unless, within one year after the accident, the parties shall have agreed upon the compensation payable under this act, or unless, within one year after the accident, one of the parties shall have filed a petition as provided in section 3680 (3602) hereof. * * * Where, however, payments of compensation have been made in any case, said limitation shall not take effect until the expiration of one year from the time of the making of the last payment. In the event of legal disability of an injured employee, said limitation shall not take effect until the expiration of one year from the time of removal of such legal disability."

The argument does not appeal to us. The payment of the $70 was apparently made under a misapprehension of the real nature of the injury and the consequences arising therefrom. For the reasons already stated, we do not think the action should be barred on any of the grounds urged by defendants.

Other questions have been raised by appellants which we have examined but do not find it necessary to discuss.

The judgment is

AFFIRMED.

MARIE GOODRICH, APPELLEE, V. EQUITABLE LIFE ASSURANCE SOCIETY, APPELLANT.

FILED FEBRUARY 13, 1924. No. 22624.

Insurance: CHANGE OF BENEFICIARY. Where the terms of a policy of life insurance are not before the court, and the statute provides that a change of beneficiary may be made by the insured with the consent of the insurance company, and where the insured has properly filled out and signed a request for a change of beneficiary on blanks furnished to him for that purpose by the company, and delivered the same to an agent of the company whose duty it is to forward the same to the company, and where through the fault of the agent the request for change of beneficiary is not received by the company at its home office till after the death of the insured, and where the company has recognized the change and paid the new beneficiary, the change will take effect, even though the formal details of consent are not complied with by the insurer before the death of the insured.

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

Gurley, Fitch & West, for appellant.

Macfarland & Macfarland and *Gray & Brumbaugh, contra.*

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

DAY, J.

The plaintiff, Marie Goodrich, brought this action against the Equitable Life Assurance Society upon a certificate or policy of insurance issued by the defendant upon the life of Rollo M. Goodrich, in which, it is alleged in the petition, the plaintiff was the beneficiary. At the conclusion

of the testimony both parties to the action moved the court for a directed verdict in their favor. Thereupon the court, as sanctioned by our practice, discharged the jury, and upon due consideration found the issues in favor of the plaintiff, and entered judgment for $1,068, and in addition thereto interest in the sum of $193.43. From this judgment the defendant appeals.

The petition alleged in substance that on or about January 1, 1917, the Union Pacific Railroad Company entered into a contract with the defendant whereby certain life, accident and health insurance was provided for a group of employees of the railroad company, without any expense to the employees; that Rollo M. Goodrich, an employee of the railroad company, was eligible for insurance under the contract between the railroad company and the defendant; that he made out an employee's statement, setting forth his name, age, class of employment, and designating Marie Goodrich, his wife, as the person to be named in his beneficiary certificate; that the employee's statement was sent by the railroad company to the defendant, and in due course of time a certificate was issued to Goodrich, providing, among other things, that, in the event of his death while the certificate was in force, a sum equal to one year's wages would be paid to Marie Goodrich, the beneficiary; that Goodrich died October 20, 1918, while under the protection of the policy; that due proof of death was made; that the certificate had been surrendered to the defendant, and for that reason the plaintiff was unable to set out a copy of the certificate; that there was due and unpaid on the certificate $1,068, with interest, for which sum, together with an attorney's fee, plaintiff prayed judgment.

The answer is in the nature of a confession and avoidance. By way of avoidance, it is alleged in substance that, under the terms of the contract and certificate, the insured had the right to change the beneficiary; that on October 12, 1918, the insured signed a notice for a change of beneficiary on a blank form provided by the defendant for that purpose, in which he requested the name of the beneficiary to

be changed from Marie Goodrich, wife, to Maggie A. Goodrich, mother; that he caused the notice to be delivered to the Union Pacific Railroad Company for its approval, and that the same was approved by the proper officers of the railroad company; that Goodrich died October 20, 1918; that proof of death was made by Maggie A. Goodrich, who made claim for the amount due as beneficiary; and that the defendant in good faith paid to her the full amount due under the certificate.

The reply denied the matter of defense alleged in the answer, and specially denied that the defendant had given its consent to a change in the beneficiary during the lifetime of the insured. The reply also pleaded that the contract was made in New York; that under the New York statutes a change could be made in the beneficiary with the consent of the corporation or association issuing the policy. This part of the reply may be dismissed from consideration, because no proof was offered in support thereof.

Under this state of the pleadings, it was incumbent upon the defendant to show that the insured had the right to change the beneficiary, or that the right existed as a matter of law, and also that the change had actually been made.

A brief reference to the facts at this time will disclose how the controversy arose. In the summer of 1918 Goodrich and his wife, the plaintiff, became estranged, culminating in a divorce action instituted by Goodrich. His wife filed a cross-petition, in which she also prayed for a divorce. This action was pending and undetermined at the time of the death of Goodrich, which occurred on October 20, 1918. On October 12, 1918, Goodrich procured a blank form for change of beneficiaries in certificates, from the railroad company, which he filled out. When introduced in evidence, the notice was as follows:

"Group Insurance. Notice of Change of Beneficiary.

"The Equitable Life Assurance Society of the United States is hereby requested to make the following change in the society's records of our employees' group policy. Individual certificate No. U. P. 8002, beneficiary to be

changed from wife, Marie Goodrich, to Maggie A. Goodrich (Relationship to Insured), mother.

"Dated Oct. 12, 1918.

"Approved, J. P. Carey, Supt. (Employer) Union Pacific Railroad.

"(Signature of Insured) Rollo M. Goodrich."

The company recognized Maggie A. Goodrich as the rightful beneficiary, and paid to her the full amount of the policy.

We come now to consider the question whether the record is sufficient to show that the insured had the right to change the beneficiary named in the policy, and, if so, did he make the change? Usually in cases of this character the right of the insured to change the beneficiary depends upon the language of the contract. In the early history of life insurance, as disclosed by the decisions of the courts, the policies contained no provision reserving to the insured the right to change the beneficiary, and in construing such contracts it was almost universally held that the beneficiary had a vested interest in the policy, and that a change of beneficiary could not be effected by the insured without the consent of the original beneficiary. The more modern policies of life insurance, however, contain provisions reserving to the insured the right to change the beneficiary, but frequently requiring the consent of the company. The statutes of many of the states give to the insured the right to change the beneficiary with the consent of the company. In the case before us, for some reason not apparent, the policy in suit was not introduced in evidence by either of the parties, so that we are not advised as to its provisions relating to a change of beneficiary, except as the inference may arise from testimony introduced, and the provisions of our statute in relation thereto. The admissions in the answer were probably sufficient to relieve the plaintiff of the necessity of offering the policy as a part of her case. Since the policy is not before us, we think that our statute with regard to the right to change the beneficiary must be read into the policy as a part of the contract. Section

7897, Comp. St. 1922, relating to life insurance policies payable in instalments, provides, in so far as applicable to the present question, as follows:

"Any person holding a policy in any such company may, without the consent of the beneficiary, unless the appointment of such beneficiary be irrevocable, * * * or with the consent of the company, he may change his beneficiary."

It sufficiently appears that the payments to be made under the policy were to be paid in quarterly instalments, so that the statute above quoted is applicable to the present policy. By plain terms the statute gives the right to the insured to change the beneficiary with the consent of the company. That the appointment of the beneficiary was not irrevocable, we think sufficiently appears in the record. It is shown that the employees of the railroad company were frequently making changes in the beneficiaries in their certificates, which were attended to by the railroad company. The blank form furnished by the insurance company for the purpose of making the change of beneficiary clearly indicates that the insurance company regarded the right to be reserved in the insured. The blank form recites, "with the right reserved by the insured to change the beneficiary." There is no dispute but that the insured signed the request for a change of beneficiary in his policy. Under the statute above quoted, it was not necessary that the insured should secure the consent of the first named beneficiary. The latter had no vested interest in the policy which would prevent a change of beneficiary.

Was the change made with the consent of the company? As above pointed out, the request for a change of beneficiary was signed by the insured on October 12, 1918. This notice came into the possession of the railroad company. How or when the railroad company received it is not disclosed. It is clear, however, that the proper officers of the railroad company had the notice in their possession, because the change of beneficiary was approved by the proper officer of the railroad company. The clerk who wrote the name "J. P. Carey" on the notice testifies that he had no

recollection whatever as to when or how the notice came into the possession of the railroad company. There was some suggestion that it might have been given by interested parties to the railroad company after the death of Goodrich. In the absence of proof, the court will not presume bad motives or bad faith. As the instrument was dated October 12, we think we might indulge the presumption that it was approved by the railroad company on that date, notwithstanding that the date is in Goodrich's handwriting. If we are to indulge in presumptions, in the absence of explanation, we think that we should presume that the notice was timely received, and the approval timely made. The testimony shows that it was the custom of the railroad company after approving the notice for change of beneficiary to send it to the defendant company on the same day it was approved, but beyond this custom the evidence throws no light upon when the notice was forwarded to the defendant. There is a letter in evidence from the defendant company which indicates that the notice was not received at the New York office until November 18, almost one month after the death of Goodrich. The record also shows that the Union Pacific Railroad Company maintained an insurance bureau to attend to the business of the insurance of its employees. No employee had any direct communication with the defendant company. In case an employee desired to change the beneficiary in his certificate, he secured a blank form from the railroad company which was furnished by the defendant company. After filling out these blanks the custom was to deliver the same to the railroad company, who, after noting their approval thereon, would send them to the defendant company. Under these circumstances it seems to us that the railroad company must be considered as the agent of the insurance company. From the entire record it appears that the insured did all he could do to effect the change in his beneficiary. The notice was made out, was given to the agents of the insurance company, and the delay in promptly forwarding it was occasioned by the agents of the defendant. Where a notice

of a change of beneficiary has been given, and the insured has done all that is required of him to do, and the company has had a reasonable time in which to make the change but fails to do so, the insured may not be deprived of his right to make the change by the neglect of the company to perform a ministerial act. This principle was recognized in *Adams v. Police & Firemen's Ins. Ass'n*, 103 Neb. 552.

In most of the cases where the question now being considered is discussed, the decision turns upon the precise wording of the contract. In some of these cases where the insured has not an unconditional right to change the beneficiary, and the language used seems to require that some exercise of judgment on the part of the company is essential to the change of beneficiary, it is held that, notwithstanding the insured may have done all that is required of him, but dies before the insurer's consent is given, the change of beneficiary is not effected. The question in each particular case, therefore, is ordinarily whether the acts required on the part of the company are essential parts of the contract, or mere ministerial and formal details. A few cases in which the question above indicated is discussed, are: *Adams v. Police & Firemen's Ins. Ass'n*, 103 Neb. 552; *Supreme Conclave, Royal Adelphia v. Capella*, 41 Fed. 1; *John Hancock Mutual Life Ins. Co. v. White*, 20 R. I. 457; *State Mutual Life Assurance Co. v. Bessett*, 41 R. I. 54, L. R. A. 1918-C. 961; *Thomas v. Locomotive Engineers' Mutual Life & Accident Ins. Ass'n*, 191 Ia. 1152; *Wooten v. Order of Odd Fellows*, 176 N. Car. 52; *Daly v. Daly*, 138 Md. 155; *Mutual Life Ins. Co. v. Lowther*, 22 Colo. App. 622; *Quist v. Western & Southern Life Ins. Co.*, 219 Mich. 406; *Reid v. Durboraw*, 272 Fed. 99.

From a consideration of the entire record, it seems clear to us that it was the intention of Goodrich to change the beneficiary in his policy. To accomplish that purpose he did everything that he could do that the policy and the custom of transacting the business required of an insured to change the beneficiary. His wish should not be defeated through the fault of the company's agents to properly

transmit his request for a change of beneficiary to the company. The consent of the company to the change was a purely formal matter. It did not call for the exercise of judgment as to whether it would assent to the change. No doubt the purpose of the consent of the company to a change of beneficiary was to enable it to keep a proper record of its policies. In this discussion we have rather assumed that the conditions of the policy were in conformity with our statute. When the policy itself is introduced a different situation may be presented. In the present state of the record, however, we hold that the failure of the company to consent to the change of beneficiary, this having been occasioned by the neglect of its agents, cannot be urged by the company or by the original beneficiary to defeat the wish of the insured.

We think there should be a new trial of the case. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

JIM MARINO V. STATE OF NEBRASKA.

FILED FEBRUARY 13, 1924. No. 23324.

1. Criminal Law: VENUE: WAIVER. The constitutional right to a trial before a jury of the county where the offense is alleged to have been committed, as provided in section 11, art. I of our Bill of Rights, is a mere personal privilege of the accused which he may waive. *Kennison v. State*, 83 Neb. 391.

2. Jury: DISQUALIFICATION OF JUROR: WAIVER. Where a juror is disqualified to serve by reason of being a nonresident of the county where the offense is alleged to have been committed, the disqualification in practice is *held* to be waived by the failure to interrogate the juror on his *voir dire* as to his residence.

3. ———: ———: ———. In a criminal prosecution a defendant does not waive his constitutional right to be tried before a jury of the county where the offense is alleged to have been committed, by his failure to challenge a juror who on his *voir dire* states that he is a resident and elector of the county where the case is being tried, when in fact he was a resident and elector of another county, which fact was unknown to the defendant and his counsel.

ERROR to the district court for Douglas county: L. B. DAY, JUDGE. *Reversed.*

Baker & Ready, for plaintiff in error.

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

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

DAY, J.

Jim Marino, hereinafter designated defendant, was convicted of murder in the first degree in the district court for Douglas county, and, conforming to the penalty fixed by the jury, was sentenced to life imprisonment in the penitentiary. As plaintiff in error he has brought the record of his conviction to this court for review.

A large number of assignments of error are noted in the brief, but, in the view we have taken of the cause, it seems unnecessary to discuss but one of them.

The main contention urged by the defendant is that Herbert M. Jackson, one of the jurors who sat in the case, was not a competent and qualified juror under the Constitution and laws of the state; that at the time of the trial, and for a long time prior thereto, the said Jackson was not a resident or elector of Douglas county; and that this fact was not known to the defendant or his counsel until after the rendition of the verdict.

The defendant contends that it was his constitutional privilege to have a trial by a jury of the county where the crime was alleged to have been committed, and that he was denied this right. This question was raised in an amended and supplemental motion for a new trial filed within three days from the rendition of the verdict, testimony in the form of affidavits being filed in support of and against the motion. Upon this phase of the case the state, while conceding that it was the constitutional privilege of the defendant to have a trial by competent jurors of Douglas county, argues: First, that Jackson was at the time of the trial a resident elector or Douglas county; and second, that,

even though he were not, the defendant is now precluded from raising the question of the qualification of the juror because he waived the privilege by neglecting to inquire of the juror upon his *voir dire* concerning his qualifications to sit as a juror.

Section 11, art. I of our Constitution, in so far as applicable to the question before us, provides as follows:

"In all criminal prosecutions the accused shall have the right to * * * a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

This language is too plain to require interpretation. This constitutional right is a personal privilege of the accused, and is not conferred upon him by any considerations of public policy. *State v. Crinklaw*, 40 Neb. 759; *Kennison v. State*, 83 Neb. 391. Being a personal privilege, it may be waived by the accused, and is generally held to be waived by failure to interrogate the juror in his examination on his *voir dire* as to his qualifications to sit as a juror; or it may be waived where the disqualification is known to the defendant or his counsel and the juror is not challenged. The reason for this rule is clearly stated in *Hickey v. State*, 12 Neb. 490, as follows:

" 'It is certainly clear that all jurors must have the qualifications of electors; and if one not having such qualifications is retained upon the panel without the knowledge of the party or his counsel, and after reasonable diligence used to ascertain that fact, when the jury is impaneled, a new trial should for that cause be granted. But it is equally clear that the proper time to take the objection is at the impaneling of the jury; and it must be taken to have been waived, unless the party is able to show to the court, upon the hearing of the motion, that with the exercise of diligence he could not have taken the exception at the proper time. This is indispensable to prevent constant mistrials, and to protect the rights of the adverse party; otherwise the party taking the exception might lie by and take the chances of a verdict in his favor, and if

given adversely be entitled to a new trial as a matter of course.' Such in our view is a correct statement of the law. The person called as juror is sworn to answer questions touching his competency as a juror."

In addition to this constitutional provision, the statute prescribing the qualifications of jurors in counties of over 100,000 inhabitants, being applicable to Douglas county, among other things, provides, that all male citizens over the age of 25 years, having the qualifications of electors, etc., with certain exceptions, shall be competent to serve on all grand and petit juries. Section 9106, Comp. St. 1922.

This brings us to a consideration of the facts bearing on the question whether juror Jackson was a qualified juror to sit in the case, and, if not, did the defendant waive the disqualification? The record shows that on September 28, 1922, the juror received by registered mail a subpœna commanding him to report for jury service in Douglas county on a day named in the month of October. This notice, according to the provisions of the statute, was mailed to him at the address at which he voted at the last preceding general election, being 8409 North Thirty-first street, Omaha, Nebraska. The letter was forwarded to him at Aurora, Nebraska. Responding to the notice he appeared and served upon the jury in this case. In an affidavit made by the juror on October 24, 1922, he stated in substance that in November, 1921, he purchased a business in Aurora, Hamilton county, Nebraska; that on March 20, 1922, he moved his family to Aurora, and lived at No. 1313 M street, in said city; that he voted at the city election in April , 1922, and again at the primary election on July 17, 1922, at Aurora; and that he has considered Aurora his legal residence since he moved his family there on March 20, 1922; that when he received the notice he asked an attorney whether it would be necessary for him to obey the subpœna, and was told that it was; that when he went to Omaha to respond to the subpœna he told some of the officers that he was not a resident of Douglas county, but, notwithstanding this, he was not excused. It is not clear

who the officers were to whom he made this statement. Other affidavits show that the juror was living in a rented house in Aurora; that his family consisted of the juror, his wife, his mother-in-law, and a maid, and that the rent of the house had been paid during the month of October. Some effort was made on the part of the assistant county attorney to show by the juror that, notwithstanding he was living at Aurora, and had voted there and had made an affidavit that he regarded Aurora as his residence, his legal residence was in Omaha. In support of this theory, in response to questions asked, the juror stated that he had always had in mind to return to Omaha as a permanent residence; that some of his effects were still in a room at No. 8409 North Thirty-first street, in Omaha, where his relatives lived, and that when in Omaha he always stopped there. It also appears by the affidavits of attorneys representing the defendant that, before the jury were sworn, the general question was asked of the jury as a whole, whether they were residents and electors of Douglas county, and, if not, to so signify, and that neither the said Jackson nor any other jurors sitting in the box responded to such question in the negative. Some of the jurors sitting in the box made affidavits to the effect that this question was not asked, and attorneys representing the state made affidavits that they did not recall that such question was asked. It stands unchallenged, however, that the county attorney elicited from the juror on his *voir dire* examinations that he was a resident of Omaha, Douglas county, Nebraska, and that he lived at No. 8409 North Thirty-first street. From the overwhelming weight of testimony, we think it is established that the juror was not a resident of Douglas county at the time he served on the jury. His intention to ultimately return to Omaha as a permanent home does not alter the situation.

The next question presented is whether the defendant waived the disqualification of the juror by failing to interrogate him upon his *voir dire* as to his qualifications. Considering all of the circumstances presented in the rec-

ord, we think he did not. It is shown by the affidavits of the defendant and his attorneys that they had no knowledge of the disqualifications of the juror until after the verdict was rendered. When the juror answered that he lived in Douglas county, in response to the inquiry of the county attorney, we think that defendant's counsel might well have relied upon his statement, but the testimony indicates that they went further and inquired as to his qualifications as an elector. We think that due diligence was exercised by the defendant in ascertaining the qualifications of the juror, and that the court, as well as counsel for the state and the defendant, were misled and deceived. The facts clearly indicate that he was neither a resident nor an elector of Douglas county.

The juror was drawn and summoned in the manner provided by law, his name being drawn from the voting list of 1920, but it appears that between the time his name was placed in the jury wheel, about January, 1921, and the time he was drawn for jury service, he had removed from Douglas county and taken a residence elsewhere.

Other questions are discussed in the brief, but as the case must be retried, and the alleged errors are not likely to occur again, we express no opinion upon them.

For the reasons above stated, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

ELLIS N. BURNS, APPELLANT, V. HENRY P. SHOLL, APPELLEE: GEORGE W. MUTZ ET AL., APPELLANTS.

HENRY P. SHOLL, APPELLEE, V. HARVEY-ENSLOW LUMBER COMPANY ET AL., APPELLEES: ELLIS N. BURNS ET AL., APPELLANTS.

FILED FEBRUARY 13, 1924. No. 22598.

1. **Mechanics' Liens: VALIDITY AND PRIORITY.** In an action for the foreclosure of a mechanic's lien, the district court has power to determine the validity and priority of all liens, prior or subsequent, of proper parties to the action, when their validity or priority is properly put in issue by the pleadings.

2. ———: PARTIES. The holder of a prior recorded mortgage which is not due is nevertheless a proper party to an action by a subsequent lienor to foreclose his lien, if such subsequent lienor challenges the validity of the prior mortgage or the amount owing thereon.

3. ———: CHALLENGE OF PRIOR LIENS. If a plaintiff, in an action to foreclose a mechanic's lien, desires to challenge the validity of a prior recorded, unmatured mortgage, or the right of the mortgagee therein named to a superior lien, it is incumbent on such plaintiff to allege facts from which it would appear that the mortgage was invalid, or that it would be inequitable for such mortgagee's lien to be made superior to the plaintiff's lien.

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

George A. Adams and *S. C. Zimmerman*, for appellants.

Clifford L. Rein, contra.

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

GOOD, J.

Ellis N. Burns, one of the appellants, brought an action against Henry P. Sholl *et al.*, to quiet title in plaintiff to lot 8 and west 45 feet of lot 7, block 4, First addition to College View, Lancaster county, Nebraska. The defendant Sholl filed an answer and cross-petition, praying for foreclosure of a mortgage. The said Sholl also commenced an independent action against Burns *et al.*, for the purpose of securing the modification and correction of a decree of foreclosure, previously entered in the same court, rendered in an action wherein Fred H. Dudley *et al.* were plaintiffs and the said Sholl *et al.* were defendants. The two actions, the one commenced by Burns and the other by Sholl, were consolidated and tried together in the district court. The trial resulted in a decree awarding Sholl a foreclosure of his mortgage, and directing the modification of the decree in the Dudley case, and denying any relief to Burns. Burns

et al. have appealed, but none of appellants, save Burns, has filed a brief, and his appeal only will be considered.

The appeal in this case presents for determination the question whether a default decree, entered in an action to foreclose a mechanic's lien, bars the lien of a senior mortgagee, whose mortgage is duly recorded, when such mortgagee is made a party defendant, served with process and makes default, and where the only allegation of the petition relating to the lien of such mortgagee is that he claims some interest in said premises; the exact nature is to plaintiff unknown, but whatever interest he may have in said premises, if any, is junior and inferior and subsequent to the rights of the plaintiffs, but plaintiffs allege that said defendant has no interest in said premises whatsoever.

The essential facts from which the controversy arises are as follows: In June, 1917, Frank Kirkwood and wife, being then the owners of the premises, executed and delivered to Sholl a mortgage on the property, to secure the payment of a note for $1,200, which mortgage was recorded June 4, 1917. September 27, 1918, Kirkwood and wife conveyed the premises by warranty deed to George W. Mutz. February 17, 1919, Fred H. Dudley filed a mechanic's lien against the premises for material and labor furnished to Mutz for repair and improvement of the buildings on said premises. February 18, 1918, Harvey-Enslow Lumber Company also filed a mechanic's lien for materials furnished Mutz for the same purpose. In May, 1919, Dudley and the said lumber company brought an action to foreclose their mechanics' liens. In this action Kirkwood and wife, Mutz and wife, Henry P. Sholl, and others were made parties defendant. Summons was personally served on all defendants. Sholl made no appearance in the action. The petition contained the following allegation: "Plaintiffs further allege that the defendants Frank Kirkwood * * * H. P. Sholl * * * claim some interest in said premises, the exact nature (of which) is to said plaintiff unknown, but, whatever interest the said * * * H. P. Sholl * * * may have in said premises, if any, is junior, inferior and subse-

quent to the rights of these plaintiffs, but plaintiffs allege they have no interest in said premises whatsoever." The prayer of the petition was for a foreclosure of the plaintiffs' liens, and that each of the defendants "be forever barred from having or claiming any right, title, interest, claim or demand to said premises, and that they be barred of all equity of redemption." December 16, 1919, after trial, a decree was entered foreclosing the plaintiffs' liens. The court found that none of the defendants had any interest whatsoever in said premises as against the rights and claims of the plaintiffs, and ordered the premises sold for the satisfaction of plaintiffs' liens, and decreed that "the defendants * * * H. P. Sholl * * * have no claims whatsoever, in said premises. * * * Subject to the liens of plaintiffs, title to said premises is hereby quieted in the defendant George W. Mutz." Pursuant to the decree, an order of sale was issued and the premises sold on the 27th day of April, 1920, to Simeon J. Quantock, which sale was afterwards confirmed and sheriff's deed issued to said Quantock for said premises.

May 29, 1920, Quantock and wife conveyed the premises by quitclaim deed to George W. Mutz. March 28, 1920, Mutz and wife agreed in writing to convey the premises, free of incumbrance, to Burns, in consideration of Burns conveying to them a certain tract of land near College View. April 19, 1920, Mutz and wife executed to Burns the warranty deed to the premises which they had previously agreed to convey to him. This deed was delivered to Burns some time between May 29, 1920, and August 20 of the same year. Burns at the same time conveyed to Mutz the tract of land that he had agreed to transfer as a consideration. At that time Burns had no personal knowledge that Sholl claimed a lien on the premises in controversy by virtue of his mortgage, given by Kirkwood, and did not gain any knowledge of this until some months later. When he learned that Sholl still claimed a lien on the premises, Burns brought his action to quiet title. Sholl then commenced his action against Mutz, Burns *et al.*, to modify and

correct the decree in the Dudley case by striking from the decree the last sentence thereof, to wit: "Subject to the liens of plaintiffs, title to said premises is hereby quieted in the defendant George W. Mutz."

Was the decree entered in the case of Dudley *et al.* against Mutz, Sholl *et al. res judicata* as to the priority of the liens of plaintiffs and defendant Sholl? The decision in the case at bar rests on the correct answer to this question. If the court, pronouncing that decree, had jurisdiction of the subject-matter, and if Sholl was a proper party to the action and the allegations of the petition were sufficient to tender to him an issue as to the validity or priority of his mortgage, then the question must be answered in the affirmative; otherwise, in the negative.

Counsel for Sholl argues that section 3212, Comp. St. 1922, forbids the court to subordinate a prior recorded mortgage to a subsequently attaching mechanic's lien. This section of the statute deals in main with the power of the court, in which foreclosures are pending, to cause the property sought to be affected by the mechanic's lien being foreclosed, to be leased *pendente lite*. The section ends with the following: "*Provided*, this law shall not be so construed as to interfere with prior *bona fide* liens on grounds on which such buildings shall be erected as a fixture." This section of the statute was considered by the court in the case of *Holmes v. Hutchins*, 38 Neb. 601. In the course of the opinion in that case, Commissioner Ryan, referring to the said provision of the statute, used this language (p. 612): "It must be held an inhibition on the power of courts to postpone to mechanics' liens prior existing valid liens on grounds on which improvements have subsequently been made." The pleadings in that case were entirely different from those in this case. In the *Holmes* case, the plaintiff sought to foreclose a mechanic's lien and made other lien-holders, including the holder of a prior mortgage, parties defendant. In his petition it was admitted that the defendant Holmes held the mortgage upon the premises and was made a party defendant for that reason, but plaintiff, seeking to foreclose his mechanic's

lien, acknowledged the validity of the mortgage, but sought, under the doctrine laid down in *Bohn Mfg. Co. v. Kountze*, 30 Neb. 719, to have the mortgage lien subordinated to that of plaintiff's mechanic's lien, upon the grounds that the mortgagee advanced the money for the purpose of erecting the buildings upon the premises, and thereby became a party to the contract for the erection of the improvements, which gave rise to the mechanic's lien.

We have no criticism to make of the holding of the court in *Holmes v. Hutchins, supra,* but in the case at bar the allegations are very different and the question presented is not the same as in the *Holmes v. Hutchins* case. We do not think the provision of section 3212 was ever intended to limit the power of the court to determine the priority of liens in an action to foreclose a mechanic's lien, nor to limit the power of the court to determine whether or not a prior recorded mortgage is, in fact, a lien upon the premises. In this case, had the allegations of the petition shown that Sholl was the owner and holder of a prior mortgage and had a lien thereon by virtue of such mortgage, then it would not have been within the power of the court to subordinate the mortgage lien to the liens of Dudley and the Harvey-Enslow Lumber Company. It is a well-known fact that many mortgages appear upon the records that are apparent but not real liens. They may have been paid and not released of record. They may have been given without consideration, and for many other reasons they might not be valid liens. It is unreasonable to suppose that said statutory provision was intended to prevent the holder of a mechanic's lien, in an action to foreclose the same, from having the validity of any supposed prior mortgage determined. We are of the opinion that the court has power, in the foreclosure of a mechanic's lien, to determine the validity or priority of all liens, either prior or subsequent, of proper parties to the action, if they are put in issue by the pleadings.

It is contended that Sholl, being the holder of a prior recorded mortgage, not then due, was neither a necessary

nor a proper party to the action. While the general rule is that prior incumbrancers are neither necessary nor proper parties to an action to foreclose a junior mortgage, yet this court held in the case of *White v. Bartlett*, 14 Neb. 320: "In an action to foreclose a mortgage, all incumbrancers, whether prior or subsequent, whose claims are due, are proper parties." We do not think the rule would extend to the prevention of making one a party defendant who was the holder of a recorded mortgage that was not due, if the junior mortgagee intended to attack the validity of that mortgage as a lien. If a plaintiff in such an action had reason to believe that the mortgage had been paid or discharged, or was invalid for any other reason, we have no doubt that he could make such person a party defendant and, by appropriate allegations, have the validity of such prior mortgage determined.

We now come to the more serious question in this case: Were the allegations of the petition sufficient to call in question the validity of Sholl's mortgage? It will be observed from the allegations of the petition, hereinbefore set out in the case of Dudley *et al.* v. Sholl *et al.*, that there is no allegation showing that the mortgage had been discharged by payment, nor is there any allegation showing that it was invalid for want of consideration, fraud, or for any other reason. The only allegations of the petition, in this respect, are that Sholl claimed some interest in said premises, the exact nature of which is to plaintiff unknown, but that whatever interest he may have in said premises is junior, inferior and subsequent to the rights of the plaintiffs, but plaintiffs allege that he has no interest in said premises whatsoever. It is apparent that these are mere legal conclusions. Moreover, the allegations refute themselves in this, that the pleader first states that he does not know the nature of the claim or interest, and that it is inferior and does not exist; the allegations are inconsistent with each other. There is no statement of fact from which it could be inferred that Sholl's mortgage was invalid for any reason, nor that it had been discharged. The mortgage

being of record gave plaintiffs in that action constructive notice of the exact amount of Sholl's lien and when it was due. Had it been intended to question this mortgage as to the amount due, or as to whether it had been discharged, or as to whether it was invalid, in whole or in part, there should have been appropriate allegations in the petition for that purpose. The allegations of the petition were wholly insufficient to justify the cancellation of Sholl's mortgage. 27 Cyc. 1599, note 41; *Smith v. Pure Strain Farms Co.*, 167 N. Y. Supp. 877; *Foval v. Benton*, 48 Ill. App. 638; *Wurcherer v. Hewitt*, 10 Mich. 453.

It necessarily follows that the decree in the Dudley case was not supported by the pleadings, and that such decree was ineffectual to cancel or bar the mortgage lien of Sholl. When Burns took title to the premises, he was chargeable with notice of Sholl's mortgage, and that the decree in the Dudley case did not extinguish the lien of such mortgage or subordinate it to the liens of Dudley and the Harvey-Enslow Lumber Company.

The decree of the district court, denying relief to Burns and foreclosing the mortgage of Sholl, is right, and is

AFFIRMED.

MORRISSEY, C. J., dissents as to paragraph 3 of the syllabus and that part of the opinion on which it is based.

IN RE ESTATE OF JOHN H. RUNYON.
WILLIAM A. LOWELL, ADMINISTRATOR, APPELLANT, V. REBECCA JANE RICHARDSON, APPELLEE.

FILED FEBRUARY 13, 1924. No. 22640.

1. **Appeal: SUPERSEDEAS BOND.** In an appeal from a final order of the county court in probate proceedings by an administrator, in furtherance of his individual interests, he is required to execute and file a bond like other suitors.
2. **———: JURISDICTION.** A district court does not acquire jurisdiction of an appeal from an order in probate proceedings, unless within 30 days from the date of such order the bond upon appeal, required by the statute, has been executed and filed.

3. ———: ———. In an appeal from an order of a county court in probate proceedings, where the record discloses upon its face that the district court has not acquired jurisdiction, such want of jurisdiction may be taken advantage of at any stage of the proceedings.

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

T. R. P. Stocker, for appellant.

Halligan, Beatty & Halligan, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE and GOOD, JJ., REDICK and SHEPHERD, District Judges.

GOOD, J.

William A. Lowell, as administrator of the estate of John H. Runyon, deceased, appealed to the district court from an order of the county court, which disallowed certain items of expense in his final report as administrator, and which directed him to pay into court for the heirs of the decedent all the funds in his possession in excess of the costs and expenses of administration, as allowed by the county court. One of the heirs of decedent filed a motion to dismiss the appeal, on the ground that the transcript was not filed within 40 days from the entry of the order appealed from. The motion was sustained and the appeal dismissed, and from this judgment of dismissal the administrator has appealed to this court.

From the record it appears that on December 3, 1920, an order was entered in the county court disallowing certain items in the account of the administrator. Subsequently, there was an additional report filed by the administrator, informing the county court that there were other heirs than had previously been disclosed to the court. The administration proceeding was opened up to let in the additional heirs, and on June 7, 1921, a final decree was entered which modified the order of December 3 with respect to the heirship and proportionate share of each heir in the estate. In this order of June 7 the court again found that the administrator was

not entitled to the items that had been disallowed on December 3, 1920, and decreed that the former order, with respect to the disallowance of the items in the administrator's account, should not be modified. The final decree of June 7 further directed the administrator to pay into court for the heirs of decedent all the funds in his possession as administrator, in excess of the amount necessary to pay the costs and expenses of administration. It is the order entered June 7, 1921, from which the administrator sought to appeal, seeking to have the district court review the order of the county court with respect to the disallowance of items in his account, and also to review the order requiring him to pay the funds in his possession into court, instead of paying them to the heirs, as provided by statute.

The transcript was not filed in the district court until the 20th day of July, 1921, which was 43 days after the entry of the order in the county court. It may be observed that, with respect to the disallowance of items in his account, the order was entered December 3, 1920, and was never modified, and that more than six months elapsed from that order before the transcript was filed in the district court. The administrator seeks to excuse himself from filing the transcript in the district court within the 40 days, prescribed by statute, from the date of the order entered June 7, 1921, by showing that the transcript was ordered and that he offered to pay for the same on or about the 6th day of July, and that his failure to furnish the transcript was due to the negligence of the county judge, and not to any fault on the part of the administrator.

From a consideration of the evidence, we are inclined to the view that the evidence sufficiently shows that the administrator ordered the transcript, and offered to pay for the same, in due time, and that the delay in preparing and filing the transcript in the office of the clerk of the district court was not due to any act of negligence on the part of the administrator, but to the unjustifiable delay on the part of the county judge.

However, appellee contends that the appeal is on behalf of the administrator, in furtherance of his individual interests, and that he is therefore required to give bond like other suitors; that, while the administrator filed a bond in the county court, such bond was not filed until the 8th day of July, 1921, being more than 30 days after the entry of the order appealed from; that, by reason of his failure to file the bond within the time prescribed by statute, the district court acquired no jurisdiction of the appeal; that it necessarily follows that the appeal was rightfully dismissed, because the court had no jurisdiction, and that it was immaterial that the motion to dismiss was not based upon the ground of the failure to file the bond within the time prescribed by statute.

In *In re Langdon*, 102 Neb. 432, this court held: "Under section 1528, Rev. St. 1913 (Comp. St. 1922, sec. 1473), an executor, administrator or guardian or guardian *ad litem* is not required to give bond on appeal when the appeal is taken in his representative capacity for the benefit of the estate, or the ward; but when the appeal is taken in furtherance of his individual interests he must give bond like other suitors." In the case under consideration, it does not appear that that appeal was for the purpose of protecting the estate of decedent; that the amount of the estate would be either increased or diminished by the order of the court directing the payment of the shares, belonging to the heirs, into court for them. The appeal, therefore, must be considered as being on behalf of the administrator, in furtherance of his individual interests, and he was required, therefore, to execute and file a bond within 30 days from the order appealed from.

This court has further held in *Jones v. Piggott*, 68 Neb. 140, and in *In re Estate of Nelson*, 108 Neb. 296, that "A district court does not acquire jurisdiction of an appeal from an order in a probate proceeding unless within forty days from the date of the order a transcript thereof and of the proceedings relative to it is filed with the district court clerk, nor unless within thirty days from the date of such order the bond upon appeal, required by the statute,

has been executed and filed." In this case the bond was not filed until the 8th day of July, which was more than thirty days after the entry of the order in the county court, which is sought to be appealed from.

It follows that the district court did not acquire jurisdiction. Since the record discloses, on its face, that the court did not acquire jurisdiction, the motion to dismiss was properly sustained, as want of jurisdiction, apparent on the face of the record, may be taken advantage of at any stage of the proceedings.

The judgment of the district court dismissing the appeal was in accordance with law, and is, therefore,

AFFIRMED.

EVA THAMANN ET AL., APPELLEES V. JOHN MERRITT ET AL., DEFENDANTS: SHERMAN & MCCONNELL DRUG COMPANY ET AL., APPELLANTS.

FILED FEBRUARY 13, 1924. No. 22998.

1. **Intoxicating Liquors: UNLAWFUL SALES.** Under section 27, ch. 187, Laws 1917, it is unlawful for a licensed pharmacist to sell any alcoholic compound, preparation, or remedy, which contains sufficient alcohol to make it intoxicating, unless it has been so medicated with drugs as to render it unfit for use as a beverage.
2. ———: ALCOHOLIC COMPOUNDS. The fact that an alcoholic compound or preparation may be drunk in sufficient quantities to produce death, does not, of itself, establish that such compound or preparation is unfit for use as a beverage, within the meaning of section 27, ch. 187, Laws 1917.
3. ———: SALES: LIABILITY. Under the civil damage sections of chapter 187, Laws 1917, a licensed pharmacist is not liable in damages arising from the use of an alcoholic compound or preparation, sold by him, unless such sale was made in violation of law.
4. ———: ———: QUESTION OF FACT. Whether essence of wintergreen, an alcoholic compound or preparation, is unfit for use as a beverage is a question of fact, to be determined from the evidence.

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

Stout, Rose, Wells & Martin, for appellants.

Murphy & Winters, contra.

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

GOOD, J.

Action under civil damage sections of the Nebraska prohibition act of 1917. From a judgment for plaintiff, the defendants, Sherman & McConnell Drug Company and Charles R. Sherman, have appealed. This is the second appearance of this case in this court. The former opinion appears in 107 Neb. 602. The action was originally begun against Merritt *et al.*, but, since the first trial, has been dismissed as to all defendants except the Sherman & McConnell Drug Company (hereinafter called the drug company) and Charles R. Sherman. The drug company, as a licensed pharmacist, operates five drug stores in the city of Omaha, and Charles R. Sherman is surety on the bond of the drug company for each of its stores.

Plaintiff brought this action on behalf of herself and minor children, to recover for loss of support, occasioned by the death of her husband, John Thamann. It is alleged in the petition that between the 24th and 30th days of December, 1917, John Thamann purchased of the drug company at its stores in Omaha essence of wintergreen, an intoxicating liquor, which he drank and which caused his death on December 31, 1917; that said intoxicating liquors, so sold to the deceased, were not so medicated as to be unfit for use as a beverage, and consisted of approximately 5 to 10 per cent. of essence of wintergreen and 90 to 95 per cent. of alcohol. The defendant drug company admitted that it was a duly licensed pharmacist, and it was admitted that the defendant Sherman was surety on the bond of the drug company, and in their answer defendants alleged that the drug company was authorized to sell and keep for sale alco-

hol, under section 17, ch. 187, Laws 1917; and denied that they had sold any alcoholic compound, preparation, or remedy, except in strict compliance with section 27 of the prohibition act of 1917.

Defendants contend that the trial court erred in the whole theory of the law applicable to the facts. They argue that under the food and drugs act of Nebraska it was lawful for defendant drug company to sell any medical compound or preparation that is recognized in the United States Pharmacopœia or National Formulary, and that is prepared according to the formula laid down in either of these works, regardless of the fact that it may be intoxicating, unless such compound or preparation is sold for a beverage. They contend, further, that the National Formulary contains a formula for the preparation of essence of wintergreen, and argue that therefore there can be no liability in this case unless the essence of wintergreen was sold to Thamann as a beverage.

We think this argument is not sound. In the first place, neither the United States Pharmacopœia nor the National Formulary lists essence of wintergreen as a medical compound or preparation. It is true that the National Formulary contains the following formula: "Any spirit of a volatile oil, for which no formula is provided, may be prepared by the following general formula: The volatile oil, 65 milliliters, alcohol, 935 milliliters." However, this by no means goes to the extent of recognizing essence of wintergreen, which is composed of oil of wintergreen and alcohol, as a medicinal preparation or compound. But, even if it was recognized in the United States Pharmacopœia or National Formulary as a medical preparation or compound, if it was fit for use as a beverage, we think it would be prohibited. Section 27, ch. 187, Laws 1917, which was in force at the time of the sale of the essence of wintergreen to Thamann, authorized the sale of alcoholic compounds, preparations, or remedies, containing drugs or medicines, which do not contain more alcohol than is necessary for the legitimate purpose of extraction, solution, or preservation, and which con-

tain drugs in sufficient quantities to so medicate such compounds, preparations or remedies as to make them medicinal preparations or compounds, and to render such compounds, preparations or remedies unfit for use as beverages. The said section permits the sale of culinary and toilet articles, containing alcohol, if not sold or dealt in for use as a beverage or intoxicant, and provided, further, that such compounds, perfumes, essences, extracts and syrups are unfit for use as beverages. We think that under this section of the liquor act, which was in force, a licensed pharmacist cannot lawfully sell any alcoholic compound or essence which contains sufficient alcohol to make it intoxicating, unless it has been medicated with other drugs, so as to render it unfit for use as a beverage.

Defendants further argue that, since it is alleged that the essence of wintergreen which Thamann drank caused his death, such fact conclusively proves that the essence of wintergreen was unfit for use as a beverage. The same argument would authorize the sale of alcohol that contained but the slightest trace of any flavoring extract, if the alcohol, when drunk in sufficient quantities, would produce death. It is a matter of common knowledge that the death of many persons has been caused by the excessive use of intoxicating liquors. The fact that they will produce death when drunk in large quantities does not render them unfit for use as a beverage, within the meaning of the statute.

Section 22 of said chapter 187, which requires a registered pharmacist to give bond, provides, among other things, that such bond shall be conditioned that the applicant will not violate any of the provisions of this act and will pay all damages, fines and penalties which may be adjudged against him for a *violation* of the provisions of this act. It further provides that the bond may be sued upon for the use of any person, who may be injured by reason of the *unlawful* sale or giving away of any intoxicating liquors by such registered pharmacist, and section 52 of the act provides, among other things, that any wife, who shall be injured in her means of support by intoxication of any person, shall have a

right of action against the person furnishing the intoxicating liquor that caused or contributed to the intoxication of such person, and provides that a registered pharmacist, holding a permit, shall pay all damages that individuals may sustain in consequence of any *unlawful* sale by himself, his agent, or servant, of intoxicating liquors. It further provides that it shall be lawful for any married woman to maintain an action for all damages sustained by herself and children on account of such *unlawful* sale.

From a consideration of these sections of the statute, we think it is clear that an action for damages will not lie unless there has been an *unlawful* sale or disposition of the alcoholic liquor which has caused or contributed to the injury complained of. So that we come to the crucial question: Was the sale of the essence of wintergreen an *unlawful* sale of intoxicating liquor? The evidence discloses beyond question that the essence of wintergreen, sold by the defendant drug company, contained 93½ per cent. of alcohol and 6½ per cent. of oil of wintergreen. The statute prescribes that liquors containing more than one-half of one per cent. of alcohol shall be deemed intoxicating. It is a matter of common knowledge, of which this court will take judicial notice, that liquor containing 93½ per cent. of alcohol is intoxicating. But, under the statute, it is not the sale of every intoxicating liquor that is prohibited. If it is sold as a medical compound or preparation and has been so medicated as to render it unfit for use as a beverage, then it is not in violation of law. As already observed, whether or not essence of wintergreen was unfit for use as a beverage is not a question of law but one of fact, which should have been submitted to the jury for its determination under the evidence. *Schemmer v. State.* 105 Neb. 324.

Defendants introduced evidence tending to prove that essence of wintergreen is a medicinal preparation or compound and is used as a medicine in the treatment of rheumatism and other diseases. They further offered evidence to prove that essence of wintergreen was unfit for use as a beverage. This proffered evidence was, on objection, ex-

cluded as immaterial. After the objection was sustained, no offer of proof was made. The questions propounded so clearly indicated the information that was expected to be elicited that the court was fully advised thereof. Under such circumstances, no offer to prove was necessary. *Williams v. Fuller*, 68 Neb. 354. The exclusion of this evidence was erroneous.

Defendants further complain of numerous instructions of the court. We deem it necessary to consider but one. By the third instruction the court told the jury, in effect, that if plaintiff proved that the defendants, at about the time alleged in the petition, sold intoxicating liquor, which was drunk by Thamann, and that such liquor caused or contributed to his death, and that by his death the plaintiff was damaged, then she was entitled to recover. If the essence of wintergreen was sold as a medicinal preparation or compound and was unfit for use as a beverage, then its sale was lawful, notwithstanding it was an intoxicating liquor and the purchaser, by an abuse of its legitimate use, might become intoxicated. Before there could be a recovery, it must be established to the satisfaction of the jury that there has been an *unlawful* sale of intoxicating liquor. It follows that the instruction, as given, was prejudicially erroneous.

Because of errors in giving the third instruction and the exclusion of material evidence, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

WALTER RAY SIMMONS V. STATE OF NEBRASKA.

FILED FEBRUARY 13, 1924. No. 23237.

1. **Criminal Law**: CHANGE OF VENUE. A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed unless an abuse of such discretion is disclosed.
2. **Homicide**: SUFFICIENCY OF EVIDENCE. Evidence examined and outlined in the opinion *held* sufficient to sustain a conviction of first degree murder.

3. Criminal Law: ADMISSIBILITY OF EVIDENCE. In a prosecution for murder, it is proper to admit in evidence bloody garments and other blood-stained articles, when a sufficient foundation has been laid, if they tend to illustrate or make clear any controverted issue in the case.

4. ———: ADMISSION OF EVIDENCE: HARMLESS ERROR. In a criminal case, the admission in evidence of articles of clothing and other personal effects of the defendant that are not relevant or material to any controverted issue in the case, but which are not prejudicial to the defendant, is harmless error.

5. ———: NEW TRIAL. Whether a motion for a new trial in a criminal case, based on alleged misconduct of jurors, should be sustained rests in the sound discretion of the trial court, and its ruling on such motion will not be disturbed unless an abuse of discretion is shown.

6. ———: MOTIVE. In a criminal prosecution, motive may be of assistance in shedding light on the intent with which the act was done or in removing doubt and completing proof which might otherwise be unsatisfactory, but it is not an essential element of the crime.

7. Homicide: REFUSAL OF INSTRUCTION. In a prosecution for murder in the first degree, it is not error to refuse to instruct the jury as to the law applicable to manslaughter, when the evidence conclusively establishes that the defendant is either guilty of the crime charged or entirely innocent.

8. Criminal Law: "WITNESS ON STAND." One whose deposition is being taken is, while testifying, "a witness on the stand."

9. ———: INSTRUCTIONS. Whether an instruction to the jury is a correct statement of law applicable to the issues must be determined from an examination of the whole charge to the jury, and not from an isolated sentence in a single instruction.

10. ———: NEW TRIAL. The district court does not possess jurisdiction to grant a new trial in a criminal case for newly discovered evidence, when the motion is filed more than three days after verdict and at a subsequent term of court.

11. Homicide: SENTENCE: REVIEW. Where a defendant, after a fair trial, has been convicted of murder in the first degree and the jury, by its verdict, has imposed the death penalty, and the court has passed sentence in conformity with the verdict, this court will not interfere with such sentence on the ground that it is excessive, in the absence of any mitigating circumstances.

ERROR to the district court for Boyd county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

Holmes, Chambers & Mann, W. T. Wills, Josiah Coombs and *A. H. Tingle,* for plaintiff in error.

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

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

GOOD, J.

Plaintiff in error (hereinafter called defendant) was convicted of murder in the first degree and sentenced to death by electrocution. He prosecutes error to have this court review the record of his trial and conviction. In the information the state charged that on May 14, 1922, the defendant, with a hammer, assaulted and killed one Frank Pahl.

A multitude of errors are assigned, but we shall consider only those urged upon the court in the briefs. At the outset, defendant insists that the court erred in denying his motion for a change of venue. In support of his motion, defendant filed his own affidavit and that of his counsel and of five other persons. These affidavits tended to show that, because of the sensational articles appearing in the newspapers of the locality, the minds of the citizens had become inflamed and prejudiced against the defendant to such an extent that it was impossible to secure a fair and impartial jury. It may be observed that, aside from the affidavits of the defendant and his counsel, those whose affidavits were filed fail to disclose what their business, occupation or standing in the community were, so that this court is not in a position to determine the weight which should be given to their testimony. It is disclosed, however, by the counter-affidavits that at least one of them had been for a considerable time an inmate of the county jail, and another was the father of this inmate. The state filed twice as many counter-affidavits of persons who were merchants, postmasters, county officials, and evidently men of high standing in the community strongly contradicting the charge that there

was any general feeling of bias or prejudice against the defendant. In addition to that, when the trial was had some months later, it does not appear from the *voir dire* examination of the jurors that there was any great amount of prejudice existing against the defendant in the community. The ruling complained of is supported by strong and convincing evidence and appears to be in accord with the overwhelming weight of the evidence. At most, it was a question for the sound discretion of the trial court, and no error can be predicated thereon, unless there has been an abuse of such discretion. No such abuse is apparent. Comp. St. 1922, sec. 10048; *Clarence v. State,* 89 Neb. 762; *Sweet v. State,* 75 Neb. 263; *Lindsay v. State,* 46 Neb. 177.

Defendant strongly urges upon this court that the evidence is insufficient to establish the guilt of the defendant beyond a reasonable doubt. A number of the assignments of error deal with this proposition. No eyewitness testified to the assault which caused Pahl's death. The evidence is wholly circumstantial. We have read and carefully considered all the evidence in the voluminous record. Space forbids an attempt to outline all of the testimony, but we shall point out some of the circumstances disclosed by the record.

Defendant had been a resident of Montana most of his life and only a few months before the tragedy came to Nebraska. He was a married man with a wife and children. It does not appear that his wife and children came with him to Nebraska, or that he had been living with them for some months. He was a stranger in Boyd county, and had come into that county from South Dakota on the day that the crime was committed. It is shown that on the 11th day of May, 1922, the defendant stated to a witness that he had but $1.50 in money. A few days before the crime he had obtained $5 on a "no fund" check. He "beat his way" on a train from Burke, South Dakota, to Spencer, Nebraska, on Sunday morning, May 14. During that day he was around and about Spencer and attended a ball game. In the evening of the same day he attempted to employ one Adkins

to take his automobile and drive defendant into the country, to obtain a quantity of intoxicating liquor. At about 10 o'clock on Sunday night he approached Mr. Caywood, a restaurateur, in his place of business and made inquiries if he knew of some person whom he could get to drive him into the country, and intimating that he desired to go for some contraband liquor. Caywood responded that he thought he could get some one to drive for him. Thereupon, Pahl was called to the restaurant over the telephone. Pahl informed the defendant that he had a Ford truck and also an Oldsmobile car. Defendant insisted upon the Oldsmobile, and an agreement was made there that Pahl should drive him in the country for a distance of about 18 miles in a southerly direction on the O'Neill road, and that defendant should pay him $20 for the drive. Defendant asked Pahl to obtain a hammer or hatchet, as they might have need of it. When Pahl went for his car, defendant picked up a hammer in the restaurant and observed that Pahl might forget to bring a hammer or hatchet, and that he would take the hammer and return it the next morning. Pahl and the defendant left Spencer at about 10:30 p. m., the defendant being in the rear seat of the car. There was also in the rear of the car a canvas or muslin automobile cover. No witness, save the defendant, ever saw Pahl alive after this time. Two days later Pahl's body was found beneath a bridge about nine miles northeast of Spencer. The body was dressed in the same manner as when he left Spencer, including the gloves on his hands which he wore when he left Spencer. The cap of the deceased was missing. An examination of the body disclosed that he had been struck with a blunt instrument on the right side of the head, just back of the ear, with sufficient force to crush in his skull and cause his death. The wound was about one inch in diameter and such as might have been made with a hammer. But 10 cents was found on the body. It was shown that when Pahl left Spencer he had $480 in currency in his possession. The wife of the deceased had counted the money, rolled it up and tied a string about it, and in counting and rolling the bills

there were a number which she was able later to identify.

On the morning of May 15, about seven or eight hours after Pahl and the defendant had left Spencer, the latter was found at the home of Orien Porter, about 16 miles northwest from Spencer and near the Missouri river. Defendant was alone and had come there in the latter part of the night or early morning in Pahl's car. When Mr. Porter discovered him there at 5:20 in the morning, defendant stated that he had lost his way and was trying to reach Fort Randall. Porter gave him directions as to how to reach Fort Randall, which was to the east of Porter's home. Porter observed that there was blood upon the car and called defendant's attention to it. Defendant stated that the car belonged to a butcher, and that on the day previous a part of a carcass had been hauled in the car, and he thus attempted to account for the blood in the car. Defendant left Porter's in haste, taking the road as directed by Porter, but instead of going to Fort Randall he went first south and then east to a point a mile and a half from Fairfax, South Dakota. At this point he drove to the home of Mr. Opbroek, 85 rods north of the highway, and drove into Mr. Opbroek's yard, leaving his car on the north side of the barn where it could not be observed from the highway. He falsely stated to members of the Opbroek family that he had burned out a connecting rod and desired to leave the car there until he could procure repairs, which might be a day or two, and immediately left, going directly to Fairfax on foot. At Fairfax he entered a clothing store and purchased a brown suit of clothes, shoes, cap, and raincoat, and left in the store a part of the clothing that he had worn, stating to the clerk from whom he purchased the new clothing that he was going to Sioux Falls. Instead, however, he boarded a train and went direct to Norfolk, Nebraska. There he registered at a hotel under an assumed name and again went to a clothing store and purchased a blue suit of clothes, another pair of shoes, and a cap, and changed his apparel. Members of the Opbroek family, shortly after the defendant left their home, discovered blood upon the car, and an examination

showed Pahl's name or initials on the car; that blood was on the windshield and some on the back of the front seat, and blood sprinkled or spurted on the interior of the top of the car at a point just over the position of the driver's head, and a considerable quantity of blood was on the floor of the rear part of the car. This fact was communicated to the officers at Fairfax, and in the meantime it was discovered that the clothing which defendant had left at the clothing store was blood-stained. Suspicion was aroused, tracers were sent out, and the defendant was arrested in Norfolk in the afternoon of the same day. He told the officers that he had come there from Sioux Falls, but this was shown to be false. He was taken to Burke, South Dakota. At this time Pahl's body had not been found, but his car was found and search was instituted, which resulted in the finding of Pahl's body in the evening of May 16. The automobile cover and a hammer, later identified as the hammer which was taken by defendant from Caywood's restaurant, were found at about this time in the field adjacent to the highway, over which defendant had driven, between the homes of Porter and Opbroek. The automobile cover was blood-soaked and the hammer was blood-stained. At about the same time the hat which defendant wore on the night he left Spencer with Pahl was found along the road between the Opbroek home and Porter's. The hat was blood-stained and upon the crown there was blood in small spots, as if blood had been sprinkled or spurted on the hat.

When defendant was arrested he had on his person $355 in currency and $5.15 in silver. Three of the bills were later identified by Mrs. Pahl as being three bills which were contained in the roll of currency that her husband had at the time he left Spencer with defendant. Also, the cap which was left by defendant at Fairfax, when he purchased a new outfit of clothing, was identified as being the cap which Pahl wore on the night of the tragedy.

The defendant was a witness in his own behalf, and he testified that on the 14th day of May, at Spencer, he met one Currier, whom he had previously known in Montana as a

professional bootlegger; that Currier told him he had a carload of liquor out in the country and that his car had broken down, and that he wanted some one with a good car to go out that night and get the liquor, stating that this liquor was about 18 miles from Spencer; that it was for the purpose of getting this liquor that he engaged Pahl to drive into the country; that about seven miles out from Spencer he and Pahl met another car, containing two persons, one of whom was Currier; that they stopped and had a few minutes' conversation; that thereupon it was arranged that Pahl should take his car and go with the other two men, while defendant should remain near the cross-roads to watch for the possible approach of officers; that they were gone from an hour and a half to three hours, when Currier returned alone in Pahl's car; that Currier stated that they had disposed of the liquor which they had in the car, that Pahl was going to Fort Randall for another load of liquor, and that defendant should take Pahl's car and meet Pahl at Fort Randall; that he got into the car and drove with Currier to a point northeast from Spencer and not far from Fort Randall, when Currier got out of the car and paid defendant $352 as his share of the profits in the liquor transaction; that at this time he discovered a cap on the seat and put the cap on and threw his own hat in the rear of the car; that his hat had not been off of his head from the time he left Spencer with Pahl until he exchanged his hat for the cap; that he lost his way and did not find Fort Randall, but stopped at the home of Porter and slept on Porter's porch until daylight, when Porter discovered him there; that up to this time he did not know that anything had happened to Pahl and did not know that there was any blood on or in the car. He attempted to account for the blood upon his hat by saying that it must have gotten there when he threw it in the rear of the car. It is apparent that this is untrue, for the blood had been in the car for at least some hours and would be clotted. If the blood on the hat had come from this source it would appear as a smear or splotch, and not in small spots, as if sprinkled or spurted

from an artery. Physicians testified that where the wound was inflicted upon Pahl's head an artery was severed, and that blood would spurt from such a wound for a distance of two or three feet. It was the theory of the state that defendant killed Pahl by striking him with a hammer while he was seated in his car; that the blood in the interior of the car over the driver's seat came from the spurting blood from the wound; that the crime was committed for the purpose of robbery.

The evidence discloses that the amount of money spent by defendant for clothing at Fairfax and at Norfolk, together with his railroad fare and some other articles which he purchased, and the money which was found upon his person just about equaled the $480 that Pahl was known to have carried with him on the night of May 14. While defendant claimed that he had $145 or $150 when he reached Spencer on the 14th of May, he admitted upon cross-examination that he had about $200 from his previous year's work when he came to Nebraska; that out of this he had bought a horse, saddle and bridle for $75; that he later sold the same for $50, and that since the fall previous he had earned $21 or $22, but he had lived for several months and kept the horse for part of the time; so it is apparent that he must have lived most economically, if his statements were true; and, while he claimed that Currier had paid him $352 for his share of the profits of the liquor transaction, he admitted on cross-examination that he had purchased no liquor, had sold none and had seen none. It is further significant that when he was first arrested and charged with the offense, after the discovery of Pahl's body, defendant told somewhat the same story, except that he said he did not know the names of the bootleggers and had never seen them before. He made many other contradictory statements and damaging admissions. The story he told as to how he obtained the $352 is so unreasonable and improbable as not to be credible. The jury evidently disbelieved his story. We think they were justified. From a consideration of all of the testimony, we think it is sufficient to

establish his guilt beyond a reasonable doubt, and justifies the verdict rendered.

A considerable number of the assignments of error are based on the theory that the court should not have admitted in evidence certain exhibits, consisting of the hammer, the automobile cover, the currency found on the person of the defendant, and various articles of clothing worn by the defendant at or shortly after the homicide. Defendant contends that these articles tended to inflame the minds of the jury and did not tend to establish the crime or defendant's connection therewith. It must be borne in mind that at the time these articles were introduced in evidence defendant had not testified, and his theory of the transaction was unknown. Most of the articles admitted in evidence had a direct bearing and tended to prove the manner in which Pahl met his death, and tended to connect the defendant with the crime. In *Blazka v. State*, 105 Neb. 13, it is held: "In a prosecution for murder, bloody garments and photographs of wounds upon the body of the victim are proper to be received in evidence, when sufficient foundation has been laid, where they tend to illustrate or make clear any controverted issue in the case." We think that most of the articles, the admission in evidence of which is complained of, either tended to illustrate the manner in which the crime was committed or to establish the defendant's connection therewith, and were therefore properly admitted in evidence.

Some of the exhibits, consisting of articles which defendant had in his possession—a traveling bag which he had purchased and some other articles—do not appear to have been material or relevant to any issue in the case, but it is not apparent that the introduction of these articles in evidence could have had any influence on the minds of the jury in determining the guilt or innocence of the defendant. Conceding that it was error to admit them, still it was error without prejudice, and errors which do not tend to produce any prejudice in the minds of the jury do not constitute a ground for reversal.

Complaint is made as to alleged misconduct of one of the jurors. Before any evidence was taken in the case, the court made an order directing that the jury should be kept together in the custody of an officer during the trial. One night, during the progress of the trial, a juror was taking some medicine and informed the officer in charge that he might have to absent himself from the jury room to respond to the call of nature. He did so, and on returning found the doors locked. In this predicament he went to the hotel where the presiding judge was stopping and informed the innkeeper, who thereupon advised the judge. Directions were given for getting the juror back into the jury room. It appears that the juror was absent from the jury room from three-quarters of an hour to an hour and a half, that during that time he saw and spoke to no person except the innkeeper and nothing was said relating to the case on trial. Nothing occurred that could have worked any prejudice to the defendant. We think no misconduct of the juror was shown. In any event, it was not sufficient to warrant granting a new trial. *Spaulding v. State*, 61 Neb. 289; *Carleton v State*, 43 Neb. 373; 16 R. C. L. 307, sec. 117.

Defendant asserts error in the overruling of his motion for a new trial, on the ground of misconduct of three jurors, namely, Smith, Fedde, and Berg, and contends that the evidence shows that these jurors had all formed and expressed opinions as to the guilt of defendant before being called as jurors, which fact was unknown to defendant and his counsel until after the verdict, and that the jurors falsely stated on their *voir dire* examination that they had no opinion as to the defendant's guilt. The record does not disclose that Berg acted as a juror, and the only evidence as to the juror Fedde is a purported affidavit by George Moody, to the effect that before the trial Fedde stated: "That the reason the jury executed Simmons was that they wanted to save the county money and further costs." This purported affidavit is signed by the affiant, but is not attested by the signature of a notary. It was not, therefore, an affidavit and was not competent evidence. It may be observed that

it presents an impossible statement of fact. Prior to the trial the juror could not have known what the verdict would be, much less state the reason for the verdict. As to the juror Smith, there are two affidavits in identical language, by two persons bearing the same surname, to the effect that prior to the trial the juror said: "They ought to have let the mob have him and saved the county the expense, or words to that general effect." The record affords no information as to the business, profession, character or standing of these affiants. They simply stated that they were residents of Boyd county at the time the affidavits were made. The place where and the circumstances under which the alleged statements were made by the juror are not disclosed. Juror Smith was called, sworn, and testified in rebuttal, and denied that he had ever made such statements at any time or place or to any person. The trial court was in a position to observe the demeanor and manner of the juror while testifying, and doubtless knew the character and standing of the juror as well as of the affiants, and was in a better position to determine the weight that should be given to the evidence of the respective parties. The question was one calling for the exercise of a sound judicial discretion. The ruling thereon should not be interfered with unless there was an abuse of such discretion, and none such appears. See *Carleton v. State, supra; Spaulding v. State, supra;* 16 R. C. L. 307, sec. 117.

Defendant urges that a motive for the crime must be proved, and contends that the state has failed to prove deliberation and premeditation. "In a criminal prosecution the state is not required to prove a motive for the crime, if, without this, the evidence is sufficient to show that the act was done by the accused. The existence or nonexistence of motive is immaterial where the guilt of the accused is clearly established. The most laudable motive is no defense where the act committed is a crime in contemplation of law, and on the other hand a bad motive does not make an act a crime if it is not so in law. * * * While, however, motive is never an essential element in a crime, it may be of assistance

in throwing light on the intent with which the act was committed, and in removing doubt and completing proof which might otherwise be unsatisfactory, especially in cases depending on circumstantial evidence." 16 C. J. 78, sec. 43.

We think the circumstances detailed in the opinion, together with other evidence in the record, clearly show that defendant contemplated committing the crime before he left Spencer with Pahl. The procuring of the hammer in advance and the luring of Pahl to take his car and go out after a cargo of liquor, when there is every reason to believe from the evidence that no such cargo of liquor existed, indicate clearly deliberation and premeditation.

The defendant complains of the giving of the seventh and eighth instructions. The seventh instruction informs the jury of the material elements necessary to constitute the crime of murder in the first degree, and the eighth instructs as to the material elements necessary to constitute murder in the second degree. The seventh instruction then contains the following: "If the state has established these facts by the evidence, beyond a reasonable doubt, then it will be your duty to find the defendant guilty of the crime of murder in the first degree." And the eighth instruction contains a like clause relating to murder in the second degree. The criticism is that it withdraws from the jury consideration of the evidence on behalf of the defendant, and requires the jury to predicate their verdict upon the evidence introduced by the state. We do not think that the instructions are fairly subject to the criticism made. Nowhere do they inform the jury that they shall consider only the evidence on behalf of the state; and in other instructions the jury are directed to consider all of the evidence introduced. The contention is without merit.

Complaint is made because the court refused to instruct the jury on the charge of manslaughter. In *Strong v. State*, 63 Neb. 440, it is held: "The court, in charging the jury, is only required to state the law applicable to the facts proved and those which the evidence tends to prove. So, where it is conclusively shown that the defendant either committed

the crime charged or is entirely innocent, the failure to instruct with respect to other crimes, or inferior degrees of the crime, embraced within the facts alleged in the information, is not error." To like effect are *Jahnke v. State*, 68 Neb. 154, *Clark v. State*, 79 Neb. 482, and *Thompson v. State*, 85 Neb. 244. There is no evidence in the record of any quarrel between the defendant and Pahl, nor any facts which would justify the submission to the jury of the charge of manslaughter. The trial court properly refused to give the proffered instruction.

Complaint is also made of instruction No. 20. The court in this instruction directed the jury not to consider any of its rulings as an indication of the opinion of the court as to defendant's guilt or innocence; that they should determine the issues from a consideration of all the evidence; that statements of counsel made in the course of the trial and statements of the court in rulings were not evidence, and told the jury the purpose of opening statements, of arguments by counsel, and of instructions of the court, and then told the jury that evidence is what the witnesses have been permitted to say while on the witness-stand and such exhibits as have been received in evidence. The criticism is made that in stating what is evidence the court omitted to mention depositions and the presumption of innocence which attends the defendant in a criminal action. Failure to mention depositions is of no importance, because one whose testimony is being given in the form of a deposition is, while testifying, a witness on the stand, and the clause in the instruction, "what the witnesses have been permitted to say while on the witness-stand," refers as plainly and clearly to the evidence taken by way of deposition as it does to the evidence taken in open court. It is true that the presumption of innocence is frequently referred to in the decisions as a matter of evidence, and the court in instruction No. 12 fully covers this question and properly informs the jury as to the law on the subject. It is apparent that the purpose of instruction No. 20 was to caution the jury that they should not consider as evidence statements made by counsel or the

court during the progress of the trial. It was not intended to withdraw from their consideration the presumption of innocence which the law gives to the defendant in a criminal action. The instructions should be considered together and as a whole, and, when so taken and considered, they fully and correctly state the law applicable to the issues in the case.

Defendant complains that the district court overruled its supplemental motion for a new trial, based upon the ground of newly discovered evidence. This motion was filed after the adjournment of the term at which defendant was tried. The rule is well settled in this state that the district court possesses no jurisdiction to grant a new trial in a criminal case, on the ground of newly discovered evidence, at a subsequent term to that at which the verdict of guilty was returned. *Hubbard v. State*, 72 Neb. 62; *Evers v. State*, 87 Neb. 721; *Fouse v. State*, 83 Neb. 258; *Dodge v. People*, 4 Neb. 220; *McCoy v. State*, 110 Neb. 360.

Finally, defendant urges that the sentence is excessive and that the record does not warrant the imposition of the death penalty. Personally, the writer is not in sympathy with the law that takes the life of any one as a punishment for the commission of a crime. However, the duty of the court is to administer the law as it exists, and not as it would prefer it should be. The evidence indicates that defendant killed Pahl by a blow of a hammer, and that the act was wilful, deliberate, premeditated and committed for the purpose of robbery. The record shows no quarrel, grudge, or ill-feeling. There are no mitigating circumstances. The law empowers the jury, in cases of this kind, to determine whether the punishment shall be life imprisonment or death. The jury, after hearing all the evidence, determined that the death penalty should be inflicted. No reason is apparent for disturbing the jury's action.

No prejudicial error has been found in the record, and the judgment is affirmed, and Friday, the 23d day of May, 1924, between the hours of 6 o'clock a. m. and 6 o'clock p. m.

of said day, is fixed as the date for carrying into effect the sentence of the district court.

AFFIRMED.

ALEXANDER G. BREHM V. STATE OF NEBRASKA.

FILED FEBRUARY 13, 1924. No. 23463.

Intoxicating Liquors: UNLAWFUL POSSESSION: SUFFICIENCY OF EVIDENCE. Evidence examined, outlined in the opinion, and *held* insufficient to support a conviction for illegal possession of intoxicating liquors.

ERROR to the district court for Adams county: WILLIAM A. DILWORTH, JUDGE. *Reversed and dismissed.*

J. E. Willits, for plaintiff in error.

O. S. Spillman, Attorney General, and *Harry Silverman, contra.*

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

GOOD, J.

Alexander G. Brehm, plaintiff in error (hereinafter referred to as defendant), was prosecuted upon a complaint, which charged him with possession of intoxicating liquors, contrary to the provision of an ordinance of the city of Hastings. The jury returned a verdict of guilty and the court imposed a fine of $100 and costs. Defendant brings the case to this court for a review of the record of his conviction. Numerous errors are assigned, but it will be necessary to consider but one, namely, that the evidence is insufficient to support the verdict.

The record discloses that the liquors had been in defendant's possession in his residence since a date prior to the enactment of our prohibitory law; that he had not sold nor given away any of such liquors, and that no person, save himself and members of his immediate family, had used any thereof; that such liquors as he had in his possession were

used by him and members of his immediate family upon their table and were kept for the personal use of the defendant, and that the quantity was not more than was reasonably sufficient for his personal use and needs. This evidence is uncontradicted and is sufficient to overcome the presumption that the possession was unlawful.

The evidence is insufficient to support the verdict, and the judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

WILL HANNAH, APPELLEE, V. AMERICAN LIVE STOCK INSURANCE COMPANY, APPELLANT.

FILED FEBRUARY 13, 1924. No. 22652.

1. **Appeal:** ADJOURNMENT, FAILURE TO APPLY FOR. A party to a suit cannot after the close of the trial, for the first time, successfully contend that he was prejudiced by the trial proceeding without sufficient time being allowed for preparation after issues joined, unless timely application for an adjournment was made either prior to or during trial.

2. ———: RECORD. "Affidavits used on the hearing of a motion for a new trial cannot be considered in this court unless preserved in a bill of exceptions." *Schmidt v. Village of Papillion*, 92 Neb. 511.

3. **Insurance:** FORFEITURE: WAIVER. A live stock insurance company, in response to a notice by telephone that an insured animal was ailing, sent veterinarians to take charge of the animal, who examined it, operated upon it, and continued to visit and treat it until its death about a month and a half later. *Held*, to have thereby waived a right to declare a forfeiture under the policy on account of failure to notify by telegram on first appearance of sickness or disease.

4. ———: VIOLATION OF CONDITIONS. Under the statutes of Nebraska, the violation of a condition in a policy of insurance on live stock, by the removal of insured chattels from premises of owner, does not invalidate the insurance, unless such breach of contract shall exist at the time of the loss and contribute to the loss. Comp. St. 1922, sec. 7787.

5. **Trial:** INSTRUCTIONS. "A party desiring a more explicit in-

struction than that given should offer such an instruction." *Larsen v. Savidge*, 103 Neb. 79.

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

Kennedy, Holland, DeLacy & McLaughlin, for appellant.

Thomas, Vail & Stoner, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE and GOOD, JJ., ELDRED and REDICK, District Judges.

ELDRED, District Judge.

This action was instituted by plaintiff to recover of defendant for the loss of a registered sow, described as "Big Mary," under a policy of insurance issued by the defendant on payment of a premium of $150, insuring the property in question against loss by death in the sum of $1,000. Plaintiff in the court below recovered judgment in the sum of $1,116.45, and defendant appeals.

The policy by its terms makes the application for insurance a part of the policy. The policy provides that the defendant will not be liable for the loss of any hogs, covered by the policy, taken from the premises where they were kept when application was made. The application provides: That insured property was kept on farm of assured in Seward county, Nebraska; that assured should notify the American Live Stock Insurance Company at its home office in Omaha, Nebraska, by telegram at the company's expense at first appearance of sickness or disease among his hogs, beginning on the day the application has been taken, and the company would not be liable for any hogs taken from the premises without the written consent of the company. The application also contains the following: "This sow is now at the farm of T. W. Haviland, Corning, Iowa, and on Monday, October 20, she will be taken to the farm of Lynden M. Young, Corning, Iowa, to be bred. She will remain there for three weeks, and then will be shipped by express to me at Utica, Nebraska, and will then remain on my farm for

duration of the policy year unless I otherwise advise you. This application signed with the understanding that the insurance will go into effect ten days from this date, and will cover this sow during transportation from Iowa to my farm in Utica." The policy contains the following indorsement: "Privilege granted to ship sow from Corning Iowa, to Utica, Nebraska, assured's home." The application was dated October 17, 1919. At that time the sow was at Haviland's place in Corning, Iowa. The policy was issued October 27, 1919; she was then at Young's place, Corning, Iowa, where she stayed until December 8, 1919, on which day she was shipped to Scribner, Nebraska, for breeding, and placed on premises of one Ferguson; she remained there until February 3, 1920, when she was shipped to Utica, Nebraska, and placed on farm of plaintiff. The insured sow died March 31, 1920.

Witness Wessels, of whom plaintiff purchased the animal, testified that the sow was in good condition, as far as he could see, at the time he sold her to plaintiff; that after that and before shipment from Corning to Scribner she "had a spell of lameness in right hind leg in the foot," but appeared to be over it when shipped. Witness Ferguson, on whose premises the sow was kept while at Scribner, testified that while at his place she was lame a week or ten days, and got all right again; that she had an enlarged toe on inside of right hind foot. When she arrived at Utica and was placed on the farm of plaintiff, she showed some lameness, and had an enlarged toe. This lameness was at first looked upon as of a trivial character. About February 15, 1920, her condition growing more serious, Dr. Trump, a veterinarian, at request of defendant company, began to treat her. An abscess formed between the hock joint and toes, which he opened on the 17th of February. While treating her, Dr. Trump observed an old scar on outside of same leg. On February 26 Dr. Trump, with Dr. Anderson, chief veterinarian for defendant, amputated the enlarged toe. Infection set in and she died March 31, 1920, from toxemia.

One defense raised by the answer of the defendant is

that the insurance was forfeited by shipment of insured animal to Scribner, instead of direct to Utica. Plaintiff contends that such right of forfeiture, if it ever existed, was waived by the acts of the officers and agents of the defendant after knowledge that the sow was shipped to Scribner. The reply to the amended answer setting up such waiver was filed November 28, 1921, and trial begun on same day. Defendant contends that it was prejudiced by the trial proceeding at that time on account of not being able to secure the attendance of the veterinarian, Dr. Anderson, as a witness. No application for a continuance was made prior to or during trial. The question was first raised by motion for a new trial. Defendant knew, at least during trial, if not before, what evidence might be material to rebut the evidence offered by plaintiff to support the issues raised by the reply. If the testimony of any material witness could not be secured at that time, application for a continuance should have been seasonably made.

The next assignment of error relied upon by appellant is that the trial court erroneously stated in the hearing of the jury, during the argument of defendant's counsel, that there was no evidence that the hog had a fractured leg. Dr. Trump was asked: "In your history here or your memoranda, I notice this statement, 'third metatarsus fractured.' Is the third metatarsal bone a large bone that extends between the hock joint and the phalanges? A. Yes." And plaintiff on cross-examination was asked: "Were you present when the veterinarian took a piece of bone out of this abscess? A. Yes, sir." This is all of the testimony to which counsel has cited us, and all we have found from a search of record that even intimates that there was an injury to the bone. This falls short of establishing that the sow had a fractured leg. The remarks complained of, if made, were in accord with the evidence, and not subject to criticism.

With reference to the two assignments of error just referred to, we might add that they are not properly substantiated by the record. While there appears to have been

an affidavit filed with motion for new trial to sustain the contentions of appellant, the affidavit has never been preserved in a bill of exceptions, and, under a well-established rule of practice, cannot be considered by this court. *Schmidt v. Village of Papillion*, 92 Neb. 511.

By the terms of the policy the plaintiff agreed to notify the defendant by telegram on "first appearance of sickness or disease" of insured hog. Defendant contends that, on account of failure to notify by telegram when hog was first observed to be lame, insurance was forfeited. It can hardly be held under terms of the policy that every trivial lameness in an insured animal should be treated as a sickness or disease. It seems from the evidence that the lameness was at first considered unimportant; however, when it failed to respond to local applications suggested by Dr. Trump (who afterwards had charge of hog under directions of defendant), the defendant was notified, not by telegram, but evidently by telephone; the defendant acted upon such notice and instructed Dr. Trump to take charge of the animal, and from that time on he and Dr. Anderson, chief veterinarian of defendant, had charge of the case until death of hog a month and a half later. Defendant, with knowledge that the provisions of the policy for notice by telegram had not been complied with, acted upon the notice it did receive, had its veterinarians take charge of hog, and continued in charge of it and to treat it until its death. By its act the defendant waived a strict compliance with the terms of the policy regarding notice of sickness, and cannot now rely thereon to defeat recovery by the plaintiff. *Smith v. People's Mutual Live Stock Ins. Co.*, 173 Pa. St. 15; *Schmidt v. Williamsburg City Fire Ins. Co.*, 95 Neb. 43; *Hunt v. State Ins. Co.*, 66 Neb. 123; *Home Fire Ins. Co. v. Kuhlman*, 58 Neb. 488.

"Forfeitures are looked upon by courts with ill favor, and will be enforced only when the strict letter of the contract requires it; and this rule applies with full force to policies of insurance." *Haas v. Mutual Life Ins. Co.*, 84 Neb. 682.

One of the provisions of the policy relied upon by the de-

fendant is to the effect that the company will not be liable for any hogs, covered by the policy, taken from the premises where they were kept when the application was made. This provision must be construed in harmony with the provisions of the application and indorsements made on the policy. From the policy and the application, which is a part thereof, the logical conclusion is that the policy was intended to cover the insured animal while at Corning, Iowa, and while en route, from there to Utica, Nebraska, by the usual route, as well as on the premises of plaintiff; that during the time that the property was at Scribner, and en route to and from that point, the policy was suspended; that when the property was brought to Utica, and placed upon plaintiff's farm, the contract of insurance was reanimated, and again attached to the property, unless some extra hazard was incurred by the shipment to Scribner, which contributed to the loss.

In this case the evidence discloses that the insured animal was removed from the location where it should have been kept, and taken to Scribner, in violation of the provisions of the policy; that the removal was temporary for purpose of breeding; and that such animal was returned from Scribner and placed upon the premises of assured before loss occured, and without any forfeiture being declared.

The temporary removal of the insured animal from the premises, where, by the provisions of the policy, it should have been kept would not invalidate the insurance, in the absence of proof that the failure to keep her on the premises of the assured existed at the time of the loss and contributed to the loss. Comp. St. 1922, sec. 7787; *Security State Bank v. Ætna Ins. Co.*, 106 Neb. 126; *Home Fire Ins. Co. v. Johansen*, 59 Neb. 349; *Johansen v. Home Fire Ins. Co.*, 54 Neb. 548; *Waters v. Nebraska Mutual Ins. Co.*, 108 Neb. 1; 19 Cyc. 741; 4 Joyce, Insurance (2d ed.) sec. 2239. This feature of the case was fairly submitted to the jury by instruction No. 9, of which no complaint is made.

There is evidence from which the jury might properly have concluded that the death of the insured animal was the

outcome of a recurring lameness of long standing; possibly the result of an injury received prior to plaintiff's purchase of the animal, which left the old scar observed by Dr. Trump while he was treating her. This scar was on the same leg in which the recurring lameness at Corning, Scribner and Utica was located. It is not apparent from the testimony that she received any injury after the execution of the policy, nor that the shipment to Scribner in any manner contributed to the loss.

Complaint is made of instruction No. 4, which states that the defendant is bound by "any knowledge shown to have been possessed by any officer or authorized agent of the company," and it is urged that the court does not define what would constitute an authorized agent. It is true the court does not attempt to do so in that instruction, but we think the subject was fairly covered by instructions Nos. 5 and 6.

Instruction No. 5 is also criticised on account of stating that, in determining whether or not any person was the agent of the company, the jury should consider whether such person has "assumed to exercise and has been permitted by defendant company to exercise such power and authority as would justify a third person in believing him to be vested with power and authority of a duly authorized agent;" and that the test should be, "Did such action reasonably entitle a third person in believing the person to be invested with the power and authority of a duly authorized agent?" While the fore part of the instruction laid down the proposition referred to, the instruction went farther than that and in the same connection sets out certain claimed facts in regard to the action of Dr. Anderson which fairly meets the test which the defendant claims should be applied to them, and instructs the jury that if it finds such facts to be true, and that defendant permitted said Dr. Anderson to take charge of its business with plaintiff in respect to said sow and to exercise ostensible authority in that behalf, then they must find that the plaintiff was justified in regarding the said Dr. Anderson as an agent of the com-

pany, and that notice and knowledge to him would bind the company.

Instruction No. 6 likewise submits a statement of certain other claimed facts, which under the evidence could only apply to Dr. Anderson, and the jury are instructed that, if they find them to be established, it constitutes a waiver by defendant of a breach, if any there was, of the conditions of the policy, relied upon by defendant. These three instructions should be considered together. Taken as a whole, they fairly submit to the jury the question as to the authority of Dr. Anderson, as well as the facts which might constitute a waiver on the part of defendant. The jury could not have been misled thereby. There is no other witness to whom the question of authority or want of authority to bind the company might apply. Zackery was the secretary of the company, and one of the officers who signed the policy. There can be no question about his authority. If any more specific definition of the terms used in the instruction was desired, an instruction covering the same should have been drafted and requested. *Larsen v. Savidge,* 103 Neb. 79; 38 Cyc. 1688.

While the evidence of waiver of the forfeiture, if any there was, on account of removal of insured property from premises where it should have been kept, is not clear, yet we believe there was sufficient evidence of such waiver to submit the question to the jury. Zackery was the secretary of the company; while Dr. Anderson was chief veterinarian, and officed in the same suite of rooms with the secretary. However, the conclusion reached by the jury need not rest upon that question, but may rest upon the more forcible theory that there was no additional hazard due to the failure to keep insured property upon the premises where insured, and no forfeiture.

Complaint is made of instruction No. 7. The record shows this instruction to have been given at request of defendant. Defendant states in brief that this is incorrect; but there is nothing in the record itself to indicate that this might be incorrect. It is significant that the record shows no excep-

tion to this instruction by defendant, while other instructions given covering the propositions involved in this case were excepted to by defendant. The record imports verity. If there was an error in the giving of this instruction, it was an invited error of which party cannot complain. However, the instruction does not appear unfavorable to defendant.

Instruction No. 8 advises the jury that if they find that the animal sustained any injury, either while being shipped to Scribner or while at farm of Mr. Ferguson where she was kept, and that any injury so sustained or received was the cause of her death thereafter, and that defendant never ratified shipment to Scribner, then the verdict should be for defendant. This instruction is criticised as omitting the element of injury while being shipped from Scribner to Utica. It will be noted that the instruction does not purport to embody every state of fact which would entitle the defendant to a verdict. In other words, it did not attempt to embody all the defendant's contentions. It merely summed up certain facts which, if established, would defeat recovery. There was no evidence of any injury in shipment from Scribner to Utica, and the defendant was not prejudiced by failure to instruct thereon. At most, it was a mere nondirection with reference to the specific matter complained of, so far as instruction No. 8 is concerned, and the matter was subsequently covered by instruction No. 9, which covers any extra hazard on account of the shipment by way of Scribner, or in her care and treatment during that time.

The cause was fairly submitted to the jury by the instructions of the court, and no prejudicial error appearing of record, the verdict should not be disturbed.

The judgment of the court below is

AFFIRMED.

PARKS STATE BANK, APPELLANT, V. JOSEPH FERNHOLZ, APPELLEE.

FILED FEBRUARY 13, 1924. No. 22653.

1. Corporations: PURCHASE OF STOCK: RESCISSION. In order to entitle a purchaser of corporate stock to a rescission of the contract of purchase, he must allege and prove notice to the vendor of his election to rescind, and a return, or offer of return, of the property. Mere deposit of stock certificate with disinterested third person with instructions to get back note given for stock and turn over certificate is not sufficient.
2. Evidence examined, and *held* insufficient to sustain verdict.

APPEAL from the district court for Cedar county; GUY T. GRAVES, JUDGE. *Reversed.*

B. Ready, for appellant.

P. F. O'Gara and *R. J. Millard, contra.*

Heard before LETTON, ROSE and DAY, JJ., ELDRED and REDICK, District Judges.

ELDRED, District Judge.

Plaintiff in its petition declares upon a promissory note of $500 executed January 20, 1920, by defendant to Stevenson Lumber Corporation, due six months after date. The petition further alleges: "That subsequent to the execution and delivery of said note, and prior to the maturity thereof, the said Stevenson Lumber Corporation sold, assigned and delivered said note to the plaintiff and plaintiff is now the owner and holder thereof; that at the time said note was sold to plaintiff said Stevenson Lumber Corporation indorsed said note as follows: 'Stevenson Lumber Corporation, by I. J. Riley, Treas.' " The answer specifically admits the making and delivery of note. It further alleges that the note was obtained from defendant through fraud and misrepresentation of facts; that it was represented that said corporation was the owner in fee of several sections of timber lands in the province of Alberta, Canada, and in the

state of Oregon, and owned valuable milling, terminal and railroad properties in the state of Oregon; and further represented that said corporation would on or before March 1, 1920, establish retail lumber yards in various towns and cities in northeast Nebraska, and particularly at Hartington; that, relying upon said representations, defendant purchased stock of said Stevenson Lumber Corporation and executed his notes therefor, in the sum of $1,500, of which the note sued upon is one; that said representations were false; that said corporation was not owner of any timber lands, nor of any milling, terminal or railroad properties; and said Stevenson Lumber Corporation neglected and refused to place lumber yards in northeast Nebraska, and especially at Hartington, which was one of the inducements to the giving of said note for the corporate stock; that said note is without consideration. Defendant further answering pleaded affirmatively that plaintiff is not an innocent purchaser of said note for value before maturity. Plaintiff by way of reply denies all allegations of new matter in answer.

The answer contains no general or special denial of the allegations of plaintiff's petition. From a verdict and judgment for defendant, plaintiff has appealed.

While a number of errors are assigned, the only one urged is that the verdict is not supported by the evidence.

Defendant apparently seeks to avoid liability on the note by claiming a rescission of contract, on the grounds of false representations and failure of consideration. Some testimony is contained in record tending to establish that plaintiff is not a holder in due course of the note sued upon. By the pleadings the ownership of note is admitted; and under the view we take of the case the question of *bona fides* of purchase is not material.

The record contains no evidence that any of the alleged false representations were ever made, or, if made, that they were not true, except the plaintiff testified that the Stevenson Lumber Corporation agreed to locate a lumber yard at Hartington, and that it never has established a lumber yard

at Hartington. The failure to establish the lumber yard at Hartington, under the facts in this case, is more in the nature of a partial failure of consideration than element of actual fraud.

The only evidence as to false representations or statements made as an inducement to secure the execution of note sued upon was the testimony of plaintiff, in substance, that at the time he gave note it was stated to him relative to stock he was about to purchase, that they were going to install a lumber yard at Hartington; that they had a big mill in Washington, and that they would put a lumber yard in before March 1, 1920; that in negotiating to purchase the stock in said corporation he relied on the statements of I. J. Riley as to the value of the stock, and as to what they would do in putting lumber yard in at Hartington, and that said Stevenson Lumber Corporation never did put a yard in Hartington.

As to the value of stock, plaintiff testified that he had a conversation with J. G. Riley about the time of trial in county court. And, in answer to a question as to what the conversation was, replied: "Well, he said he didn't believe the stock was worth anything, that it was a wildcat scheme, that is what he thought." The witness further testified: "Q. And isn't this what he said to you, that he didn't know anything about the stock, it might not be worth anything? A. He thought it wasn't worth anything, but he didn't know, of course. Q. He said he didn't know? A. Yes; he said he didn't know."

Touching the same subject, witness J. G. Riley testified: "Q. Did you during that conversation at any time remark to him that you knew it was a wildcat scheme? A. I don't remember that being made, in substance I said that perhaps the stock might not be worth a dollar, but that I didn't know."

As to tender back of stock, defendant testified: "Q. Mr. Fernholz, as to the stock that you received from the Stevenson Lumber Corporation, what, if anything, did you do relative to returning it or advising the Stevenson Lumber Cor-

poration that you did not wish to retain the stock? A. I turned it over to the Farmers State Bank at Wynot, Percy Sullivan, and told him to get back those notes and turn over this stock. * * * Q. Mr. Fernholz, this stock that you got from the Stevenson Lumber Corporation is still in the Farmers State Bank at Wynot? A. I guess it is." There is no evidence that either the Stevenson Lumber Corporation or the plaintiff was ever advised that the stock was at the bank at Wynot.

While plaintiff testified he relied upon the statement of I. J. Riley as to the value of the stock, he does not state what Riley stated the value to be. The answer does not allege, and the evidence does not disclose, what the value of stock would have been if as represented, nor its value without the location of the lumber yard at Hartington. Neither does it disclose that it had no value. The answer does not plead a return or tender back of stock, and none was proved at the trial.

Treating the case of defendant, made by his answer and evidence, as a claim for rescission, it is insufficient, as the answer contains no sufficient allegation of rescission, and there is no proof that defendant ever rescinded or returned or offered to return the corporate stock either to the Stevenson Lumber Corporation or plaintiff. Such allegations and proof are necessary to sustain an action for rescission. *Sherrill v. Coad,* 92 Neb. 406.

It was the duty of defendant if he would rescind the contract for a partial failure of consideration to put the Stevenson Lumber Corporation, or plaintiff as its assignee, in substantially the position it occupied before the contract, and it required him to return or tender back whatever of value to himself he had received under it. It was not sufficient that the defendant may have deposited the stock with some disinterested third party with instructions to get back the notes and turn over the stock. *Mundt v. Simpkins,* 81 Neb. 1.

If defendant's case were to be treated as one for damages for breach of contract, there is nothing either in the answer

or proof from which any damage could be calculated or determined.

The evidence not being sufficient to sustain the verdict, it follows that the case must be reversed and remanded for further proceedings.

REVERSED AND REMANDED.

FRANK A. BARTON V. STATE OF NEBRASKA.

FILED FEBRUARY 13, 1924. No. 23746.

1. **Information:** ESSENTIAL AVERMENTS. To charge a statutory offense, the information must contain a distinct allegation of each essential element of the crime as defined by the law creating it, either in the language of the statute, or its equivalent.
2. **Forgery:** MATERIAL AVERMENTS. In a prosecution for unlawful possession of a forged instrument under section 9683, Comp. St. 1922, the possession, "with intent to utter and publish as true and genuine," is a material element of the offense, and must be charged in the information.
3. **Bill of Exceptions:** EXTENSION OF TIME. Where a party seeking to obtain the allowance of a bill of exceptions has used due diligence in that behalf, but has failed to secure settlement and allowance of same within the time allowed by the statute, it is competent for the judge who tried the cause, upon due showing of diligence, and not otherwise, to extend the time allowed by statute therefor. Laws 1923, ch. 114. Where diligence not shown, *held*, application for extension of time properly denied.

ERROR to the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Reversed.*

W. W. Towle and *Francis V. Robinson,* for plaintiff in error.

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

Heard before MORRISSEY, C. J., LETTON, ROSE and DEAN, JJ., ELDRED and REDICK, District Judges.

ELDRED, District Judge.

The defendant was prosecuted in the district court for

Lancaster county for having the unlawful possession of a forged instrument. The information charges:

"That Frank A. Barton, late of the county aforesaid, on or about the 28th day of April, A. D. 1923, in the county of Lancaster, and the state of Nebraska, aforesaid, then and there being, did then and there unlawfully, feloniously and knowingly have in his possession and custody a certain false, forged, and counterfeited bank check for the payment of money which is in the words and figures following, to wit: 'Chicago, Illinois, Apr. 25, 1923. No.————. State Bank of Chicago 2-18, Member Federal Reserve System. Pay to the order of Frank A. Barton, $75.00, seventy five dollars —only—, dollars. R. J. Goodrich. Accepted Apr. 25, 1923, State Bank of Chicago, by A. J. Lindstrom'—with the intent then and there, and thereby to prejudice, damage or defraud person or persons, body politic or corporate, he, the said Frank A. Barton, knowing the same to be falsely made, forged and counterfeited."

From a verdict of guilty and judgment thereon, defendant brings the case to this court for review.

It is contended on the part of defendant that the information is fatally defective in failing to charge either that the possession of the check was with an intent to utter and publish the same as true and genuine, or that such possession was for the purpose of bartering, selling or disposing thereof. From the condition of the record it is difficult to definitely determine under what section of law the information was filed; but probably under section 9683, Comp. St. 1922. That is the section on which the trial court instructed the jury. Section 9683, in so far as it might apply to this case, provides:

"Whoever * * * shall have in his possession with intent to utter and publish as true and genuine, any of the above named false, forged, counterfeited, falsely printed or photographed matter, above specified and described, knowing the same to be false, altered, forged, counterfeited, falsely printed or photographed, with intent to prejudice, dam-

age or defraud any person or persons, body politic or corporate, shall," etc.

The material elements of the offense of the unlawful possession of a forged instrument under the foregoing section are: (1) Possession, with intent to utter and publish as true and genuine, of the forged instrument, (2) knowing the same to be false, forged or counterfeited, (3) with intent to prejudice, damage or defraud any person or persons, body politic or corporate.

It will be observed that the information in the case at bar does not allege that the possession was "with intent to utter and publish as true and genuine," nor any words equivalent thereto.

To charge a statutory offense the information must contain a distinct allegation of each essential element of the crime as defined by the law creating it, either in the language of the statute or its equivalent. *Newby v. State*, 75 Neb. 33; *Altis v. State*, 107 Neb. 540; *Hase v. State*, 74 Neb. 493; *Gaweka v. State*, 94 Neb. 53; 26 C. J. 955, sec. 107; 15 C. J. 361, sec. 25.

Some suggestion has been made that the information may have been filed under section 9684, Comp. St. 1922. That could in no manner relieve the present situation. It is possible that section 9684 was intended to cover possession of dies, plates and such instruments as might be used for the purpose of engraving, forging or counterfeiting, and not to cover instruments of the character involved in this case. But, should it be construed to apply in a case of this character, it would merely emphasize the materiality of the element of the offense omitted from the information. The elements of the offense under the two sections referred to, so far as they might be construed to apply to possession of forged instruments, are practically the same, with the exception that in section number 9683 the possession must be "with intent to utter and publish as true and genuine;" while in section number 9684 the possession must be "for the purpose of bartering, selling or disposing thereof." The penalty provided in the two sections is materially different.

It will be seen that the intent and purpose of the possession, that is, the particular fraudulent purpose or intent of the accused, is the distinguishing feature of the two sections, as to the elements of the crime defined. Through it alone it must be determined whether the accused, if convicted, may be confined in the penitentiary from one to twenty years with a fine of $500, as provided by section 9683, or be confined from six months to ten years with a fine of $1,000, as provided by section number 9684. It would seem that under the last named section one of the material elements of the offense is that the possession must have been "for the purpose of bartering, selling or disposing thereof;" and the information in the case at bar does not contain such an allegation, or any allegation of the same import and meaning. Furthermore, the trial court did not instruct the jury on that section; although the sentence pronounced appears to have been under the latter section.

Counsel for state urges that under the rule announced in *Nichols v. State*, 109 Neb. 335, the information is sufficient. There is nothing said in that case that could be construed as holding that it was not necessary to state in the information all the essential elements of the offense. In that case it is said, with reference to charging the offense involved therein; "Any properly verified information may be held sufficient, if it states the name and the authority of a qualified informer and facts constituting every element of murder in the first degree as defined by statute."

We are not unmindful of the provisions of section 10186, Comp. St. 1922; but that section does not obviate the necessity of alleging in the information every material element of the alleged offense, and thus advise the accused of the charges which he may have to meet. This was a substantial right to which the accused was entitled. The sufficiency of the information was raised in due time in the district court by a motion to quash, and by demurrer. The demurrer should have been sustained.

Complaint is made that the court erred in refusing to grant 40 days additional time for serving bill of exceptions

after the expiration of 40 days originally allowed. The bill of exceptions was ordered of the official reporter only a few days before the original 40 days allowed had expired. On the day following the ordering of the bill of exceptions, application was made for extension of time. No showing of diligence was made. Chapter 114, Laws 1923, provides:

"In cases where a party seeking to obtain the allowance of a bill of exceptions has used due diligence in that behalf, but has failed to secure the settlement and allowance of the same as herein required, it shall be competent for the judge who tried the cause, upon due showing of diligence, and not otherwise, to extend the time herein allowed."

Under the circumstances of this case, the order of the trial court refusing to extend time for settlement of the bill of exceptions was proper.

For the reasons herein set forth, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

WINCEL SEDLACEK, APPELLANT, V. WELPTON LUMBER COMPANY, APPELLEE.

FILED FEBRUARY 13, 1924. No. 22636.

1. Sales: BREACH OF WARRANTY: RESCISSION. A sale of personal property with a warranty of its fitness for a prescribed use may be treated as a sale upon condition subsequent, at the election of the purchaser, and in the event of a breach of the warranty the property may be restored and the sale rescinded.
2. ———: ———: ———. In such case the purchaser must rescind promptly, and notify the seller of his intention to rescind within a reasonable time after the breach is discovered, or his remedy will be confined to an action for damages.
3. Evidence examined, and *held* as a matter of law insufficient to establish a rescission.

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

Hoagland & Carr, for appellant.

Halligan, Beatty, Halligan & Percy, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE and GOOD, JJ., REDICK and SHEPHERD, District Judges.

REDICK, District Judge.

Action to recover the cash paid and to cancel a note given for the purchase of a farm tractor. The action is based upon an alleged rescission of the contract by plaintiff for breach of warranty that the tractor was suitable for and would do the work for which plaintiff intended to use it. The petition alleges that on April 23, 1920, plaintiff purchased of defendant a Wallace Cup Junior Tractor upon representations of defendant that it would pull three plows in any condition of soil, and that it would pull an eight-foot tandem disc with press drills on high, and that, though a second-hand tractor, it had a new motor; that said representations were false; that it would not do the work as represented, and that it was of no value to plaintiff; that upon learning that it would not work he orally rescinded the contract, and later served a written notice of rescission upon defendant and returned the tractor to defendant's place of business, and demanded return of $350 cash paid and his note for $990 given for the purchase price, all of which was refused. The answer admitted the sale of the tractor, but denied all representations, and alleged that the failure of the tractor to work was due to the inexperience and negligence of plaintiff. These allegations were put in issue by the reply.

The case was tried to a jury, but at the close of plaintiff's case, on motion of defendant, the court instructed the jury to return a verdict for defendant. Judgment followed expressly stating it was without prejudice to future action for damages, and, upon motion for new trial being overruled, plaintiff appeals.

The evidence presented for plaintiff, for the purposes of the appeal, must be taken as true, and is sufficient to sustain a finding that the warranty and representations were made, and that the tractor failed to do the work for which it was intended. Except as to the "new motor" the representa-

tions were in the nature of warranty, and are so treated by the parties. Whether the expression "new motor" was intended to mean an unused motor complete in all its parts, or one newly fitted, or a new type of motor (it being shown that a tractor of that make had been a failure), might be for the jury upon consideration of the circumstances under which the words were used. But the real complaint is that the tractor would not do the work, and if this be so, it would be immaterial what kind of motor it had.

Two questions then are for decision: (1) Is the contract one which may be rescinded? (2) Was there a rescission by plaintiff?

On the first question, appellee contends that, inasmuch as the contract had been completely executed by the delivery of the tractor, plaintiff's only remedy was for damages for breach of warranty, as it was not a part of the agreement that it might be returned if not as warranted. The weight of authority is said to support this position, 35 Cyc. 138, where a case from this state, *Mundt v. Simpkins*, 81 Neb. 1, is cited as announcing it. The same authority proceeds: "There are, however, many decisions holding that the buyer may rescind an executed contract merely on the ground that there has been a breach of warranty, and it seems to be the established rule in some jurisdictions"—and cities the same case of *Mundt v. Simpkins, supra.* It will therefore be instructive to see just what was there decided. The action was upon promissory notes given in the purchase of a secondhand steam traction engine, and the answer set up representations and warranties of a similar character to those in the present case, and notification to the seller that he would not keep it and that it was subject to the seller's order. A counterclaim for repairs to the engine, loss of time, payment of freight, etc., amounting to $100, was also included, for which judgment was prayed. Judgment went generally for defendants, on the ground, as stated in the opinion, that the contract had been rescinded, doubtless because if it had been upon the counterclaim it would have been for some amount. The court then held that no facts

were pleaded or proof made to establish a rescission by defendant, and stated the rule (page 4): "It is undoubtedly the better law that a sale of personal property with a warranty of quality, even without fraud on the part of the vendor, may be treated as a sale upon conditions subsequent, at the election of the purchaser, and in the event of a breach of warranty the property may be returned and the sale rescinded, since a breach of the warranty may be equally injurious to the buyer, whether the vendor acted in good faith or bad faith"—citing *Millikin v. Skillings*, 89 Me. 180. If this is a binding authority, we should follow it, notwithstanding the law in other jurisdictions, at least until convinced that justice requires a different holding.

But plaintiff contends that the above statement is "wholly dictum" and not controlling upon the court in this case. We are unable to yield our consent to this contention. A dictum has been defined: "An opinion expressed by a court upon some question of law which is not necessary to the decision of the case before it." 1 Bouvier, Law Dictionary (3d Rev.) 863. This is a strict definition and is subject to many qualifications, as stated by the author. But taking it as it is, how can it be maintained that a statement of the rule in question was not necessary to a decision of the *Mundt* case? The question before the court was the sufficiency of the pleadings and evidence to support the judgment. This required a determination of the right to rescind, as the verdict was based upon the finding that the contract had been rescinded. Having announced the rule, the court proceeds to discuss the acts necessary to accomplish such rescission, and holds, with the Maine court, that it is not sufficient to merely give notice that he holds the goods subject to the order of the seller, but "must tender back the goods to the seller at the place of delivery, unless upon making the offer so to do he is relieved of the obligation, as stated, by refusal to receive them if tendered." It seems clear that the court was under necessity to state the rule in order to decide whether defendant's allegations brought his case within it. The case was tried in the lower court as though rescission had been

properly pleaded, and that question was submitted to the jury, for which error the case was reversed.

In *Union P. R. Co. v. Mason City & Ft. D. R. Co.*, 199 U. S. 160, 166, it was said: "Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere dictum. *Railroad Companies v. Schutte*, 103 U. S. 118, in which this court said (p. 143): 'It cannot be said that a case is not authority on one point, because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended.' " The rule announced in *Mundt v. Simpkins, supra*, on the right to rescind is not dictum. Defendant quotes from that case: "That inasmuch as the defendants were seeking to counterclaim for damages for breach of warranty or the misrepresentations, no question of rescission was involved, and that issue should not have been submitted to the jury." But the official report contains no such language, neither does the report of the case in 115 N. W. 325. Counsel may have relied upon some proposed opinion, but the final one adopted is that officially published, in which the court said: "The attempt to show a rescission signally failed, and that question, under the evidence and the pleadings in the case, should not have been submitted to the jury." In the opinion of the writer there is much more reason to claim the first syllabus as dictum, which, while it states a correct rule of law, is based upon what I conceive to be a misinterpretation of the answer, which otherwise would have claimed damages for the difference in value between the machine as delivered and as represented.

The *Mundt* case was cited as authority for the reversal in *Sherrill v. Coad*, 92 Neb. 406, which was an action to

recover the purchase price of a stallion for breach of warranty, on the theory that it was worthless, but without offer to return it. The case was also cited as an authority on the point in 27 L. R. A. n. s. 921. And in *Spiegal & Son v. Alpirn*, 107 Neb. 233, 248, it was distinguished. The rule stated in the *Mundt* case is the law in this state and controls the case at bar.

The remaining question is whether plaintiff by delay in returning or offering to return the tractor had waived his right to rescind. The tractor was purchased April 23, 1920, and delivered by defendant at plaintiff's farm April 28; the tractor could not be made to work by agents of defendant, efforts being made on several occasions up to June 10; plaintiff tried to use it on that day, and after disking about four acres, the magneto was broken off and gears stripped; plaintiff thereupon left the tractor in the field until August 10, when he hauled it to town and left it in the yard where defendants conducted their business and demanded return of his money and notes, which was refused.

The evidence fails to show any notice of rescission until August 10. On direct examination plaintiff testified that he gave no notice, attempting to excuse his failure by saying that they would not listen and would turn their backs. There was no suggestion that the tractor be taken back and price refunded, and it seems clear that these conversations were confined to complaints about the failure of the tractor to work, and that defendants in response thereto made a number of efforts to fix it, and no complaint seems to have been made between June 10 and August 10. Plaintiff relies on the following as sufficient notice: On cross- examination plaintiff was asked: "Why didn't you tell them to take the tractor back then (the time it was first delivered and would not work)? A. I told them many times. You cannot do anything with them. They always tell you, you are mistaken, it will work." This is palpably insufficient to establish a rescission, especially in view of his direct evidence. If any such demand was made, plaintiff would surely have testified to the fact on direct, giving time and

circumstances. There is no evidence of any attempt to rescind between June 10 and August 10. Whether it was necessary for plaintiff to deliver the tractor at Ogalalla in order to accomplish a rescission need not be determined. We think the district court was right in holding as a matter of law that attempted rescission came too late. *Von Dohren v. John Deere Plow Co.*, 71 Neb. 276.

The judgment is

AFFIRMED.

BLANCHE MAY JACOBY ET AL., APPELLES, V. JOSEPH E. DVORAK ET AL.: FIRST NATIONAL BANK OF HAVELOCK, GARNISHEE, APPELLANT.

FILED FEBRUARY 13, 1924. No. 22643.

1. **Limitation of Actions:** CERTIFICATES OF DEPOSIT. A bank certificate of deposit payable 12 months after date upon return of the certificate properly indorsed matures at the expiration of the 12 months, and the cause of action thereon then accrues so as to start the statute of limitations.
2. **Garnishment:** CERTIFICATES OF DEPOSIT. Where a bank certificate of deposit is negotiable, the debt thereby represented is not ordinarily subject to garnishment; an exception is where the certificate remains in the hands of the payee.
3. **Dismissal and Nonsuit:** DISMISSAL AFTER JUDGMENT. Where, by mistake of the clerk, a case in which a final judgment has been rendered was placed upon the trial docket, an order dismissing "the case" for want of prosecution is irregularly entered, is a nullity, and may be set aside at any time on motion.
4. ———: ———. Such an order cannot in any way affect pending proceedings in aid of execution for the collection of the judgment.

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

G. H. Risser, for appellant.

McCarty & Hager and *C. J. Campbell, contra.*

Heard before MORRISSEY, C. J., DAY, GOOD and ROSE, JJ., REDICK, District Judge.

REDICK, District Judge.

This is a proceeding in aid of execution. March 1, 1919, plaintiffs secured a judgment against Joseph E. Dvorak and the Illinois Surety Company, defendants, for the sum of $5,000, upon which execution was issued and returned unsatisfied; whereupon March 18, 1919, plaintiffs made application for an order of the court for the examination of garnishee, First National Bank at Havelock, as to moneys of the defendant claimed to be owing from said bank to the judgment debtor. The bank appeared by its cashier, who was examined and stated that they were indebted to some one on two certificates of deposit dated May 3, 1915, payable 12 months after date, "on return of these certificates properly indorsed," one for $500, and one for $250; that said certificates were payable to the Illinois Surety Company, defendant, and purchased with money furnished by defendant Dvorak; that Dvorak and his brother were at that time engaged in the saloon business, and the surety company had become surety upon their bond according to the requirements of the statute, and that the surety company held the certificates of deposit in question as security to indemnify them from any loss by reason of having executed said bond. It was further shown that said certificates had never been paid and had never been presented for payment, and that the bank has no knowledge as to where they are or as to who holds them. Upon this showing and upon the 2d day of May, 1919, the court made an order that the bank hold and retain the money represented by said certificates and not pay the same to any person until the further order of the court. On May 2, 1921, plaintiffs filed a motion to require the bank to pay said money with interest into court, and on May 6, 1921, a motion, supported by affidavit, to require the bank to appear and answer as to its indebtedness to the defendants, and obtained the order for the bank to appear, which it did, disclosing the same state of facts hereinbefore set forth as upon its former examination. After taking the matter under advisement, the court on December 30, 1921, entered an order and judgment against the

bank for the sum of $750, and ordered execution therefor, and that the same when paid should be credited upon plaintiff's judgment. The bank filed a motion for a new trial, which was overruled, and now brings the proceedings to this court for review on appeal.

The sole question for determination is whether or not the disclosures of the bank upon the examination showed an indebtedness from the bank to the Illinois Surety Company. It is the claim of the bank that the certificates of deposit were negotiable instruments, and the amount represented thereby was not subject to garnishment or supplemental proceedings, on the same principle that the maker of a negotiable note may not be garnisheed because he might thereby be subjected to a double payment. On the other hand, the plaintiffs claim that, it not appearing that the certificates have ever been sold or transferred, and that the surety company, holding them merely as collateral, had no right to transfer them but only to collect them, there is a presumption that it still holds them; and, further, inasmuch as the certificates matured May 3, 1916, at the time of making the order in question, the bank had a perfect defense of the statute of limitations as against any action thereafter brought, and was therefore in no danger of a double liability.

The certificates in question were negotiable instruments, and the general rule is well settled that the indebtedness of the maker of such an instrument is not subject to garnishment, as the obligation is to the holder of the instrument, who may be either the payee or a transferee in ordinary course. *Fisher v. O'Hanlon,* 93 Neb. 529. It was held, however, in *Campbell v. Nesbitt,* 7 Neb. 300, that, where the instrument was past due and remained in the hands of the payee, it was subject to attachment. A material question necessary to be considered is when, if at all, the certificates in question matured so as to start the statute of limitations. There is considerable difference of opinion in the decisions as to whether a certificate substantially in the language of those under consideration matures so as to start the statute

until a demand of payment has been made. Negative of this proposition has been held in Pennsylvania, *Gardner's Estate*, 228 Pa. St. 282; *Brown v. McElroy*, 52 Ind. 404. And it is quite generally held that the statute will not begin to run until after demand in those cases where the certificate does not fix any definite time of payment; for example, when the certificate is substantially in this form: "Catherine Tobin has deposited in this bank $500, payable to the order of herself in current funds on return of this certificate properly indorsed. With interest at 6 per cent. per annum if left six months." *Tobin v. McKinney*, 14 S. Dak. 52; *National Bank v. Washington County Nat. Bank*, 5 Hun (N. Y.) 605; *Cornwall v. McKinney*, 12 S. Dak. 118; *Matter of Cook*, 86 App. Div. (N. Y.) 586. Also, where the certificate is payable upon its return properly indorsed, no time being stated, it is held to be the same as a general deposit, against which the statute will not run until demand. *Elliott v. Capital City State Bank*, 128 Ia. 275. See, also, *Sharp v. Citizens Bank*, 70 Neb. 758. But in *Thompson v. Farmers State Bank*, 159 Ia. 662, it was held that a certificate payable "six months after date" matured at that time and the statute then began to run. It was held, however, in *First Nat. Bank v. Security Nat. Bank*. 34 Neb. 71, that a certificate of deposit payable three months after date, matured at that time, and, not being paid, was dishonored so as to charge a subsequent purchaser with notice of all defenses which the maker might have; and in *Kirkwood v. First Nat. Bank*, 40 Neb. 484, the holding was to the same effect, and it was held that under the language of the certificate, "with interest at 6 per cent. *if left six months*," so far as ascertaining rights of purchasers was concerned, the instrument should be treated as one payable on or before six months after date, or, if not, that six months after date should be treated as the reasonable time within which it should be presented, and a purchaser taking it within that period should be considered as a purchaser before maturity. Without pursuing the discussion further, we think it results from these decisions that the law of this state must be declared to be

that where a certificate of deposit is payable at a certain date say three, six, or twelve months, it matures at the expiration of the time stated and the cause of action accrues at maturity. It follows that the statute of limitations commences when the cause of action accrues. As was said in *First Nat. Bank v. Security Nat. Bank, supra.* (p. 78): "The holder could not have lawfully demanded payment before the expiration of the three months, and had suit been instituted before such time had elapsed, it would have been prematurely brought. The words 'on the return of this certificate properly indorsed,' when read in connection with the other stipulations, do not control the time of payment, nor was it indispensable to a recovery that the certificates should have been previously presented to the maker duly indorsed."

It appears, then, that at the date of the order in question on appellant the statute of limitations would be a perfect defense to any action brought by the payee subsequent to the 3d day of May, 1921, five years after the maturity of the certificate. It is suggested that the plea of the statute is personal to the debtor, and that he cannot be compelled to plead it. On the other hand, it seems equally evident that the debtor cannot aid the creditor in defeating *his* creditors who have secured a lien upon the debt before the same was barred by the statute by such a plea. Such a holding would permit the garnishee to defeat the plaintiff, and, later on, by a plea of the statute defeat the claim of the debtor (its creditor), and thus retain the fund to which it has no legal claim.

By the transaction the Illinois Trust Company was made a pledgee of the certificates, holding same as collateral security as against its liability upon the saloon-keepers' bond, and its only authority over the certificates was to collect the same. It had no authority to negotiate them (Jones, Pledges (3d ed.) sec. 651), which would be a wrongful act, and therefore, in the absence of any evidence on the subject, a presumption arises that the pledgee still holds them, and that all danger of a double liability on the part of the bank,

under the conditions shown, has passed. At least, it will not be presumed that the pledgee committed a wrongful act for the purpose of aiding the garnishee to retain the fund as against the claim of plaintiff.

One further contention of the garnishee requires consideration, viz., that the present proceedings were not commenced within five years from the maturity of the certificate and are therefore barred by the statute. By reference to the statement of facts herein, it will be noted that the first step in these proceedings was taken March 18, 1919, which finally resulted in an order May 2, 1919, that the garnishee hold the fund until further order; that May 2, 1921, a motion was made requiring the garnishee to pay the money into court. These proceedings were all within five years from the maturity of the certificate. On May 6, 1921, a second motion and affidavit were filed for examination of the garnishee, and on December 30, 1921, the judgment complained of was entered, in which it was recited that the matter came on for hearing on the motion of May 2, 1921, and the motion of May 6, 1921. It thus appears that the second motion was treated as a continuation of the first, and that the judgment was a final disposition of the proceedings initiated March 18, 1919, and well within the period of limitations. However, the following orders appear of record;

"Blanche May Jacoby *et al* v. Joseph E. Dvorak *et al.*

"It is by the court ordered that cause be shown within twenty days from this date why this case should not be dismissed for want of prosecution."

This order was made February 28, 1921. Under the same title the following:

"It is by the court ordered that this cause be and hereby is dismissed for want of prosecution, at the costs of plaintiffs, Blanche May Jacoby, Everett Franklin Jacoby, and Violet Lamont Jacoby, by their next friend, Iretus W. Jacoby, taxed at $———, for which execution is hereby awarded."

This order was made March 25, 1921. It is contended by the garnishee that by these orders the proceedings in aid of execution were finally dismissed; that no action was

taken on the motion of May 2, 1921, because of such dismissal, and that the only pending proceedings are those commenced May 6, 1921, three days after action was barred on the certificates. If this be true, garnishee would have a perfect defense as against the judgment debtor, and, as the plaintiffs could have no greater rights, the garnishee should have been discharged.

We feel bound to differ from these contentions. The orders do not purport to dismiss the supplemental proceedings—no mention thereof is made; the reference is to "this case" and "this cause." There was nothing appearing on the docket to show the existence of these proceedings, nor, in fact, that a judgment had been rendered in the case two years before. No notice of either of these orders was given plaintiffs. It is perfectly evident from the record itself that the order was inadvertently made and was a nullity, and should have been set aside even after the term on either of two grounds: That it had been irregularly entered and without notice; or for mistake of the clerk in entering upon the trial docket a case already in judgment. Comp. St. 1922, sec. 9160, subd. 3. An order dismissing a case in which a final judgment had been entered two years before is certainly irregular (see *Estate of McKenna v. McCormick*, 60 Neb. 595, for definition), and a case in judgment has no place on the trial docket. The court refused to set aside the order of dismissal on account of the lapse of the term, which was clearly erroneous, but as the order was a nullity on the face of the record this fact is immaterial. Furthermore, the judgment herein was based in part upon the motion of May 2, 1921, which was filed within the five-year limitation. We conclude that, in the absence of any evidence that the certificates had been transferred, the garnishee was indebted to the judgment defendants on May 2, 1921; that this proceeding was commenced in time; that the bar of the statute is complete against any action that may hereafter be brought by any one *sui juris*—the possibility of the certificate being presented for payment by one who had been under disability until within five years of the

bringing of an action thereon is so remote under the circumstances that it need not be considered—and that the order to pay the money into court was proper. Execution, however, should not be awarded unless the money is not paid within ten days after the mandate of this court is issued, and, as thus modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

ROSE and GOOD, JJ., dissent.

The following opinion on motion for rehearing was filed July 7, 1924. *Former judgment modified.*

Former Judgment Modified. Former opinion adhered to, but plaintiffs required, upon receipt of the money from the clerk, to execute a bond to the clerk for the benefit of the garnishee, said bond to be in an amount equal to the sum received, conditioned to indemnify the garnishee against loss should it be required to pay the amount of the certificate to an innocent holder thereof.

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

DAY, J.

This case was before the court upon a former occasion, the opinion being reported, *ante*, p. 683. A motion for rehearing was filed on behalf of the garnishee, and the cause reargued. The material facts are set forth in our former opinion, and need not be restated. Upon a reconsideration of the case a majority of the court are satisfied with the principles of law announced, and with the general disposition of the case. The action is equitable in its nature, and the question presented involves equitable principles. The payee in the certificate of deposit, is also one of the judgment debtors. The payee in the certificate, as pointed out in the former opinion, holds the certificate as a pledge, the pledgor being a codefendant and one of the judgment debtors. Under the peculiar circumstances presented by the record, the presumption is that the pledgee has not transferred the certificates. We have concluded, however, that the order of the

district court should be modified so as to require the plaintiffs, upon receipt of the money from the clerk of the court, to execute a bond in an amount equal to the sum paid into court by the garnishee. The bond should run to the garnishee, and be approved and filed with the clerk, and indemnify the garnishee against loss in the event that it is required to pay the amount of the certificate to an innocent holder thereof.

As thus modified, the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

ROSE, J., dissenting.

In my opinion the garnishee should be discharged.

LYDIA G. DAVIS, APPELLEE, V. WILLIAM H. FERGUSON ET AL., APPELLANTS.

FILED FEBRUARY 13, 1924. No. 22655.

1. Evidence: WRITTEN CONTRACT: PAROL EVIDENCE. Where a written contract of employment was for a definite period, parol evidence of a prior or contemporaneous oral contract that the employment should continue, or a new employment begin after the expiration of such period, is inadmissible.
2. ———: ———: ———. A written contract complete on its face cannot be shown to be incomplete by resorting to the oral negotiations leading up to its execution.

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

Hall, Baird & Williams, for appellants.

Clifford L. Rein, contra.

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

REDICK, District Judge.

Action to recover damages for breach of a parol contract to employ plaintiff as a drayman. The petition alleges that

on or about November 1, 1920, plaintiff and defendants entered into an oral contract whereby defendants employed plaintiff to transport milk and cream from defendants' farm to the city of Lincoln at $5 a day, "said employment to commence on the first day of May, 1921, and continue until such time as the defendants should acquire and own their own facilities for transporting said milk and cream between the above described points and should themselves actually transport said milk and cream between said points without employing outside labor and assistance for said purpose;" that on May 1, 1921, plaintiff offered to perform such services and is still ready to do so; that by defendants' refusal he has been damaged $673.50 during a period of six months before suit brought. Defendants' answer was a general denial. Trial to a jury resulted in a verdict and judgment for plaintiff, and defendants appeal.

The only question for decision is as to the competency of the parol evidence offered to prove the oral contract sued upon; if competent, the judgment must be affirmed, otherwise, reversed.

It appears from the evidence that plaintiff had a written contract of hauling with defendants for the period November 1, 1919, to November 1, 1920, which was fully performed. Several weeks before the expiration of that contract there had been talks about a new contract, and finally about November 3, 1920, the parties came together in the presence of a third party, and after considerable discussion, during which plaintiff sought to secure a contract for one year, and defendants refused to be bound for so long a period, a contract for six months from November 1, 1920, was agreed upon and a day or two later was put in writing and executed as follows:

"Lincoln, Neb., Nov. 1, '20.

"This agreement made this first day of November, 1920, by and between L. G. Davis of Lincoln, Neb., party of the first part, and the Woodlawn Dairy of Lincoln, Neb., party of second part,

"Witnesseth: For and in consideration of the conditions

hereinafter set forth, party of the first part agrees to transport by auto truck all the milk and cream of the Woodlawn Dairy not to exceed 4,000 pounds daily, each and every day from the Woodlawn Dairy at Woodlawn, Neb., to 2208 O Street, Lincoln, Neb., either packed in containers of one quart and half pint bottles or cans as desired, and return the empty containers to Woodlawn, Neb., each and every day.

"In case of impassable roads for the auto truck, the party of the second part is to deliver the milk and cream to the end of the pavement at West Lincoln and return the empty bottles and containers to Woodlawn, Neb., for a consideration equal to the amount the party of the first part receives for transporting the milk and cream to Lincoln, Neb., daily, the party of the first part to meet the party of the second part at the end of the pavement at West Lincoln, Neb.

"Party of the second part is to pay the party of the first part for the service at the rate of $5.00 per day for each and every day, payment to be made at the end of each week, following the delivery.

"This agreement to remain in force six months from Nov. 1st, 1920.

"Signed and sealed this 5th day of November, 1920.

"L. G. DAVIS,

"WOODLAWN DAIRY, Per CHAS. D. SMITH, Mgr."

This contract was fully performed and expired May 1, 1921, and the claim of the plaintiff is that at the same time this written contract was agreed upon and before it was signed, and as a part of the same negotiations resulting in the written contract, the parties made an oral contract to employ plaintiff for an indefinite period beginning May 1, 1921, for the breach of which oral contract he is seeking damages. To say the least and put it mildly, the proposition is just a little startling. We had supposed that all prior and contemporaneous negotiations and conversations upon the subject of the contract were merged in the writing which expressed the final agreement of the parties as to the matters covered thereby; that the prime motive of putting the

contract in writing was to end discussion and furnish evidence of the terms of the contract which would not be dependent upon the uncertain memory of parties or witnesses; and that, in the absence of fraud, accident, or mistake, it would be conclusively presumed that the writing embraced the entire agreement of the parties as to the subject-matter covered by it. 3 Jones, Commentaries on Evidence, sec. 434; *Sylvester v. Carpenter Paper Co.*, 55 Neb. 621.

Counsel for plaintiff do not dispute the general rule, but contend that: "Parol evidence is admissible of a prior or contemporaneous oral agreement, when (a) the oral agreement, is separate and distinct from and independent of the written contract; and (b) the oral agreement is not inconsistent or in conflict with the written contract; and (c) the written contract is not, upon inspection and in the light of its purpose, subject-matter and circumstances attending its execution, so far complete as to merge, include, or exclude the possible existence of the independent oral agreement." If these propositions be conceded, plaintiff has not brought his case within either of them.

(a) The oral agreement is not separate and distinct from the written, because it related to the same subject-matter (the employment of plaintiff), constituted a part of the negotiations leading up to the writing, and concerned one of the important features thereof, the time for which the employment was to continue. Suppose A. is negotiating for the purchase of B.'s cow; A. wants an option for 30 days, but finally B. signs a written option for 10 days; can it be possible that A. may erect a parol contract out of the negotiations for 30 days to begin after the expiration of the written option? The argument is not only sophistical, but is not even persuasive. Why make two contracts when one was all sufficient? How simple it would have been to have stated in the written contract, "This contract shall be in force for six months at all events and until I conclude to do my own hauling." *Green v. Booth*, 91 Miss. 618, cited by plaintiff, does not aid him. In that case de-

fendant gave plaintiff a written option to purchase real estate at a certain price, and plaintiff was permitted to prove a parol contract to pay him a commission if he sold the property to another, which he in fact did. The parol contract was upon an entirely different subject and the parties dealt in different relations—the writing involved a purchase by plaintiff, the other the employment of plaintiff as agent.

(b) The supposed parol contract is in direct conflict with the writing as to the time the employment was to continue, which was definitely fixed at six months. Plaintiff is in the position of saying, "Yes; the writing says my employment was to terminate in six months, but it was orally understood and agreed that I should continue for an indefinite period until the happening of a certain event." To assert that such an oral contract is not in conflict with the writing seems absurd. In *Mann v. Independent School District,* 52 Ia. 130, with reference to a like claim, Day, J., remarked: "The position of plaintiff seems to be that, notwithstanding the written contract for two months, the plaintiff may show that there was a parol contract for eight months. In this position the plaintiff is in error." The fact that the writing fixes a date for the termination of the employment negatives the idea of a continuance thereof which is thus directly repugnant to the writing.

(c) The contract is complete in itself; there is no ambiguity requiring explanation. "Whether the written contract expresses the entire agreement of the parties must be determined from the contract itself in the light of the subject-matter with which it deals, and of the circumstances attending its execution." *Meland v. Youngberg,* 124 Minn. 446. But it was held in *Smith v. Bailey,* 105 Neb. 754: "Even though a written contract, in the light of its purpose and subject-matter and the circumstances under which it was executed, may have been determined to be incomplete, extrinsic evidence cannot be admitted for the purpose of proving a supplemental provision, inconsistent or in conflict with the expressed intention of the parties, as embodied in

the writing." In that case it was sought to convert a privilege to purchase into an obligation so to do by parol evidence of the negotiations leading up to the written contract; here, by the same means, it is sought to show that the employment was to continue beyond the term limited in the writing. From the very nature of the proposition it is manifest that a written instrument complete on its face, and which is conceded to be in the precise form intended by the parties signing it, cannot be shown to be incomplete by the oral statements of the parties prior to or contemporaneous with the date of its execution. No case has so held where the parol evidence rule is in force, for the obvious reason, as observed by Dorsey, C., in *Spiegal & Son v. Alpirn*, 107 Neb. 233, 246, that, if so, "No case could be imagined in which it would not be possible for one party or the other by parol evidence to insert new conditions into the contract, or for one party to impose added burdens upon the other." That case contains a valuable discussion of the rule and its application. Counsel for plaintiff contends that there is no "decision excluding oral evidence which does not contravene and thereby defeat a subsisting written contract." But that is just what this evidence does, in that it precludes defendants from dispensing with plaintiff's services on May 1, 1921, as was his right under the written contract, and requires him to continue the employment indefinitely. He further says: "Neither party, by parol modification of the document, seeks to defeat that contract, or assert different, conflicting rights." Yet defendants have and claim the right, May 1, to terminate plaintiff's employment at $5 a day and procure the work to be done at $3.50 a day, as he is now doing. Would not this right secured by the written contract be defeated if the parol contract may be proved? Further: "Thus the precise subject-matter of the written contract is Davis' employment for six months from Nov. 1, 1920, while the precise subject-matter of the oral agreement in suit is Davis' employment for a period immediately following the expiration of the written contract. The two contracts being thus separate as to subject, if both had

been in writing, there would have been no question about the two documents being separate and consistent." Of course, if both contracts were in writing the rule would not apply; and right here lies the fallacy of counsel's argument: It *assumes* the existence of *two contracts*, which is the very matter in dispute. Plaintiff's difficulty lies further back in that there is no legal evidence of more than one contract.

The brief is replete with similar arguments which are ingenious, but unsound. For example, the two contracts are on different subjects, because one is for employment for six months and the other for employment for a term commencing thereafter; one is for the specific six months between November 1 and May 1, the other for a different period of time; therefore they are entirely independent and cannot be inconsistent; that the written contract has been fully performed and therefore cannot be defeated by the oral contract; that "neither party asserts rights under the written contract," which is not true, as defendants insist upon terminating the employment as per the terms of the written contract.

Reduced to its final terms, plaintiff's claim is this: "We had a conference; we discussed the time the contract should continue; I wanted a contract for a year, which they refused to sign, and so we signed a written contract for six months, but at the same time and before we signed they agreed orally to employ me for a year." To the legal mind the mere statement of the proposition refutes it, and argument is halted for want of a subject. A number of cases are cited by plaintiff, none of which sustain him. On the contrary, where at all applicable, they are in harmony with the views herein expressed. *Smith v. Bailey*, 105 Neb. 754; *Spiegal & Son v. Alpirn*, 107 Neb. 233; *Security Savings Bank v. Rhodes*, 107 Neb. 223.

For the reasons stated, the judgment is reversed and the cause remanded, with instructions to the district court to dismiss the case.

REVERSED.

WILLIAM BOWERS, APPELLEE, V. WILLIAM A. PIXLEY, APPELLANT.

FILED FEBRUARY 13, 1924. No. 22668.

Evidence: COLLATERAL FACTS: ADMISSIBILITY. "Where there is a direct conflict in the evidence of the witnesses relating to a material issue in the case, any collateral fact or circumstance tending in any reasonable degree to establish the probability or improbability of the fact in issue is relevant evidence and proper for the consideration of the jury." *Shepherd v. Lincoln Traction Co.*, 79 Neb. 834.

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

Montgomery, Hall & Young, for appellant.

R. T. Coffey, contra.

Heard before MORRISSEY, C. J., LETTON and ROSE, JJ., ELDRED and REDICK, District Judges.

REDICK, District Judge.

The petition of plaintiff declared upon a loan to defendant of the sum of $2,900; the answer was a general denial. Trial to a jury resulted in a verdict and judgment for $1,607.89, and defendant appeals.

The pleadings do not disclose the various contentions of the parties, and it is necessary for a clear understanding of the questions presented for review to state those contentions as developed upon the trial. Plaintiff was in the employ of the Trans-Mississippi Grain Company engaged in the buying and selling of grain on commission on the board of trade at Chicago and elsewhere. Plaintiff claims that the defendant, on and prior to the 10th day of April, 1920, was indebted to the grain company in the sum of $2,900 as a balance resulting from losses incurred by defendant on account of various margin transactions, and that plaintiff was instructed by the company to secure cash from the defendant to cover the said balance; that as the result of his efforts he secured from defendant a check for $3,000, which he

agreed to hold for a few days; that after the lapse of such time he was instructed by the company to have the check certified, and, upon notifying defendant of that fact, defendant lodged with the company collateral amply sufficient to cover the check. The company, however, still insisted upon his procuring the cash from the defendant to cover the balance shown on the books of the company, and finally, about April 10, 1920, he took $3,400 of his own money, went to defendant and gave it to him, saying, "You might as well owe me as the company," and instructing him to pay it to the company and square his account, which was done. Plaintiff testified that he suggested the giving of a note for the amount due in six months, but no note, receipt or other written evidence was taken of the transaction. Plaintiff claims that the money was loaned defendant for the purpose of taking up the $3,000 check above referred to.

Defendant admits the receipt of the $3,400 and the payment thereof to the grain company, but denies that it was a loan to the defendant, and denies that he was indebted to the grain company in any sum, his contention regarding the transaction being as follows: That plaintiff, being an employee of the grain company, was not permitted under its rules to speculate upon the grain market; that, nevertheless, plaintiff in connection with three other employees did carry on a large number of trades upon the market in the names of five or more fictitious persons (a device for the purpose of concealing such trades from his employer), and, as bookkeeper, manipulated the accounts of defendant and other customers of the grain company by charging such accounts with losses resulting from such trades and crediting the fictitous accounts with any profits arising therefrom; that as a result of such operations plaintiff became indebted to the grain company in a sum exceeding $50,000, and that defendant's account was made to show a debit of $3,400, whereas in truth and in fact it should have shown a profit; that shortly before the $3,400 transaction, as a result of defendant's insistence upon a complete itemized statement of his account with the grain company, it was discovered by

the president that defendant had made a profit of $500.60 which did not appear in his account, an account sales for which had been discovered in the desk of plaintiff while he was not present, and an audit of the accounts of plaintiff, especially regarding the transactions with defendant, was threatened or in progress; that defendant's check for $3,000 had been taken up by deposit of the collateral some months before April, 1920. With reference to the $3,400 defendant claims that the plaintiff came to him and stated that he had got in some trades with some other employees and he wanted to stop the check of the books, and gave the money to defendant, asking him to deposit it in defendant's account and give his check to the grain company for $3,400, and not let the president, Mr. Westbrook, know where the money came from. Instead of doing as requested, defendant took the cash to Mr. Westbrook, protesting that he was not indebted to the company, and that his account had been manipulated by plaintiff, and telling him Bowers had furnished the money, and received the collateral which had theretofore been deposited in lieu of the $3,000 check. Briefly stated, defendant's position is that he was not indebted to the grain company, and that the $3,400 was a gratuitous deposit for the benefit of the plaintiff to be used in balancing the account of defendant in order to stop the audit and prevent the discovery of plaintiff's manipulations of the accounts of defendant and other customers of the grain company. If the $500.60 had been credited to defendant's account, the apparent balance would have been reduced to $2,900 (round figures). Plaintiff gives no satisfactory explanation why he furnished $3,400 to settle the account.

While it has required some space to state the respective contentions of the parties, it will be noted that the question of fact for the determination of the jury was whether or not the transaction between the parties was a loan from plaintiff to defendant or a transaction purely for the benefit and accommodation of the plaintiff in which defendant had no interest.

Appellant assigns a large number of errors, but they may

be condensed as follows: (1) That the verdict is not supported by the evidence, for the reason that it is for one-half of plaintiff's claim, whereas it should have been for the whole amount or nothing; and (2) errors of law occurring at the trial, consisting of the exclusion by the court of testimony offered by defendant tending to show that at the time of the transaction in question plaintiff was largely indebted to the grain company on account of the prohibited transactions, and that he had carried on those transactions in fictitious names, manipulating the accounts as above stated, and certain statements of plaintiff claimed to be admissions, and the subsequent transfer by plaintiff to the grain company of a considerable amount of personal property in satisfaction of his indebtedness to it.

The assignment attacking the verdict presents a very interesting question. Of course, defendant generally is in no position to complain that the verdict is for less than it should be, but there was evidence of defendant tending to show that a large number of debits in his account were in connection with transactions not authorized by him, but represented transactions of plaintiff on his own account, the total of which is claimed by defendant to be *precisely* and by plaintiff *about* one-half of plaintiff's claim. Defendant says the verdict was a mere compromise, while plaintiff contends it is supported by the evidence, and if the jury found that any of the charges in defendant's account represented losses of plaintiff, they might be deducted from plaintiff's claim, but, as the judgment must be reversed on other grounds, we do not discuss this question.

The second assignment involves the exclusion of certain evidence offered by defendant in corroboration of his testimony, and here we think the learned trial judge erred. The question was whether the transaction was a loan. The only witnesses to it were plaintiff and defendant, and their testimony is in direct conflict. The jury were required to determine which witness was telling the truth, and are entitled to consider not only what the witnesses said, but the situation of the parties and all the circumstances in any way

connected with the transaction; in fact, the trial judge very properly instructed the jury that, "When the evidence of witnesses is conflicting it is your duty to reconcile the same consistently with the honesty of the witnesses where you can do so reasonably, but where you cannot, then you must determine from the evidence and circumstances and credibility of the witnesses, to whom you will give credit." Citation of authority is hardly necessary, but in *Shepherd v. Lincoln Traction Co.*, 79 Neb. 834 it was held:

"Where there is a direct conflict in the evidence of the witnesses relating to a material issue in the case, any collateral fact or circumstance tending in any reasonable degree to establish the probability or improbability of the fact in issue is relevant evidence and proper for the consideration of the jury."

The defendant testified to his belief that he was not indebted in any sum to the grain company, and at the time of the $3,400 transaction the plaintiff said that he had got in some trades with some other employees and that they were checking over his books and he wanted to stop them, and gave the money to defendant, asking him to deposit it in the bank to his own account and give his personal check to the grain company for $3,400, and not let Mr. Westbrook or anybody know where the money came from; that they discussed the uncredited item of $500.60, but plaintiff said he did not want to create any excitement about that (defendant's) account, that he wanted defendant to write the check for the full amount and that he (plaintiff) would stand the loss. Plaintiff denied having made any such statements, and testified in support of his position as hereinbefore outlined. As showing the probability of the truth of his evidence and in corroboration thereof, defendant offered to show that the plaintiff in connection with three other coemployees, contrary to the rules of the company, had been speculating upon the market, using a large number of fictitious names for the purpose of concealing such operations from the company; that plaintiff had manipulated the accounts of defendant and other customers of the grain com-

pany by charging them with losses which the plaintiff and other employees had sustained in their speculations; that on account of such transactions plaintiff was indebted to the grain company in excess of $50,000, and that he subsequently settled such account by transfer to the grain company of a large amount of personal property; that, in fact, defendant was not indebted to the grain company. Evidence of all these facts was excluded, except that defendant was permitted to testify as to admissions made to him personally by the plaintiff in regard to some of such matters, but defendant's testimony as to such admissions was categorically denied by the plaintiff, so that proof of them rested entirely upon evidence of the defendant, and the jury were compelled to determine the decisive issue of the case by a choice between conflicting statements of the parties without the aid of evidence of circumstances tending to discredit or weaken the evidence of plaintiff and strengthen that of defendant. We think proof of these facts would have a reasonable tendency to support the testimony of the defendant, and thus maintain his position as to the nature of the transaction of April 10, and that they were circumstances which the jury were entitled to have brought before them to enable them to properly determine which party was telling the truth. An illustration will make this clear: A. gives to B. $100, saying, "I went over to C.'s store and bought $100 worth of goods and had them charged to you; now, I wish you would take this $100 and go over and pay that bill, as I don't want to get myself in wrong with C." B. does as requested. Some months later A. sues B. for the $100, claiming it was a loan. B. denies it was a loan and testifies to the nature of the transaction and as to what A. said about it at the time. B. then called C. as a witness and offered to prove by C. that A. had made the purchases and had them charged to B. Can there be any question as to the relevancy and materiality of these facts? They tended to support B.'s version of the transaction and to show the probability of the truth of B.'s testimony. We think the supposititious case, though less complicated, is in true analogy with the one at

bar, and that it requires no further discussion to establish that the offered testimony should have been received.

REVERSED AND REMANDED.

EDGAR FARMER V. STATE OF NEBRASKA.

FILED FEBRUARY 13, 1924. No. 23356.

Evidence examined, and *held* insufficient to sustain a verdict.

ERROR to the district court for Perkins county: CHARLES E. ELDRED, JUDGE. *Reversed.*

John V. Beveridge, for plaintiff in error.

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

Heard before MORRISSEY, C. J., DAY, LETTON and ROSE, JJ., REDICK, District Judge.

REDICK, District Judge.

Plaintiff in error was convicted of having in his possession mash being used in the process of manufacturing intoxicating liquor, and brings the case here for review.

A number of questions are discussed in the briefs which, in view of our conclusion, we do not deem it necessary to consider. The statute under which the complaint was filed declares substantially any person "who shall have in his possession any mash or other material being used in the process of manufacturing intoxicating liquor" shall be punished as provided by law. There were two counts in the information, the first one charging the possession of a still, but only the second count was submitted to the jury, the charging language of which was that the defendant did "have, keep and possess mash used in the process of the manufacture of intoxicating liquor," etc. It will be noticed that the word "being" is omitted before the word "used," and it is contended that for that reason the information fails to state a crime. It would have been better if the charge had been in the language of the statute, but we think there is no sub-

stantial difference between the two expressions, both involving the idea of an unlawful use.

The serious question raised by the defendant is the sufficiency of the evidence to sustain a conviction, and from a careful consideration of the evidence we have concluded that defendant's contention in this regard must be sustained. The evidence for the state simply went to the point that the sheriff found in a cave outside defendant's residence a barrel half full of chopped corn and rye soaking in water which covered the grain to the extent of four or five inches; and it was further shown that he found a five or ten-gallon gasoline can on the back porch which the sheriff called a still, but which had no connections appropriate for such use. The barrel was seized in December, 1921, and no analysis of the contents was made until September, 1922, and in the meantime the barrel was kept in the cellar of the sheriff during the winter where a furnace was in operation, and during the following summer in his attic until it became such a nuisance that, after drawing out a couple of Mason jars of liquor, the remainder was thrown out. It is shown by the evidence that under the circumstances just detailed the alcoholic content of the mash would be very largely increased, the analysis of September showing it to be about 16 per cent. There were no other incriminating articles and no intoxicating liquor of any kind found upon the premises.

The evidence of the defendant was to the effect that he used the chopped feed, termed "mash," for the purpose of feeding chickens, of which he had some 200, and that he used feed of the same character for hogs and turkeys and cattle. His evidence as to such use is corroborated by one or more of his neighbors, who testify that such is the custom among farmers.

We think, in order to sustain a conviction under this statute, it is incumbent upon the state to prove not only the possession of the mash, but that it was being used in the manufacture of intoxicating liquor. The only evidence that it was so used is the presumption arising from its possession

which the statute makes sufficient *prima facie;* but we think the defendant satisfactorily accounted for the possession in this case, and that the evidence produced by him was sufficient to defeat the presumption. We conclude that the evidence is insufficient to sustain the verdict. Judgment is reversed.

REVERSED AND REMANDED.

FRANK BORO ET AL. V. STATE OF NEBRASKA.

FILED FEBRUARY 13, 1924. No. 23357.

1. **Criminal Law**: EVIDENCE UNLAWFULLY OBTAINED. "Where articles or information are offered in evidence, which are pertinent to the issue, the court will not exclude them because they may have been obtained in an irregular or illegal manner." *Billings v. State*, 109 Neb. 596.
2. **Evidence** examined, and *held* sufficient to sustain a verdict.

ERROR to the district court for Perkins county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

Beveridge & Spittler, for plaintiffs in error.

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

Heard before MORRISSEY, C. J., DAY, LETTON and ROSE, JJ., REDICK, District Judge.

REDICK, District Judge.

Plaintiffs in error, Boro and Snyder, were charged and convicted of having in their possession mash being used in the manufacture of intoxicating liquor, and bring the case here for review.

The first contention of the defendants relates to the reception in evidence by the trial court of the mash and other articles taken from the farm of one of the defendants without a search warrant. The evidence seems to establish that defendant Boro consented to the search, but, however this may be, the question has been settled adversely to the defendant in the case of *Billings v. State*, 109 Neb. 596.

Defendants next urge that there was error in instruction No. 8, given by the court, in which the jury were told, "if defendants below did unlawfully have in their possession mash used in the process of manufacturing intoxicating liquor," etc., they might find the defendants guilty; the point being that the court should have used the language of the statute "mash being used." We think, however, there is no substantial difference between the two expressions and the jury could not have been misled.

Finally, it is contended that the evidence is insufficient to support the verdict. The officers found on the farm of defendant Boro a boiler and some milk cans containing a liquid which, upon being analyzed, showed an alcohol content of 16.1 per cent., and which defendant admitted had been taken that morning from the farm of one Cromwell in an adjoining county. It was in the pursuit of Cromwell as a violator of the liquor statutes that the sheriff came upon the defendants and discovered the mash in question. Defendant claimed he got it for the purpose of feeding it to his hogs. There was evidence upon the part of the state that when the mash was discovered defendant said, "Well, Mr. Klinck (the sheriff), you have got me; I might as well give up; that is the mash," and some other language tending to show an admission of the unlawful purpose for which the mash was kept. Defendant denied these statements, but the sheriff's evidence was corroborated by that of his son, Hoyt Klinck, and we think the evidence was sufficient to submit to the jury the question of defendant Boro's guilt.

With reference to defendant Snyder, it is contended that the evidence is insufficient to connect him with the possession of the mash on the Boro place. It was shown by the state that, upon the evening of the day in which the mash had been taken to the Boro farm, the sheriff and his party met the two defendants coming from Grant at a point about ten or eleven miles from the Boro place, in Boro's car; that at the place of meeting was an abandoned Ford car which bore evidence of having been recently used for the trans-

portation of mash, quantities of it being present on the rear seat and on the floor of the car. Snyder admitted that the car belonged to him, but denied that he had used it that day or had ever been to the Cromwell place. The sheriff, one of the state's witnesses, testified that on the return to town from the Boro farm Snyder said, "We have got this on shares; we were going to divide the profit." Snyder denied making any such statement, but we think the evidence was sufficient to present to the jury the question of Snyder's connection with the mash. If he and Boro were interested in a joint undertaking to make a profit out of the sale of the mash, the possession of one of the parties was the possession of both. The mere physical location of an article of personalty is not conclusive upon the question of possession, but wherever situated it is deemed in law to be in the possession of the person entitled thereto, and especially so where the actual custody is in the possession of the joint owner. We are of the opinion that the evidence was sufficient to sustain the verdict as to each defendant, and the judgment is

AFFIRMED.

MRS. IONA MCEWEN, APPELLEE, V. ALLIED CONTRACTORS, APPELLANT.

FILED FEBRUARY 13, 1924. No. 23811.

Master and Servant: APPEAL FROM COMPENSATION AWARD: VENUE. A transitory civil action against a domestic corporation brought in a county other than those in which the statute provides it may be brought, in a court having jurisdiction of the subject matter, and in which the defendant files a general appearance, is within the jurisdiction of such court, and such court is one having "jurisdiction of a civil action between the parties," within the meaning of those words in section 3060, Comp. St. 1922, to which the matter referred to in said section may be submitted.

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

Dressler & Neely and *Stough & Dunn,* for appellant.

Sterling F. Mutz and *Edward C. Fisher, contra.*

Heard before LETTON, ROSE and DEAN, JJ., ELDRED and REDICK, District Judges.

REDICK, District Judge.

Appeal from an award by the compensation commissioner. Claimant's husband was a resident of Saline county, and at the time he received the injuries resulting in his death was working in Douglas county, Nebraska, for the defendant, a domestic corporation having its principal place of business in Douglas county, Nebraska. Claimant filed a petition before the compensation commissioner at Lincoln, and by the consent of the parties the matter was heard in Lancaster county, resulting in an award to the claimant. Notice of appeal was filed with the commissioner, and in proper time a petition on appeal was filed in the district court for Lancaster county, by the defendant, for the purpose of reviewing said award, and summons served upon claimant in said county. Claimant filed a special appearance objecting to the jurisdiction of the court, on the theory that the appeal should have been taken to the district court for Douglas county, where defendant had its principal place of business. The statute provides: "If either party at interest is dissatisfied with the award of the compensation commissioner, then the matter may be submitted to the district court of the county which would have jurisdiction of a civil action between the parties." And claimant contends that the county of Douglas is the only place where she could have brought a civil action against the defendant, and, therefore, that the district court for that county was the only one having jurisdiction of the appeal. This is the only question submitted.

The claimant insists that the question is controlled by the case of *Globe Indemnity Co. v. Larson*, 103 Neb. 673. The appeal in that case was taken to the district court for the county where the defendant resided, and therefore was, within the strict letter of the statute, in the county where claimant might have brought a civil suit. The only question necessary to be determined in that case was whether the

appeal was properly taken to the district court for Dodge county, and to that extent the decision is controlling. Cornish, J., laid down a number of propositions in the discussion of the question which make for the position of the claimant in this case and form the principal basis of her counsel's argument; but, while the arguments of the learned justice are entitled to great respect from this court, they do not foreclose an inquiry as to whether or not the court of some other county than that of the residence of the defendant may also be possessed of jurisdiction, for the reason that, however cogent, the opinions thereby expressed were not necessary to the decision of the one question at issue.

The question, then, whether the district court for Lancaster county in the instant case had jurisdiction must be considered an open one, and its proper solution depends upon the discovery of the intention of the legislature in using the language above quoted, and we agree with Justice Cornish that "the legislative intent was to leave the forum for an action between the parties the same as it was before the enactment of the compensation law." What, then, would have been the situation? Under the statute, a civil action may be brought in the county in which the corporation is situated or has its principal office or place of business. The language is permissive, and, so far as we are aware, has never been construed as denying the jurisdiction to the district courts of other counties where the corporation files a general appearance. On the contrary, it was held in *Clark v. Bankers Accident Ins. Co.*, 96 Neb. 381, that, where the action was commenced in a county where service could not be had upon the defendant and the defendant filed a so-called special appearance, but which the court held in fact a general one, jurisdiction was complete.

Suppose in this case the award had been against the claimant and she had filed her petition in the Lancaster county district court, and summons served upon defendants in Douglas county, and they filed a special appearance objecting to the jurisdiction, it seems without doubt it would have to be sustained, as it was the privilege of the defendant

to be sued only in the county of its principal place of business. But, on the other hand, supposing defendant had appeared generally and tried the case, it seems equally without doubt that the court had jurisdiction for the reason that defendant waived his privilege.

Where the action is purely transitory, the action may be brought wherever the defendant may be found, and statutory provisions as to where they may be brought are generally construed as not restrictive of the general jurisdiction of courts, but rather as regulations for the benefit or protection of the defendant, which may be waived. We think a fair construction of the language of the statute does not restrict the jurisdiction of courts in compensation cases to any greater extent than in ordinary civil actions, and, as all district courts have general jurisdiction of the subject-matter of claims for compensation, jurisdiction of the particular matter may be conferred by consent, express or implied, of the parties. The situation in the instant case is somewhat anomalous; the plaintiff, a resident of the county in which the suit is pending, seeks to raise an objection which is a personal privilege belonging to the defendant, and this after obtaining the consent of the defendant that the hearing before the commissioner should be had in Lancaster county. Perhaps this fact has no logical connection with the problem, but is adverted to as a situation not hitherto met with in our researches. It needs no argument to sustain the proposition that a personal privilege must be claimed by the party for whose benefit it is declared. We have the situation, then, of a proceeding instituted in a court having general jurisdiction of the subject-matter, the consent and appearance of the only party having any legal right to object to the county in which it is brought, and service upon the opposite party in the county of her residence; surely these facts ought to satisfy all questions of jurisdiction.

We therefore conclude that a transitory action may be commenced in any county of the state before a court having

jurisdiction of the subject-matter, and jurisdiction will be complete upon the general appearance of the defendant, and that such court meets the requirement of the statute quoted, as one having jurisdiction of a civil action between the parties. We must not be understood as holding that the defendant may select any county in the state as the forum for the consideration of his appeal, but we are clearly of the opinion that, under the circumstances shown by the record in this case, the district court for Lancaster county was possessed of jurisdiction.

REVERSED AND REMANDED.

ETHEL LABERTEW, APPELLEE, V. RAY H. WEEKS, APPELLANT.

FILED FEBRUARY 26, 1924. No. 22665.

1. **Appeal:** HARMLESS ERROR. A judgment will not be reversed because of an error in an instruction, when it clearly appears that the error was not prejudicial to the complaining party.
2. **Evidence** reviewed, and *held* sufficient to sustain the verdict.
3. **Bastardy:** DAMAGES. "The amount which a defendant in bastardy proceedings shall be adjudged to pay is largely in the discretion of the district court, and its award will not be disturbed unless manifestly excessive." *Gatzemeyer v. Peterson*, 68 Neb. 832.
4. ———: ———. The judgment entered *held* not excessive.

APPEAL from the district court for Scotts Bluff county: RALPH W. HOBART, JUDGE. *Affirmed.*

Mothersead & York, for appellant.

F. J. Reed and *L. L. Raymond, contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE and DAY, JJ., REDICK, District Judge.

MORRISSEY, C. J.

Plaintiff brought this action against defendant by fil-

ing her complaint before a justice of the peace within and for Scotts Bluff county, in the following language:

"On this 18th day of April, 1921, Ethel Labertew personally appeared before me, O. P. Burrows, a Justice of the Peace in and for Scotts Bluff county, and being by me first duly sworn on oath says that she is an unmarried woman, resident of Scotts Bluff county, Nebraska. That on the 15th day of April, 1921, she was delivered of a bastard child and that Ray H. Weeks is the father of said child."

The sufficiency of this complaint is upheld in *Campion v. Lattimer*, 70 Neb. 245, and cited and approved in *Parrish v. Hodges*, 98 Neb. 403.

Upon trial in the district court, defendant was found guilty by a jury and the court entered a judgment ordering him to pay for the support of the child $2,520 in semi-annual installments of $90 each.

The court instructed the jury as follows:

"The only questions for your consideration in this matter are whether or not Ethel Labertew is an unmarried woman; that on the 15th day of April, 1921, she was delivered of a bastard child, and that Ray H. Weeks is the father of said child, and if you so find by a preponderence of the evidence you should find the defendant guilty as charged. If, on the other hand, you do not find by a preponderance of evidence that Ethel is an unmarried woman, that she was delivered of a bastard child and that Ray H. Weeks is the father of said bastard child, then you will find the defendant not guilty."

Complaint is made because the court used the present tense and left the jury to determine whether or not plaintiff was unmarried at the time of the trial. The court should have told the jury to determine whether she was married or unmarried at the time she gave birth to the child. The complaint alleges that plaintiff was unmarried at the time she filed the complaint, which was only three days after she gave birth to the child. We have already shown that this was sufficient allegation of her unmarried status, both at the time of the conception and of the birth of the child. A sub-

sequent marriage would not have defeated her cause of action, so when the court told the jury that if they found that she was not then unmarried, he placed a burden upon her which under some circumstances would have been prejudicial to her. The instruction was erroneous, but was in no wise prejudicial to defendant.

Defendant denies that the evidence is sufficient to sustain a finding that plaintiff was unmarried at the time of the birth of the child. It is true that the proof on this point might have been made more clear and direct, but proof that she was then unmarried is not entirely lacking. She was asked the direct question if she was married when she filed the complaint and she answered that she was not. Her maiden name is shown to be the same as that under which she filed the complaint and the same name under which she testified as a witness. No issue was made on this point in the court below. The defense consisted of a denial of the paternity of the child. On this issue the proof is conclusive. The record indicates that she was recognized by all parties as an unmarried woman. The testimony of defendant shows that he played the role of sweetheart and that he looked upon her as a single woman. There was talk of marriage between them, and the evidence is ample to sustain a finding that she had not been married.

It is claimed that the judgment is excessive, and we are cited to a number of allowances made by courts in bastardy cases in which the sum awarded is not so great as the sum awarded in this case.

"The amount which a defendant in bastardy proceedings shall be adjudged to pay is largely in the discretion of the district court, and its award will not be disturbed unless manifestly excessive." *Gatzemeyer v. Peterson*, 68 Neb. 832.

The judgment entered does not appear excessive.

Complaint is made of the admission of certain evidence, including letters written by defendant, but these complaints are without substantial merit.

Defendant has shown a wanton disregard for both his moral and legal obligations, and, there being no prejudicial error in the record, the judgment is

AFFIRMED.

MAURO BRUNO V. STATE OF NEBRASKA.

FILED FEBRUARY 26, 1924. No. 23425.

1. **Criminal Law: WEIGHT OF EVIDENCE.** The weight of testimony is not necessarily determined by the number of witnesses. In determining the weight of evidence and the credence to be given witnesses, the triers of fact are free to consider all the surrounding facts and circumstances.
2. **Homicide: EVIDENCE: QUESTION FOR JURY.** Evidence outlined in the opinion *held* sufficient to call for the submission of the cause to the jury to determine the question of defendant's connection with the shooting charged in the information.
3. **———: INTENT: QUESTION FOR JURY.** When on the trial of one charged under section 9553, Comp. St. 1922, with shooting another with intent to kill, there is proof that the party making the assault stood at a distance of from 25 to 40 feet from the party assaulted and with a shotgun fired two loads of No. 6 shot into the body of the person assaulted, it is proper for the court to submit to the jury the question of the intent with which the shots were fired.
4. **———: MALICE: QUESTION FOR JURY.** When on the trial of one charged, under section 9553, Comp. St. 1922, with shooting another with intent to kill, there is proof that defendant with a shotgun, at a comparatively short range, twice shot and inflicted wounds upon the person of the complaining witness, the question of malice, like every other question of fact presented, becomes a question for the determination of the jury.
5. **Evidence *held* sufficient to sustain the verdict.**

ERROR to the district court for Douglas county: CARROLL O. STAUFFER, JUDGE. *Affirmed.*

Bigelow & LaViolette, for plaintiff in error.

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

Heard before MORRISSEY, C. J., LETTON, ROSE and GOOD, JJ., REDICK and SHEPHERD, District Judges.

MORRISSEY, C. J.

Defendant prosecutes error from a conviction for shooting with intent to kill. It is argued that the evidence as to defendant's connection with the shooting was insufficient to warrant the submission of the cause to the jury. At the time the crime is alleged to have been committed, September 22, 1922, defendant resided with his family at 5514 North Sixteenth street in the city of Omaha. The complaining witness, Joseph Vargo, resided with his family in the house immediately south of defendant's house. At defendant's house there lived a man named LaFortazzo, together with his wife, and a man named Joe Maiellai. Defendant, LaFortazzo, and the complaining witness, Vargo, had all formerly been employed in the shops of the Missouri Pacific Railway Company. Some months before the commission of the crime, these men had joined in a general strike which extended over several railroad systems. On the evening of September 22, 1922, Vargo was passing in front of defendant's home and stopped for a short time to have a friendly visit with his neighbors. Without controversy, it appears that there were then on the porch of defendant's home Mr. and Mrs. LaFortazzo, Mr. Maiellai, a neighbor named Folisi, and defendant's wife. Vargo testified that defendant was also present, but this is denied by defendant and his witnesses. The party conversed for a few moments about the strike. Vargo is said to have expressed the opinion that it was lost and to have announced that he had returned to work, but no acrimonious debate developed. Vargo testified that while he was engaged in this conversation defendant left the party, entered the house, and was not seen again by him. After Vargo visited for a few moments at defendant's home, he walked to the front door of his own house, but, finding it locked, proceeded to a side door near the rear of the house. While he was in the act of opening the door, which led

onto a small screened porch, he was struck by a charge of No. 6 bird-shot. Almost immediately thereafter he was struck by a second charge of the same kind of shot and fell on the porch. His wife immediately ran to his assistance and helped him into the house. A physician was called, and the police were notified of the shooting. Shot were found in the clothing and skin of Vargo extending from his feet to his face. The shot had not penetrated his body to any considerable depth, and, under proper medical treatment, he made a complete recovery. Upon the arrival of the police officers, they went to defendant's home, and there found the parties heretofore named, LaFortazzo, Folisi, Maiellai, Mrs. LaFortazzo, and Mrs. Bruno, but defendant was not found. The offcers took the three men found at defendant's home to the home of Vargo, where, according to some of the witnesses, both for the state and for defendant, Mr. and Mrs. Vargo accused Folisi of having done the shooting. However, it is claimed by Vargo that he asked the officers to arrest all four of the men, defendant as well as the three then in custody. Whether acting under directions of Vargo or upon their own volition is not material, but, while still holding the three men who were then under arrest, they returned to defendant's home in an effort to arrest him. While the officers were still at his home, it is claimed that defendant called his wife over the telephone from a drug store a few blocks from his home. He soon thereafter arrived at his home and was placed under arrest. Defendant and his three friends, heretofore mentioned, were all detained by the police until released on bail. Later in the evening a shotgun, which apparently had been thrown away by some person who feared the consequences of being found with it in his possession, was found a few blocks from defendant's home. Shells found in the gun and shells found in defendant's home were offered in evidence and are attached to the bill of exceptions. There is some confusion over the identification of these shells because of carelessness in tagging them or in the loss or removal of certain of the tags. These shells appear to have

been made by two different manufacturers, some being marked "Schultz," while the others are marked "DuPont," but they are all loaded with No. 6 shot and are of the same gauge.

Mrs. Vargo testified that, when she heard the report of the gun, she ran to the porch to assist her husband, and that she looked out and saw defendant with a gun in his hands. Defendant argues, and perhaps correctly, that this is the principal evidence fastening the crime charged upon him, and says it is wholly discredited and unworthy of belief, because it was shown that she did not at the preliminary hearing of defendant give this testimony either verbatim or in substance. It is argued, also, that because of the physical situation she could not have seen defendant even had he been standing at the point where she claims she saw him. As going to the credibility of her story, it is urged that she would not under the circumstances have endangered herself by stepping through the door to look for the man who had shot down her husband. It is said that her first thought would have been to give assistance to her husband, and that, if this part of her story were true, she would have called up the police and told them that defendant was the guilty party.

No doubt this argument was made to the jury, and of course it had their consideration. It is evident that English is not the mother tongue of the witness, and allowance must be made for discrepancies that will inevitably creep into the story of a witness who thinks in one language and talks in another. Nor can we forget that, at the time the police officers arrived and defendant's three friends and companions were arrested and brought to the house, this woman was laboring under the excitement produced by the shooting of her husband who was then suffering from what, so far as she knew, might be fatal wounds. She knew that the men brought into her house by police officers were friends and neighbors of defendant, and it is little wonder that she accused them, one and all, of having shot her husband.

According to defendant's story, he had been down town all that afternoon and evening. This story is corroborated, not only by defendant's friends whom we have named, but by another witness who testified that he had been with defendant a part of the time, and that he saw defendant board a street car at Fourteenth and Douglas streets about 10 o'clock. Another witness testified that he accompanied defendant to a picture show. Defendant testified that when he transferred from one street car line to another street car line at Sixteenth and Sprague streets, which is said to be only a few blocks from his home, he called up his wife by telephone. This, it may be inferred, is the telephone call which came to the home when the officers were present shortly before defendant's arrest. The testimony of defendant and his witnesses just mentioned is in direct conflict with the testimony of Vargo. However, in weighing defendant's evidence, it is worthy of mention at least that, if his story be true, he absented himself from his home all the afternoon and evening, not even returning for the evening meal; that he went to a picture show with a gentleman companion while his wife was at home; and that it did not occur to him to call up his home until the day was done, the evening's amusements over, and he was returning home and had reached a point only a few blocks from his own house. The jury were free to accept that story, but they were equally free to disbelieve it. The greater number of witnesses support defendant as to his whereabouts, but the weight of testimony is not necessarily determined by the number of witnesses. In determining the weight of evidence and credence to be given witnesses, the triers of fact are free to consider all the surrounding facts and circumstances. *Moore v. Williams, ante,* p. 342.

The second division of the brief is devoted to an argument in support of defendant's contention that, regardless of the disposition of the subject heretofore discussed, the proof is insufficient to show that defendant shot "with intent to kill." The statute on which the information was based, section 9553, Comp. St. 1922, would permit the drafting of an

information charging defendant with shooting "with intent to kill, wound or maim." The county attorney saw fit to charge that defendant shot with intent to kill. The court properly instructed the jury that, before they would be warranted in finding defendant guilty, the proof should show that the shooting was done with this specific intent. Making this clause of the instruction the basis for the argument, defendant contends that the evidence is wholly insufficient to show the intent. It is ingeniously argued that the "range" of the shot extended from the victim's feet to his head, nearly 6 feet, that the bullets were light "bird-shot;" that little more than skin wounds were made; that, on the testimony of the state, the party discharging the gun stood at a distance of from 25 to 40 feet from the complaining witness when the shots were fired, but that the wide range of the charge proves that the shots were fired from a much greater distance, and that a person accustomed to the use of fire arms would know that the light bird-shot, fired from the distance shown, would not produce death. This argument is entitled to serious consideration. However, the record does not disclose the angle at which the victim's body stood to the line of shot. When struck by the first charge, Vargo was about to go upon his porch, and, while it is not clear, we may assume that he was ascending a set of steps. When struck by the second charge he was probably falling to the floor; if so, that charge might have inflicted wounds the entire length of his body, regardless of the range at which it was fired. The shot were light in weight it is true, nevertheless, if they had struck a vital part of the body, they might well have caused death. The court would not have been warranted in holding as a matter of law that the proof was insufficient to sustain a finding that the shots were fired with the intent charged.

Defendant sets out a paragraph from the instructions in which the court told the jury:

"The rule that a sane man is presumed to intend the necessary or the natural and probable consequences of his voluntary acts is not sufficient in a case where a man is charged

with shooting with intent to kill to evidence the intent, and other and additional affirmative evidence that the shooting, if done by this defendant, was done with the intent to kill is necessary before you can find the defendant guilty beyond a reasonable doubt."

With this instruction as a basis, an argument is made that the proof is insufficient to sustain the verdict because of a failure, or an absence, of that "additional affirmative evidence" mentioned. This argument completely ignores the succeeding paragraph of the instructions, wherein the court properly told the jury:

"To constitute the offense charged in this case, the intent alleged in the information is necessary to be shown, but direct and positive testimony is not necessary to prove the intent. It may be inferred from the facts and circumstances shown by the evidence; and if you believe from the evidence, beyond a reasonable doubt, that the shooting, as alleged in the information, was done wilfully and intentionally, and was likely to be attended with dangerous consequences, the intent requisite to make out this case, as charged, will be presumed."

When the instructions are read as a whole, it is clear that the proof falls within the rule announced.

Defendant denies that there is sufficient evidence of malice to warrant the submission of the cause to the jury. There being competent evidence in the record from which the jury might find that defendant with a shotgun loaded with gunpowder and leaden bullets, at a comparatively short range, twice shot and inflicted wounds upon the person of the complaining witness, the question of malice, like every other question of fact presented, became a matter for the determination of the jury.

We have discussed the assignments of major importance. Those not discussed have been considered, but do not appear to be of such character as to warrant separate consideration. Defendant was not prejudiced by the ruling of the court in relation to any of them. He had a fair trial,

and the evidence is found ample to sustain the verdict of the jury, and the judgment is

AFFIRMED.

ANNA FERGUSON V. STATE OF NEBRASKA.

FILED FEBRUARY 26, 1924. No. 23771.

1. **Intoxicating Liquors: INFORMATION.** The information outlined in the opinion *held* sufficient to charge a violation of section 3252, Comp. St. 1922.
2. **Husband and Wife: VIOLATION OF PROHIBITORY LIQUOR LAW: CONVICTION SUSTAINED.** When on the trial of a woman charged with the possession of "certain equipment commonly known and described as a still, made and designed for the purpose of manufacturing intoxicating liquor," of mash and material "designed for, and then and there used" in the process of, manufacturing and distilling intoxicating liquor, and of intoxicating liquor "manufactured by her," it appears from her own testimony that she had personally rented the house in which these articles and commodities were found, and was in charge thereof, the common law fiction that the husband is the head of the household is not sufficient to overcome the verdict of the jury finding her guilty as charged.

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

Raymond T. Coffey, for plaintiff in error.

O. S. Spillman, Attorney General, and *Harry Silverman, contra.*

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

MORRISSEY, C. J.

Defendant prosecutes error from a conviction under section 3252, Comp. St. 1922. In count one, defendant is charged with having in her possession "certain equipment commonly known and described as a still, made and designed for the purpose of manufacturing intoxicating liq-

uor;" count two charged defendant with the possession of mash and material "designed for, and then and there being used" in the process of manufacturing and distilling intoxicating liquor; and count three charged defendant with having possession of intoxicating liquor "manufactured by her." The sufficiency of the information, and each count thereof, is questioned. We do not deem it necessary, however, to deal with these assignments, for the reason that, since defendant's brief was filed in this court, the points presented have been fully discussed and determined in the case of *Maro v. State, ante,* p. 491. The holding in that case is adverse to the contention of defendant and the rule therein announced will be followed here.

Under an assignment which questions the suffciency of the evidence to support the verdict, defendant urges as a defense the ancient common law rule that *prima facie* the husband is the head of the family; and argues that defendant cannot be held in this case because she testified that she had a husband living with her upon the premises.

The rule invoked never went so far as to be a complete bar to the prosecution of the wife for the unlawful use of premises. It merely shifted the burden of proof and made it incumbent upon the state, before the wife could be held criminally liable for the unlawful use of the premises, to show that the husband was absent, or to make it affirmatively appear that she was active in granting permission to so use the premises. The record before us is silent as to the husband, except a mere incidental statement of defendant that she had a husband and that he lived at home. On the other hand, defendant's testimony affirmatively shows that, if she had a husband, he was absent when the house was searched and the articles described in the information were found in the house. He did not testify as a witness, and inferentially the existence of such a person is questioned. Defendant testified that she rented the house from its owner, and that her son had granted permission to a third party (who is named in the testimony but not called as a witness at the trial) and that this third party owned

the articles. To show that defendant was actually in control of the house, we may quote her own testimony: "You are the one who has charge of that house, aren't you?" Answer, "Yes, sir." There is no merit in the assignment.

Finally, defendant asserts that the statute under which the prosecution was brought is unconstitutional. The constitutionality of the act has been upheld in *State v. Badberg*, 108 Neb. 816, and will not be reviewed here.

The judgment is

AFFIRMED.

JOHN KRUEGER, APPELLEE, V. CRYSTAL LAKE COMPANY, ET AL., APPELLANTS.

FILED FEBRUARY 26, 1924. No. 23681.

1. Waters: WATERS OF STREAM. Where the flood-waters of a river, in times of high water, follow a natural channel or waterway into a "cut-off lake," and from thence, if they reach a certain height, flow into the river at a lower point in its course, such waters are waters of the stream or lake, and not surface-waters.
2. ———: RIGHTS OF RIPARIAN OWNERS. In such a case, all owners of property fronting upon the lake are riparian owners and are entitled to have the waters in the flood-channels run, and the waters of the lake remain, in their natural condition, subject to the ordinary incidents and rights of use by riparian proprietors.
3. ———: ———: INJUNCTION. One who comes into equity must come with clean hands, and where, by reason of unlawful obstruction of flood-channels, whereby its waters are replenished from a river, the waters of a lake recede to such an extent as to permit the cultivation during one of a long series of years of a portion of the lake bed, an owner of the land, who has aided in maintaining the unlawful obstructions, and has produced this unusual and artificial condition, is not entitled to an injunction to prevent other riparian owners from restoring the lake to its former level.
4. Injunction: WATERS: PRESERVATION OF PUBLIC INTERESTS. Where the result of an injunction would greatly interfere with the maintenance and retention of a body of water seven miles long, of such a depth as to permit passenger boats to ply upon it, which has been stocked with fish for public use by the state of Nebraska, and which furnishes a place of recreation and resort

for the public generally, a court of equity will, in case of doubt, incline toward the protection of the public interest as against a mere private claim which, if well founded, may be compensated by an action for damages.

5. Equity: CLAIM FOUNDED ON WRONGFUL ACTS. Where one procures and maintains a condition through the wrongful acts of others, which are ratified, confirmed and sought to be perpetuated by him, he is not entitled to the aid of a court of equity to preserve and maintain such a condition, even though the parties against whom the injunction is sought are themselves not free from fault.

APPEAL from the district court for Dakota county: GUY T. GRAVES, JUDGE. *Reversed and dismissed.*

Byron Clark, Jesse L. Root, Herman E. Kuppinger, J. W. Weingarten, R. E. Evans, William P. Warner and *C. W. Krohl,* for appellants.

George W. Leamer and *Stason & Stason, contra.*

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

LETTON, J.

A permanent injunction was granted by the district court restraining the defendants from diverting and conducting water from a natural watercourse through a conduit and discharging it into Crystal lake, thereby overflowing certain lands of the plaintiff. Defendants and a large number of intervening defendants have appealed.

The facts are substantially as follows: Crystal lake is a natural lake, about seven miles long, the bed of which was formerly the main channel of the Missouri river. It is somewhat crescent shaped, and is of a character known in the Missouri valley as a "cut-off lake," that variable and inconstant stream having, as is not infrequent, changed its channel, and, by silting the inlet and outlet, left the old channel, forming a basin, which is partly filled with water. In times of flood or high water in the Missouri river, when the flood-waters reached a certain height, they flowed

through a natural depression or flood-channel into, and sometimes through, the lake, until the level of the water in the river subsided below the highest point in the flood-channel. This did not happen every year, but it occurred so frequently as to maintain the level of the lake at such a height that it furnished an attractive natural resort. On the banks and around the lake are large groves, both natural and the result of planting. Part of the land adjacent to the lake has been platted into lots, blocks, and streets, many summer cottages have been erected, as well as two hotels and several club-houses. There are five public bath-houses, and a number of amusement buildings and enterprises have been erected. There are seven passenger motor-boats operating upon the lake, and the use of the lake for public and recreation purposes has continued for nearly 30 years. The city of Sioux City, Iowa, is within a very few miles, and there are a number of towns and villages near by. Consequently a large urban population makes use of the facilities for recreation furnished by the lake. The state of Nebraska has stocked its waters with food fish for public use, and its waters have been utilized by one of defendants for the cutting of ice in winter, and by the Chicago, Burlington & Quincy Railroad Company, which requires large quantities of water daily for the operation of its engines and in its repair shops, which are situated close to the bank of the lake.

From 1910 or 1911, up to the latter part of 1921 and 1922, while the water-level in the lake was lower at different times and at different seasons of the year, it maintained such an average height that its waters could be thus utilized. In 1917 the flood-water filled the lake, and ran into the river again at the lower channel. In 1922 there was deficiency in the usual precipitation, and on account of the access of flood-water from the Missouri river having been cut off by dikes, dams and obstructions erected by farmers and others who desired to prevent the flood-waters from flowing over their lands, and by reason of summer evaporation, the amount of water in the lake became largely di-

minished and the level much lower than normal. This reduction of the water-level exposed and caused to dry from 20 to 35 acres of land belonging to the plaintiff. Part of the land had formerly been covered with water and part of it was ordinarily so permeated with water that cattails, watergrass and other swamp vegetation grew thereon. In 1922 the plaintiff was able to and did bring part of this land into cultivation and he obtained a crop of corn and of potatoes. In 1911 it had been realized by persons interested in maintaining the normal level of the water in the lake that, by reason of obstructions placed in the overflow-channels of the river, the level of the water in the lake had been lowered. The predecessors in interest of defendants were threatening to remove these obstructions and allow the flood-water of the river to flow as they had been wont to do. An action was brought by Mr. Krueger and four other private individuals to procure an injunction to prevent those interested in preserving the lake from removing the dikes and embankments which obstructed the flood-water channel from the river into the lake, or cutting a channel or inlet through them, and from interfering with their strengthening the dikes, embankment, or ridge. Mr. Krueger, plaintiff here, was one of the plaintiffs in that case, and he, as one of the principals, signed the bond given to procure the temporary injunction. The temporary injunction was dissolved in 1912. Afterwards another suit was brought by one Gribble, a riparian owner upon the lake, in which the present plaintiff, and others who were interested in maintaining the artificial obstructions, were made defendants, to enjoin the defendants in that case from erecting or maintaining the dams or dikes, and for a mandatory injunction for their removal. A temporary injunction was issued. Both of these actions were dismissed before a trial, an amicable settlement and contract having been entered into between all the parties interested, whereby the lake was to be fed through a ditch or flood-channel, which had been laid out by an engineer and was to be afterwards constructed at another point, upon the giving of

a bond in the sum of $5,000 by those interested in the latter suit, to pay damages to certain owners of land if the flow of water was not properly controlled.

The Missouri river, in one of its annual floods, having eroded its banks so as to more closely approach the lake at the point where this artificial channel was to be constructed, the parties interested, fearing that the river in flood-time, on account of this changed condition, might flow into the lake through this ditch and again make the lake the main channel of the river, by tacit agreement went no further with this work. The final result was that, unless in the case of an extraordinary and unusual flood such as occurred one year when an ice gorge had formed in the river, the flood and overflow waters were in large measure prevented from reaching the lake, and its waters diminished so as to expose part of its bed. In this condition of affairs the Crystal Lake Company, the railroad company, and a number of private individuals interested in preserving the lake, adopted the plan of conducting water, through a tile drain or conduit, from a natural watercourse, known as Jackson chute, into the bed of Crystal lake. Subscriptions were made to defray the expense, which was over $26,000. The conduit began to discharge water into the lake early in 1923. The effect of this was to raise the level of the lake to such an extent that the plaintiff was unable to use the land from which the water had receded in 1922. This action was brought by him to restrain the defendants from conducting water through the tile conduit and discharging it into the lake bed.

A large number of legal questions have been raised in the case; the pleadings are numerous, lengthy and involved, but the legal principles involved are comparatively simple. In the first place, it is clear that the defendants have no legal right to take the waters from a natural watercourse and divert them from their natural channel so as to damage the lands of others, without their consent. *"Aqua currit, et debet currere, ut currere solebat."* So that, if the allegations of plaintiff's petition are borne out by the facts, and

there are no other controlling circumstances, he would be entitled to a permanent injunction restraining the discharge of water from the conduit into the lake to his damage.

But the maxim also applies to the natural flood-channels into Crystal lake. The evidence is undisputed that, before any obstructions were placed in the flood-channels, when the waters of the Missouri river reached a certain height, they flowed into the bed of the lake. While in the interval between the successive rises, which it is shown occur each year, and which are known as the "spring rise" and the "June flood," and between the June flood of one year and the spring rise of the next year, the shrinkage of water by means of evaporation or seepage was sufficient to lower the level of the water in the lake to a considerable extent, still the accumulation from rains, melting snows and from percolation from higher ground was sufficient to preserve the water at such an average height as to render that portion of his land, which plaintiff asserts has been damaged, of little or no use or value for agricultural purposes. The settled doctrine in this state is that no man has the right, without the consent of other riparian proprietors, to interfere with these flood-channels in such a way as to increase or diminish the water coming to other proprietors, to their injury and without their consent, and that the overflow waters of a stream flowing in an accustomed course do not cease to be a part of the stream unless or until separated therefrom so as to prevent their return to its channel. There is no more right to divert or obstruct such waters flowing in an accustomed channel than there is to divert or obstruct the waters of the stream flowing at their usual level in their natural channel. This is the general doctrine. *Chicago, B. & Q. R. Co. v. Emmert*, 53 Neb. 237; *Brinegar v. Copass*, 77 Neb. 241; *Murphy v. Chicago, B. & Q. R. Co.*, 101 Neb. 73; *Spelman v. City of Portage*, 41 Wis. 144; *Conn v. Chicago, B. & Q. R. Co.*, 88 Neb. 732; 3 Farnham, Waters and Water Rights, sec. 880; *Buchanan v. Seim*, 104 Neb. 444. Under *Buchanan v. Seim, supra*, the plaintiff has no prescriptive right to have the obstructions maintained

which prevent or exclude the flood-waters of the river from the lake.

The evidence is that, were it not for these artificial obstructions, the water in the lake would in all probability remain at about the same average level as it did for years before the natural flood-channel was obstructed, and that in such case the greater portion of the plaintiff's land which has been or will be flooded or damaged by the water discharged from the conduit would remain a part of the bed of the lake. If the evidence on behalf of plaintiff had established that the lowering of the water-level in the lake had been occasioned by natural causes, or by the acts of third parties with whom he was not co-operating, or conniving and assisting with material support, or associated in interest, and that the waters had so receded and the land dried so as to be cultivatable, and there was a reasonable probability that it would so remain, then he would be entitled to restrain the discharge of water through the conduit. But one who comes into equity must come with clean hands. When the predecessors in interest of the defendants sought to remove the unlawful obstructions which prevented the flood-waters of the river from entering the lake and maintaining its former level, plaintiff was an active participant in the injunction proceeding brought to restrain them from removing or interfering with these obstructions. The petition in that case alleges that the obstruction "is partly a natural ridge and was partly placed there and maintained by Dakota county and by the citizens thereof as a public highway, *and as a protection against the extraordinary floods and overflows of the Missouri river,*" and prays that the defendants be enjoined "from interfering with plaintiffs while they are protecting their said lands from the floods of the Missouri river by strengthening and repairing the said ridge and keeping it in the condition it now is."

The legal principles which are applicable to the reliction or emergence of submerged land are much the same as prevail with respect to accretions. A riparian owner is en-

titled to any additions made to his land by imperceptible degrees which are caused by the operation of natural forces, or even produced by the operation of third parties with whom he is not in privity, has no causative or collusive connection, or whose purposes he in no wise aids, abets or procures. But, if by the result of his own unlawful action, or by the action of third parties whose acts and doings in this regard, he countenances, aids, abets or causes a change in the shore-line made for the purpose of increasing his estate, he cannot take advantage of this as against other riparian owners whose interests are affected. *Brundage v. Knox*, 279 Ill. 450, opinion by Chief Justice Carter. So in this case, cutting off the flow of flood-waters which served to replenish the lake caused, or contributed to cause, the land which plaintiff cultivated in 1922 to be dry enough to be thus utilized. He was *in pari delicto* in procuring the channel to be obstructed—even though the evidence fails to show his physical participation in the construction of the dams or dikes—because by his institution and active participation in the injunction suit he prevented their wrongful acts from being interfered with and caused the unlawful obstructions to remain. He aided to deprive the defendants, who are also riparian owners, of the benefits of the water flowing from the river, to which they were rightfully entitled, and he is not entitled to the aid of a court of equity to preserve and maintain a condition which he obtained through the wrongful acts of others, which were ratified, confirmed, and sought to be perpetuated by him. Each riparian owner was entitled to have the natural water-level uninterfered with except by natural causes, or as the law allows. If the evidence had disclosed that plaintiff at this time is authorized to enter upon the lands of others and remove the unlawful obstructions in the flood-channels, then the court, applying the maxim, "He who seeks equity must do equity," might properly grant the relief he seeks, but only upon the condition that he restore the natural conditions which have been interfered with; but, it not being

shown that full relief can be granted in this way, the court should not interfere between wrong-doers.

A number of other points have been raised and discussed by counsel, but it is unnecessary to consider them. It may be said that some, but not all courts, take the view expressed by the court of appeals of New York, in a comparatively recent case, as follows: "The ownership of property will be protected unless there are other considerations which forbid, as inequitable, the remedy of the prohibitive or mandatory injunction. If the protection of a legal right would do a plaintiff but comparatively little good and would produce great public or private hardship, equity will withhold its hand and remit the plaintiff to his legal rights and remedies. A court of equity is not bound to decree an injunction where it will produce great public or private mischief, merely for the purpose of protecting a technical or unsubstantial right." *McCann v. Chasm Power Co.*, 211 N. Y. 301. While there is much to be said in support of this view, we are reluctant to stand upon such a broad generalization, since it may not in all cases protect private property rights. The public nature of Crystal lake is to be considered and the court will incline to protect the public interest when the right to injunctive relief is not clear.

The evidence is not sufficient to show that the portion of plaintiff's lands now overflowed could have been reclaimed and used for cultivation except for the unlawful acts mentioned. This being the state of the evidence, whether defendants rightfully or wrongfully diverted the water from Jackson chute cannot affect any property or personal right of the plaintiff, and he is therefore not entitled to an injunction. The judgment of the district court is therefore reversed and the action of plaintiff dismissed, and since there seems to be fault on both sides, each party must pay the costs incurred by him, or it, in the district court, defendants recovering their costs in this court.

REVERSED AND DISMISSED.

ROBERT C. O'BRYAN V. STATE OF NEBRASKA.

FILED FEBRUARY 26, 1924. No. 22852.

1. **Witnesses: PRIVILEGE: WAIVER.** A witness may decline to testify to facts incriminating himself, but this is a privilege which he may waive by failing to assert it.
2. **Conspiracy.** A conspiracy to commit a felony is a penal offense. Comp. St. 1922, sec. 9543.
3. **———: INDICTMENT.** In an indictment for a conspiracy to commit the felony of procuring money and other property by making a false representation with intent to cheat and defraud, the failure to charge the conspirators with knowledge that the representation which they conspired to make was known by them to be false may not be a fatal defect, where such knowledge is necessarily included in a proper charge of criminal intent, such knowledge, independently of the criminal intent, not being a statutory ingredient of the felony involved in the conspiracy. Comp. St. 1922, sec. 9892.
4. **Insolvency.** The test of insolvency is the insufficiency of available property to pay debts.
5. **Conspiracy: INSOLVENCY: INSTRUCTION.** In a prosecution for a conspiracy to commit the felony of procuring money and other property by the false pretense that a corporation is solvent, with intent to cheat and defraud prospective purchasers of its capital stock, it is error to instruct the jury that "insolvency means that the party whose business is in question is unable to pay his debts as they become due in the ordinary course of his daily transactions."

ERROR to the district court for Douglas county: CHARLES A. GOSS, JUDGE. *Reversed.*

Baldrige & Saxton and *L. A. Hammes*, for plaintiff in error.

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

Heard before LETTON, ROSE, DEAN and GOOD, JJ., ELDRED, District Judge.

ROSE, J.

In a prosecution by the state in the district court for

Douglas county, Robert C. O'Bryan, defendant, was convicted of conspiring with others to commit a felony, and for that offense was sentenced to serve a term of one year in the penitentiary and to pay a fine of $1,000. As plaintiff in error he presents for review the record of his conviction.

It is argued that the prosecution should have been abated and the proceeding dismissed on the ground that a prosecuting attorney invaded a constitutional right of defendant by requiring him as a subpœnaed witness to testify against himself before the grand jury that indicted him. Defendant is not entitled to a reversal on this ground, for the reason that he did not, when interrogated as a witness before the grand jury, claim the privilege of declining to testify to facts incriminating himself—a privilege which may be waived by the failure to assert it.

The sufficiency of the indictment was challenged by both motion and demurrer and the overruling of each is assigned as error. Defendant with a number of others was indicted for a conspiracy to commit a felony, a penal offense under a recent statute. Comp. St. 1922, sec. 9543. The felony which defendant and others were charged with a conspiracy to commit was the procuring of money and other property by means of false pretenses. Comp. St. 1922, sec. 9892. According to the indictment the conspirators agreed, in substance, omitting names, to falsely and fraudulently represent that the Great Western Commercial Body Company, a corporation, was solvent and had earned profits for the payment of dividends, and that the conspirators agreed to use these false and fraudulent representations as inducements to prospective purchasers of capital stock of that corporation, and thus to feloniously procure from them money and other property with the intent to cheat and defraud them. The overt acts to effect the object of the conspiracy, like the conspiracy itself, were charged in details unnecessarily prolix.

It is argued that the indictment is fatally defective for want of a direct charge that the conspirators knew the representations which they agreed to make were then false or

would be false when subsequently repeated in the commission of overt acts. A careful prosecuting attorney skilled in drawing indictments would not ordinarily omit this charge, but the omission does not seem to be a fatal defect in the present instance. Whoever drew the indictment attempted to follow an old form which should be abandoned as a legal abomination. Instead of charging in simple and direct language the facts constituting each element of the conspiracy and the overt acts to effect the object thereof, the indictment contains unnecessary details and bewildering repetitions borrowed from an ancient form not suited to present conditions. Mistakes in the difficult tasks of following such a form under modern statutes sometimes cause delays, confuse accused, mislead the court and defeat justice. In the present instance, however, defendant should not be released because he was not directly charged with knowledge that the representations which he agreed with others to make were false. The statute making the procuring of money or other property by means of false pretenses a crime does not in direct terms declare that knowledge of the falsity of a representation is a substantive element of the offense. The words "knowledge" and "knowingly" or their equivalent are not used. Intent to cheat and defraud the persons wronged is, however, made an ingredient of the crime and this intent necessarily includes knowledge. The intent to cheat and defraud by means of pretenses or false representations is contained in the charge of conspiracy as well as in the overt acts to effect the object thereof. Accused understood this feature of the indictment and defended accordingly. For the reason that knowledge is necessarily included in the charge of an intent to cheat and defraud, considered in connection with the statute and the indictment, the conviction should not be set aside under this assignment.

The giving of the following instruction is assigned as error:

"Under the bankruptcy laws of the United States, and under the definition in force in this state, insolvency means

that the party whose business is in question is unable to pay his debts as they become due in the ordinary course of his daily transactions."

This is a misstatement of the law applicable to a material issue. Under the federal bankruptcy act the test of insolvency is the insufficiency of the available property to pay debts. U. S. Comp. St. 1918, sec. 9585. The definition in force in this state is at variance with the instruction. *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624. In a recent case it was said:

" 'Insolvency,' as that term is ordinarily used, is not the same thing as a mere failure to pay debts, but, as applied to an individual or a corporation, it means an insufficient amount of property to pay debts." *Frank v. Stearns, ante*, p. 101.

In the instruction, therefore, the district court departed from both the act of congress and the definition of insolvency in force in this state. The doubtful character of the evidence relating to insolvency and to the intent to cheat and defraud might have resulted in a verdict of not guilty, had proper instructions been given. In passing on the case erroneously submitted the jury in their verdict of guilty made the following recommendation:

"The jury strongly recommend clemency of the court, because of the extenuating conditions existing at the times under which the unlawful acts were, as charged in the indictment, committed."

On the record presented the error in the instruction quoted was clearly prejudicial to defendant, and for that reason the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE, V. TOM DAVIS ET AL., APPELLANTS.

FILED FEBRUARY 26, 1924. No. 22626.

1. **Attorney and Client**: PROCESS: PRIVILEGE. A nonresident attorney who comes into the state for the purpose of taking depositions to be used in the trial of an action pending in another state is not privileged from service of civil process in this state.
2. **Champerty**: STATUTES: CONSTITUTIONALITY. Sections 9737 and 9738, Comp. St. 1922, prohibiting the soliciting of certain classes of claims for the purpose of instituting suits thereon outside of the state, and providing a penalty therefor, are regulatory measures, and, as such, do not infringe the rights of an individual under the Constitution of the United States or of this state.
3. **Injunction.** An injunction may issue in a proper case even though the effect be to restrain the commission of a crime, when the doing of the criminal act will produce irreparable injury to civil rights.
4. ———. Under the facts disclosed by the record, *held* to present a proper case for equitable relief.

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

C. L. Clark, Tom Davis, Ernest A. Michel and *Benjamin F. Baker*, for appellants.

Byron Clark, Jesse L. Root, Reavis & Beghtol, J. W. Weingarten and *C. W. Krohl, contra.*

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

DAY, J.

This action was brought by plaintiff railroad company against Tom Davis, A. E. Roe, Ed F. Murphy, Ernest A. Michel, and Davis & Michel, a copartnership, to restrain the defendants and each of them from violating section 9737, Comp. St. 1922, commonly known as the anti-ambulance chasing statute. Personal service of summons was had on defendants Davis, Roe and Murphy. The other defend-

ants were not served with process. Defendants Davis and Roe, each in his own behalf, filed a special appearance objecting to the jurisdiction of the court over his person, upon the ground that at the time of the service of summons they were each privileged from service of civil process. The special appearances were overruled. Defendants Davis, Roe and Murphy failed to answer, and default for want of answer was entered against them. Thereupon judgment was entered in favor of the plaintiff granting to it the relief prayed. Defendants Davis and Roe have appealed. The joint brief of the appellants is divided under two heads—one devoted to the question of privilege, and the other to the merits of the petition and the decree.

The claim of privilege from service of civil process, in so far as Davis is concerned, is based on the following facts: On and prior to September 8, 1921, an action was pending in the district court for Douglas county, Minnesota, entitled John O'Halloran v. Chicago, Burlington & Quincy Railroad Company, in which the law firm of Davis & Michel of Minneapolis, Minnesota, were attorneys for the plaintiff. In preparation for the trial of that case, plaintiff's counsel deemed it advisable to take the depositions of certain persons residing at or near the city of York, Nebraska, and accordingly served notice on the defendant in that case, the plaintiff in this action, that the depositions would be taken at York, Nebraska, at a time and place mentioned in the notice. As Davis, accompanied by Roe, were en route to York to take the depositions, they stepped off the train at Lincoln, Nebraska, and while on the depot platform were each served with summons in this action. The question is thus squarely presented, in so far as relates to Davis, whether a nonresident attorney, while in the state for the purpose of taking depositions to be used in an action pending in another state, is privileged from service of civil process in an action pending in this state.

The rule exempting nonresident parties and witnesses from service of process while attending a trial in a state

other than their residence is well-nigh universal. Should this rule be extended to include nonresident attorneys who are in the state under circumstances such as are disclosed by the record? We think not.

In *Nelson v. McNulty*, 135 Minn. 317, the facts involved were practically the same as in the case at bar. In that case an attorney from South Dakota went into the state of Minnesota for the purpose of taking depositions for use in the trial of a case pending in South Dakota. After arriving in Minneapolis and going to the place where the depositions were to have been taken, a stipulation as to the facts in the case was entered into between the attorneys for the respective parties, which obviated the necessity of taking the depositions. About an hour later the attorney from South Dakota was served with civil process in an action pending in Minnesota. He sought to vacate the service of process upon himself on the ground of privilege. The supreme court of that state held, however, that under the facts presented he was not privileged from the service of process in a civil action, issued out of the courts of that state.

The case of *Berlet v. Weary*, 67 Neb. 75, involved a somewhat analogous principle. In that case B., who was a member of the legislature, was served with civil process while at the seat of government. He filed objections to the jurisdiction and a motion to quash the service, alleging that he was a member of the Nebraska state senate, and that he was in Lancaster county on the day of the service of the process for the sole purpose of attending the legislative session, which convened the day following the date of the service of summons. This court in a well-considered opinion reviewed the authorities, and came to the conclusion that the law of this state makes no distinction as to the service of summons between members of the legislature and other persons, and that a member of the legislature in a proper case may be served with summons while at the seat of government for the purpose of attending the legislative session.

Other cases supporting the view that a nonresident attorney is not exempt from civil process are: *Greenleaf v. Peoples Bank*, 133 N. Car. 292, 63 L. R. A. 499; *Paul v. Stuckey*, 126 Ark. 389, L. R. A. 1917B, 888.

A number of cases are found supporting a contrary view, among them *Read v. Neff*, 207 Fed. 890; *Central Trust Co. v. Milwaukee Street R. Co.*, 74 Fed. 442.

We think the better reason supports the rule that a nonresident attorney who comes into the state for the purpose of taking depositions to be used in the trial of an action pending in another state is not privileged from service of civil process in this state.

So far as concerns defendant Roe, it is not claimed that he was an attorney in the case. He was in the employ of Davis, and accompanied the latter for the purpose of assistance. Under any view which might be taken on the question of privilege, so far as it applied to attorneys, it could not be extended to include Roe.

We come now to a consideration of the merits of the petition and the decree. Defendants urge that the facts alleged in the petition are not sufficient to entitle the plaintiff to the remedy of injunction. The arguments advanced in support of this contention are that section 9737, Comp. St. 1922, upon which the action is founded, is contrary to the Constitution and laws of the United States, and, further, that the remedy for violating the provisions of the statute is a criminal prosecution, as provided in the act, and not by injunction. In apt language the petition charges the defendants with doing acts with the state which are in direct contravention of the provisions of our statute. The act provides:

"That it shall be unlawful for any person, with the intent or for the purpose of instituting a suit thereon outside of the state, to seek or solicit the business of collecting any claim for damages for personal injury sustained within this state, or from death resulting therefrom, or in any way to promote the prosecution of a suit brought outside of this state for such damages, or to do any act or thing in

furtherance thereof, in cases where such right of action rests in a resident of this state, or his legal representative, and is against a person, copartnership or corporation subject to personal service within this state."

A penalty of a fine or jail sentence is provided for violating any of the provisions of the act.

The statute in question was the outgrowth of certain conditions which existed in the state. It was a matter of common knowledge that a few attorneys outside of the state, through themselves and agents, were engaged in the practice of soliciting claims for settlement or suit in personal injury actions, and also in cases where the injury resulted in death, with the avowed purpose of bringing actions thereon in some foreign jurisdiction, notwithstanding the fact that both of the parties to the controversy resided in the state. A condition existed where agents of these attorneys were traveling in the state soliciting employment for nonresident attorneys, haunting the homes of the injured and bringing great discredit to the legitimate practice of the law. It was to curtail this species of "ambulance chasing" which prompted the legislature to enact the statutes in question. While the statute is in general terms and applies to "any person" engaged in these practices, it was chiefly aimed against the attorneys. It will be observed that there is nothing in the statute which in any wise attempts to abridge the right of a party entitled to bring an action, to bring it in any jurisdiction he may choose. So far as his rights are concerned, they are not affected at all by the terms of the act. The act was intended as a regulatory measure to curtail the conduct of a class of attorneys who were guilty of infractions of long-established ethical precepts of the profession. As a regulatory measure we think the legislature was well within its power in enacting the statute in question.

In *McCloskey v. Tobin*, 252 U. S. 107, it was held: "The rights under the Fourteenth Amendment of a layman engaged in the business of collecting and adjusting claims are not infringed by a state law prohibiting the solicitation

of such employment." In considering the power of the legislature to prohibit "any person" who "shall seek to obtain employment in any claim, * * * by means of personal solicitation," the court said: "To prohibit solicitation is to regulate the business, not to prohibit it. * * * The evil against which the regulation is directed is one from which the English law has long sought to protect the community through proceedings for barratry and champerty. * * * Regulation which aims to bring the conduct of the business into harmony with ethical practice of the legal profession, to which it is necessarily related, is obviously reasonable."

The defendants place great reliance in support of their position upon a recent decision of the circuit court of appeals, Eighth circuit, in *Chicago, M. & St. P. R. Co. v. Schendel*, 292 Fed. 326. In that case the court was dealing with a statute of the state of Iowa, identical in terms with ours, but which had been held by the Iowa supreme court to be broad enough to base an injunction, prohibiting a party to an action from bringing his suit in any other jurisdiction than the state of Iowa. The circuit court held that a statute of a state which prohibits a citizen of the state from bringing an action in a federal court of a district in which the defendant is doing business is unconstitutional, as invading the right of the party entitled to bring the action, as prescribed by the federal employers' liability act. We do not consider this authority against our position. Our statute, as we construe it, places no restriction whatever upon the action of the party entitled to bring the suit.

Appellants also urge that there is no allegation of the petition which calls for a remedy by injunction. The argument seems to be that, if appellants' conduct has violated the statute, the remedy is by punishment as provided by statute. The case of *Wabash R. Co. v. Peterson*, 187 Ia. 1331, is authority for jurisdiction by a court of equity in cases of this character. The general rule is that an injunction will not issue for the purpose of preventing the commission of a crime; but, when the act sought to be en-

joined will result in private damage to either person or property, the case comes within the principle governing actions to enjoin a nuisance when the plaintiff suffers special or peculiar damages differing from those suffered by the public.

In *Wabash R. Co. v. Peterson, supra,* the court had under consideration a statute in identical terms with our own. In that case, as in this, it was contended that the plaintiff had no standing to invoke the remedy of injunction. The court held, however: "An injunction may issue even though it restrains the commission of a criminal act, if so to restrain such act will prevent irreparable injury to civil rights which will be caused by the doing of the criminal act." (175 N. W. 523.)

The conduct of the defendants, if persisted in, would entail upon the plaintiff financial loss, by way of expenses in defending itself in a foreign jurisdiction. We are satisfied with the reasoning of the Iowa court upon this point.

It is next urged by the defendants that the terms of the decree are beyond the power of the court, and invade the clear rights of the defendants. Holding, as we do, that the language used in the statute is within the power of the legislature, it was within the power of the court in granting the injunction to prohibit acts forbidden by the statute, and in doing this it was proper for the court to use the language of the statute. It was also proper to enjoin specific acts referred to in the statute as rendering intelligible the particular conduct which the court considered within the meaning of the prohibition. The statute prohibits the soliciting of claims of the class enumerated with the intention of bringing suit thereon in a foreign jurisdiction. The clause in the statute, "or in any way to promote the prosecution of a suit brought outside of this state, * * * or do any act or thing in furtherance thereof," must be construed as referring to suits which have been unlawfully solicited. No one would contend that, if a party to the action had of his own initiative brought a suit in a foreign jurisdiction, an attorney or any other person would be pro-

hibited from rendering assistance in the prosecution of such action. The decree, when construed in this light, is, we think, within the power of the court. It may be possible that there are some expressions in the decree which go too far, but these can be determined in a proper action if occasion should require. Considering that the decree was intended to enjoin the commission of acts prohibited by the statute, and that the acts enjoined refer to cases which have been solicited, we are of the view that the decree is a proper exercise of the power of the court.

The judgment of the trial court is

AFFIRMED.

JACKSON STATE BANK, APPELLANT, V. LAUREL NATIONAL BANK, APPELLEE.

FILED FEBRUARY 26, 1924. NO. 22649.

Bills and Notes: TRANSFER. Under sections 4641, 4642, Comp. St. 1922, a negotiable instrument payable to the order of a person can be transferred, so as to preserve the negotiable character of the instrument, only by the indorsement of the holder completed by delivery. The indorsement must be in writing on the instrument itself, or upon a paper attached thereto.

APPEAL from the district court for Cedar county: GUY T. GRAVES, JUDGE. *Affirmed.*

Sidney T. Frum, for appellant.

F. P. Voter and *B. Ready, contra.*

Heard before LETTON, ROSE and DAY, JJ., ELDRED and REDICK, District Judges.

DAY, J.

This action was brought by the Jackson State Bank of Jackson, Nebraska, against the Laurel National Bank of Laurel, Nebraska, to recover on a draft for $300 issued by the defendant and drawn on the Security National Bank of Sioux City, Iowa, in which Roy Vernon was named as payee,

and which it is alleged came into the possession and ownership of the plaintiff in due course. The answer of the defendant admitted that it issued the draft; pleaded that it received no consideration therefor; and denied that the plaintiff was the owner and holder of the draft in due course. The reply denied the allegations of new matter pleaded in the answer. The trial resulted in a verdict and judgment for the defendant. Plaintiff appeals.

The principal question in dispute was whether Vernon, the payee named in the draft, had indorsed it.

It may not be amiss to state some of the facts which gave rise to the present controversy. It appears that Vernon, in behalf of himself and another, had made arrangements with a bootlegger to purchase a number of cases of whisky to be delivered and paid for in cash at Allen, Nebraska. The delivery of the whisky and the collection therefor was to be made by Louis Johnson. On April 12, 1919, Vernon went to the town of Laurel and purchased the draft in question, giving in payment therefor his personal check drawn on the Dixon Bank of Dixon, Nebraska. On the same day he also purchased from the First National Bank of Laurel a draft for $350. The present suit involves only the draft for $300 issued by the Laurel National Bank. By arrangement, Vernon met Johnson at Allen, where two barrels supposed to contain the cases of liquor were delivered to a confederate of Vernon, and thereupon Vernon delivered the two drafts to Johnson. There is a direct dispute in the evidence as to whether Vernon indorsed the drafts, which will presently be considered. On the same day Johnson went to the town of Jackson, where he presented the drafts to the plaintiff bank for payment. The cashier of the plaintiff bank testified, in substance, that when the drafts were presented he did not examine them carefully, but thought they bore no indorsement; that he supposed the drafts were being presented by Vernon, and said to Johnson, the drafts are all right, and if you are Roy Vernon and can be identified you can get the money; that Johnson replied, "If I wasn't Roy Vernon, I wouldn't be getting

the money;" that thereupon Johnson went out and returned with Orval Beith; that he asked Beith whether he knew this man, and that Beith replied that he did, and that he had known him for a number of years; that he then told Johnson, under the belief that he was Vernon, to indorse the drafts; that Johnson went to a near-by desk, took out a pencil and appeared to be writing; that when the drafts were again presented they were indorsed with the name "Roy Vernon;" that he then requested Beith to indorse the drafts, which he did, and that thereupon he paid the amount of the drafts to Johnson.

Johnson testified that he did not represent himself to be Vernon; that he did not write the name "Roy Vernon" on the drafts; that the indorsement was made by Vernon at the depot in Allen at the time the drafts were delivered.

Beith testified that he did not understand that the cashier was under the belief that Johnson was Vernon; that the cashier simply asked him whether he knew this man, and that he answered that he did.

Vernon testified that he did not indorse the drafts. Other testimony was introduced on both sides tending to corroborate their respective theories.

Under this state of facts, it was clearly a question for the jury to determine whether the draft in question was indorsed by Vernon.

Meanwhile, at the earliest opportunity, Vernon proceeded to examine his newly-made purchase. One can readily imagine his chagrin on discovering that, instead of the cases of whisky, the barrels contained only shelled corn. Realizing that he had been duped by a bootlegger, he hastened to the telephone and stopped the payment of his check, and also stopped the payment on the draft.

Under this state of the record, the payment of the check given to the defendant bank for the draft having been stopped by Vernon, it is clear that the defendant received no consideration for its draft. As between Vernon and the defendant bank, the latter had the right to stop the payment of its draft. The question is then presented whether

the plaintiff is the owner of the draft in due course. The draft was a negotiable instrument, and if plaintiff became the owner thereof in due course, the defense of lack of consideration on the part of the defendant would be unavailing. The draft, being a negotiable instrument payable to the order of Roy Vernon, could be transferred so as to preserve its negotiable character only by the indorsement of Roy Vernon on the instrument itself, or upon a paper attached thereto. Comp. St. 1922, secs. 4641, 4642.

The question whether Vernon indorsed the draft was submitted to the jury by instruction No. 4, which was as follows: "If the jury believe from the evidence that the draft, exhibit A, sued upon by the plaintiff was issued by the defendant payable to the order of Roy Vernon, and that said Roy Vernon never indorsed said draft, then you should find for the defendant and so say by your verdict." In response to this issue, the jury returned a verdict for defendant. The plaintiff criticises the above instruction, but we think it was responsive to the evidence and is a correct statement of the law.

Plaintiff also complains of the giving of instruction No. 5, given by the court on its own motion, but in the motion for a new trial no complaint is made of that instruction. Plaintiff also complains that the court erred in failing to give instruction No. 2, requested by the plaintiff. This instructon was to the effect that a negotiable instrument may be transferred by a separate oral agreement, followed by a delivery. It is unnecessary for us to decide whether an oral agreement would constitute an equitable assignment of the instrument, but a verbal assignment would not constitute such a transfer of the instrument as to preserve its negotiable character.

Complaint was also made of the failure of the court to give other instructions requested by the plaintiff, but an examination of these discloses that the substance of such instructions was given by the court on its own motion.

Under the circumstances presented by the record, we

must be satisfied with the finding of the jury on the question whether Vernon had indorsed the draft.

We find no error in the record. The judgment is

AFFIRMED.

H. G. BRYAN ET AL., APPELLEES, V. I. A. MANCHESTER, APPELLANT.

FILED FEBRUARY 26, 1924. No. 22660.

1. Trial: AFFIRMANCE OF VERDICT. A verdict which is not affirmed by the jury in open court is of no force and effect.
2. ———: ———. Under the facts disclosed by the record and set out in the opinion, *held* that the court was open at the time the jury returned its verdict and that the verdict was properly received.
3. ———: DIRECTORY STATUTE: VERDICT. The provisions of section 8806, Comp. St. 1922, that the verdict shall be "read by the clerk to the jury, and the inquiry made whether it is their verdict," and the further provision of section 8807, Comp. St. 1922, that the jury must be conducted into court, and "their names called by the clerk," are directory, and not mandatory.
4. ———: RECEIPT OF VERDICT. Ordinarily it is not error for the court, while in session, to receive a verdict in a civil action, in the absence of the clerk, the parties to the action, and of their counsel.
5. Appeal: IMMATERIAL ERRORS. Under section 8657, Comp. St. 1922, errors which do not affect the substantial rights of the complaining party will not justify a reversal of the judgment.
6. ———: CONFLICTING EVIDENCE. Where questions of fact are determined by the jury upon conflicting testimony, the verdict will not be disturbed on appeal, unless clearly wrong.

APPEAL from the district court for Valley county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

Munn & Norman, for appellant.

Davis & Davis, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE and DAY, JJ., REDICK, District Judge.

DAY, J.

This is an action by plaintiffs to recover damages from the defendant for an alleged breach of contract. The trial resulted in a verdict and judgment for the plaintiff for $1,907.31. Defendant appeals.

Defendant relies upon two main grounds of error for a reversal of the judgment: First, that the court erred in receiving the verdict, and ordering it to be filed; and, second, that the verdict is contrary to the weight of evidence. In support of the first proposition, the defendant contends that the court erred in receiving the verdict, because it was not returned in open court. The rule of law is well established that a verdict is of no force and effect unless it be affirmed by the jury in open court. *Young v. Seymour*, 4 Neb. 86; *Longfellow v. State*, 10 Neb. 105.

As bearing upon this phase of the question, the record shows that the trial was concluded and the cause submitted to the jury at 11:45 a. m. of December 15, 1921. The verdict was returned at 10:15 p. m. of the same day. At the time the verdict was received by the court, no one was present in the courtroom except the judge, the jury, and the bailiff. It appears that during the trial the judge announced that the court would remain open until midnight of December 15, 1921. This announcement by the court was understood by counsel for both sides, as evidenced by their conduct in remaining in and about the courtroom until about 9:30 p. m. waiting for the jury to agree upon a verdict. The law does not require that the court adjourn at any given hour of the day. It was competent for the judge to hold the court open till midnight if he thought proper to do so. In support of their argument that the court was not open when the verdict was received, counsel for the defendant cite *Young v. Seymour*, and *Longfellow v. State, supra*. There is some similarity in the facts in those cases and the case at bar. But in each of those cases, the pivotal point of the decision was that, after the jury had retired for deliberation. the court adjourned until the following day, and subsequently during the recess received the verdict and

discharged the jury in the absence of the clerk and the parties to the action. In those cases it was held that the verdicts were invalid because not affirmed by the jury in open court. The controlling point was not that the clerk and the parties were not present, but that the court had previously adjourned for that day. The absence of the clerk, or the parties to an action, or of counsel are not necessarily factors in determining whether court is open. The record of the court is the controlling factor in determining whether the court is open. The journal entry, in so far as it applies to the question now under discussion, recites as follows: "At 10:15 p. m. of said day, the said jury returned into open court with their verdict for the plaintiff in the sum of $1,907.31, the clerk of the said court not being then present in open court, the court duly received the said verdict and read the same to the jury, and thereupon asked, 'Gentlemen of the jury, is this your verdict?' Whereupon each and all of the members of the said jury answered, 'Yes.' " This order of the court, together with the announcement by the judge that court would remain open till midnight, clearly show that the court was open when the verdict was received.

It is also contended by defendant's counsel that the verdict was improperly received because of the absence of the clerk. In support of this contention, they cite sections 8806 and 8807, Comp. St. 1922, which, in so far as pertinent to the point urged, are respectively as follows:

"Section 8806. The verdict shall be written, signed by the foreman, and read by the clerk to the jury, and the inquiry made whether it is their verdict. If any juror disagree, the jury must be sent out again; but if no disagreement be expressed, and neither party requires the jury to be polled, the verdict is complete, and the jury discharged from the case."

"Section 8807. When the jury have agreed upon their verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by the foreman. When the verdict is announced, either party may re-

quire the jury to be polled, which is done by the clerk asking each juror if it is his verdict. If any one answer in the negative, the jury must again be sent out for further deliberation."

We are of the view, however, that the provisions of section 8806 that the verdict shall be "read by the clerk to the jury, and the inquiry made whether it is their verdict," and the further provision of section 8807 that the jury must be conducted into court, and "their names called by the clerk," are merely directory, and not mandatory. The functions to be performed by the clerk, as prescribed by the sections of the statute above quoted, are ministerial and can be performed by the judge as well as the clerk. The affidavit of the trial judge states that all the jurors were present when the verdict was returned. The requirements of the statute with respect to receiving the verdict were substantially complied with.

Defendant's counsel also complain because the verdict was received in the absence of the parties to the action, and of counsel. The record shows that defendant's counsel, after waiting some considerable time for the jury to agree upon a verdict, voluntarily left the courtroom, and requested the bailiff to notify them in case the jury arrived at a verdict. This request was not made known to the judge. When the jury agreed upon a verdict about 10 o'clock at night, the bailiff informed the judge, who came to the courtroom and received the verdict. If counsel desired to be present at the time the jury returned its verdict, they should have remained in the courtroom until the jury reported, or have communicated their wish to the trial judge, which undoubtedly would have been respected. Defendant's counsel not having brought this matter to the attention of the judge, we are unable to see that there was error on the part of the court in receiving the verdict in their absence. The law is well settled that the verdict may be received by the court when in session, in the absence of the clerk, the parties to the action, and their counsel.

Defendant's counsel also argue that they were deprived

of the right to poll the jury. The right of a litigant to have the jury polled is one which may be waived, and is waived by the failure to be present when the verdict is returned, or, if present, by failure to request that the jury be polled. If counsel for defendant desired to poll the jury, they should have remained in the courtroom, or have made arrangements with the judge that they be notified and given an opportunity to be present before the verdict was received.

Defendant's counsel have made a showing that they attempted to enter the courthouse at about 9:30 p. m. and found both of the doors to the courthouse locked. It does not appear that they made any other effort to gain entrance. Whatever may have been the condition of the doors with respect to being locked at the time defendant's counsel attempted to gain entrance, at about 9:30 p. m., it clearly appears that, at the time the trial judge entered the courthouse by the west door, he left the door unlocked. It also appears that during the evening, before the verdict was returned, a number of persons passed in and out of the courthouse. The sheriff was present in his office, and by affidavit stated that at about the time the verdict was rendered a number of persons entered the courthouse. It is not claimed by defendant's counsel that they attempted to gain an entrance to the courthouse after about 9:30 p. m. We are satisfied that the courthouse was accessible from the outside at the time the verdict was received.

The several arguments made in support of the defendant's first assignment of error relate to technical questions of practice, and do not appear to involve any of the substantial rights of the defendant. Under section 8657, Comp. St. 1922, errors which do not affect the substantial rights of the complaining party will not justify a reversal of the judgment.

With respect to the contention that the verdict is contrary to the weight of evidence, the record shows that the parties entered into a contract whereby the plaintiffs agree to raise a quality of Flint corn, the seed to be furnished by the defendant. The plaintiffs agreed to deliver the crop to

defendant, who was to pay $1.75 a bushel therefor. It was stipulated that the corn, when delivered, "shall be in a bright well-cured and merchantable condition, the corn to be free from impure, rotten or bad kernels, and all corn to have germinating quality which shall test at least 85 per cent." The principal dispute arose over the germinating quality of the corn. Upon this question the evidence introduced by plaintiffs tended to show that the germinating quality of the samples was largely in excess of the requirements of the contract. One test was made by the seed analyst of the department of agriculture of the state of Nebraska which showed a germinating quality of 100 per cent. Tests made on behalf of the defendant showed the germinating quality to be from 50 to 60 per cent. The question thus presented was purely a question for the jury to determine. It has been repeatedly held that, where questions of fact are determined by the jury upon conflicting testimony, the verdict will not be disturbed on appeal, unless clearly wrong. We cannot say under this evidence that the verdict is clearly wrong.

The judgment of the trial court is

AFFIRMED.

JAMES KRUNTORAD, APPELLANT, V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, APPELLEE.

FILED FEBRUARY 26, 1924. NO. 22657.

Negligence: LICENSEES. Where one, solely for his personal pleasure, convenience, or benefit, enters upon the premises of another with his consent, but without an invitation, express or implied, he is a bare licensee, and the occupier of the premises owes no duty to him save to refrain from wilfully or wantonly inflicting injury upon him.

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

Sears, Horan & Sheppard, for appellant.

E. P. Holmes and *Guy C. Chambers, contra.*

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

GOOD, J.

Action to recover damages for personal injuries, alleged to have been caused by the negligence of defendant. After the evidence was taken the trial court, on motion, directed a verdict for defendant, and plaintiff has appealed.

While plaintiff was descending a stairway that had been erected against an embankment on the defendant's right of way, at a point near the intersection of Twenty-fifth and Monroe streets, in the city of South Omaha, one of the steps gave way, causing plaintiff to fall and receive the injuries complained of in this action. Plaintiff alleges that defendant had for a long time maintained the stairway in close proximity to the regularly traveled way along Monroe street; that it had been used by the public generally, and that defendant, by maintaining the stairway, thereby invited the plaintiff and others to use the same; that defendant had negligently permitted said stairway to become in a defective and unsafe condition, which condition was not apparent to plaintiff; that, while using said stairway in a lawful and cautious manner, he was injured, as alleged in the petition.

Defendant admits that at the time plaintiff received his injuries there was a stairway at or near Monroe and Twenty-fifth streets, and near or on the right of way of the defendant, but denies that it erected or maintained the said stairway, and alleges that said stairway was erected and maintained by the city of South Omaha, Nebraska, and was constructed without the knowledge or consent of defendant.

The evidence shows that the embankment against which the stairway was erected was formerly a part of Twenty-fifth street in the city of South Omaha; that the east half of said street between Monroe and Adams street had been vacated and conveyed by the city of South Omaha to the defendant some years before, and that the stairway in ques-

tion was on that part of defendant's right of way which had formerly been a part of Twenty-fifth street. Across the defendant's right of way and near the north side of Monroe street is a cinder walk. The foot of this stairway is a few feet north of the cinder walk. The evidence does not disclose when, nor by whom, the stairway was originally erected, nor does it show that the defendant ever repaired or maintained the same in any manner. It discloses that a considerable number of people habitually, or at least occasionally, used this stairway for their own private purposes or pleasure, and that plaintiff at the time he received his injuries was using the stairway for his own convenience and while attending to his personal business, which had no connection with any business dealings or transactions with the defendant railroad. While there were some cinders scattered on the ground between the cinder walk and the bottom of the stairway, it was apparent to any one of ordinary intelligence that the stairway was not a part of the public crossing or footway over the defendant's right of way.

Plaintiff contends that it is immaterial by whom the stairway was erected; that plaintiff was upon the premises as a licensee by invitation; that defendant owed him the duty to see that the premises upon which he was invited were reasonably safe; that the question of defendant's negligence in failing to keep the stairway in repair and plaintiff's resulting injuries and damage should have been submitted to the jury, and that the trial court erred in directing a verdict for the defendant. On the other hand, defendant argues that plaintiff was upon the stairway either as a trespasser or as a bare licensee; that it was under no obligation to keep the stairway in repair, and that it owed no duty to plaintiff other than not to wilfully injure him.

There is much confusion from the failure of courts to distinguish between a license and an invitation, and particularly between an implied license and an implied invitation. An invitation is inferred where there is a common interest or mutual advantage, or where an owner or occu-

pant of premises, by acts or conduct, leads another to believe the premises, or something thereon, were intended to be used by such other person; that such use is not only acquiesced in by the owner or occupant, but is in accordance with the intention or design for which the way, place or thing was adapted or prepared or allowed to be used; while a license is implied where the object is the mere pleasure, convenience or benefit of the person enjoying the privilege. *Shults v. Chicago, B. & Q. R. Co.*, 83 Neb. 272, 91 Neb. 587; *Greenfield v. Miller*, 173 Wis. 184, 12 A. L. R. 982; *Bennett v. Louisville & N. R. Co.*, 102 U. S. 577; *Jonosky v. Northern P. R. Co.*, 57 Mont. 63; *Cusick v. Adams*, 115 N. Y. 55; *Hicks v. Gulf, C. & S. F. R. Co.*, 212 S. W. (Tex. Civ. App.) 840; 20 R. C. L. 69, sec. 60; 2 Words and Phrases (Second Series) 1190 *et seq.*; 3 Words and Phrases (Second Series) 126 *et seq.*

The facts as disclosed by the record show unmistakably that plaintiff's use of the stairway in question was for his own convenience and benefit. It fails to show that there was any common interest or mutual advantage to plaintiff and defendant in the use of the stairway, and there is no evidence that would justify an inference that defendant intended or designed that third persons should use the stairway in question. Under the circumstances disclosed, it is clear that plaintiff was a bare licensee, and not a licensee by invitation. The case falls within the rule announced in *Shults v. Chicago, B. & Q. R. Co., supra*, and *Chesley v. Rocheford & Gould*, 4 Neb. (Unof.) 768, wherein the rule is announced in the following language: "Where one enters upon the premises of another with his consent, but without an invitation, and not in the discharge of any public or private duty, he is a bare licensee, and the occupier of the premises owes no duty to him as long as no wanton or wilful injury is inflicted upon him by the licensor or his servants."

See *Lepnick v. Gaddis*, 72 Miss. 200, 26 L. R. A. 686, and note; *Pittsburgh, Ft. W. & C. R. Co. v. Bingham*, 29 Ohio St. 364; *Vanderbeck v. Hendry*, 34 N. J. Law, 467; *Illinois*

C. R. Co. v. Godfrey, 71 Ill. 500; *Redigan v. Boston & M. R. Co.*, 155 Mass. 44, 14 L. R. A. 276; 33 Cyc. 774, 775.

It follows that defendant was under no legal obligation to keep the stairway in a safe condition for plaintiff's use as a bare licensee. The ruling is based on reason and is in harmony with sound legal principles. The judgment is

AFFIRMED.

STATE, EX REL. WILLIAM E. HILL, COUNTY ATTORNEY, APELLANT, V. GEORGE M. SMITH ET AL., APPELLEES.

FILED FEBRUARY 26, 1924. No. 23627.

1. Schools and School Districts: RURAL HIGH SCHOOL DISTRICT. Under the provisions of section 6373, Comp. St. 1922, it is competent for two or more adjoining common school districts, which are not able, or do not deem it expedient, to maintain a school of more than eight grades, to unite for the purpose of forming one rural high school district, notwithstanding the fact that such common school districts comprise a part of a county high school district.
2. ———: ———. Under section 6373, Comp. St. 1922, it is competent for a consolidated high school district, which is not able, or does not deem it expedient, to maintain a school of more than eight grades, to join with two or more adjacent common school districts to form a rural high school district.

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

William E. Hill and *Beeler, Crosby & Baskins*, for appellant.

Hoagland & Carr, H. E. Dress and *C. S. Beck, contra.*

Heard before LETTON, ROSE, DEAN and GOOD, JJ., ELDRED, District Judge.

GOOD, J.

Relator, William E. Hill, as county attorney of Logan county, Nebraska, instituted this action in *quo warranto*, to determine the validity of the organization of Baker rural

high school district, in said county, and to test the right of respondents to hold and exercise the functions of the offices of trustees of said district. To the information, respondents filed an answer, and relator demurred thereto. The demurrer was overruled, and relator elected to stand on the record as presented by the pleadings. The action was dismissed, and relator has appealed.

From the admissions contained in the answer, together with the averments thereof, which are admitted by the demurrer, the following pertinent facts appear: Under the statutory provisions relating to county high schools, Logan county high school was organized in 1918, and since that date has been maintained at Gandy, the county seat of said county. Soon thereafter there was organized a consolidated high school district, and the school located at Stapleton, in the west half of the county, while Gandy is in the east half of the county. The consolidated high school district is known as district No. 2. Logan county has an area of 576 square miles, of which 54½ square miles were in said district No. 2, and, apparently, the remainder of the county in the county high school district. District No. 2, in operating its high school during the past five years, had become indebted to the extent of $47,000, and found it impracticable and inexpedient, if not impossible, to continue to maintain a high school. In April, 1923, district No. 2 decided that it was not able, and that it was not expedient, to maintain a school above the eighth grade, or to maintain a consolidated high school. Thereupon, district No. 2, together with 11 contiguous common school districts, undertook to organize a rural high school district. None of the 11 common school districts maintained, or was able to maintain, a high school or a school above the eighth grade, except in so far as each constituted a part of the county high school district and assisted in maintaining that high school. District No. 2 and 10 of the other districts voted in favor of the organization of the rural high school district and were declared organized as a rural high school district. Pursuant to the provisions of the law, the county superintendent

named the district Baker rural high school district and appointed the respondents trustees thereof. Said district contained an area of 271 square miles.

Baker rural high school district was organized pursuant to the provisions of article VIII, ch. 63, being sections 6373 to 6384, inclusive, Comp. St. 1922. Section 6373 provides:

"Any two or more adjoining school districts in any county of this state which are not able or do not deem it expedient to maintain a school of more than eight grades may unite for the purpose of forming one high school district and maintaining one high school as hereinafter provided."

It is relator's contention that none of the school districts voting to organize the rural high school district was competent so to do. He very earnestly argues that district No. 2, being a consolidated high school district and at the time actually maintaining a high school, was incompetent to join in organizing a rural high school district. He further contends that each of the common school districts, which united with district No. 2 to form the rural high school district, was incompetent, because, as a part of the county high school district, it was thereby able to maintain, and was actually maintaining, a high school, and that none of said districts was in the class of districts designated by said section.

The rural high school law was originally enacted in 1901 (Laws 1901, ch. 64) and the county high school act in 1907 (Laws 1907, ch. 122). Relator argues that the legislature realized that the rural high school act was not adequate and had not induced the organization of high schools in some of the more sparsely settled counties of the state, and, deeming it proper and necessary that at least one high school should be maintained in each county in the state, provided for the county high school; that the legislature did not contemplate nor intend that the county high school might be interfered with or crippled by rural high school districts subsequently organized. Relator contends that, if rural high school districts are permitted to be organized in coun-

ties where there is a county high school, each of such rural high schools would take away from the county high school a part of its territory and means of support, and that, by reason of the organization of such rural high schools, the county high school would be left without sufficient territory and sufficient income to maintain the county high school.

We are unable to accept relator's view. We cheerfully concede that it was the legislative design that there should be at least one high school in every county, but we do not think that it was the legislative intent to thereby prevent the subsequent organization of rural high schools. We think, rather, that it was the purpose of the legislature, in enacting the county high school law, to provide for one high school in each county, and that it contemplated that, as population increased, rural high schools might be organized to supply the educational needs of the communities. It is scarcely to be believed that the legislature intended that but one high school should be maintained in a county. If such had been the case, doubtless the legislature would have so provided by legislating against the organization of rural high school districts in counties where a county high school was maintained. It is not to be overlooked that the legislature, on more than one occasion, has amended the rural high school act since the adoption of the county high school law, which clearly indicates that it was not the intention of the legislature to have the county high school law supersede the rural high school act.

Again, section 6400, Comp. St. 1922, provides that, where the proper officers of *any* rural high school, or of any city or village high school, shall certify to the governing body of the county high school that a high school course has been prescribed for such rural, city or village high school for the ensuing year, then all the property within such high school districts shall be omitted from the levy of tax for the support and maintenance of the county high school year, and such property shall be omitted from the levy of any tax to pay the principal or interest on any bonds that may be subsequently issued by the county high school

district. This clearly indicates that rural high school districts may be organized within counties that maintain a county high school, because the law authorizes the organization of county high schools only in counties where there are no high schools maintained. It follows that if there are any rural high schools in said counties they must, necessarily, have been organized subsequent to the organization of the county high school. Again, the language of section 6373, above quoted, provides that any two or more adjoining districts in any county of the state may unite for the purpose of forming one high school district, when the conditions therein prescribed exist. This does not limit it to the common school districts, and, when the term "any district" is used without limitation, it is not competent for the court, by a strained construction, to put any limitation upon the districts that may so organize.

The county high school is maintained either by the whole county, or at least by all of that part of the county which is not included in districts maintaining high schools. To hold that common school districts within a county high school district could not unite to organize a rural high school district would mean that, aside from districts containing cities or villages, there could be no other high schools organized within such a county until such time as an individual common school district alone was able to maintain a high school. We think that such was not the legislative intent.

As to the competency of a consolidated high school district to join with common school districts in forming a rural high school district, we think the question depends solely upon whether such district was able, and deemed it expedient, to maintain a high school in that district. The admitted facts in the pleadings show that, while district No. 2 was at the time maintaining a high school, it also appears that it was not able to do so, and that it deemed it inexpedient to continue to maintain a school of more than eight grades. The record shows that district No. 2 was competent to join in the organization of a rural high school district.

AFFIRMED.

BUFFALO COUNTY, APPELLANT, V. E. BOWKER ET AL., APPELLEES.

FILED FEBRUARY 26, 1924. No. 22667.

1. **Counties and County Officers: DETERMINATION OF POPULATION: COMPENSATION OF OFFICERS.** In the absence of a statutory provision for determining the population of a county, a board of county commissioners, in order to enable it to classify the officers governed by section 2369, Comp. St. 1922, and thus arrive at the amount of their compensation, may ascertain and determine by any competent means the number of inhabitants of the county. Where such determination has been so made by the county board, *held*, that it is binding upon parties affected thereby until set aside or vacated by some forum of competent jurisdiction in a proceeding brought for that purpose.

2. ———: CLERK OF DISTRICT COURT: COMPENSATION. Under the provisions of said section 2369, the compensation provided for the clerk of the district court should be figured on a yearly basis, and not upon a term basis, and a clerk of the district court is not entitled to retain an excess of fees earned by him in any one year above maximum amount allowed per annum, to make up for a deficiency in amount of fees earned by him during preceding years of his term of office.

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

H. M. Sinclair and *H. H. Drake*, for appellant.

N. P. McDonald and *John A. Miller, contra.*

Heard before LETTON, ROSE, DEAN and GOOD, JJ., ELDRED, District Judge.

ELDRED, District Judge.

This action was brought by Buffalo county to recover of appellee, Bowker, formerly clerk of the district court for such county, and the Chicago Bonding & Surety Company, as his surety, the sum of $1,099.95, alleged to be due appellant from appellee, Bowker, on account of fees earned and received by him as such official during the year 1920, over

and above the amount he was entitled to retain as compensation for his services, and $800 additional for deputy. From a judgment in favor of the defendants in the court below, the plaintiff appealed.

Bowker was elected clerk of district court in 1916, for a term of four years beginning January 4, 1917, and held the office during said term. In the year 1920 he received fees of office aggregating $4,399.95, and was entitled to retain out of said sum $800 allowed by county board for deputy. In addition to the amount allowed for deputy, the clerk earned as fees in 1917, $2,557.65; 1918, $2,349.75; and 1919, $2,885.85.

On December 12, 1916, the board of county commissioners adopted the following resolution:

"Be it resolved that the election returns of the county of Buffalo, in the state of Nebraska, held on November 7, 1916, shows the fact to be that said county then had a population of more than twenty-five thousand inhabitants; therefore, it is by this board declared to be a fact that the population of said county then did and now does exceed the number of twenty-five thousand inhabitants."

The appellant contends that Buffalo county had less than 25,000 inhabitants in the year 1920, and that the clerk was entitled to retain only a maximum of $2,500 for the year for his services, and that he must pay the excess of fees into the county treasury. Appellee contends that it was officially determined by the county board December 12, 1916, that said county then had more than 25,000 inhabitants, and that such decision continued in effect during his term of office, and entitled him to retain $3,000 per annum as his compensation; and further contends that he is entitled to apply the excess fees of the year 1920 to the deficiency of preceding years during his term. The statute provides:

"If the fees shall exceed twenty-five hundred dollars per annum in counties having more than twenty thousand inhabitants and less than twenty-five thousand inhabitants, or if the fees shall exceed three thousand dollars per an-

num in counties having more than twenty-five thousand inhabitants and less than fifty thousand inhabitants, * * * said clerk shall pay such excess into the treasury of the county in which he holds office." Comp. St. 1922, sec. 2369.

By this section the amount of compensation the clerk was entitled to receive, if the fees earned were equal thereto, is established; but the statute fixes no method by which the population of a county should be ascertained or determined. The county officers are, by this law, classified upon the county attaining the required number of inhabitants. What the number of inhabitants may be is a question of fact which must be determined by some competent authority. The duty of settling with county officers, auditing their accounts, fixing the salaries of their deputies, as well as the general management of the affairs of the county, rests upon the county board. Before they can perform the duties devolved upon them by law, it becomes necessary that some determination should be made of the number of inhabitants of the county in order to classify the officers. For instance, in addition to classifying the officers, the section of the statute above referred to further provides: "If the clerk of the district court think necessary, said clerk may be allowed one deputy at a compensation of not to exceed one-half of the amount allowed his principal." How could that amount be determined without classification of the officers of the county, which requires determination of the number of inhabitants?

The board of county commissioners of a county are clothed not only with the powers expressly conferred upon them by statute, but they also possess such powers as are requisite to enable them to discharge the official duties devolved upon them by law. *Berryman v. Schalander*, 85 Neb. 281; *Wherry v. Pawnee County*, 88 Neb. 503; *Emberson v. Adams County*, 93 Neb. 823.

The board of county commissioners of Buffalo county assumed jurisdiction to determine the number of inhabitants of the county, and on December 12, 1916, adopted the resolution heretofore set forth. There is no suggestion

made that the commissioners were not acting in good faith in adopting this resolution. Since that date, up to and including the year 1920, the county board allowed all officers of the county to retain fees and salaries based upon a population of 25,000, and has fixed salaries of deputies and clerks in county offices based upon such population. In the absence of a law pointing out how the population should be ascertained, the county board has jurisdiction to determine the number of inhabitants of the county for the purpose of arriving at the classification of its officers; it may ascertain that fact by any competent evidence, just as it may determine any other question of fact arising in the discharge of its duties. *Lewis County v. Montfort,* 72 Wash. 248.

The county board, in ascertaining and determining the number of inhabitants of a county for classification and fixing the compensation of its officers and their deputies, acts quasi-judicially. *Mitchell v. Clay County,* 69 Neb. 779, 795; *Lewis County v. Montfort,* 72 Wash. 248. And where the board of county commissioners in good faith ascertain and determine the number of inhabitants of a county for the purpose of classification of the county officers, such determination is not subject to collateral attack, but is conclusive as to those to whom it applies until set aside or vacated by such county board or some other forum of competent jurisdiction in a direct proceeding instituted for that purpose. *Thomas v. Whatcom County,* 82 Wash. 113; *Selectmen of Holliston v. New York C. & H. R. R. Co.,* 195 Mass. 299; *Dexter Horton Trust & Savings Bank v. Clearwater County,* 235 Fed. 743; *Mitchell v. Clay County,* 69 Neb. 779; *Lewis County v. Montfort,* 72 Wash. 248.

The appellant relies upon the government census of 1920, which shows the population of Buffalo county to be 23,787. While the evidence of such enumeration was, of course, competent, it does not necessarily control even in an action where the determination of the board is attacked directly, and not collaterally. Other competent evidence may be resorted to for the purpose of determining the

number of inhabitants of the county at any given time. *O'Connell v. Sioux County*, 94 Neb. 826; *State v. Davis*, 66 Neb. 333.

It follows from what has been said that, during the year 1920, the appellant, Bowker, was entitled to retain out of fees earned by his office the sum of $3,000 as compensation for himself in addition to the $800 allowed for deputy.

According to the stipulation, the office of the clerk of the district court for Buffalo county earned, during 1920, the sum of $4,399.95; deducting therefrom $800 allowed for deputy and $3,000 which the clerk is entitled to retain as compensation for himself, there remains an excess of $599.95. During the three preceding years of the clerk's term of office, the fees earned aggregated, after allowing for salary of deputy, only $7,793.25, or $1,206.75 less than he would have been entitled to retain as salary during those three years, had the fees of his office equalled the sum of $3,000 each year. The question now is: May the $599.95 of excess fees for the year 1920 be retained by the clerk to apply on the deficiency in the amount of fees earned during the preceding years of his term of office?

Section 2369, Comp. St. 1922, is a special provision relating to fees and compensation of clerks of the district court, and, so far as it may be applicable to the matter now in controversy, provides:

"If the fees shall exceed three thousand dollars per annum in counties having more than twenty-five thousand inhabitants, * * * said clerk shall pay such excess into the treasury of the county in which he holds office: Provided, also, the clerk of the district court of each county shall, on the first Tuesday of January, April, July and October of each year make a report to the county board, under oath, showing the different items of fees received, from whom, at what time and for what services, and the total amount of fees received by such officer since the last report and also the amount received for the current year."

While this section was amended during the appellee's term of office, in 1917, and again in 1919, yet neither amend-

ment affects the question involved in this case. The legislature does not, in the foregoing section, treat the compensation of the clerk therein provided for as a salary, but rather as charges which he shall make for his services.

In the following section, 2370, a salary is provided for the clerk of court, to be paid by the county, and accounted for in the same manner, and subject to the same limitations, as other fees; the fees he is entitled to retain being referred to in that section as compensation, and not as salary. This court, in construing a similar section relative to the county clerk, has said: "The object of this statute was not to make the office of county clerk, and other offices named, a salaried office, but to fix a limit in the amount received and retained, and require the excess to be paid into the county treasury." *Gage County v. Wilson*, 38 Neb. 165.

By section 2369 the maximum fees the clerk is entitled to retain per annum is fixed, and it is also provided therein, "Said clerk shall pay such excess into the treasury of the county;" and the same section provides a report must be made quarterly, showing, among other items, the amount of fees received for the "current year." What excess does the section refer to? Evidently the excess above the amount he is entitled to retain per annum as his compensation for the "current year." Otherwise, what was the purpose of a report showing the amount of fees for the current year? There has been some discussion by counsel as to the meaning of the term "current year;" but this court has defined the term as meaning, ordinarily, the calendar year in which the event under discussion took place. *Clark v. Lancaster County*, 69 Neb. 717, 733.

Both parties to this controversy have also discussed the provisions of section 2396, Comp. St. 1922 (Rev. St. 1913 sec. 2454), which by its terms purports to apply, as now amended, to "all county officers who now make report, as required by law;" and it is urged by appellee that it applies only to county judge, county clerk, and county treasurer; and in his brief he states: "We contend that section 2454

and the amendments thereto (Comp. St. 1922, sec. 2396), have no reference whatever to the office of the clerk of the district court, and, if they were so intended, they would be unconstitutional."

We are inclined to adopt the view of appellee that section 2396 does not apply to the office of the clerk of the district court. Section 2369 is a special statute having reference only to the charges and compensation of the clerk of the district court, and his duties in making reports and settling with the county. This statute with its amendments is a statute complete in itself, relating to an independent subject. It is a well-settled rule of construction that special provisions of law relating to a particular subject will prevail over general provisions in other statutes so far as there is a conflict. *State v. Penrod,* 102 Neb. 734.

In support of his contention that an excess of one year may be applied to a deficiency of a preceding year, appellee cites *Wiegand v. Luzerne County,* 7 Luzerne L. R. Rep. 183, and *Ziegler v. Lancaster County,* 42 Pa. Super. Ct. Rep. 221, wherein the law in question provided that the average monthly salary should be based upon fees earned "during such term of office." The statute differs so vitally from the statute of this state now under consideration that those cases can have no application here. The case of *Gray v. Matheny,* 66 Ark. 36, also cited by appellee, does not conflict with the views here expressed. That case follows *Independence County v. Young,* 66 Ark. 30, from which it appears that emoluments of county clerk were fixed at not to exceed $1,800, and he was required to make report and settle with county court quarterly by paying into the treasury all amounts in excess of the amount of salary due him on that date, etc. Held, that the purpose of the statute was to fix a maximum limit of $1,800 per annum to be paid out of fees collected and chargeable against the clerk during the fiscal year, and that a deficiency in one quarter of fiscal year may be made up from excesses in another quarter. The question of making up a deficiency of one year out of the excesses of another year was not decided. Appellee

also cites 15 C. J. 507, sec. 174, 23 Am. & Eng. Ency. of Law (2d ed.) 387, and 16 Current Law, 1349, but the text announced in those authorities is supported only by the decisions above referred to.

In *Barnes v. Red Willow County*, 62 Neb. 505, the statute under consideration, involving compensation of county treasurers, provided that every county treasurer whose fees shall in the aggregate exceed the sum of $2,000 per annum shall pay such excess into the treasury of the county. In the opinion in that case the court said: "The section just quoted is too plain to require judicial interpretation." And, in effect, the court construed the term "per annum" as meaning "in any one year."

In a more recent case the question involved was: May a register of deeds retain an excess in his hands on settlement of one year, to guard against any deficiency in the amount of fees available for payment of compensation for himself and assistants during the remainder of his official term? The statute under consideration in that case provided that each register of deeds whose fees in the aggregate exceed the sum of $1,500 in any one year, after payment of necessary deputy and clerk hire, shall pay such excess into the treasury of the county. The statute did not provide when the payment of excess should be made. The distinguishing feature involved in the register of deeds case and in the case at bar is that in the former the term, "in any one year," was used, while in the case at bar the term, "per annum," is used. In the opinion in the case referred to, it is said: "A year is manifestly the statutory period for an accounting. The county treasurer is the lawful custodian of any balance in favor of the county as soon as the correct amount is shown by a duly approved accounting or settlement. * * * At the end of each year it is the duty of the register of deeds to turn over to the county treasurer all fees in excess of statutory compensation." *State v. Uerling*, 94 Neb. 694. This rule should be applied in the case at bar.

Section 2369, *supra*, not only fixes the maximum amount

of compensation that may be retained by the clerk, but it seems clear that it was the intention that any excess should be paid into the county treasury annually. The settlement should be made with the county for each year separately, and without reference to whether there was a deficiency in amount of fees for any previous year. The appellee, Bowker, may not lawfully retain the excess of 1920, to apply on deficiency in the amount of fees earned during prior years of his term.

The judgment of the district court, so far as it held that the clerk of the district court for Buffalo county was entitled to a salary of $3,000 for 1920, should be affirmed; and, so far as holding that the excess fees of one year could be applied on deficiency of a prior year of his term, should be reversed.

AFFIRMED IN PART, AND REVERSED IN PART, AND REMANDED.

GEORGE N. SEYMOUR, APPELLEE, V. F. J. H. LAWSON, APPELLANT

FILED FEBRUARY 26, 1926. No. 22658.

1. Mortgages: FORECLOSURE: SALE: CONFIRMATION. Where the evidence of value of lands sold under a decree of foreclosure is conflicting, and two sales have been set aside, an order confirming a third sale for an amount greater than that previously secured will not be disturbed on account of inadequacy of price not so great as to afford an inference of fraud.

2. ———: ———: PLACE OF SALE. A sale advertised to take place at the "north front door" of the courthouse may be held either outside or inside the door, the statute requiring only that it be held "at the courthouse."

3. ———: ———: NOTICE OF SALE: AFFIDAVIT OF PUBLICATION. Affidavit of publication of notice of sale in the language of the statute is sufficient *prima facie*, and need not show requirements of a later statute as to circulation and time of publication of the newspaper.

APPEAL from the district court for Wheeler county: BAYARD H. PAINE, JUDGE. *Affirmed.*

C. M. Skiles, F. J. H. Lawson and *A. L. Bishop*, for appellant.

Williams & Kryger, contra.

Heard before LETTON, ROSE and DAY, JJ., ELDRED and REDICK, District Judges.

REDICK, District Judge.

This is an appeal from an order confirming a sale of real estate under a decree foreclosing three several mortgages. The suit was commenced in July and decree entered October 1917, for $7,294.92; stay was taken by defendant's wife, but such decree was reversed by this court, and a second decree was entered April, 1920, and another stay of nine months taken. The land was sold March, 1921, for $9,100, which sale was set aside by the district court. It was again sold May, 1921, for $5,800, and this sale was set aside by the district court. The sale in question was made November 22, 1921, for $10,420 and defendant appeals from the confirmation thereof to this court, assigning three grounds for the reversal thereof:

1. That the land was not sold for its fair value. Affidavits and evidence of witnesses were taken upon this question and preserved by bill of exceptions. The opinions of the witnesses, as is generally the case, differed widely upon the value of the lands in question, the evidence for plaintiff fixing it at an average of about $5 an acre, and that of defendant about $15. A majority of the witnesses for plaintiff were connected with the plaintiff organization, while defendant's witnesses were principally farmers and landowners in Wheeler county, and if the question had been presented originally to this court, we would be inclined to hold that the greater weight of the testimony would establish the average value of the land at from $8 to $12 an acre. But the discrepancy between the amount of the sale and the value of the land is not so great as to raise an inference of fraud, and we think the ruling of the district court should not be disturbed, especially in

view of the fact that more than six years have elapsed since the entry of the first decree, and if the land was of so great a value as contended by the defendant, it would seem that he should have been able to protect it from sale at a sacrifice. The land was offered three times, and the amount bid by plaintiff at the last sale was very nearly the amount due upon the decree. There must be an end to litigation, and we think the defendant in this case has had all the opportunity to which in justice he is entitled.

2. That the sale did not take place at the north front door of the courthouse. The notice of sale provided that it would take place at the north front door of the courthouse. It appears that the weather was very inclement, and the sheriff opened the sale by reading the notice outside the door, and then retired, with all the other persons attending, including defendant, inside, but within a few feet of the door, the sale was held open for one hour, and the lands finally sold to plaintiff. Defendant made no objection at the time to the place of sale, and the statute only requires that the sale be held at the courthouse. The sale was held substantially in conformity with the notice.

3. The notice of sale was not published in a paper having a circulation of 300 copies weekly and published within the county for 52 successive weeks prior to the sale. These requirements as to the newspaper are statutory, and there is no evidence that they did not exist in the present case. The point is that the affidavit of the publication of notice did not so state. The affidavit was in the language of section 8908, Comp. St. 1922, that "said newspaper is a legal newspaper," and showed the other requirements were complied with. This was sufficient. The particular requirements above referred to were inserted by an amendment (Laws 1919, ch. 133) but section 8908, *supra*, was not changed so as to require those facts to be stated in the affidavit, and therefore compliance with that section was all that was required. *City of Moline v. Chicago, B. & Q. R. Co.*, 262 Ill. 52, 61.

There is no error in the record. The judgment of the district court is

AFFIRMED.

ETHEL M. COLSON, APPELLEE, V. ESTATE OF RALPH C. JOHNSON, APPELLANT.

FILED FEBRUARY 26, 1924. NO. 22697.

Executors and Administrators: CLAIMS FOR PURCHASE MONEY. One who has contracted with a testator in his lifetime for the sale and conveyance of land to him cannot, while the contract remains executory, have an allowance in the county court against the estate of the vendee for the amount of the remainder of the purchase money.

APPEAL from the district court for Dodge county: FREDERICK W. BUTTON, JUDGE. *Reversed, with directions.*

Henry M. Kidder and *Charles E. Abbott*, for appellant.

Courtright, Sidner, Lee & Gunderson, contra.

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

REDICK, District Judge.

This is an appeal from the judgment of the district court confirming the allowance of a claim by the county court against the estate of Ralph C. Johnson. The claim was for a balance of the purchase money under an executory contract whereby claimant sold and Ralph C. Johnson agreed to purchase certain lands in South Dakota for the sum of $48,000, payable, $10,000 cash at times stated, $8,000 by conveyance of a lot in Fremont, and $30,000 in five years, secured by mortgages in stated amounts upon the several tracts of land sold. The conveyance of the lot was made, and $8,000 in cash paid at times to which extensions were granted by the vendor, the time for payment of the remaining $2,000 being extended by agreement to September 1, 1920. The transaction was to be completed

by a conveyance made by the vendor and the execution of the mortgages March 1, 1920, but the time was extended to June 1, 1920. Conveyance and mortgages, however, were not executed at that time, probably because the final cash payment had not been made, and on July 3, 1920, Ralph C. Johnson died. The vendee took possession of the lands under the contract, and the administrator and heirs still retain the same. Legal title remains in vendor.

January 7, 1921, claimant filed her claim, and on March 26, 1921, an amended claim against the estate of Johnson for $33,975.67, the balance of the purchase price of said lands, stating therein that, by reason of default of Johnson "in the terms of said contract and in executing and delivering any mortgage or mortgages in accordance therewith, claimant has elected and now elects to declare a breach of said contract on the part of said Ralph C. Johnson and the estate of said Ralph C. Johnson, and to declare the whole amount of the purchase price of said real estate now due and payable." Claimant also tendered deeds to be made to whomsoever the court may decree entitled thereto and to be delivered upon payment of the amount due. Allowance of the claim was resisted by the administrator upon grounds not necessary to set out in detail. The claim was allowed in full, and the question presented upon the record is whether or not such allowance was proper.

Many questions are presented and authorities cited in the brief of appellant, but we think they do not touch the decisive question in the case. The allowance of a claim for money against an estate has the force and effect of a judgment (*McGrew v. State Bank*, 60 Neb. 716), and such claims are provable as decedent would be liable upon if suit were brought during his lifetime. It is therefore pertinent to inquire what would be the rights and liabilities of the parties under the contract in question if Johnson were alive. The contract is unusual in two particulars, viz.: (A) It does not purport to be binding upon the heirs, executors and administrators of the parties; and (B) it contains no provision whereby vendor, upon default, may

declare the whole amount due. Regarding (A) we do not deem this ommission material at this time; and as to (B) it is well settled that without a provision to that effect in the contract no power exists to declare the whole amount due upon default. 1 Cyc. 740; *Napa Valley Wine Co. v. Daubner,* 63 Minn. 112. It will be observed at once that an action at law could not be maintained to recover the $30,000 which was to have been represented by the mortgages until the expiration of five years from March 1, 1920, which period has not as yet expired, and that claimant is attempting to that extent to secure a judgment against the estate for a sum not due.

As far as we are advised, the question has not been determined in this state, but the great weight of authority seems to be that an action will not lie at law to recover the purchase price of real estate under an executory contract of sale. *Prichard v. Mulhall,* 127 Ia. 545; *Goodwine v. Kelley,* 33 Ind. App. 57; *Bensinger v. Erhardt,* 74 App. Div. (N. Y.) 169; *Reed v. Dougherty,* 94 Ga. 661; *Freeman v. Paulson,* 107 Minn. 64. The contrary was held in *North Stockton Town Lot Co. v. Fischer,* 138 Cal. 100, in which there was a strong dissenting opinion in conformity to the general rule stated. Under certain circumstances an action at law has been sustained, as for example, *Sadler v. Bowles,* 42 Miss. 414, where notes had been given separate from the contract; and in *Shenners v. Pritchard,* 104 Wis. 287, where payment was to precede the conveyance. The covenants in the contract in question were mutual and dependent, the one party to convey and the other to pay at a time fixed. And in some cases the action, though in form at law, has been sustained as one for specific performance, the decree protecting the defendant by providing for a deposit of the deed. *Olmstead v. Smith,* 87 Mo. 602; *Pershing v. Canfield,* 70 Mo. 140; *Shelly v. Mikkelson,* 5 N. Dak. 22. In *Stephens v. Harding,* 48 Neb. 659, the action seems to have been sustained as a suit for foreclosure. In *Gantt & Lee v. Mechin,* 30 Mo. App. 532, it was held: "One who has contracted with a testator, in his lifetime, for the sale

and conveyance of land to him cannot, while the contract remains executory, have an allowance in the probate court against the estate of the vendee for the amount of the purchase money." It is true that in that case there was no tender of a deed, but we think this is not material for the considerations now to be stated. It may be that in jurisdictions, as in this state, where the distinctions of form between legal and equitable actions are abolished, a court having jurisdiction of questions involving the title to land and suits for specific performance might entertain an action purely legal in form to recover the purchase money, for the reason that it had the power to protect the defendant by the delivery or deposit of a conveyance, as was done in two cases above cited; but, assuming that to be correct procedure under the conditions noted, it can have no application here, for the reason that the county court has no jurisdiction of cases involving the title to lands, nor of cases for specific performance, and is therefore, in no position to afford the defendant any protection regarding the conveyance.

The contract containing no provision that upon default the entire debt might be declared due, if suit had been brought against Johnson in his lifetime to recover the $30,000, it could not have been maintained, as the debt was not due. *Lipp v. Horbach*, 12 Neb. 371.

In conclusion, we believe the proper rule to be, as stated in a number of cases above cited, that, where the land contract is executory and the vendee makes default, the remedies of the vendor are to rescind, specific performance, foreclose the contract as a mortgage, or bring suit for damages for the breach. Whether specific performance would lie against the heirs in the absence of a suitable provision in the contract binding them, *quære*. But in a suit to foreclose, a court of equity would have power to permit the heirs to bring up the default and complete the contract, or require them to submit to foreclosure for amount in default. At any rate, the remedy here sought is not open to her. The judgments of the district court and of the

county court are reversed, and cause remanded, with instructions to disallow the claim, without prejudice to other remedies.

REVERSED, WITH DIRECTIONS.

DEWITT C. SUTPHEN ET AL., PLAINTIFFS, V. GEORGE A. JOSLYN ET AL., DEFENDANTS: EARL C. SUTPHEN, APPELLANT: SARAH H. JOSLYN ET AL., APPELLEES.

FILED MARCH 22, 1924. No. 22671.

1. Wills: FORMER CONSTRUCTION FOLLOWED. Where the question presented is whether the rule in Shelley's case applies to the interpretation of a will, and the question has already been raised and decided in this court at the suit of two of the three persons entitled to claim as heirs to the property if the first takers took only life estates, in a subsequent action by the third heir, no new facts or controlling circumstances having occurred in the meantime, the court will abide by the interpretation formerly given to the will.
2. ———: ———. Under the decision in *Yates v. Yates*, 104 Neb. 678, and *Myers v. Myers*, 109 Neb. 230, the language of the will in controversy is *held* to have conveyed estates in fee to the first takers, and not a mere life estate.

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

William O. Gilbert and *Frank H. Woodland*, for appellant.

Sullivan, Wright & Thummel, contra.

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

LETTON, J.

In April, 1893, an action was brought by DeWitt C. Sutphen, grandfather, and Charles D. Sutphen, father, of the plaintiff, against George A. Joslyn, in the district court for Douglas county. Its purpose was to compel Joslyn to specifically perform a contract of purchase from them of

five acres of land situated within the city of Omaha. Joslyn answered admitting the making of the contract of purchase and alleged that he was willing to perform if the plaintiffs could make a good and marketable title to the property; that their title came by will from Emily M. Sutphen; that the will devised a life estate in the tract to each of the plaintiffs, respectively with remainder to their heirs forever; that this only created a life estate in the plaintiffs, with remainder over to their heirs; that the three minor children of Charles D. Sutphen, Clinton Joy, Gladys E. and Earl C. Sutphen, were proper parties to the controversy; and that if the court found that plaintiffs had the full legal title he was ready and willing to perform.

The court ordered that the minors be made parties defendant. They were brought in, and a guardian *ad litem* appointed for them, who filed an answer for each, denying generally the allegations of the petition and cross-petition. The court, applying the rule in Shelley's case, held that the fee simple title was in the plaintiffs Sutphen, ordered Joslyn to specifically perform his contract, and barred and estopped Clinton Joy Sutphen, Gladys E. Sutphen and Earl C. Sutphen from having or claiming any right, title or interest in and to the real estate under the will. This decree was rendered July 10, 1893. No appeal was taken by the guardian *ad litem,* or by any other of the parties to the suit.

Earl C. Sutphen filed a petition for vacation of the judgment, within one year after attaining his majority. In substance the petition alleges that the petitioner is a son of Charles D. Sutphen; that at the date of entry of the judgment he was of the age of one year and 16 days; that he was neither a necessary nor a proper party to the controversy, and that the court erred in adjudicating his rights in the action; that neither the petition nor the answer and cross-petition states facts sufficient to constitute a cause of action against him; that the plaintiffs, under the will of Emily M. Sutphen, took only a life estate in the real estate, and that the court erred in adjudging that they took the fee to the same; that the guardian *ad litem* did not

defend in fact, but only perfunctorily went through the form of making a defense. He pleads that the conveyance from the plaintiffs to Joslyn, although in form of deed, was in fact only a mortgage; that he is one of the heirs of Charles D. Sutphen; that the court was without jurisdiction to adjudicate the issues raised between Joslyn and him, and that he has under the will an undivided interest in the fee to said real estate. The answer alleged the good faith of the proceedings, the validity of the decree, that plaintiff was an actual party though not named in like proceedings brought by his brother and sister and determined adversely to them by this court, and that he is estopped for this and other reasons from now claiming any interest in the property. The district court found for defendant and dismissed the proceedings. The petitioner has appealed.

The question as to the right of the heirs of Charles D. Sutphen to set aside the decree and the question as to the nature of the title devised by the will of Emily M. Sutphen have been considered by this court in suits prosecuted by Clinton Joy Sutphen and Gladys E. Kiplinger, *nee* Sutphen, the brother and sister of plaintiff, against George A. Joslyn, seeking to vacate and set aside the same decree. In *Sutphen v. Joslyn*, 93 Neb. 34, which was an original bill in equity filed more than one year after the plaintiff therein had attained his majority, it was held that there was neither actual nor constructive fraud in procuring the decree, and that it was not subject to the attack. The judgment of the district court was affirmed. In a similar suit brought by Gladys E. Kiplinger, the district court found that the action was commenced in time; that she had a good defense to the original action, and granted a new trial. Mrs. Kiplinger then filed a demurrer to the answer and cross-petition of Joslyn in the original case. This demurrer was sustained and the answer and cross-petition of Joslyn dismissed.

The suit by Clinton Joy Sutphen appears as No. 16634 of this court (93 Neb. 34); that brought by Mrs. Kiplinger for a new trial is No. 16827 (93 Neb. 40). The suit

in which the demurrer of Mrs. Kiplinger to the answer of Joslyn in the original case was overruled by this court appears as No. 17236 (93 Neb. 45). The brief of Mrs. Kiplinger in No. 16827 recites: "By stipulation of counsel and permission of the court, this case and No. 17236 are to be heard with No. 16634, and the briefs in the latter case are to be considered as though filed also in the two former. The petition, answer, and reply are essentially the same in No. 16634 and in this case. * * * It is assumed by both parties that after deciding the issues in this and No. 16634 it will be very apparent what ruling should be made in No. 17236." The briefs in No. 16634 alone consist of 304 printed pages. The merits of the entire controversy as to the meaning and effect of the will of Emily M. Sutphen and as to whether the rule in Shelley's case is in force in the state of Nebraska are exhaustively discussed, as well as the question whether the right to open the decree had expired by limitation. The briefs on behalf of the Sutphens argued that the rule in Shelley's case is not a part of the law of this state, while on behalf of Joslyn it was contended that the common law of England by virtue of statute is law in this state, and that by reason thereof the rule in Shelley's case must be applied. This was the crucial and decisive question in all the cases. In the final judgment of this court it was held in No. 16634 that the decree of the district court was not obtained by fraud and that the judgment could not therefore be opened for that reason or on that account. In No. 16827 it was held that Mrs. Kiplinger did not begin her suit to open up the decree within the time limited by statute after her disability ended. In No. 17236 it was held that the demurrer to the answer and cross-petition of Joslyn should have been overruled, and that the court erred in sustaining it and in vacating the former decree. That decree was reinstated and affirmed. The language of the brief opinion in the latter case is lacking in clearness and is inaccurate in its statement as to the opinion and judgment in No. 16634, *Sutphen v. Joslyn*, 93 Neb. 34. The fact of

these inaccuracies was pointed out in the brief upon the motion for rehearing in No. 17236, and the same attack was made on the judgment as is now made. This motion for rehearing was overruled, the court evidently being of the opinion that the three opinions covered all questions raised in the three cases, and that the several judgments of this court determined the whole controversy. The final conclusion in the whole matter was that the original judgment of the district court was upheld, and it was held that the effect of the will was to pass a title in fee to DeWitt C. Sutphen and Charles D. Sutphen, and not a mere life estate.

Plaintiff stands in exactly the same relation to the will and to the title to the real estate as did his brother and sister at the time the former cases were decided. But it is urged that, even conceding that the rule in Shelley's case applies in this state, there is sufficient other language in the will to demonstrate that Mrs. Sutphen intended the heirs of the devisees to take by purchase and not by descent, and that the court must apply the intent statute, section 5594, Comp. St. 1922. One line of authorities, such as *Perrin v. Blake,* 4 Bur. (Eng.) 2579, 10 Eng. R. C. 689; *Jesson v. Wright,* 2 Bligh (Eng.) 1, 10 Eng. R. C. 714; *Carpenter v. Van Olinder,* 127 Ill. 42; *Hageman v. Hageman,* 129 Ill. 164; *Doebler's Appeal,* 64 Pa. St. 9, and *Brockschmidt v. Archer,* 64 Ohio St. 502, holds that the words of explanation in a will, to be effective to defeat the rule, must be with respect to the testator's intention as to how the heirs are to take, and that however much the testator may emphasize the fact that the first taker is to have only a life estate, by the use of expressions that the first taker may not sell or alienate the property, or that he is to have only the use of the property during his life, or that his intention is that the first taker shall have only a life estate, such expressions are not effective to defeat the operation of the rule in Shelley's case. The idea is well expressed by Blackstone in *Perrin v. Blake,* 10 Eng. R. C. 689, 710: "All the cases therefore that have hitherto occurred, from the statute of wills to the present time

(a period above two centuries), all the cases, I say, in which heirs of the body have been construed to be words of purchase, are reducible to these four heads: either where no estate of freehold is given to the ancestor; or where no estate of inheritance is given to the heir; or where other explanatory words are immediately subjoined to the former; or, lastly, where a new inheritance is grafted on the heirs of the body—none of which is the present case."

Other courts, upon whose decisions appellant relies, hold that, if the will, taken as a whole, indicates that the testator intended that the first taker should have a life estate only, the court will give effect to that intention, although there is language in the will which, standing alone, brings the devise within the rule. The following cases are cited to support this proposition: *Frank v. Frank*, 1 Monag. (Pa.) 347; *Smith v. Hastings*, 29 Vt. 240; *Striker v. Mott*, 28 N. Y. 82, 91; *Chelton v. Henderson*, 9 Gill (Md.) 432; *Tongue's Lessee v. Nutwell*, 13 Md. 415; *Westcott v. Meeker*, 144 Ia. 311. *Westcott v. Meeker, supra*, squarely supports it, but some of the other cases are not applicable, and the Vermont case is of no force as authority because the rule is not in force in that state. This court has not been entirely consistent in its expressions upon the question how far the intent statute should control the interpretation of wills which contain language coming within the rule, with other language which might be construed to indicate an intent that the rule should not apply. In some of these cases the actual intent of the testator seems to have been treated as the criterion regardless of the rule, and to go as far or even farther than appellant contends is the law, while in others the rule has been applied strictly. The cases in which such questions have been considered, other than the three *Sutphen v. Joslyn* cases above referred to, are: *Albin v. Parmele*, 70 Neb. 740; *Spencer v. Scovil*, 70 Neb. 87; *Moran v. Moran*, 101 Neb. 386; *Grant v. Hover*, 103 Neb. 730; *Kluge v. Kluge*, 103 Neb. 534. An examination of these cases will demonstrate the confusion and uncertainty which existed up to the time of the deci-

sions in *Yates v. Yates*, 104 Neb. 678, and *Myers v. Myers*, 109 Neb. 230. The latter cases clarify the situation by adopting the strict rule in Shelley's case in its pristine vigor. Since the decision of the latter cases valuable tracts of land have passed to purchasers who relied upon the rule announced therein. The rule has now become a rule of property.

A majority of the court feel bound by the views expressed in the cases first cited, and in *Yates v. Yates*, and *Myers v. Myers*. To the mind of the writer, who, with Judge Rose, dissented in the *Yates* case, this interpretation practically repeals the intent statute. It conflicts with *Moran v. Moran, supra*, and other cases following that decision. But if the language in the *Yates* and *Myers* cases is given a fair interpretation, then, even if the decisions in the *Sutphen* cases in 93 Neb. 34, 40, 45, had not settled the question, the will of Mrs. Sutphen must be considered as passing the estate in fee to the first takers.

The judgment of the district court is

AFFIRMED.

WILLIAM J. ROSE, JR., APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED MARCH 22, 1924. No. 22737.

Appeal: CONFLICT OF EVIDENCE. In an action between a shipper and a carrier for negligent delay in the shipment of live stock, the published schedules required by law are the best evidence of the time in which the live stock was to be transported under the bill of lading. But, where such schedules are not introduced in evidence by the carrier, and where there is a conflict of evidence as to the schedule time, the question is one of fact for the jury, and a verdict based upon such evidence will not be set aside unless it is manifestly wrong.

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

Wymer Dressler, Robert D. Neely, Paul S. Topping and *Hall, Williams & Cline*, for appellant.

Jacob Fawcett, F. V. Robinson and *Ernest F. Armstrong, contra.*

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

LETTON, J.

Plaintiff recovered a judgment for damages by reason of the negligent failure of defendant to transport certain of his live stock to market in reasonable time, whereby an undue shrinkage and loss of market occurred. In substance, the facts as stated by the witnesses for plaintiff are as follows:

On the afternoon of March 19, 1920, plaintiff shipped, under a written contract, 51 head of cattle from Howe, Nebraska, to Chicago, over the line of the Missouri Pacific Railway Company. They were to be transported over the line of the Chicago & Northwestern Railway Company, defendant, from Omaha. Plaintiff had inquired of the agent there how long it would take to move the cattle on defendant's line of road from Omaha to Chicago, and had been told less than 36 hours. The cattle arrived in Omaha at 11:30 a. m. March 20, where they were unloaded. He had a conversation in Omaha with the agent of the defendant, the Chicago & Northwestern Railway Company, as to the time the shipment would arrive in Chicago, desiring to make the Monday morning market. The agent told him that the cattle would go through in 36 hours. In order that this should be done he then signed what is known as a 36-hour release, which is an agreement upon the part of the shipper that the cattle may remain in the cars 36 hours without unloading. The cattle were loaded in three cars at Omaha at 8:30 p. m. Plaintiff accompanied the shipment. They arrived at Clinton, Iowa, at 10 p. m. the next day. At Clinton he was told that he would have to unload the stock because there was not time to get into Chicago within the 36 hours required by the federal statute. Some cars of stock upon the same train were taken on to Chicago at once. The cattle had been in the cars for 25½

hours when they arrived at Clinton. The cattle arrived in Chicago at 2 a. m. on March 23, and were sold on the Chicago market that forenoon. The market for such cattle on March 22 was $14.74 per cwt. and on March 23, $14.15. The cattle were not in good condition when they arrived in Chicago, and if they had arrived the day before they would have sold at an increased price of from 25 to 50 cents per cwt. There was testimony that the usual time for the shipping of live stock over the defendant line from Omaha to Chicago was from 28 to 36 hours when the stock was not unloaded, and that during March, 1920, it was not customary to unload stock between Omaha and Chicago. There was testimony that from 40 to 50 pounds a head would be a reasonable shrinkage if the cattle had been shipped straight through, and that from 70 to 80 pounds was the estimated shrinkage under the circumstances of the case.

For the defense there was an explicit denial of any promise by the agent at Howe, or by an agent of defendant, to any one that the cattle should be delivered in Chicago within 36 hours, and denial of the authority of any one to vary the printed and published schedule. The general superintendent of the railroad testified that he supervised the making of train schedules and was familiar with them during the year 1920; that according to the schedule it would be necessary to unload and feed these cattle at Clinton, Iowa, in compliance with the federal statute, and that the first train out from South Omaha, which is train No. 254, on which the cattle were shipped, would furnish the fastest time possible in conformity with good railroad practice. The several conductors of the train testified that though traffic was heavy the train made the run in the usual time. From Omaha to Clinton, a distance of about 420 miles, the entire time consumed was 25½ hours; and from Clinton to Fortieth street, Chicago, a distance of 130 miles, the time occupied was 8 hours and 5 minutes.

Defendant assigns as error the refusal of the court to direct a verdict in its favor, asserting that the evidence is

insufficient to support a liability, and because the alleged agreement to transport the cattle to Chicago within 36 hours, if in fact made, was an unlawful discrimination as against other shippers, and was void. Whether the agreement to transport the cattle to Chicago within 36 hours was an illegal discrimination depends upon what were the actual published traffic rates and schedules for the transportation. We have no fault to find with the contention of the defendant in this regard if the schedules had been shown to be in excess of 36 hours, nor with the other propositions of law presented by it to the effect that the schedule time of a stock train is presumed to be reasonable; that a carrier is liable only for negligent delay; that to agree with a particular shipper to expedite a shipment at regular rates when no rates have been published for such expedited service is unlawful discrimination; that a bill of lading issued by the initial carrier binds all participating carriers and protects all; and that liability for damage to interstate shipments depends upon the law as construed by the federal courts.

The trouble with the defense in this case is that the published time-tables and schedules were not produced by defendant, and that there is a conflict in the evidence with regard to the schedule time for the transportation of cattle from Omaha to Chicago at that time. Three witnesses, whose business was closely connected with such shipments, testified that they were familiar with the time for such transportation, and that it was within 36 hours. The superintendent of the defendant railroad testifies that he supervised the making of train schedules and was familiar with them during the year 1920, and that according to the schedule it would be necessary to unload and feed these cattle at Clinton in compliance with the federal statute. If, as several witnesses testify, the usual and customary time for the transportation of such cattle over defendant's line at the time they were shipped was from 28 to 36 hours, the jury were entitled to presume, in the absence of the published schedules, that these trains were run upon

schedule time. An issue of fact was thus raised between their testimony and that of the general superintendent, which the jury were entitled to determine from the testimony adduced. The best evidence not being before the jury, they had a right to consider that which had been admitted, and to determine the question as a question of fact. The jury probably took note of the fact that defendant, though having the schedules in its possession, did not offer them in evidence. Another relevant fact in this connection is that, if the schedule provided for a greater time than 36 hours for shipment from Omaha to Chicago, there would have been little use in having plaintiff sign the 36-hour release, since feeding became obligatory at the expiration of 28 hours unless a release was signed by the shipper, and stopping at Clinton would have been compulsory.

The court gave the substance of nearly all of the instructions requested by the defendant, but left the question as to the negligent delay to the jury.

We find no error in the judgment, and it is

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES G. V. INGOLDSBY, DEFENDANT: JOHN HAWBAKER ET AL., APPELLANTS.

FILED MARCH 22, 1924. NO. 23309.

Recognizance: FORFEITURE: DEFENSES. In this, an action against the sureties on a bail bond upon which the default of the principal had been taken and the bond declared forfeited in the forenoon of the day upon which he had been bound over to appear, and in which action the sureties defend on the grounds, that the default was prematurely taken, that the court had no jurisdiction to declare the forfeiture, and that therefore no cause of action had accrued upon the bond, *held*, that taking the default upon the day at which the defendant was recognized to appear was a mere irregularity and not a jurisdictional defect, and that the facts stated are no defense to the action.

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

D. W. Livingston, for appellants.

O. S. Spillman, Attorney General, and *George H. Heinke, contra.*

Heard before MORRISSEY, C. J., LETTON, DAY and GOOD, JJ.

LETTON, J.

One Ingoldsby was arrested charged with a crime. In the county court he entered into a bail bond in the sum of $400, in the usual form, to secure his appearance on the first day of the next jury term of the district court for Otoe county, with defendants as sureties. An information was afterwards filed in the district court at the September, 1920, term, and the case was set for trial on February 14, 1921, at 10 o'clock a. m. This was the first day of the next regular jury term. On that day defendant was called three times in open court and made default. His bond was declared forfeited. This action is against the sureties on the bond.

The proof shows that there were a jury and witnesses in attendance on February 14. Defendant did not appear or answer during that term of court. On the part of the sureties it is shown that Ingoldsby was at that time charged with another crime, and was extradited from the state of Texas and placed in jail in Otoe county, in the early part of May, 1922. He was in the custody of the sheriff and the courts of that county for several months until conviction of the latter crime. In the present action judgment was rendered for the full amount of the penalty in the bond.

The principal errors assigned are that the court had no jurisdiction to forfeit the bond during the day upon which the defendant was bound over to appear, that he had the whole day in which to appear, and that the forfeiture, which was entered in the forenoon of the same day, was premature. Before the motion for a new trial was ruled upon, another motion was filed setting forth that Ingoldsby had been returned to the county for trial in another case without any expense to the state in the criminal proceeding

in which the bond was given, and moving the court to reduce the judgment to an amount that is warranted by the evidence. These motions were both overruled. We are of the opinion that the entry of default and the forfeiture of the bond early in the day upon which the defendant was bound over to appear, even if premature, was a mere irregularity and was not a jurisdictional defect (compare section 9157, Comp. St. 1922), and that the default, if erroneous, might have been corrected at any time during the term upon being called to the attention of the court by motion; that after the expiration of the term the same became final.

Defendant having been returned to the state and in the custody and control of the sheriff in Otoe county, on another charge, he might have been proceeded against upon the criminal charge in which the obligation of the defendants was given. Under section 10041, Comp. St. 1922, the trial court may remit or reduce the penalty and render judgment according to the circumstances of the case and the situation of the party, upon such terms as shall seem just and reasonable to such court. When the motion was made in this case to reduce the amount of the judgment on account of the facts above recited, we think the trial court should have taken the same into consideration and reduced the judgment accordingly. The county incurred some expense for telephoning and telegraphing; this should be paid. While the matter is largely within the discretion of the district court, we are of the opinion that a recovery of $100 on the bond is all the evidence fairly warrants. *Sullivan v. Furnas County*, 105 Neb. 564. The judgment of the district court is therefore modified and reduced so as to stand, as of the date it was rendered, at the sum of $100 against defendants. As thus modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

JOHN C. HAARMANN V. STATE OF NEBRASKA.

FILED MARCH 22, 1924. NO. 23744.

Intoxicating Liquors: INFORMATION. Defendant was charged in one count of an information with unlawful possession of intoxicating liquor, and in another count with unlawful transportation of intoxicating liquor. He was convicted and fined on both counts. The evidence showed that after the act of transportation had ceased defendant was in possession of the liquor. Two separate crimes were committed, and there was no error in joining the counts or in trying defendant on both counts at the same trial.

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

E. H. McCarthy and *D. W. Livingston,* for plaintiff in error.

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

Heard before MORRISSEY, C. J., LETTON, DAY and GOOD, JJ.

LETTON, J.

The accused was charged in the first count of the information with the unlawful possession of intoxicating liquor, and in the second count with the unlawful transportation of intoxicating liquor, the automobile in which it was transported being described in the information. He was convicted, and a penalty imposed upon both counts.

It is first asssigned that the proof was insufficient to establish that the liquor was intoxicating; that the only testimony of its intoxicating nature was that of witnesses who smelled it, and that this taken alone is insufficient evidence to sustain a conviction. But the evidence rests upon more than the mere odor of the liquor. It is shown that officers found a quart bottle about half full of liquid, and a gallon can in the automobile; that two witnesses smelled the contents and were of the opinion that the liquor contained therein was intoxicating. If this were all, the proof would be insufficient under *Hutter v. State,* 104 Neb.

9. But four or five witnesses testified to direct admissions by the accused that he had intoxicating liquor in the car. There is evidence that he was partially intoxicated when arrested. It is also shown that, at a time when the officers were temporarily absent from the car, leaving defendant in control of it and its contents, the vessels containing the liquor were abstracted by some one unknown, and that defendant was at the car when the officers returned. The liquor was not afterwards found. All these facts taken together are sufficient to support a conviction for possession.

Complaint is made that there is no proof that the liquor was transported by the accused except during the time when the car was in the custody of the officers, being moved through the streets of the village. But the fact that the accused, who was not a resident thereof, drove his automobile into the village, that the vessels containing the liquor were almost immediately found in the car, that he told witnesses that he had "Booze," and at least one that he had liquor that he "had brought down for a friend," are sufficient to establish unlawful transportation. The evidence of defendant is that the only liquid he had in the car was ginger ale. He denies the statements attributed to him as to having had liquor in the car, and denies that he was intoxicated, but the circumstances tend to discredit these claims.

It is said that, though the information contains two counts, the evidence proves only one crime, if any. There is no proof of possession of the liquor other than in the automobile. The question which has given us the most trouble is whether a conviction can be sustained upon each of two counts, one charging unlawful possession and the other unlawful transportation, when the only proof of possession is possession in the vehicle in which the liquor had been transported. The authorities seem to be somewhat divided upon this question, but it will be seen that the defendant remained in possession of the liquor after his transportation of it into the village of Unadilla had ceased, and it may reasonably be inferred that in the ab-

sence of the officers it was removed by him. In *Massey v. United States*, 281 Fed. 293, the defendant had transported intoxicating liquor in an automobile and then carried it into a dwelling-house. The court said: "There was evidence that the defendant transported intoxicating liquor in an automobile, and then carried it into a dwelling-house, where he was in possession of it. The national prohibition act penalizes the illegal possession, as well as the illegal transportation, of such liquor. Transportation involves elements of carriage or removal from one place to another that are not involved in mere possession. Separate acts, though parts of a continuous transaction, may be made separate crimes by the legislative power, as in the case of one who unlawfully breaks and enters a building with intent to steal, and thereupon does steal while in the building. * * * The two offenses here involved were distinct, because the evidence to support the charge of possession was not sufficient to sustain the charge of transportation, without proof of an additional fact. *Gavieres v. United States*, 220 U. S. 338, 342."

This case, with others, is reviewed in a learned opinion in *State v. Marchindo*, 65 Mont. 431. The question is considered at length, citing and discussing numerous cases, and a conviction upon three counts of an information which charged the defendant with unlawful sale of liquors, with the unlawful possession of liquor, and with unlawfully maintaining a common nuisance, was affirmed. The prohibition statute of Montana is like ours, which provides that in an information for the violation of the act separate offenses may be united in several counts, the defendant tried on all at one trial, and the penalty for all the offenses imposed. Comp. St. 1922, sec. 3278. Even before the enactment of this law, it was held by this court that in misdemeanor cases separate offenses of the same nature might be joined in an information and the defendant tried on all of them at the same trial. *Burrell v. State*, 25 Neb. 581; *Little v. State*, 60 Neb. 749; *McArthur v. State*, 60 Neb. 390.

The usual rule applied in the determination of like questions is whether the same evidence would sustain a conviction under each count, or whether one of the counts requires proof additional to that required in the other. In order to convict defendant of unlawful transportation, it was necessary to prove that he had driven the automobile containing the liquor into the village where he was found in possession of it. As soon as the act of transportation ceased, the crime of unlawful transportation was complete, and by retaining possession of the contraband goods he was then guilty of the other offense.

A number of other assignments of error have been made, but we are convinced that the errors assigned, if any were committed, were not prejudicial. The judgment of the lower court is

AFFIRMED.

EDITH F. HOPE, APPELLEE, V. JOHN F. TWARLING, DEFENDANT: ANNA S. TWARLING, APPELLANT.

FILED MARCH 22, 1924. No. 22705.

1. **Husband and Wife**: ACTION FOR ALIENATION: DECREE OF DIVORCE: EFFECT AS EVIDENCE. In an action against a former mother-in-law for alienating the affections of her son from plaintiff, his wife, a prior decree of divorce may be admitted in evidence to prove marriage and the severing of conjugal relations, but it is not a former adjudication with respect to the subsequent cause of action and it does not operate as an estoppel by judgment.

2. ———: ———: AWARD OF ALIMONY AS DEFENSE. In an action against a former mother-in-law for alienating the affections of her son from plaintiff, his wife, alimony awarded to the latter by a former decree of divorce is not proper matter of defense.

3. ———: ———: PROOF. In an action against a former mother-in-law for alienating the affections of her son from plaintiff, his wife, the evidence will support a verdict in favor of plaintiff, if it proves marriage and divorce and justifies the inference that defendant maliciously pursued a course of wrongful conduct which eventually alienated the affections of her son from plaintiff and resulted in his abandonment of her without cause.

4. ———: ———: MALICE. From repeated, deliberate, wrongful acts of a third person, resulting in the alienation of the affections of a husband from his wife and his abandonment of her without cause, malice of such third person may be inferred.

5. ———: ———: FAILURE TO INSTRUCT. In an action against a former mother-in-law for alienating the affections of her son from plaintiff, his wife, the failure of the trial court to submit to the jury the defense of parental advice is not erroneous, if there is no evidence to support a finding in favor of defendant on that issue.

6. ———: ———: ADMISSION OF EVIDENCE. In an action against a former mother-in-law for alienating the affections of her son from plaintiff, his wife, disparaging statements of the husband to the wife, when defendant was not present, may be admitted in evidence to indicate the state of his mind and his attitude toward his wife as the result of defendant's wrongdoing, if properly shown by other evidence.

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

Mills, Beebe & Mills and *Sullivan, Wright & Thummell,* for appellant.

King, Bittner & Campbell and *Prince & Prince, contra.*

Heard before MORRISSEY, C. J., ROSE and DAY, JJ., ELDRED, District Judge.

ROSE, J.

This case, as presented on appeal, is a controversy between Edith F. Hope, plaintiff, and Anna S. Twarling, defendant. The action was one to recover $25,000 for alienation of the affections of Arthur C. Twarling, a son of defendant and the former husband of plaintiff. Defendant's son and plaintiff were married August 21, 1918. Thereafter until March 10, 1919, they made their home on a farm with the parents of the husband, when they moved about 30 rods to a home of their own. The husband left his new home July 29, 1919, and sued plaintiff for a divorce October 21, 1919. His suit was dismissed on cross-petition of

plaintiff who procured a decree of divorce from him, restoring her maiden name, Edith F. Hope, and awarding her $4,000 as permanent alimony. The present action followed, resulting in a judgment for $6,000 against defendant, the former mother-in-law, for alienating from plaintiff the affections of her former husband. Defendant has appealed.

The first assignment of error is directed to a preliminary order sustaining a motion by plaintiff to strike from the answer of defendant the allegation that the decree of divorce granted to plaintiff "$4,000 permanent alimony." Error in this respect does not seem to be shown. In an action for the alienation of a husband's affections, a prior decree of divorce may be admitted in evidence to prove marriage and the severing of conjugal relations, but it is not a former adjudication with respect to the subsequent cause of action and it does not operate as an estoppel by judgment. See cases cited in note beginning on page 943, 20 A. L. R.; *Pollard v. Ward,* 20 A. L. R. (289 Mo. 275) 936. Defendant in the present action was not a party to the former suit for divorce and is not entitled to any fruits of that litigation. The duty of a husband to pay for the support of a wife whose conjugal rights were destroyed by him without cause, as "alimony," is defined in *Greene v. Greene,* 49 Neb. 546, is not the same as the liability of a third person to respond in damages for alienating his affections. The action by plaintiff against her former mother-in-law to recover damages for the alienation of her son's affections is based on the loss of the husband's companionship and other connubial rights or consortium, a loss not compensable in the form of alimony. 30 C. J. 1123, secs. 976, 977. In this view of the law error in striking from the answer the reference to alimony is not shown. For the same reasons proof of the amount of alimony received by plaintiff was properly excluded at the trial.

It is next argued that the evidence is insufficient to support the verdict. There is a reasonable view of the testimony in which it justifies the inference that defendant

designedly and continuously pursued a hostile course toward plaintiff as a wife, casting bitter and unjust reflections upon her social and pecuniary standing, intelligence, veracity, cleanliness, common sense, worthiness and other attributes prized by a husband, and that this wrongful conduct operated on the mind of her son, interfered with his marital relations and alienated his affections from his wife. From the wrongful acts proved the jury were justified in inferring malice. There does not seem to be a sufficient reason for setting aside the verdict on the ground that it is not supported by the evidence.

The instructions are criticised because the jury were not directed that defendant, owing to her natural solicitude for the happiness and welfare of her son, acting honestly and in good faith with that end in view, had a right to give him maternal advice. This is a futile criticism, for the reason that defendant did not prove the defense of parental advice. On the contrary, she took the position that she said and did nothing to alienate the affections of her son. In effect she so testified.

It is finally insisted that the trial court erred in permitting plaintiff to testify to disparaging statements made to her by her husband at times when defendant was not present. The circumstances were such as to make the statements admissible. There was testimony tending to prove that defendant, in the presence of her son, had made offensive remarks concerning plaintiff. How they affected his mind, and his resulting attitude toward plaintiff were material inquiries. There was therefore no error in admitting the statements. There is abundant authority for this conclusion.

There does not seem to be any meritorious ground for setting aside the verdict or for reducing the amount of the recovery.

AFFIRMED.

JESSE W. STEWART, APPELLANT, V. HARRY WEINER, APPELLEE.

FILED MARCH 22, 1924. No. 23459.

1. **Appeal:** AFFIRMANCE. Unless it clearly appears that material evidence has been disregarded by the jury which, if considered and given due weight, would require the verdict to be set aside, a new trial will not be ordered.
2. **Innkeepers:** INJURY TO GUEST: LIABILITY. "An innkeeper is not an insurer of the safety of his guest; but he is bound to exercise reasonable care for the comfort and safety of the guest while in his hotel, and if the guest is injured through the negligence of the innkeeper or his employees the innkeeper is liable therefor." *Strahl v. Miller*, 97 Neb. 820.
3. **Appeal:** AFFIRMANCE. A verdict will not be disturbed, on the ground that it is not supported by the evidence, where there is sufficient competent evidence to support it.

APPEAL from the district court for Douglas county: JOHN B. RAPER, JUDGE. *Affirmed, with directions.*

Weaver & Giller, for appellant.

Montgomery, Hall & Young, H. M. Johnson and *Brogan, Ellick & Raymond, contra.*

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

DEAN, J.

Plaintiff sued to recover damages for personal injuries, alleged to have been sustained while he was a guest at defendants hotel at Omaha. The hotel took fire at about 10:30 in the forenoon, and plaintiff contends that, while attempting to escape from the building through a window, he fell 40 or 50 feet to the pavement. The case was tried twice to a jury in Douglas county. At the first trial, when plaintiff rested, defendant moved for a directed verdict. The motion was overruled. Defendant introduced no evidence. Thereupon the case went to the jury on plaintiff's evidence alone and he recovered a verdict for $12,500,

which, under an accepted rule of practice, was reduced to $7,500 by a remittitur on the ground that the verdict was excessive. Defendant appealed and the judgment was reversed and a new trial was ordered. *Stewart v. Weiner*, 108 Neb. 49. Such of plaintiff's evidence as is discussed in the former opinion, with respect to the manner in which he says he sustained the injury in his fall, need not be here again set out at length. At the second trial defendant introduced a good deal of evidence. The jury found in his favor, and plaintiff now appeals.

Plaintiff's room was on the fourth floor of the Savoy hotel. The floor in question is referred to generally by the witnesses as the "third sleeping floor." Plaintiff testified that there was a telephone directly over the head of his bed, and that, while the fire was in progress, he did not hear it ring, nor did he hear the fire gong sound in the hall; that he heard no commotion anywhere in or about the hotel, nor was he aware of the fire in the hotel until he was awakened by the smoke and heat in his room; that the bed covers which he made into a rope, as outlined in the former opinion, broke when he was about 40 or 50 feet above the paving, upon which he landed in his fall, and that he thereby sustained the injuries of which complaint is made. Other witnesses testified on plaintiff's part and their evidence, which need not be here reproduced, is corroborative of that of plaintiff.

On defendant's part the evidence of several witnesses was introduced which tended to prove that the telephone bells were rung in all rooms, and that the fire gongs, which were of the average size, were sounded on all floors, and that employees were sent to every floor in the building and that they gave the alarm of fire in the halls and pounded on the doors to arouse the guests. The evidence of disinterested guests corroborated that of the employees in respect of the warning of fire which was given by the hotel management.

The argument is that there was ample time and opportunity for defendant to have aroused plaintiff and to have

warned him of the fire, but that he negligently, carelessly and wholly failed in the discharge of his duty in this respect, and that such failure was the proximate cause of his injury.

Plaintiff contends that the verdict is manifestly against the weight of evidence. He cites *Urban v. Novotny*, 107 Neb. 384, in support of his argument. In that case defendant, who was an able-bodied man, without provocation made a vicious assault upon an under-sized cripple and gave him a brutal beating from the effects of which he was confined to his bed for about five or six weeks, a part of the time at a hospital, and was incapacitated for performing any sort of work for a long time thereafter. The jury, however, for no reason that was discoverable in the record, nonsuited the plaintiff. The judgment was of course reversed and a new trial was ordered on the ground that the evidence did not support the verdict. We do not think the *Urban* case is applicable to the facts here.

Plaintiff contends that material evidence was disregarded by the jury, and that if it had been given due weight plaintiff would have recovered a verdict. *Exchange Bank v. Gifford*, 102 Neb. 324, is cited. In the *Gifford* case the jury disregarded material evidence in respect to the authorship of certain promissory notes to which two names were affiixed as apparent makers. One of the defendants denied that he drew up the notes in suit or that he wrote the signatures. But it clearly appears from a comparison of the signatures upon the notes in suit, with several specimens of the defendants handwriting, which were penned while the case was in progress, and which were made a part of the record, that he wrote the notes and signed them and that he also wrote the name of his codefendant thereon. But the jury for some undisclosed reason, relieved him of liability. Aside from the defendant's bald assertion the verdict was without support and the probative value of his evidence was destroyed by inspection and comparison of the handwriting. We reversed the judgment and ordered a new trial on the ground that, as to the defendant

by whom the notes were written, the evidence did not support the verdict. As to his codefendant the judgment was affirmed. We do not think the *Gifford* case is in point.

Plaintiff testified that the injuries were such that he was compelled to discontinue his work as a locomotive fireman. On this point the evidence of five or six locomotive engineers was introduced by defendant by whom it was shown that plaintiff acted as fireman on their respective engines after the accident and that they never observed that he was physically disabled or in any manner unfitted to do the required work.

Plaintiff complains of the following instruction which he incorporates in his brief as follows:

"If you find for plaintiff, then in estimating his damages you should take into consideration that plaintiff's discharge * * * from the Missouri Pacific * * * was not due to his injured arm, * * * and his loss of wages to this time * * * cannot be allowed as damages against the defendant after plaintiff's discharge by the Missouri Pacific Railroad."

We think that, in view of the evidence on this point, the instruction is without error.

Plaintiff contends that the court erred in giving 10 of the 15 instructions which appear in the record. The argument is that they are "long, involved, confusing and misleading," and "capable of a double construction." Upon examination we do not find the instructions open to the objections urged by counsel. And, besides, when the instructions are all considered together they properly construe the law which is applicable to the evidence.

In respect of the duties of an innkeeper the rule upon which defendant relies is stated in *Strahl v. Miller*, 97 Neb. 820, wherein it is said: "An innkeeper is not an insurer of the safety of his guest; but he is bound to exercise reasonable care for the comfort and safety of the guest while in his hotel, and if the guest is injured through the negligence of the innkeeper or his employees the innkeeper is

liable therefor." See, also, 22 Cyc. 1080, sec. B, and cases there cited.

We think the evidence discloses that defendant comes fairly within the rule announced in the *Strahl* case, to which we adhere. While the innkeeper was not an insurer of the guest's safety, there is evidence to support a finding that the hotel management exercised reasonable care and did all that was reasonably within its power to warn and to arouse its guests in time to leave the burning building. Women and children were safely removed during the progress of the fire, and it was shown that a locomotive engineer, a very large man, was safely taken from an upper window to the pavement by a member of the fire department on one of its ladders.

The evidence conflicts, but there is sufficient to sustain the verdict, and in this state of the record, under instructions that do not disclose reversible error, the verdict will not be disturbed. *Vandeweg v. Olson,* 106 Neb. 211. It is elementary that disputed questions of fact, and of the credibility of witnesses as well, are for the jury. *Mathews v. State, ante,* p. 593.

Other questions are raised by plaintiff which we do not find it necessary to discuss. Notwithstanding the case was submitted at the former hearing on plaintiff's evidence alone, it is observed, in the former opinion, that the question of defendant's negligence is "very close." We think the great weight of the evidence at the last trial is on the side of defendant. The court did not err in overruling plaintiff's motion for a new trial.

The judgment is therefore affirmed, and the cause is remanded, with directions that the action be dismissed.

AFFIRMED AND REMANDED, WITH DIRECTIONS.

TONY MANGIAMELI, APPELLEE, V. SOUTHERN SURETY COMPANY, APPELLANT.

FILED MARCH 22, 1924. No. 22669.

1. **Principal and Agent: APPARENT AUTHORITY.** The apparent authority of an agent which will bind his principal is such

authority as the agent appears to have by reason of the actual authority conferred upon him by his principal.

2. Insurance: WAIVER: APPARENT AUTHORITY OF AGENT. Under the facts set out in the opinion, *held* that statements of an agent of an insurance company with limited authority, waiving notices of sickness required by the policy, are within the apparent scope of the agent's authority and binding upon the company.

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

Dressler, Neely & Morehouse, for appellant.

A. W. Elsasser, contra.

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

DAY, J.

Plaintiff recovered a judgment against the defendant for $285 for sick benefits upon a policy of life, accident and health insurance issued by the defendant. Defendant appeals.

The petition is in the usual form in actions of this character. Among other things, it is alleged that while the policy was in full force and effect the plaintiff was taken sick and confined to his home from December 29, 1920, to April 15, 1921; that during that period, by reason of his sickness, he was unable to perform the duties of his vocation; and that by the terms of the policy there was due to him $285 with interest.

The defendant admitted the issuance and delivery of the policy, and the payment of the premiums, but denied any liability to the plaintiff because of the failure of plaintiff to comply with the provisions of the policy respecting notice of sickness. These provisions were set out in full in the answer. In brief, the conditions provided that written notice of sickness on which a claim may be based must be given to the company within 10 days after the commencement of disability from such sickness; that, if the insured is disabled by illness for more than 30 days, he or his

representatives shall furnish the company every 30 days, or as near thereafter as may be reasonably possible, with a report in writing from his attending physician, fully stating the condition of the insured and the probable duration of the disability; and that strict compliance with all the terms of the policy on the part of the insured was a condition precedent to recovery, and that a failure in this respect shall forfeit to the company all rights to indemnity.

The reply pleaded a waiver of strict compliance with the terms of the policy with respect to notice.

The ultimate question presented by the record is whether the written notices of sickness required to be given by the terms of the policy have been waived by the defendant.

The record shows that one Joe Turney was the duly appointed agent of the defendant; that he solicited the plaintiff to take out the policy upon which this action is based; that the policy was delivered to the plaintiff by Turney on February 2, 1916, and that thereafter the said agent collected from plaintiff the monthly premiums of $1.60 until May, 1921, a period of about five years and three months. The record further shows the plaintiff was taken sick on December 29, 1920, and that a few days thereafter the agent, Turney, was notified of that fact; that on January 8, 1921, Turney, who was a friend of the plaintiff, called at plaintiff's home; that during the conversation Turney told plaintiff not to bother about notice to the company, and added, "I will take care of you;" that during the plaintiff's sickness Turney called "many times" on the plaintiff; that on several occasions the plaintiff asked about his sick benefits, and was told by Turney not to worry about that, that he, Turney, would attend to everything necessary.

It is not disputed that Turney made the statements attributed to him by the plaintiff. The defendant claims that Turney was an agent of limited powers, and that he had no authority to waive any of the provisions of the policy. The

testimony on behalf of the defendant tends to show that Turney was authorized to solicit applications for insurance, deliver policies, collect premiums, and remit the same to the company, and that beyond performing these acts he was not authorized to represent the defendant. In this connection defendant calls attention to a condition of the policy which recites: "No agent has authority to change this policy or to waive any of its provisions." It has frequently been held, however, that provisions of this type, in an insurance policy, are for the benefit of the company and may be waived by the company acting through its agents authorized to do so.

The question is then presented whether Turney, in thus assuring plaintiff regarding notice of sickness to the company, was acting for the company, and within the apparent scope of his authority. Notwithstanding the testimony of the defendant as to the limited authority of Turney in representing the company, we think the terms of the policy confer upon him broader powers than indicated by the defendant's testimony. Following the provisions of the policy with respect to notices of sickness which have been referred to, the policy provides: "Such notice given by or on behalf of the insured or beneficiary, as the case may be, to the company at St. Louis, Missouri, or to any authorized agent of the company, with particulars sufficient to identify the insured, shall be deemed to be notice to the company." It seems clear that under this provision of the policy a written notice of sickness served upon Turney would have complied with the terms of the policy. He had actual authority then to do some acts for the company in connection with the subject of notice of sickness.

The rule established in this jurisdiction is well settled that the apparent authority of an agent which will bind his principal is such authority as the agent appears to have by reason of the actual authority conferred upon him. *Oberne v. Burke*, 30 Neb. 581; *Creighton v. Finlayson*, 46 Neb. 457; *Northwest Thresher Co. v. Eddyville State Bank*, 80 Neb. 377.

We think that the statements of Turney that he would look after the matter of sending notices to the company, and that the plaintiff need not bother about it, were within the scope of his apparent authority, and that the defendant was bound by his action. After lulling the plaintiff into a sense of security and inaction by the conduct of its agent, the defendant will not be permitted to take advantage of the provisions of the policy which the action of its agent had waived.

From what has been said, it follows that the judgment of the district court is right, and is therefore affirmed. An attorney fee of $50 is allowed for plaintiff's attorney for services in this court, to be taxed as a part of the costs.

AFFIRMED.

MARY ETHEL THIES, APPELLEE, V. PERRY J. THIES ET AL., APPELLANTS.

FILED MARCH 22, 1924. No. 22686.

1. **Creditors' Suit.** "There are two classes of creditors' bills, one to reach the equitable assets or property of the debtor on which an execution at law cannot be levied; the other in aid of an execution at law, as to set aside an incumbrance or a transfer of property made to defraud creditors. In the first class of cases the creditor must allege and show that he has exhausted his remedy at law, while in the second it is sufficient to show that his claim has been reduced to judgment and docketed in the county where the land lies which he seeks to subject to the payment of his claim. The equity court in such case is merely lending its assistance to the legal tribunal to remove a fraudulent obstruction interposed to the execution of its writ." *State Bank of Ceresco v. Belk*, 68 Neb. 517.
2. **Fraudulent Conveyances:** TRANSACTIONS BETWEEN RELATIVES. The facts surrounding a conveyance of land between near relatives will be closely examined where fraud is charged, to discover if the conveyance was made for the purpose of hindering, delaying, or defrauding creditors.
3. ———: CONVEYANCE TO SISTER. Evidence examined, and *held* that the deed from the grantor to his sister was not a good faith transaction, but was made for the purpose of hindering, delaying, and defrauding the plaintiff, a creditor of the grantor.

4. ———: CONVEYANCE TO ATTORNEY. "An insolvent debtor has the right to employ attorneys to defend his estate and himself, and to transfer his property in payment of such contemplated services, provided it is done in good faith and the property transferred does not exceed a reasonable fee for the service which might be reasonably anticipated." *Farmers & Merchants Nat. Bank v. Mosher*, 63 Neb. 130.

5. ———: ———. Evidence examined, and *held* that the mortgage executed by the grantor to his attorneys was in payment of contemplated services to be rendered by such attorneys; that it was made in good faith; and that the mortgage did not exceed a reasonable fee for services which might be reasonably anticipated.

APPEAL from the district court for Keith county: J. LEONARD TEWELL, JUDGE. *Affirmed in part, and reversed in part, with directions.*

C. C. Sheppard and *A. H. Murdock*, for appellants.

H. A. Dano and *Morgan, Horton & Strehlow, contra.*

Heard before MORRISSEY, C. J., ROSE, DAY, and GOOD, JJ.

DAY, J.

This is a creditors' bill brought by Mary Ethel Thies against Perry J. Thies, Anna V. Thies, Charles C. Sheppard, *et al.*, to set aside as fraudulent certain conveyances of real estate in Keith county, executed by Perry J. Thies to his codefendants. The trial resulted in a decree setting aside and canceling the deed from Perry J. Thies to his sister Anna V. Thies, and also setting aside and canceling the mortgage from Perry J. Thies to Charles C. Sheppard and Fred P. Marconnit, and further decreeing the title to the land to be in Perry J. Thies and subject to the lien of plaintiff's judgment. Defendant's have appealed.

The facts out of which the controversy arises are substantially as follows: On August 23, 1915, the plaintiff, Mary Ethel Thies, commenced an action for divorce in Douglas county against defendant Perry J. Thies, and one week later secured an order from the court requiring the

defendant to pay for her support $10 a week *pendente lite*. In a cross-petition the husband also prayed for a divorce. Upon the trial of the divorce action on its merits the court denied to the plaintiff and the defendant the relief prayed, but entered a decree of separate maintenance, in which the defendant was required to separately maintain and provide for his wife and minor child, who was at the time of the decree 5½ years old. The decree required the defendant to pay $35 a month commencing February 1, 1917, until the further order of the court. The decree also required the defendant to pay $350 attorney fees for plaintiff's attorney, and the further sum of $40 on account of costs and expenses. This decree was dated January 19, 1917. On appeal by the defendant to this court the decree was affirmed. *Thies v. Thies*, 103 Neb. 499, and again affirmed on rehearing in 103 Neb. 501. It also appears that for a number of years prior to January,1916, Perry J. Thies was the owner of a tract of land in Keith county comprising about 480 acres. On January 17, 1916, he executed a mortgage on this land for $1,500 in favor of his attorneys, Charles C. Sheppard and Fred P. Marconnit, defendants herein. On January 18, 1916, he executed a quitclaim deed to the land to his sister, Anna V. Thies. The plaintiff did not join in either of these conveyances. On February 1, 1916, the plaintiff instituted a suit in Keith county to set aside and cancel the mortgage and deed above described. The action was based upon the judgment for temporary alimony entered on the 30th day of August, 1915. On February 8, 1916, a certified copy of the order for temporary alimony was filed in Keith county. Later several amended petitions were filed to cover the increasing amount becoming due from month to month on the order for temporary alimony, the last amended petition being filed April 4, 1917. Demurrers were filed to the petition and the several amendments thereto upon the ground that no cause of action was stated. The demurrers were overruled. Upon issue joined, the trial resulted in a decree in favor of the plaintiff. On appeal by the defendants to this court the

judgment of the lower court was reversed upon the sole ground that the amended petition upon which the cause was tried failed to state a cause of action, because it was not alleged that a transcript of the judgment obtained in Douglas county was filed in the office of the clerk of the district court in Keith county. *Thies v. Thies,* 104 Neb. 248. On May 4, 1917, a transcript of the decree for separate maintenance rendered in Douglas county was filed in Keith county. To correct an error another transcript of the decree in Douglas county was filed for record in Keith county on May 14, 1920. On August 4, 1920, the plaintiff filed a petition in Keith county, designated "amended petition." A summons was regularly issued upon this petition and served upon all of the defendants named therein, except Bartell. On September 23, 1920, the plaintiff filed an amended and supplemental petition. The defendants who were served filed demurrers, as they had done to all previous petitions, upon the ground that a cause of action was not stated. The demurrers were overruled. Issue was then joined, and a decree entered in favor of the plaintiff, which is the decree now sought to be set aside.

The defendants insist that the "amended petition" filed August 4, 1920, and the amended and supplemental petition thereto filed September 23, 1920, are but amendments to the original cause of action filed February 1, 1916, and that under the rule announced in *Thies v. Thies,* 104 Neb. 248, the demurrers should have been sustained. We think the argument is based on a false premise. While it is true that the petition was designated an "amended petition," we think it must be regarded as the petition in a new and independent action from the original case. A summons was regularly issued upon the petition and served upon the defendants. To all intents and purposes, it was a new action. The mere fact that it was incorrectly designated as an "amended petition" is not at all controlling. In the last petition facts were alleged showing that a transcript of the judgment in Douglas county, not only upon the temporary

order but also upon the final decree, was filed in Keith county before the present action was commenced.

It is next urged by the defendants that the petition fails to state a cause of action, because it is not alleged that execution was issued upon the judgment and returned *nulla bona*. We think the objection thus sought to be raised by the defendants is fully answered against defendants' contention in *State Bank of Ceresco v. Belk*, 68 Neb. 517. In that case, it is held: "There are two classes of creditors' bills, one to reach the equitable assets or property of the debtor on which an execution at law cannot be levied; the other in aid of an execution at law, as to set aside an incumbrance or a transfer of property made to defraud creditors. In the first class of cases the creditor must allege and show that he has exhausted his remedy at law, while in the second it is sufficient to show that his claim has been reduced to judgment and docketed in the county where the land lies which he seeks to subject to the payment of his claim. The equity court in such case is merely lending its assistance to the legal tribunal to remove a fraudulent obstruction interposed to the execution of its writ." In the course of the opinion it is said: "In the latter class of cases, the prevailing doctrine is that it is not necessary to allege that an execution has been returned unsatisfied, or that the debtor has no other property out of which the judgment can be satisfied; for that is not the ground upon which the court of equity assumes to grant relief in such cases, but upon the theory that the fraudulent conveyance is an obstruction which prevents the creditor's lien from being efficiently enforced upon the property. As to the creditor, the conveyance is void, and he has a right to have himself placed in the same position as if it had not been made. The fact that other property has been retained by the debtor may be evidence that the conveyance is not fraudulent, but, if the grantee's title be tainted with fraud, he has no right to say that all other means to satisfy the debt shall be exhausted before he shall be disturbed." (Citing cases.)

It is urged on behalf of the defendant Anna V. Thies, that the evidence is not sufficient to sustain the decree of the trial court setting aside the deed to her. There is considerable diversity of opinion as to the value of the land deeded to Anna V. Thies. The testimony on behalf of the plaintiff fixes the value of the land from $11,800 to $14,300. Defendants' witnesses place the value from $10,000 to $12,000. While the consideration recited in the deed to Anna V. Thies was $1 and other valuable consideration, the proof on her behalf tends to show that she gave $1,000 and assumed the incumbrance on the property, which she states was $3,000 or $4,000. There was no incumbrance upon the land, however, except the mortgage of $1,500 to Sheppard and Marconnit above described. Later she states that she was to assume some of her brother's indebtedness, but no person is described as creditor, and her testimony upon this point is far from satisfactory. While she states that she did not know that a judgment had been rendered against her brother for temporary alimony, she did know that he was having domestic difficulty with his wife, and that she had advanced him sums of money for his defense. She also knew that the wife had failed to join in the deed. The rule is established that the facts surrounding a conveyance of land between near relatives will be closely scrutinized where fraud is charged, to discover whether the conveyance was made for the purpose of hindering, delaying, or defrauding creditors. Without attempting to give a review of all of the facts surrounding the transaction, we think that the grossly inadequate consideration paid for the land, the fact that the wife did not join in the conveyance, the knowledge that the grantee had that her brother was in trouble and needed money to defend himself, a part of which she had then advanced, were sufficient to at least put her on inquiry, which we think would have shown that her brother was conveying the land for the purpose of hindering, delaying, and defrauding the plaintiff. This transaction bears the ear-

marks of fraud. An inspection of the entire record convinces us that the transaction was fraudulent.

With respect to the mortgage given to the attorneys, Sheppard and Marconnit, it is undisputed that the mortgage was given in payment of services at that time performed, and services anticipated to be rendered in the present action. The fees for services in prior actions, while not stated, could not have been very large. In *Farmers & Merchants Nat. Bank v. Mosher*, 63 Neb. 130, it was held: "An insolvent debtor has the right to employ attorneys to defend his estate and himself, and to transfer his property in payment of such contemplated services, provided it is done in good faith and the property transferred does not exceed a reasonable fee for the service which might be reasonably anticipated." It is difficult to determine what was exactly in the minds of the parties with reference to future litigation. It is shown, however, that the attorneys appeared twice in the supreme court in the divorce action, twice in the district court and in this court in the action to set aside the conveyances in Keith county, and that they made eight or ten trips from Omaha to Ogallala in the necessary preparation and trial of the cases. Upon the record made upon this phase of the case, we are led to conclude that the mortgage was given in good faith, and that the amount thereof did not exceed a reasonable fee for services which might be reasonably anticipated.

Other questions are presented in the record, which we have considered, but which we do not deem necessary to discuss. The main questions have been considered.

The judgment of the district court setting aside the deed from Perry J. Thies to Anna V. Thies is sustained. That part of the judgment setting aside the mortgage from Perry J. Thies to Charles C. Sheppard and Fred P. Marconnit is reversed, and the cause remanded, with directions to enter judgment in accordance with this opinion.

AFFIRMED IN PART, AND REVERSED IN PART, WITH DIRECTIONS.

ARLINGTON STATE BANK OF ARLINGTON, APPELLANT, V. HENRY LOW, APPELLEE.

FILED MARCH 22, 1924. No. 22718.

Evidence examined, and *held* sufficient to sustain the verdict and judgment of the trial court.

APPEAL from the district court for Dodge county: FREDERICK W. BUTTON, JUDGE. *Affirmed.*

Dolezal, Spear & Mapes, for appellant.

Courtright, Sidner, Lee & Gunderson, contra.

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

DAY, J.

This action was brought by the plaintiff bank, as purchaser in due course of an alleged promissory note for $600, purporting to be signed by the defendant, Henry Low. The defense interposed was that the note was a forgery. The jury returned a verdict for the defendant, upon which judgment was entered, and plaintiff appeals.

An examination of the record discloses the following facts: On March 21, 1919, the defendant gave a note for $40 for stock remedy to an agent of the Arlington Stock Remedy Manufacturing Company, which company was operated solely by E. O. Burroughs. This note was paid when due. At the time of the sale the agent agreed to return to defendant's home on March 24, 1919, and assist in feeding some of the stock remedy to his hogs. On March 24, 1919, which is also the date of the $600 note now in suit, Mr. Burroughs came to defendant's home, instead of the sales agent. With Mr. Burroughs was a Mr. H. J. Hammang. They remained at defendant's place about one hour, and during this time tried to induce defendant to accept an agency and sell the stock remedy for Burroughs, which offer was declined by defendant.

In regard to whether or not the note in question was

executed, defendant Low on direct examination testified as follows: "Q. Did you sign any note that day (March 24, 1919)? A. I had no dealings; didn't sign nothing with him. Q. Did you sign that note? A. No, sir. * * * Q. Did you sign exhibit 'A,' a $600 note, any time? A. No, sir." The defendant's wife, who was present when Burroughs and Hammang were at defendant's home, testified on direct examination as follows: "Q. Did he (Mr. Low) sign any note on that day (March 24, 1919)? A. He did not."

There is no evidence in the record showing that the $600 note was executed by defendant Low on March 24, 1919. When the case was tried Burroughs had disappeared, and Mr. Hammang was not called as a witness by plaintiff, and so evidently he knew nothing of the note now in suit. On March 26, 1919, Burroughs, who had been dealing with plaintiff bank for some time, discounted the note to the bank. On July 5, 1919, defendant gave a note for $800 for stock remedy, and the same was paid. On March 20, 1920, the plaintiff sent a notice to defendant that the note would be due on April 1, 1920, and asking him to remit payment. Defendant thereupon went to his banker at Scribner, Nebraska, a Mr. Keller, and had him write a letter to plaintiff regarding the matter.

On behalf of plaintiff, a banker from Omaha testified as a handwriting expert, and, after making a comparison of the signature on the note in suit with defendant's signature on several checks and tax schedules introduced in evidence, stated that in his opinion it was defendant's signature on the $600 note.

As to his transactions with the Arlington Stock Remedy Manufacturing Company, defendant Low testified as follows: "Q. Between the time of giving the $40 note on the 21st of March, and the giving of the $800 note the 5th of July, you did not have any transaction with him (Mr. Burroughs) at all of any kind? A. No, sir. Q. Did you during that time receive from the Arlington Stock Remedy

Manufacturing Company, or whatever the name is, any stock food except that that was paid for by the $40 note? A. No, sir."

The real question in the case is purely one of fact as to whether the note was genuine or a forgery. This question was submitted to the jury upon conflicting testimony. It is a well-settled principle that the verdict of a jury on conflicting testimony will not be disturbed on appeal, unless clearly wrong. In this case we cannot say the verdict is clearly wrong.

The plaintiff insists that the court erred in admitting evidence that defendant had received no consideration for the note in question. It is contended that this was clearly prejudicial to plaintiff's rights, because, under a defense of forgery, the sole question involved was the signature to the note and nothing else. Plaintiff claims that when such evidence is before the jury to the effect that the man who is to pay the note has received nothing for it, the jury know no innocent purchaser, due course of business, or any other legal proof, and only know "that a bank can lose it easier than a farmer." We see no merit in this contention. We think that evidence tending to show that, at the time the note was supposed to have been executed, no business dealings were had between defendant and the stock remedy company, and no goods received by defendant from the company under such a note as the one in suit, was competent. It seems reasonable to assume that, under this record, if defendant had given the $600 note he would have ordered some of the stock remedy under this note, instead of waiting more than three months and then giving an $800 note and ordering stock remedy under this latter note.

Complaint is made by plaintiff that the court erred in giving instruction No. 7, which is as follows: "There can be no doubt that, where a signature is placed on a bill of exchange or a promissory note under circumstances that constitute it a forgery, no liability attaches to the person whose signature it purports to be, even where the instrument has come into the hands of a holder in due course.

If an action is brought on the instrument the party has a complete and perfect defense, or he may appeal to a court of chancery for affirmative relief." It is evident that this instruction is too lengthy, but in substance it correctly stated the law to be that, if a note is a forgery, no liability is imposed on the purported signer by it, even though it has passed into the hands of an innocent purchaser in due course. We cannot see any prejudicial error in this instruction. The only question in the case, being a disputed question of fact, was properly one for the jury's determination.

We are satisfied from a careful examination of the record that the verdict and judgment of the trial court are supported by the evidence, and are right.

The judgment of the trial court is, therefore,

AFFIRMED.

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

FILED MARCH 22, 1924. No. 23663.

1. **Appeal in Equity**: PROCEDURE ON REMAND. "Where, in an equitable action, the decree of the trial court is reversed, and the case remanded generally, the situation of the parties is the same as at the beginning of the trial, and, in the exercise of a sound discretion vested in the trial court, amendments of the pleadings may be made, not inconsistent with the opinion of the appellate court, and a trial of all the issues had *de novo*." *Pinkham v. Pinkham*, 60 Neb. 600, followed.

2. **Specific Performance**: PEREQUISITES TO RELIEF. Ordinarily, a vendor in a contract for the conveyance of lands must either substantially perform or tender substantial performance of the contract before he is entitled to maintain an action for specific performance or an action of foreclosure on the contract for a breach thereof by the vendee.

3. ———: SUFFICIENCY OF EVIDENCE. Evidence examined, and *held* that the plaintiff has not tendered a substantial performance of the contract. Also, *held* that defendants are entitled to recover from plaintiff the amount paid upon the contract.

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

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

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

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

DAY, J.

This is the second appearance of this case in this court, our former opinion being reported in 109 Neb. 152. By our former opinion the judgment of the district court, granting the plaintiff the relief prayed, was reversed, for reasons therein stated, and the cause remanded for further proceedings. Upon being remanded, the plaintiff amended the prayer of his petition to conform to the views expressed in our opinion. The defendants thereupon filed answers which enlarged the defenses contained in the original answers. The second trial also resulted in a judgment in favor of the plaintiff. Defendants have again appealed.

For the purpose of a better understanding of the discussion, a brief reference to the pleadings, as well as to the controlling facts, will be made. The plaintiff, Miller, by this action sought to foreclose a land contract wherein he agreed to sell and the defendants Ruzicka to purchase a certain quarter-section of land in Holt county. The contract which forms the basis of this action was in writing, dated October 6, 1919, and was fully set out in the plaintiff's petition. The contract provided in substance that the plaintiff was to convey to the defendants on or before March 1, 1920, the Holt county land. The contract recited that the land was "valued at $24,180." The defendants upon their part were to convey to the plaintiff on or before November 1, 1919, a property in Clarkson, Nebraska, which the contract recited was "valued at $4,500." Defendants were also to turn over to the plaintiff on the date of the

contract, $1,900 in liberty bonds, which were to be received by the plaintiff in lieu of that amount in cash. They were also to pay on March 1, 1920, $2,780, the date upon which the deed to the Holt county land was to be delivered. The possession of the Holt county land was not to be given until March 1, 1921, and it was agreed that the defendants should receive a credit on the contract of $1,000 for the use of the land. For the balance, $14,000, the defendants were to execute a mortgage on the land. The contract contained the following provisions:

"The said above described property (Holt county land) to be valued at $24,180, and to be free and clear of all incumbrance, except as hereinafter stated $14,000 to be executed in mortgage or mortgages, or part assumed and part executed, same to run 5 years from March 1, 1920, at 6 per cent. net, and optional to pay $100 at interest pay days. Party of first part (plaintiff) agrees to renew above mortgage at end of 5 years. * * * All conveyances to be made by warranty deed, and deeds to be changed on or before March 1, 1920, at the Wolf Bank, Clarkson, Nebraska: Each party to furnish the other, within 30 days from date hereof, with an abstract of the property to be conveyed by him, showing a good and sufficient title to said real estate, free and clear from all incumbrance except as herein recited, $14,000 to be carried on Holt county land."

The petition alleged that on January 5, 1920, the plaintiff had executed a mortgage on the land for $6,000 in favor of Julius Duft, bearing interest at 6 per cent. payable annually, and due March 1, 1925, the mortgagor to have the option to pay $100 or any multiple thereof on any interest date. It was the theory of the plaintiff that he had tendered full performance of the contract on his part, but that defendants had failed and refused to carry out the contract, except that they had paid thereon the sum of $1,900. The plaintiff prayed for an accounting of the amount due upon the contract; that the defendants be foreclosed of their equity of redemption; and that the lands be sold as upon execution to satisfy the amount found due.

As to the Clarkson property, conforming to the views of our former opinion, the plaintiff prayed for specific performance, or for judgment for the value of the land in case the defendants were unable to convey.

The answers of the defendants pleaded lack of jurisdiction of the court, fraud on the part of the plaintiff in procuring the contract, defects in the title to the land to be conveyed by plaintiff, and also set up in greater detail than was contained in the answers on the first trial facts showing that the plaintiff had not fully performed or tendered performance of the contract. The trial court decreed specific performance of the contract as to the Clarkson property, and upon an accounting found there was due to the plaintiff upon the contract $10,780 with interest, and decreed foreclosure of the contract upon the Holt county land for said sum. It is shown that on November 7, 1919, Ruzicka notified the plaintiff that he had discovered that plaintiff had fraudulently represented the nature, quality, and value of the land, and also stated that he had learned that there was a defect in the plaintiff's title, although at that time no abstract had been furnished by the plaintiff. He also notified plaintiff that he had elected to rescind the contract, and asked for a return of the $1,900 which he had paid upon the contract. In our former opinion, it was held that the court had jurisdiction; that the objections to the title had been perfected before the decree was entered, and that that defense was not available to defendants as a basis for rescission; and that the allegations of fraud were not sustained. We held, however, that the plaintiff's remedy, so far as it affected the property which defendants were to convey to the plaintiff, was by action for specific performance, or damages for failure to perform, and that the court erred in including in the foreclosure the amount agreed upon between the parties in the contract as the value of the Clarkson property. The judgment was reversed and the cause remanded, with leave to the plaintiff to amend the prayer of his petition, and with directions "that the trial court take further proceedings in accordance herewith."

The defense that the plaintiff had not performed or tendered performance of the contract on his part, while perhaps presented by the evidence, was not passed upon in our former opinion. On the second trial the evidence which was introduced upon the first trial was offered and received in evidence, and also additional evidence relating to the defense of fraud, and evidence that the plaintiff had not fully performed his part of the contract when the cause was instituted.

It is argued by the defendants that the trial court took the position that, under our opinion and mandate, there was nothing for the court to do except to grant specific performance on the part of the defendants as to the Clarkson property, and to decree foreclosure of the contract, reducing the amount found due upon the first trial to the extent of the value of the Clarkson property. It is not entirely clear that this was the view of the court, although this might be well inferred from the judgment rendered. This, however, is not very material, as the case is before us for trial *de novo*. By our mandate it was intended that the case should be sent back for a retrial.

The rule established in this state is stated in *Pinkham v. Pinkham*, 60 Neb. 600, as follows: "Where, in an equitable action, the decree of the trial court is reversed, and the case remanded generally, the situation of the parties is the same as at the beginning of the trial, and, in the exercise of a sound discretion vested in the trial court, amendments of the pleadings may be made, not inconsistent with the opinion of the appellate court, and a trial of all the issues had *de novo*." This principle is sustained in *Badger Lumber Co. v. Holmes*, 55 Neb. 473, and *Troup v. Horbach*, 57 Neb. 644.

The record shows that on January 5, 1920, Miller and his wife executed a mortgage of $6,000 upon the Holt county land; that on February 21, 1920, Miller and his wife executed a warranty deed to the Holt county land, in which the defendants were named as grantees. The deed recited that it was "subject to one certain first mort-

gage for the principal sum of $6,000. The grantee of this deed assumes and agrees to pay the above described mortgage on said land, together with interest thereon from and after March 1, 1920; subject likewise to an existing lease on said premises for the year 1920."

The record shows that on March 1, 1920, Miller went to the bank with the deed and also a blank mortgage for $8,000 for Ruzicka to execute in favor of the plaintiff. He notified Ruzicka that he was there ready to receive the $2,780 in cash, and the deed to the Clarkson property; to deliver the deed to the Holt county land; and to have Ruzicka execute a mortgage for $8,000 on the Holt county land. Ruzicka refused to proceed with the contract.

As before stated, the plaintiff's cause of action is to foreclose a vendor's lien based upon the contract between the parties. It seems fundamental that, unless the plaintiff has substantially performed his part of the contract, or tendered a substantial performance, he would have no standing in an action to foreclose the contract, or to demand specific performance. It is the claim of the plaintiff that his readiness to deliver the deed to the defendants, and the execution by them of an $8,000 mortgage upon the land to him, together with the payment of $2,780 cash, and the conveyance by the defendants of the Clarkson property, would be a full performance of the contract. In determining whether the plaintiff had tendered full performance of the contract, it is necessary to examine the terms of the contract, as well as the acts done by plaintiff in performance thereof. Under the terms of the contract the defendants were obligated, among other things, to execute a mortgage on the Holt county land to the plaintiff for $14,000 as a part performance of the contract, or to assume a mortgage on the land for that sum, or to assume a mortgage for part of that amount and execute a mortgage for the difference between the amount assumed and $14,000. By the terms of the contract an option was reserved to the defendants to renew the mortgage of $14,000

on the same terms for an additional period of 5 years. The $6,000 mortgage described in the deed tendered by the plaintiff was dated January 5, 1920, and due March 1, 1925. By the terms of the deed tendered the grantee assumed and agreed to pay this mortgage. The mortgage bore interest at the rate of 6 per cent. payable on March 1, each year, but there is nothing in the mortgage giving the right to the mortgagor or his assigns to renew the same. It needs no argument to show that the right of renewal of a mortgage is a valuable right. Besides this, the mortgage described in the deed contained an acceleration clause. By the terms of the mortgage described in the deed, if the interest should not be paid when due, it was the right of the mortgagee to declare the whole sum due and payable, and to proceed at once to foreclose the entire mortgage. There is nothing in the contract which obligated the defendants to execute a mortgage containing such conditions. Under the contract a default in payment of the interest by the defendants would not render the entire sum due at the option of the mortgagee, or authorize the mortgagee to foreclose for the entire sum. In addition to this, the mortgage described in the deed contained a provision that, if the interest was not paid when due, the deferred payment should draw interest at the rate of 10 per cent. after due. The contract did not require the defendants to assent to a mortgage containing such provisions. If the defendants had accepted the deed tendered by the plaintiff, they would have assumed entirely different obligations from those contained in the contract. It seems plain to us that the tender of the deed in the form it was drawn was not a substantial compliance with the contract on the part of the plaintiff, and, therefore, he was not in a position to demand a foreclosure of a contract which he himself had not performed, or tendered performance. It is true that the $6,000 mortgage could have been paid off at any interest pay day, but this does not relieve the situation. The defendants might not be in a position to secure a new loan on the terms of the contract.

In this discussion we have rather assumed that our former opinion was controlling upon the question of fraud, as well as the defects in the plaintiff's title, because upon these questions the evidence is practically the same upon both trials.

The defendants also argue that the mortgage described in the deed required the mortgagor to pay taxes upon the mortgage, and that this was in contravention of the terms of the contract. The contract is not clearly expressed. With respect to the $14,000 mortgage, the contract recites, interest "6 per cent. net." There was no explanation as to whether this was a well-understood term in real estate transactions. Whether this was a violation of the terms of the contract, we deem it unnecessary to determine, in view of the questions heretofore discussed. From a consideration of the record, we are satisfied that the plaintiff has not tendered substantial performance of the contract on his part, and is, therefore, in no position to demand a foreclosure of the contract, or the specific performance thereof. We think the judgment should have been in favor of the defendants upon the issues presented, and that the defendants should have judgment against the plaintiff for $1,900 paid upon the contract, with interest thereon at 7 per cent. from October 6, 1919.

The judgment of the district court is reversed, and the cause remanded, with directions to enter judgment denying to the plaintiff the relief prayed, and to enter a judgment in favor of the defendants and against the plaintiff for $1,900 with interest thereon at 7 per cent. from October 6, 1919.

REVERSED, WITH DIRECTIONS.

J. WARREN KEIFER, JR., APPELLANT, V. ARTHUR J. STANLEY, APPELLEE.

FILED MARCH 22, 1924. No. 22676.

1. Waters: DIVERSION: LIABILITY. If, for the protection of his own lands, a person, by means of a dam or dike across the

channel of a stream, diverts the waters thereof onto the lands of another, where such waters, but for the dam or dike, would not have flowed, he is liable in damages for the injuries inflicted by the diverted waters.

2. Appeal: INSTRUCTIONS: PREJUDICIAL ERROR. The submission to the jury of an affirmative defense, not supported by the evidence, if calculated to mislead the jury, is prejudicial error.

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

Buck & Brubaker and *Stewart, Perry & Stewart,* for appellant.

F. H. Stubbs, contra.

Heard before MORRISSSEY, C. J., LETTON, ROSE, DAY, DEAN, and GOOD, JJ., ELDRED, District Judge.

GOOD, J.

Plaintiff brought this action to recover damages to his land and crops, caused, as he avers, by the wrongful act of defendant in damming and obstructing the flow of water in the natural channel of Oak creek in such a manner as to divert and cast the waters of the creek upon plaintiff's lands.

Defendant in his answer denied all the allegations of the petition save those relating to the ownership of the farms of the respective parties, and for a further defense alleged that "if plaintiff's lands were flooded, or his lands or crops damaged, such flooding and damage were caused without any fault, blame or negligence on defendant's part, but on account of a terrific, sudden and unprecedented rainstorm which occurred in that vicinity at that time and which could not have been anticipated or guarded against by this defendant." In his reply plaintiff denied the affirmative averments of the answer. The trial resulted in a verdict and judgment thereon for defendant. Plaintiff has appealed.

Defendant owns the northwest quarter and plaintiff owns

the northeast quarter of section 27, township 1 north, range 8 west of the 6th P. M., in Nuckolls county, Nebraska, and at the time of the occurrence complained of plaintiff owned the crops on the quarter-section immediately east of his own farm. The farms of plaintiff and defendant are along the south bluff of the Republican river and approximately the north half of each farm is in the valley at the foot of the bluff. For convenience, these parts of the farms will hereinafter be referred to as the valley eighties of plaintiff and defendant. The valley eighties slope to the north and east. Oak creek is a small stream, with its source some distance south of the lands in question. It comes down the bluff into the valley of the Republican river at a point near the southeast corner of defendant's valley eighty, and in its natural course runs north across the east end of this eighty onto the section immediately north, then turns in an easterly course for a half mile or more, then turns to the southeast and runs across the northeast corner of plaintiff's valley eight onto and across the northwest quarter of section 26. Dry creek is a somewhat smaller stream that comes down the river bluff onto plaintiff's land at a point near the southwest corner of his valley eighty, and its natural course from that point is in a southeasterly direction over this eighty. Some time prior to the acts complained of, a drainage ditch had been constructed along the west and north borders of plaintiff's valley eighty and a dike constructed across the channel of Dry creek, near where it emerges from the bluff, and its waters were turned into this drainage district so that the water of this creek flows in this ditch along the west edge of plaintiff's valley eighty to the northwest corner thereof, thence due east in the ditch until it intersects Oak creek at the point where it crosses the northeast corner of plaintiff's valley eighty. A dike or dam was constructed across the natural channel of Oak creek on defendant's land at a point near the southeast corner of defendant's valley eighty, and the waters of this creek diverted from the natural channel and directly east into the drainage ditch on plaintiff's land. On July

4, 1921, a heavy rain-storm occurred in the vicinity, and the drainage ditch did not have sufficient capacity to carry the waters from the two creeks. The waters overflowed the dikes along the drainage ditch and flooded plaintiff's lands and caused the injury complained of.

Defendant did not allege, nor does the record disclose, that he had acquired any right to divert the waters of Oak creek into the drainage ditch on plaintiff's land. On July 4, 1921, plaintiff's wheat crop on a part of his valley eighty had been cut and partly shocked, when that eighty was flooded by the waters overflowing the dikes of the drainage ditch. That plaintiff suffered material damage to his wheat crop is established beyond question.

A number of errors are attempted to be assigned, but most of them are too vague and indefinite to be considered. However, two of them are sufficiently specific to require attention: (1) That the verdict is not sustained by the evidence; and (2) that the court erred in submitting to the jury the defense that the damage was caused by the act of God. Defendant contends that the damage to plaintiff's crop was caused by the waters of Dry creek. The evidence shows that some of the water of Dry creek did overflow onto plaintiff's land above the place where the diverted water of Oak creek enters the drainage district. This may, in some measure, have contributed to the plaintiff's injury, but such fact would not have the effect of relieving the defendant of liability for any increased damage, due to the additional waters from Oak creek, which defendant caused to flow over plaintiff's land.

If, for the protection of his own lands, a person, by means of a dam or dike across the channel of a stream, diverts the waters thereof onto the lands of another, where such waters, but for the dam or dike, would not have flowed, he is liable in damages for the injuries inflicted by the diverted waters. *Kane v. Bowden*, 85 Neb. 347; *Nelson v. Wirthele*, 88 Neb. 595; *Taylor v. Chesapeake & O. R. Co.*, 84 W. Va. 442, 7 A. L. R. 112; 40 Cyc. 576-578. In view of the case as made, plaintiff was entitled to a verdict in some

amount. The verdict is, therefore, contrary to and not sustained by the evidence.

By its instructions, the court submitted to the jury the defense that plaintiff's damage was caused by such a sudden and unprecedented rain-storm that it could not have been anticipated or guarded against. While the evidence shows that plaintiff's lands were overflowed by a great volume of water, there is no evidence that the rainfall was unprecedented or unusual. One witness testified that he kept a rain gauge and that the rainfall of that day was 1.27 inches. Other witnesses designated the rain as a shower. No one testified that the rainfall was even unusually heavy. There was no evidence to sustain the affirmative defense. It is error to submit to the jury an affirmative defense that is not supported by the evidence. *Suiter v. Chicago, R. I. & P. R. Co.*, 84 Neb. 256; *Wallenburg v. Missouri P. R. Co.*, 86 Neb. 642. The submission to the jury of the affirmative defense was an implied suggestion that the court considered that there was sufficient evidence to support a finding thereon for defendant, and was calculated to mislead the jury. This error was prejudicial.

Since the cause must be remanded, it may not be amiss to call attention to another feature of the case. Plaintiff complained of damage to a crop of alfalfa on the northwest quarter of section 26. The record discloses that, if Oak creek had been permitted to flow in its natural channel, all of the waters of Oak creek, together with all of the waters of Dry creek, would have run over and across this land. We do not see how it could be material to plaintiff whether the water that thus reached the land was conveyed thither through the natural channel or through the drainage ditch, since the drainage ditch emptied into the natural channel at a point above this tract of land. The land in the northwest quarter of section 26 was subject to the burden of all the water of Oak creek and Dry creek. Upon the record as presented, defendant was entitled to a directed verdict as to any damage occurring to the crops on the northwest quarter of section 26.

For the reasons stated in the opinion, the judgment of the district court is reversed and the cause remanded.

REVERSED.

SOPHIA C. GIBSON, APPELLEE, V. GLENS FALLS INSURANCE COMPANY, APPELLANT.

FILED MARCH 22, 1924. No. 22699.

1. Insurance: MEASURE OF RECOVERY. In an action on a nonvalued policy of insurance against loss by theft and fire to an automobile, where there has been a total loss, the measure of recovery is the actual market value of the automobile at the time the loss occurs.
2. Trial: INSTRUCTIONS. It is not error for the court in an instruction to assume as true facts that are established by the evidence without controversy.
3. Insurance: RECOVERY: DEDUCTION OF SALVAGE. When an insurance company, after damage to personal property, which it has insured against loss by theft and fire, takes and retains possession of the damaged property, it is not entitled, in an action on the policy, to have the value of the salvage deducted from the actual market value of the property at the time of loss.

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

DeLamatre & DeLamatre, for appellant.

Arthur C. Pancoast, contra.

Heard before MORRISSEY, C. J., ROSE, DAY and GOOD, JJ., ELDRED, District Judge.

GOOD, J.

This is an action on a nonvalued insurance policy, which insured plaintiff against loss by theft and fire to her second-hand automobile. On the trial plaintiff recovered a verdict and judgment thereon for $837.33. Defendant has appealed.

The policy was issued April 28, 1920, and insured plaintiff to the amount of $900 against loss. The car was stolen

March 20, 1921. A few days later the charred remains of the car were found about 12 miles distant from the scene of the theft.

Several errors are assigned, but on oral argument defendant conceded that it relies on but three of the assignments, namely: Error in giving instructions 7 and 8; and that the verdict is excessive.

The seventh instruction is as follows: "You are instructed that, where the value of an automobile at the time of insurance is fixed or determined, the only diminution on the value thereof which should be considered in determining the loss for which payment can be demanded as insurance is the inherent depreciation in the machine itself, due to injury or damage accruing to it subsequent to the date of the policy."

One of the provisions of the policy is as follows: "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused."

Under this provision of the policy and of the law applicable thereto, the giving of the seventh instruction was manifest error, since it permitted the jury to measure the plaintiff's recovery by the value of the car at the time the policy was issued, less inherent depreciation in the machine itself, due to injury or damage accruing to it subsequent to the date of the policy. Our statute does not require a valued policy upon personal property; nor did the contract of insurance provide for a valued policy, but to the contrary. The true rule for the measure of recovery on a policy of this kind, under our law, where there has been a total loss, is the actual market value of the property at the time the loss occurs. Should the loss be only partial, then the measure of recovery would be the difference between the actual market value of the insured property immediately before and immediately after the damage or injury thereto occurs.

It will be observed that the car was stolen and burned almost a year after the issuance of the policy. It is a matter of common knowledge that automobiles will deteriorate and depreciate in value by reason of ordinary use. A car with ordinary and careful usage would depreciate in value to some extent, while greater and harder usage would naturally depreciate its value to a greater extent. It is also a matter of common knowledge that automobiles may depreciate in value very greatly within the period of a year because of a general decline in automobile prices.

The instruction given seems to have been based upon the case of *Siegle v. Phœnix Ins. Co.*, 107 Mo. App. 456; but that case was based upon a Missouri statute, which provided: "No company shall take a risk on any property in this state at a greater ratio than three-fourths of the value of the property insured, and when taken its value shall not be questioned." In *Gibson v. Missouri Town Mutual Ins. Co.*, 82 Mo. App. 515, 521, it was held that the practical effect of the statute was to make a valued policy. There is no statute of the same import in Nebraska.

Defendant criticises the eighth instruction because it assumes that the car was stolen and burned on the 20th of March, 1921, and did not leave that question to be determined by the jury. The undisputed evidence shows this fact to be true, and no error was, therefore, committed in assuming the fact which was established without controversy.

The eighth instruction is further criticised because it does not tell the jury to deduct from the value of the car the value of the wreckage or salvage. The evidence shows that, upon finding the remains of the car after it had been stolen and burned, possession thereof was taken and retained by defendant. When an insurance company, after damage to property on which it holds a policy of insurance, takes possession of the damaged property and retains the same, it is not entitled, in the measurement of damages in an action upon the policy, to have any deduc-

tion made because of the salvage. The giving of instruction No. 8 was not erroneous.

Defendant also complains that the verdict is excessive. This contention, we think, would be entirely without merit, if the case had been submitted to the jury upon proper instructions. The evidence on behalf of plaintiff tended to show the value of the car was in excess of the amount of the verdict, while the evidence on the part of the defendant tended to show its value was much less than the verdict. A verdict based upon conflicting evidence will not be disturbed unless clearly wrong.

The only substantial error that was prejudicial to the defendant related to the measure of recovery. Defendant, itself, offered competent evidence tending to show that the value of the car at the time of the loss was $550. It is evident that, if the jury had returned a verdict fixing the amount of plaintiff's recovery at $550, together with interest at 7 per cent. from the date of the loss to the date of the verdict, the defendant would have suffered no prejudice. This amount would be $576.20.

The judgment will be affirmed on condition that plaintiff shall, within 20 days, enter a remittitur of all in excess of $576.20. Otherwise, it will be reversed and remanded for a new trial.

AFFIRMED ON CONDITION.

TORRENCE E. BACON, APPELLEE, V. A. B. A. INDEPENDENT OIL & GASOLINE COMPANY ET AL., APPELLANTS.

FILED MARCH 22, 1924. No. 22740.

1. **Explosives:** PROBABLE CAUSE. When gasoline, while being pumped into a motorcycle tank, is ignited, and the evidence shows but one potential or probable cause therefor, the jury are warranted in finding that the gasoline was ignited by such potential or probable cause.

2. ———: CARE REQUIRED IN HANDLING. One who operates at night a gasoline filling station, adjacent to a public highway, is chargeable with knowledge that patrons, driving into the station at night with motor vehicles, are required to have them

equipped with lighted lamps, and owes a duty to his patrons to exercise reasonable care to ascertain whether the lamps on the vehicle are of such a character and in such close proximity to the gas tank on the motor vehicle as to be liable to ignite the gasoline while being pumped into the tank, and thereby cause injury to the patron.

3. Appeal: REVIEW. This court cannot consider alleged misconduct of the jury when the evidence relating thereto is not contained in the bill of exceptions.

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

R. F. Stout, for appellants.

Wilmer B. Comstock, contra.

Heard before MORRISSEY, C. J., ROSE, DAY and GOOD, JJ., REDICK, District Judge.

GOOD, J.

This is an action to recover damages for personal injuries resulting from alleged negligence of defendant. Plaintiff recovered a judgment, and defendant has appealed.

The record discloses, without substantial dispute, the following pertinent facts: Defendant operates a gasoline filling station in the city of Lincoln, Nebraska. Plaintiff owned a motorcycle, equipped with a presto lamp and propelled by a gasoline engine, which he had owned for about two months at the time of the injuries complained of. About 8:30 at night plaintiff rode his motorcycle into defendant's filling station and stopped adjacent to one of the gasoline pumps, and removed the cap from the gasoline tank on his motorcycle, preparatory to being supplied with gasoline. The presto lamp on the front of the vehicle was lighted. This was the first occasion on which plaintiff had had his motorcycle tank filled with gasoline at night, and he testified that he did not know that it was dangerous to fill the tank, with the presto light burning. Defendant's servant came out of the office, and neither

looked to see whether the light on the vehicle was burning nor made any inquiries concerning it, but asked plaintiff how much gasoline he wanted. On being informed of the amount desired, he took the hose that is used to convey gasoline from the pump to the vehicle tank and either placed the nozzle in the intake or handed it to plaintiff to place therein. Defendant's servant then began pumping the gasoline into the motorcycle tank, and almost immediately a flame came from the gas tank of the motorcycle, and plaintiff was severely burned and thereby received the injuries complained of in this action.

The negligence complained of is that defendant knew the danger incident to filling the tank on the motorcycle with gasoline while the lights were burning, and knew, or by the exercise of due care should have known, that the light on plaintiff's motorcycle was burning, and that the gasoline was likely to become ignited from said light and thereby injure the plaintiff. Defendant denied any negligence, and alleged contributory negligence on the part of plaintiff. The defendant alleges error in the admission of testimony; that the verdict is not sustained by the evidence; and misconduct of the jury.

A witness was produced, who had had considerable experience in working in and about gasoline filling stations, who was permitted to testify that he knew that it was dangerous to fill a motorcycle tank with gasoline while the presto light thereon was burning. The witness was evidently familiar with gasoline and its volatile and inflammable qualities and knew that it was dangerous to have a flame in close proximity thereto. We perceive no error in the admission of this testimony.

Defendant argues that there is no evidence to show that the gasoline was ignited by the flame from the motorcycle lamp and that the jury were left to conjecture as to the cause of the gasoline becoming ignited. The evidence does not disclose the exact distance that the presto lamp was from the intake of the gas tank on the motorcycle, but there is sufficient evidence to indicate that it could not have been

more than two feet. No other cause for, or source of, ignition than the presto lamp was shown to exist.

"When a cause is shown which might produce an accident in a certain way, and an accident happens in that manner, it is a warrantable presumption, in the absence of showing of other cause, that the one known was the operative agency in bringing about the result." *Brownfield v. Chicago, R. I. & P. R. Co.*, 107 Ia. 254, 258. See *Settle v. St. Louis & S. F. R. Co.*, 127 Mo. 336; *Riley v. Cudahy Packing Co.*, 82 Neb. 319; *Gould v. Merrill Railway & Lighting Co.*, 139 Wis. 433. In the instant case the evidence discloses that the burning light was a potential and probable cause of the ignition of the gasoline. No other potential or probable cause was shown. It is not necessary that the evidence exclude every possible cause of the fire. The jury were not left to conjecture, but were permitted to and did draw a warranted inference from the facts proved, viz., that the lighted presto lamp set fire to the gasoline.

Defendant earnestly urges that it was in no way remiss in any duty or obligation to the plaintiff, and was, therefore, not guilty of actionable negligence. The court cannot adopt this view. The defendant was operating a gasoline filling station for its own profit. It was dealing in a volatile and inflammable commodity. It knew, or should have known, that it was dangerous to pump gasoline into a tank in close proximity to a burning gas lamp. It was also chargeable with knowledge that every operator of a motor vehicle is required to have it equipped with lamps and to have them lighted when driving on the highway at night. Defendant's filling station was immediately adjacent to the highway. It knew, or should have known, that every patron driving into its filling station at night would have the lamps on his vehicle lighted. It is a matter of common knowledge that many of the motor vehicles are equipped with presto lamps. Defendant must have known of this fact. One operating a gasoline filling station, to which all persons, with every character of motor vehicle, are invited to come and be supplied with gasoline,

owes a duty to exercise ordinary care to prevent injury to his patrons while being served. It was defendant's duty to exercise reasonable care to prevent an explosion or ignition of gasoline when delivering to its patrons. Knowing that the motor vehicle is equipped at night with burning lights, it was its duty not to pour or pump the gasoline into the tank in such close proximity to a burning gas light as to render an explosion or ignition of the gasoline probable. The evidence discloses that the defendant took no precaution to see that no burning lamp was near at the time it was delivering the gasoline to the plaintiff. We think the facts disclosed were sufficient to warrant the jury in finding that the defendant was negligent.

The question of whether the plaintiff was guilty of contributory negligence was one of fact for the jury, and, upon the facts disclosed, we are unable to say that their finding is not supported by the evidence.

Misconduct of the jury is assigned as error. This presents a question of fact. The evidence upon this question is not preserved in the bill of exceptions and cannot, therefore be considered.

No reversible error is apparent, and the judgment is

AFFIRMED.

FRANCES E. FORD, APPELLEE, V. BOYD COUNTY, APPELLANT.

FILED MARCH 22, 1924. No. 23019.

1. **Statutes**: PROVISO. The office of a proviso in a statute is usually to modify the operation of that part of the statute immediately preceding the proviso, or to except something from the operation of the statute which would otherwise have been within it.
2. **Officers**: CLERKS OF COUNTY COURTS. The proviso in section 2395, Comp. St. 1922, contemplates that in counties having a population in excess of 3,000, if the county board deems it necessary, an assistant, who shall be the clerk of the county court, may be appointed, regardless of the amount of the fees earned by the office, and that the salary of such clerk shall be paid out of the county general fund.
3. ———: REAPPOINTMENT. Where a person is appointed to an of-

fice, pursuant to the provisions of a statute then in force authorizing such appointment, and during his incumbency of the office the statute is repealed, but like provisions for the appointment are contained in the repealing act, no reappointment of such official is necessary, since the reenactment of the old law into the new is, in effect, a continuation of the law under which he was appointed.

4. Pleading: "DULY APPOINTED." In an action against a county to recover salary, claimed to be due to an appointive officer, an allegation in the petition that he was duly and legally appointed signifies that his appointment was regularly made and in conformity with the requirements of the law.

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

D. A. Harrington, for appellant.

J. A. Donohoe and *W. T. Wills, contra.*

Heard before MORRISSEY, C. J., ROSE, DAY and GOOD, JJ., ELDRED, District Judge.

GOOD, J.

From a disallowance by the county board of her claim for salary as clerk of the county court for Boyd county from the 14th day of April, 1921, to and including the 31st day of December, 1921, plaintiff appealed to the district court. On a trial in that court, plaintiff recovered a judgment, and defendant appeals.

On the 12th day of January, 1921, while in regular session, the county board of Boyd county approved the appointment of plaintiff as clerk in the county judge's office and fixed her salary at $720 for the year 1921. Plaintiff continued to perform the duties of clerk of the county court during the entire year and received a salary until the 14th day of April, 1921, since which date the county board has refused to allow her salary. Her appointment as clerk of the county court has never been revoked; nor has the action of the county board, in approving her appointment and fixing her salary, been rescinded. The controversy

arises because of the amendment to the statute under which plaintiff was appointed to her position.

Chapter 98, Laws 1921, became effective on the 14th day of April of that year. Section 2 of that act, being 2395, Comp. St. 1922, is in part as follows:

"Every county judge shall have such assistants to be appointed by him as the county board shall deem necessary, whose compensation shall be fixed by the county board not to exceed the fees of the office in excess of the salary of the county judge at not more than the following schedule, and shall be paid monthly out of the fees of the office: *Provided,* however, in counties having more than 3,000 population the county judge may have one assistant who shall be the clerk of the county court if the county board deems it necessary. * * * In counties having more than 6,000 and less than 16,000 population, $1,000."

Boyd county has a population of more than 6,000 and less than 16,000 population. The salary of the county judge in counties having more than 6,000 and less than 16,000 population is fixed at $1,900. The fees of the county judge of Boyd county for 1921 were $1,902. Defendant contends that under the section above quoted the county board had no authority to allow a salary to the clerk of the county court unless the fees of the office were sufficient, over and above the amount of salary that the county judge received, to pay the salary of such clerk.

The solution of this question depends upon the construction to be given to that part of section 2395 above quoted. We think the intention of the legislature was to provide as many assistants to the county judge as the county board should deem necessary, and generally limiting the payment of their salaries to the excess in fees over the amount of the county judge's salary; but we also think the legislature did not intend to put such a limitation upon the payment of salary to one assistant, to be the clerk of the county court, if the county board deemed it necessary. The office of a proviso in a statute is usually to modify the operation of that part of the statute immediately preceding the pro-

viso, or to except something from the operation of the statute which would otherwise have been within it. 36 Cyc. 1161, 1162; 25 R. C. L. 985, sec. 232. The proviso in section 2395 clearly contemplates that in counties having a population in excess of 3,000, if the county board deems it necessary, an assistant, who shall be the clerk of the county court, shall be appointed, regardless of the amount of fees earned by the office, and that the salary of such clerk shall be paid out of the county general fund.

Defendant contends that plaintiff's appointment was valid only until the taking effect of section 2395, Comp. St. 1922, and that thereafter she was not authorized to act as clerk of the county court, because she was not reappointed and there was no approval of the appointment nor salary fixed by the county board after the new act took effect. We think this position is untenable. The law in force in 1919 authorized the appointment of an assistant to act as clerk of the county court, and further provided that such appointment should be approved and salary fixed by the county board. While the law of 1919 (Laws 1919, ch. 201) was repealed, yet these provisions, in effect, were carried forward and reenacted into the law of 1921. The provisions of section 2395, relative to the appointment of a clerk of the county court and the fixing of salary, was but a continuation of the law previously in force. Under the circumstances, no new appointment was necessary. *Gage County v. Wright*, 86 Neb. 347; 36 Cyc. 1223.

Defendant further contends that the petition did not state a cause of action, because it was not alleged that plaintiff had qualified by taking the oath of office, required by the statute. The petition alleged that plaintiff was duly and legally appointed and that she had acted as such officer and performed the duties of the office, and, in fact, salary was paid from the time of that appointment until the 14th day of April, 1921. The words "duly and legally appointed" signify and mean that the appointment was regularly made and in conformity with the requirements of the law. *Rogers v. Trumble*, 86 Neb. 316. If defendant desired to raise

the question that the plaintiff had not qualified by taking the oath of office, it should either have moved for a more specific statement of the petition, or have made a direct allegation to that effect in its answer.

We find no error in the record. The judgment is

AFFIRMED.

ALFRED M. LONGMAN, RECEIVER, APPELLANT, V. JOHN U. POPE, APPELLEE.

FILED MARCH 22, 1924. No. 22687.

1. **Appeal:** REVIEW. A litigant cannot complain of an error which he himself invites. Where a party requests a trial court to give instructions framed upon a certain theory, he cannot thereafter be heard to complain that the court gave other instructions proceeding upon the same theory.
2. **Witnesses:** CROSS-EXAMINATION. "The trial court has a certain discretion in determining the limits of cross-examination, and reasonable limitation with respect to matters not necessarily material, in the exercise of such discretion, is not erroneous." *Gatzemeyer v. Peterson*, 68 Neb. 832.
3. **Evidence:** examined, and *held* sufficient to sustain verdict.

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

Peterson & Devoe and *William R. Patrick*, for appellant.

Byron Clark, H. E. Kuppinger and *T. J. McGuire, contra.*

Heard before MORRISSEY, C. J., ROSE, DAY and GOOD, JJ., ELDRED, District Judge.

ELDRED, District Judge.

The Farmers State Bank of Springfield sued John U. Pope on a note of $3,000 alleged to have been executed November 21, 1919, by the defendant, payable to himself, due in one year, and which it is alleged he, on the same day, for a valuable consideration, indorsed and delivered to Bankers Brokerage Company, of Lincoln, Nebraska. The petition further alleges:

"Thereafter and before maturity thereof, the plaintiff, for a valuable consideration and in the regular course of business, purchased said promissory note from said Bankers Brokerage Company, without notice or knowledge of any existing equities, defenses or infirmities in said paper, and is now the owner and holder thereof."

The answer is a general denial. There was a verdict and judgment for the defendant. The plaintiff appeals.

The first assignment of error relates to the sufficiency of the evidence to support the judgment, which will be referred to later. By assignments 2 and 3 errors are charged in giving to the jury instructions Nos. 3 and 4. Instruction No. 3 quotes section 4663, Comp. St. 1922, and adds the following:

"In this connection you are instructed that the positive statements of the plaintiff's officers as to their actions in purchasing the note in question are not necessarily to be taken as conclusive by the jury, but you should consider all of the circumstances and facts known and given in evidence and determine from all the facts and circumstances surrounding the alleged purchase, together with statements of the plaintiff as to whether or not plaintiff is such *bona fide* purchaser."

This instruction is in harmony with the rule announced in *Nebraska State Bank v. Walker, ante, p.* 203. But it is strongly urged that the question of good faith in the transfer, under the pleadings, was not a material issue. Had not the plaintiff itself by its petition, by the evidence it offered, and the instructions it tendered, made it an issue, there would have been merit in the criticism made. The plaintiff by its petition made that question an issue. Evidence as to the good faith of this transfer was first offered by the plaintiff on direct examination of its first witness; the issue was insisted upon by the plaintiff at the close of the evidence, by requesting instructions to the jury. The plaintiff requested five instructions, and three of them embody the proposition of the good faith of the plaintiff's purchase. The instruction complained of

presented to the jury an issue and proposition first injected and brought into the action by the plaintiff itself. The case having been tried and submitted on plaintiff's own theory, it cannot now successfully contend that the issue submitted was immaterial. If the instruction was erroneous, on account of embodying an immaterial issue, it was an invited error of which plaintiff cannot complain. *Schrandt v. Young,* 62 Neb. 254.

Complaint is made of the use of the word "known" in instruction No. 3, in the clause "circumstances and facts known and given in evidence;" but we think the clause is not vulnerable to the criticism made. A fair construction of the clause implies that the circumstances and facts referred to must be known, not from some outside source, but those "known and given in evidence."

Instruction No. 4 quotes section 4634, Comp. St. 1922, and further advises the jury, in substance, that, if the plaintiff failed to prove by a preponderance of the evidence that the defendant signed the note sued upon, the plaintiff could not recover, even if they found the plaintiff was an innocent holder of the note in due course. The complaint of this instruction by the appellee is that it submitted to the jury the question of whether the plaintiff was the holder in due course of the note in controversy, and thereby sought to impress upon the minds of the jury that the issue was controverted, or at least that there was sufficient evidence to justify the finding adverse to the plaintiff in relation thereto. We cannot adopt this view. The defense in this case was forgery. The plaintiff having pleaded that it was a holder in due course, and having offered evidence in support of such allegation, the instruction was a correct statement of the law, and under the circumstances in this case, evidence of good faith having been offered, was properly given to the jury. Had this or some similar instruction not been given, the jury might readily have reached the wrong conclusion as to the rights of a holder in due course of a forged note.

By instruction No. 2, requested by the plaintiff and re-

fused by the court, the court was requested, in substance, to advise the jury that the undisputed evidence established that the plaintiff was the holder of the note in question in due course of business. Such an instruction, under the facts in this case, might have been misleading to the jury, and was properly refused.

Instruction No. 3, requested by the defendant, was as follows: "You are instructed that the instrument upon which this suit is brought is a negotiable promissory note, payable to bearer and transferable by delivery without further indorsements." The note in suit was not payable to bearer, unless the name of John U. Pope, indorsed thereon, was his genuine signature. In the form presented the request was properly refused. Before the note in question could have been treated as a note payable to bearer, the jury must have first found that the indorsement of the name of John U. Pope thereon was genuine.

Instructions 4 and 5, requested by plaintiff, covered the proposition as to what constitutes a good faith purchaser. While correct as abstract statements of law, they refer to the same subject covered by instruction No. 3, given to the jury, which the plaintiff now insists was an immaterial matter. Had they been given, it would have emphasized any possible error in instruction No. 3, given by the court. Their refusal was not prejudicial.

Complaint is made of the ruling of the court in sustaining objections to certain questions on cross-examination of plaintiff as to the genuineness of the signature on a document not involved in this case, except as it was desired for comparison. Witness had not admitted the signature on the instrument inquired about.

Complaint is also made of rulings of the court in excluding questions on cross-examination of the witness Holbrook, who was called as an expert on handwriting. The questions went to previous experience and qualifications of the witness. The cross-examination of both of these witnesses was liberal; in fact, quite extended. The extent to which cross-examination may be extended as to matters

not necessarily material is largely within the discretion of the trial court. *Gatzemeyer v. Peterson,* 68 Neb. 832.

The remaining assignments of error go to the sufficiency of the evidence to sustain the verdict and judgment. Some days prior to the transaction in question the defendant had bought stock in the Bankers Fire Insurance Company to the amount of $1,000. It appears that, on the date the note in controversy is alleged to have been given, a stock salesman by the name of Earl Saxe, representing the Bankers Brokerage Company, and a companion by the name of Louis Bates called upon the defendant and desired to sell him an additional $5,000 worth of stock in the Bankers Fire Insurance Company, but he told them he did not want to buy; that Saxe stated to the defendant that, if he would take that $5,000 worth, no note was desired and no interest, only sign an application, and he would resell it in 90 days, just hold it for him, and if he did not resell it, he would buy it. The transaction took place in the home of the defendant. There were present Saxe, Bates, the defendant, and his family. The defendant denies that he signed the note sued upon, but claims that he signed an application for stock on that date, the application being on white paper. Defendant's statements as to what was said by Saxe, and what transpired at the time in question, and the color of the paper signed, is corroborated by John Pope, a son, and Miss E. Pope, a daughter. His statement that he signed the application for stock is also corroborated by the fact that a receipt offered in evidence was sent from Lincoln on November 22, acknowledging the receipt of the application for stock. Bates testified, with reference to the alleged signing, that at that time they passed to the other side of the room, and he acted as though he was going to sign, and Saxe took from his pocket two blue papers, and he saw Pope write his name there, but they were off quite a distance when he was writing. He did not testify that he saw Pope write his name upon the particular document in suit. It is significant that Earl Saxe was not produced as a witness to the alleged execution of the note.

There was also evidence of the president of the plaintiff bank and two other witnesses on behalf of the plaintiff, and one on behalf of the defendant, who testified as experts as to the handwriting on the note in controversy. After careful examination of the record in this case, we conclude that there was ample evidence before the jury to justify the verdict rendered. The verdict having been rendered upon a disputed question of fact, on conflicting evidence, it should not be disturbed.

AFFIRMED.

GUY LIGGETT, APPELLEE, V. J. T. BERTWELL, APPELLANT,

FILED MARCH 22, 1924. No. 22692.

Contract construed, evidence examined, and *held*, insufficient to sustain the verdict.

APPEAL from the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Reversed and remanded, with directions to dismiss.*

Kennedy, Holland, DeLacy & McLaughlin, for appellant.

Edward R. Burke, contra.

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

REDICK, District Judge.

The petition in this case counts upon an oral contract, whereby it is alleged that the defendant agreed upon a certain contingency to repurchase from the plaintiff 50 shares of stock of the Omaha Refining Company at the par value of $100 a share. The defendant denies the existence of any parol contract, and alleges that the same was in writing. The circumstances out of which the suit arises are substantially as follows: Sometime prior to November 1, 1919, defendant approached plaintiff for the purpose of inducing him to purchase the 50 shares above mentioned, which plaintiff agreed to take und· · considera-

tion. At a subsequent meeting plaintiff suggested that, if he could buy his gasoline from the Omaha Refining Company at wholesale, he would purchase the 50 shares. Defendant replied that the only way in which that could be accomplished would be for the company to put in a filling station on the premises of the plaintiff so as to give him the status of a dealer, and that the company would do that. It finally resulted that the filling station was erected, plaintiff purchased the stock, paying $1,000 cash and a note for the balance which he finally paid and on November 1, 1920, a contract in writing was entered into between the refining company and plaintiff, appointing plaintiff agent for the sale of the company's oils for the period of one year, with the right to either party to cancel the same upon 30 days' notice. This contract was never canceled and the parties operated under it without serious complaint until some time in October, 1920, when some difficulties arose, which will be referred to later in more detail.

Substantially the entire testimony of the complaint upon the subject of the oral contract is contained in the answer to the following question put by his counsel: "Now, I will ask you to state fully what Mr. Bertwell said at that time, and what you said, in reference to the purchase of stock. * * * A. Well, I turned him down on his first call, and decided that I would not invest in it. A short time later he came back, and put the proposition up to me again; and at the same time proposed to sell my firm gasoline. I says, 'Unless you can make us a better price than we are getting I can't afford to change and buy gasoline from a new firm, because I don't know whether they would be able to supply me every time I want it.' He finally made me a proposition that, if I would buy this $5,000 of stock, they would put in a filling station at our plant, and sell me gasoline at the wholesale prices. We were using from 2,000 to 3,000 gallons of gasoline a month; and the wholesale prices would give us a one cent reduction in gas; and a graduated reduction of from $5 a month up, owing to the volume of gasoline used, would make us a saving of any-

where from a cent and a half to two cents a gallon. Well, I figured it would save us at least $40 a month the year around, which would make about $480 a year. * * * I says, 'If you will give me a proposition in writing, whereby, if for any reason your company ever quits furnishing me gasoline at reduced prices, that you will buy my stock back at par,' and I took a piece of paper, and wrote down just what I wanted. 'Now,' I says, 'If you will sign that personally, I will give you an order for $5,000 of stock.' He took my memorandum and went away, and the next day came back with it typewritten just what I had written, with it typed on the company's stationery, and signed by him personally, agreeing to buy my stock back, if for any reason they quit furnishing us gasoline; and I gave him my note for $5,000 and he sent me the stock."

Defendant testifies that there was nothing said about the quantity of gasoline to be furnished or an uninterrupted supply sufficient for plaintiff's needs (in fact plaintiff does not testify to any such agreement—see his evidence quoted later), and denies that any agreement was made in the language claimed by plaintiff, but gives his version of the conversation as follows: "After the stock was written and delivered, as I remember the matter now, he came to me, and he said, 'I want—I believe it would be better for me to have that in writing.' I said, 'All right, I will put it in writing, the way I understand it.' I gave him the letter that has been read to you five days after the stock was delivered, or written, dated and delivered." The letter referred to, and which defendant claims was the only contract between the parties, is as follows:

"November 5, 1919.

"Mr. Guy Liggett, 1515 Jones street, City.

"Dear Mr. Liggett:

"I hereby agree to buy the stock of Omaha Refining Company owned by you, amounting to fifty shares at par $100.00 per share, if for any reason the company cancels the contract whereby you now get dealers' rate on oils

used by the Pantorium and sold through your filling station at 1515 Jones street.

"Yours very truly,

"J. T. BERTWELL."

In view of our conclusion, we do not deem it necessary to determine this dispute between the parties as to which was the contract, for in our judgement the determinative question in the case is whether or not the verdict of the jury is sustained by sufficient evidence, and for that purpose we must assume the contract to have been in the terms stated by the plaintiff. The appeal is by defendant from a verdict and judgment for plaintiff in the sum of $5,000.

The solution of the problem before us will be found in the answer to the question: What is the proper interpretation of the phrase. "If for any reason your company ever quits furnishing me gasoline at reduced prices?" Of course, the intention of the parties is to be determined by giving to the language its usual meaning in connection with the subject and the circumstances surrounding the parties. For this purpose it is not consonant with the best reasoning to hold the parties to a strict definition of the terms made use of by them as given by the lexicographers; but, unless the context or circumstances indicate the use of the terms in a special sense, such definitions are valuable aids. Webster defines the word "quit," so far as it has any application to our present inquiry, as follows: "To set free as from anything harmful, to relieve or release; to clear; to liberate. * * * To release from obligation, accusation, penalty, or the like; to absolve, acquit. To discharge, as, an obligation or duty; to meet and satisfy. * * * To have done with; to cease from; to stop; hence, to depart from; forsake; as, to *quit* work; to *quit* the place; * * * to let go; yield; surrender." And he gives the following synonyms: "Leave, relinquish, resign, abandon, forsake, surrender, discharge, requite." And Soule gives in addition, "desert, forswear, cast-off." It will be noted that each of these definitions and synonyms, as applied to

the act of a person, involves the idea of an intention of the party charged with the act to accomplish the result following it. To quit doing anything implies an operation of the mind whereby the decision is reached to abandon a course of procedure which had been theretofore followed. The term in its common and ordinary acceptation involves the idea of finality, an ending of the state of, a complete departure from a former course of conduct, and would be entirely inappropriate as characterizing a mere failure or delay in the performance of an act. True, such failure or delay might be so long continued as to give rise to an inference of an intention upon the part of the person chargeable therewith to abandon the future performance of the act or contract in question, but this merely proves the correctness of the proposition that the intention of the actor is essentially involved in the term "quit." That the plaintiff considered the term to have some such meaning as we have adopted is indicated by the expression in his letter quoted in full later on: "We feel that it is your intention to discontinue business with us."

We are therefore of the opinion that before the plaintiff is entitled to recover, or even to have his case sent to the jury, he must produce some evidence from which an inference may be properly drawn that the refining company quit furnishing him gasoline, intending to abandon their former conduct in that behalf, and that a mere failure on their part to furnish it promptly, while it would give rise to an action of damages if plaintiff were compelled to purchase the gasoline elsewhere at a greater price, would not be such a breach of defendant's contract as would support this action.

It is therefore necessary to review the evidence in as favorable a light to the plaintiff as permissible, and we find the following facts are without substantial dispute: The contract between the plaintiff and the refining company covered a period of one year from November 1, 1919, to November 1, 1920. Gasoline was furnished substantially in accordance with its terms until October 1, 1920,

shortly after which date there were some delays on the part of the company, but the following deliveries were made in October 2d, 221 gallons; 8th, 30 gallons; 11th, 227 gallons; 15th, 291 gallons; 23d, 300 gallons. Evidence for plaintiff is to the effect that on four occasions he ordered gasoline which was not delivered at the time wanted and he was compelled to purchase it elsewhere. The exact dates of these occurrences are not shown. Evidence for defendant is to the effect that on two occasions the latter part of October they sent their trucks to the plaintiff's place of business to deliver gasoline in response to orders, and in the first instance it was refused on the ground that plaintiff had purchased elsewhere, and on the second, though the tanks were only half full, gasoline was refused on the ground that orders had been given elsewhere, which evidence was not denied other than by the statement of plaintiff's employees that they had no recollection of the occurrence, but admitting its probability. There was never any refusal upon the part of the company to furnish gasoline, but in every instance the order was accepted and delivery promised. Plaintiff gave no orders for gasoline after October 26, 1920. On that day he wrote the following letter:

"Omaha, Nebr., Oct. 26, 1920.

"Mr. J. T. Bertwell, c|o Omaha Refining Co., East Omaha, Neb.

"Dear Sir:

"For the past month, it has been almost impossible for our firm to get sufficient gasoline from your company to keep us going. This morning we are entirely out, and upon calling your firm, were informed that you could not deliver us any gas today.

"In view of the fact that you have not been furnishing us sufficient gasoline in the past, and that prospects look no better for the future, we feel that it is your intention to discontinue doing business with us. I therefore take this opportunity to call your attention to the letter you gave me November 5th, 1919, at the time we entered into

a contract with you to use your gasoline and for the purchase of 50 shares of your stock. At that time you gave me a letter stating that if for any reason the company should cancel our contract or discontinue furnishing us gasoline, that you would buy my stock back at par.

"I expect you to live up to that contract, and the stock is here ready for you the minute you bring in a $5,000 check. I will be only too glad to make the exchange, Tom, because I feel the Omaha Refining Company has a rocky road before it. Very truly yours,

"The Pantorium, by GUY LIGGETT, President."

"Omaha, Neb., November 1, 1920.

"Mr. Guy Liggett, 1513 Jones St., City.

"Dear Friend Guy:

"Your letter of October 26th received. We might be out of gasoline occasionally and thereby cause you to buy a load or two from some other firm but we think we are capable of keeping a fairly good supply on hand with which to fill your orders when they come in. We shall hope to take care of you right along as we have in the past and we have your name on our special list. Yours very truly,

"Omaha Refining Co., J. T. BERTWELL, Vice-Pres."

There was some evidence that during the month of October the refining company had some difficulty in getting a supply of gasoline to fill its contracts, in consequence of which there was some delay in deliveries. The company went out of business March 25, 1921, and was declared a bankrupt April 12, 1921, but we do not consider these facts material to our present inquiry, which is simply whether or not on October 26, 1920, the refining company had quit delivering gasoline within the meaning of the contract between plaintiff and defendant, so as to authorize him to declare a breach thereof. This action was brought February 5, 1921.

We are clearly of the opinion that the meaning and intent of the parties, as evinced by the language used and the circumstances surrounding them, was that the defendant would repurchase the stock if the refining company

refused to furnish plaintiff gasoline at wholesale or dealers rates. The evidence fails to disclose any such refusal which cannot be erected upon the refusal of the plaintiff to receive the gasoline when brought, or to continue ordering the same after the 26th of October. Without expressing any opinion upon the rights and liabilities of the parties to this contract consequent upon the bankruptcy of the refining company, we hold that there is no evidence of a breach of the contract by defendant prior to the bringing of this suit sufficient to sustain the verdict rendered.

Judgment reversed and cause remanded, with directions to dismiss.

REVERSED AND DISMISSED.

WILLIAM HUTTON ET AL., APPELLEES, V. CITY OF OMAHA, APPELLANT.

FILED MARCH 22, 1924. No. 22716.

Patents: ROYALTIES: ESTOPPEL. In an action by employees of a city for royalties for the use of a patented invention, *held*, that under the facts set forth in the opinion no implied promise to pay royalties existed, and plaintiffs were estopped from claiming them.

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

Daná B. Van Dusen and *John F. Moriarty*, for appellant.

Weaver & Giller, contra.

Heard before MORRISSEY, C. J., ROSE, GOOD and DAY, JJ., REDICK, District Judge.

REDICK, District Judge.

This action was brought March 23, 1921, by appellees Hutton and Jorgensen against the appellant, City of Omaha, to recover royalties claimed to be due for the use by defendant of a certain device for a sewer inlet upon which appellees have a patent of the United States which was applied for May 1, 1917, and granted July 29, 1919. The

city admits the use of the device, but denies any liability for royalties on the ground of an implied license of the patentees to use the same without compensation. There was a verdict and judgment for the plaintiff, and defendant appeals.

Plaintiff Hutton was in the employ of the city, working in the city sewer department for 34 years, the last 20 years being in charge of it, and left the city's employ September 1, 1919. Jorgensen, the other plaintiff, was in the employ of the city in the sewer department from 1890 until May 6, 1921, the last 5 or 6 years having charge of the flush-tanks, water-troughs and drinking-fountains. Prior to 1915 the city had been using cast-iron sewer inlets, with the exception of three, reference to which will be made later. In the fall of 1915 Walter Jardine, city commissioner in charge of sewers, received many complaints of disagreeable odors emitted through the sewer intakes, and called in Mr. Hutton for the purpose of discussing a remedy. He inquired of Hutton if it was not possible to make the intakes of concrete, and Hutton replied they already had three concrete intakes which had been installed some two years, with the result that Jardine ordered Hutton to have some of the concrete intakes made up, reinforcing them so they would be stronger than the others, and in such manner that they could be connected with a trap to prevent the escape of stench from the sewers. Wooden frames were thereupon constructed from city materials in the sewer yard, and substantially after the pattern of the three concrete inlets already installed, and a number of inlets were made from city materials, reinforced and provided with trap connection. These inlets proved a success, and were very much cheaper than those made of cast iron and were more easily removed when required, and from that time forward have been used with the assent of plaintiffs and installed under the supervision of plaintiff Hutton as superintendent in charge of the sewers until he left the employ of the city, and are in use up until the present time. Plaintiffs collaborated in devising a concrete inlet to take

the place of cast iron from 1913 to date of application for patent, and are entitled to the benefit of their invention, and the ownership of the patent, beyond all question. This is not denied by the city; but it is contended that, by reason of the facts and circumstances above mentioned and those about to be referred to, the plaintiffs are estopped from claiming royalties from the city, which has an implied license to use the device without compensation. The three inlets installed prior to 1915 were constructed of city materials by city employees; likewise the forms, experimental intakes and others subsequently installed. Prior to the application for patent a drawing was made by the city engineer representing the concrete intakes, blue-prints from which were used as a basis for the application for patent. No suggestion of a claim against the city for royalties was made until after September 1, 1919, when Hutton left the defendant's employment, although about 1,000 had been installed at that time. Early in September, 1919, a claim was presented to the bookkeeper in the city engineer's office, but was never presented to the city commissioners. From that time on the city continued to use the inlets, and in March, 1921, this suit was commenced. There is no serious dispute about the facts, and we are clearly of the opinion that the law would not imply a promise to pay royalties under the circumstances stated, but, on the other hand, that the only conclusion to be drawn therefrom is an implied license without compensation, and that defendant's motion to so instruct the jury should have been sustained.

In various forms the question of the right of an employee to demand compensation from his employer for the use of inventions patented by the employee has received consideration of the federal courts in numerous cases and has almost universally been denied. *McClurg v. Kingsland*, 1 How. (U. S.) *202; *Solomons v. United States*, 137 U. S. 342; *Lane & Bodley Co. v. Locke*, 150 U. S. 193; *Gill v. United States*, 160 U. S. 426. In *Solomons* case the rule was announced:

"When a person in the employ of another in a certain line of work devises an improved method or instrument for doing that work, and uses the property of his employer and the services of other employees to develop and put into practicable form his invention, and explicitly assents to the use by his employer of such invention, a jury, or a court, trying the facts, is warranted in finding that he has so far recognized the obligations of service flowing from his employment and the benefits resulting from his use of the property, and the assistance of the coemployees of his employer, as to have given to such employer an irrevocable license to use such invention."

The plaintiffs attempt to draw a distinction between cases where the materials and assistance of the master are supplied merely in the construction of the device, and where they enter into the processes by which the idea constituting the invention is developed. They say: "The idea of this kind of an intake was thought out by plaintiffs and perfected by them without in any way or manner interfering with their work for the city and without taking up any of the city's time for that purpose. After they had thought out and devised and invented this concrete sewer intake and made a sketch of it, all that remained to be done was to construct this wooden form and then proceed with the making of the three intakes that were first used in the city streets." But the invention was of no value until it had been put into practicable form, for which purpose the materials and services of other employees of the defendant were used, and the adoption by the city of that form of intake demonstrated its practicability, and established, so to speak, a market for the invention of which the plaintiffs received the advantage in the way of royalties upon sales made by the defendant to other cities and individuals. It seems quite in consonance with the inference of an implied license that plaintiffs were quite content to permit defendant the free use of their invention in the expectation that its adoption by a great metropolitan city would give the device such standing in the com-

mercial world as would result in great profits to the inventors; but whatever their motive, they could not encourage the city to assist in the construction of the device and use the same, make detail drawings for use in obtaining the patent, assent thereafter to their use in large quantities without notice of any intention to claim royalties therefor, without being estopped from making such claim. An interesting case on this view of the matter is *Ford Motor Co. v. K. W. Ignition Co.*, 278 Fed. 373, in which the plaintiff was not an employee.

Plaintiffs cite *Ft. Wayne, C. & L. R. Co. v. Haberkorn*, 15 Ind. App. 479, but in that case the court, while approving federal cases above cited, distinguishes them by saying: "The principles asserted in these cases cannot govern here, for the reason that none of the employer's material or labor entered into the discovery or perfection of these inventions, nor was anything of the employer's devoted to the construction of the appliances, until after the invention had been put into definite form and carried to completion, and a patent either issued or applied for."

If plaintiffs independently of their employment had constructed their device and the same had been adopted and used by the city, the case just cited would have some application. The same remark applies to the case of *United States v. Société*, 224 U. S. 309, where a completed invention by a French officer relating to military ordnance was presented to and adopted by the United States, the supreme court holding that an implied contract to pay a reasonable royalty for the use of the patented invention existed on general principles governing contracts. The case did not involve the rights between employer and employee. Plaintiffs also cite *Deane v. Hodge*, 35 Minn. 146, in which it was held that, where a director and officer of a corporation was the owner of a patented invention which the corporation used with his consent and acquiescence, the question was for the jury whether a license without compensation would be implied, notwithstanding "the fact that the model, which was inexpensive, was made by defendant's

workmen, and that the fees of the patent attorney for services in procuring the patent were advanced by the company, or by the fact that he did not in the outset give notice of his intention to claim royalty." The case undoubtedly makes for plaintiff's contention, but it seems to us the case is distinguishable by reason of the fact that the device was not used until after the patent issued, and the further fact that the plaintiff's connection with the company was not such as to charge him with any duty respecting the particular subject covered by the invention; that is, his duties were not strictly connected with the application to the use of the company of the particular device to which the invention related; they were such as devolve upon directors and officers of a corporation. In *McKeever v. United States,* 14 Ct. Cl. 396, also cited, an army officer invented a cartridge box which was adopted by the United States; there was no question of estoppel nor use of defendant's time or materials. *Miller v. Kelley,* 18 App. D. C. 163, was an interference case and has no application; what was said *arguendo* in the opinion supports the views herein expressed.

While the question is one ordinarily to be presented to the jury, we are of the opinion that only one inference is justified from the evidence. In view of our conclusion, other questions presented by the briefs need not be discussed. The judgment is reversed and the cause is remanded, with directions to dismiss.

REVERSED.

ERNEST BUSBOOM, APPELLEE, V. CAPITAL FIRE INSURANCE COMPANY, APPELLANT.

FILED MARCH 22, 1924. No. 22726.

1. Insurance: AUTHORITY OF AGENT: SUFFICIENCY OF EVIDENCE. Evidence as to authority of an insurance agent to receive payment of a premium note examined, and *held* sufficient to sustain a verdict in the affirmative.

2. ———: MISSTATEMENTS IN APPLICATION. "An insurance company is liable on its policy issued on a written application misstating the facts, where such misstatements were written in the application by the company's agent, the insured having correctly stated the facts and acted otherwise in good faith, not consenting to or knowing of the misstatements." *Home Fire Ins. Co. v. Fallon*, 45 Neb. 554.

3. ———: ———. The mere acceptance by the assured of a policy of insurance containing false statements from the application will not charge the assured with the adoption of such statements as his own, and thereby make it his duty to notify the company thereof.

APPEAL from the district court for Cheyenne county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

McCarty & Hager, for appellant.

Kepler & Kratz, contra.

Heard before MORRISSEY, C. J., ROSE, GOOD and DAY, JJ., REDICK, District Judge.

REDICK, District Judge.

Action for loss under a policy of fire insurance upon a threshing machine. The Capital Fire Insurance Company, having its principal place of business at Lincoln, Nebraska, was represented by Lavoni & Son as agents for the writing of insurance at Sidney, Nebraska. Plaintiff, Ernest Busboom, was a farmer, and while out in the field was solicited by Carl Lavoni, an employee of Lavoni & Son, and J. H. McNew, district manager of defendant, to take out a policy of insurance on the thresher in question. McNew wrote out the application and the plaintiff signed it, together with a note for the premium in the sum of $52 payable September 1, 1921, at the home office of the company. McNew and Lavoni then went to the yard where the thresher was located, obtained the numbers and some other details which were inserted in the application by McNew, and in due time the policy in suit was mailed to the plaintiff. Prior to the maturity of the note, the company sent plaintiff two

notices to pay the same, but it was not paid when due. On September 21, 1921, plaintiff paid to Carl Lavoni $52.21, being the amount due upon said note with interest. Carl was not the agent of defendant for any purpose, but turned the money over to Lavoni & Son, who on September 22 mailed a check for said amount to defendant at Lincoln, with letter of transmittal requesting the return of the note to them. If the check was mailed at Sidney before 6:40 p. m. on the 22d, it should have arrived in Lincoln at 10:50 of the 23d by usual course of mail, but, as evidenced by the receiving stamp of the company, it did not arrive until the morning of the 24th of September, when it was accepted by defendant and the note mailed to Lavoni & Son. Some time on September 23 the threshing machine and other articles covered by the policy were destroyed by fire, and notice thereof given the defendant on the 25th or 26th, and defendant thereupon caused an investigation to be made by their agent at Sidney, and, upon receiving his report, returned the sum of $52 to the plaintiff, the matter of the small amount of interest being overlooked, but which was tendered upon the trial.

Defendant presented two defenses upon the trial: (1) That Lavoni & Son were not the agents of the defendant for the purpose of collecting said note and had no authority from said defendant to receive payment thereof; and (2) that plaintiff in said application falsely represented that there were no incumbrances upon the property insured, whereas in truth and in fact there were three chattel mortgages past due thereon. The case was tried to a jury and resulted in a verdict and judgment for the plaintiff for the full amount of the policy less the premium returned, and defendant appeals.

1. As to both defenses, the contention is that the verdict is not supported by the evidence, and we will first consider the one relating to the agency of Lavoni & Son. The evidence of defendant leaves no doubt that the collection of premium notes was not within the general duties of Lavoni & Son, but there is evidence that sometimes they

did collect such notes and transmitted to defendant, and that other agents did the same, and such remittances were accepted.

"Whether the relation of principal and agent exists between two parties is generally a question of fact, and while it is not necessary to prove an express contract between the parties to establish such relation, either that must be done, or the conduct of the parties must be such that the relation may be inferred therefrom." *Bankers Life Ins. Co. v. Robbins*, 53 Neb. 44.

It is the almost universal custom for the assured to pay the premium to the soliciting agent, and the fact that the note was payable at the company's office at Lincoln did not preclude payment to defendant's agent elsewhere. It would seem, therefore, that the transaction in question was in the ordinary course, and that under ordinary conditions the acceptance of the money from the agents would bind the insurance company on the principle of the agent's apparent authority and that of ratification. But defendant contends that, when they accepted the money, they were not aware that a loss had occurred, which fact is clearly shown by the evidence, and that if they had known of the loss they would not have accepted the money. This proposition would have great force if it were claimed that by the receipt of the money the agent had waived some provision of the policy or had estopped the defendant from making some defense which then existed; as, for example, if the loss had occurred before payment. But we think that the fact of the loss intervening between the payment to Lavoni and the receipt of the money by defendants is not pertinent upon the question of agency here presented. The position is hardly tenable that Lavoni & Son were authorized to receive the money if no loss had occurred, but were not so authorized because of that circumstance taking place subsequently. It cannot be doubted but that, if the loss had occurred at any time after the receipt of the money by defendant, no question of the agent's authority would have arisen, and if in such case the evidence would be sufficent

to sustain the authority of the agent at the time it was paid, we are unable to perceive how such authority can be destroyed by something occurring subsequently. The finding of the jury was for the plaintiff on this issue and is sustained by sufficient evidence.

2. The application contained the following: "Incumbrance on the above described property, $ no." And it contained the following warranty: "I further warrant that all answers to above questions as shown herein are true, * * * and I further warrant that no one except the signer or signers hereof has any interest in the property above described, except as stated in the application, either as mortgagees or otherwise."

The plaintiff testified as to what occurred at the time the application was written up by defendant's agent McNew, as follows: "Q. Just state what was asked you by the agents. A. They asked me whether I had anything against this machine, and I said there was, and they asked me what it was, and I told them I had two small mortgages against it, that I didn't think they were on record; and he just branched off and said, 'If they are small we will not pay any attention to that.' He let it go, and he didn't put it on."

With reference to this matter, McNew testified that he got the information from which the application was prepared from the plaintiff, and that he stated truthfully in the application the information given him; "could not positively say whether I read it to him or not. I prepared the application and asked the questions and completed it and handed it to him; could not say whether I read it to him or left it to him to read." Plaintiff testified that he did not think the application was read over to him, but could not remember. There is no positive evidence that the plaintiff knew how the answers were put down in the application; at any rate this was a question for the jury. It appears that at the time of the application there were three mortgages upon the threshing machine, one for $1,237, which also covered 5 cows, 4 heifers, 1 steer, 3 calves, 4

horses, and a lot of farm machinery not included in the policy of insurance; also one for $429.10, which also covered one Model 83 Overland Automobile and one Titan engine not covered by the policy; also one for $400 on the Avery separator alone, which appears to have been given to a former partner of plaintiff for his half interest in the separator, but which mortgage plaintiff claims had been settled and paid off, although this is disputed by the mortgagee. The existence of these mortgages was undoubtedly a material fact which, if known, would have prevented the issuance of the policy. It is clearly established by the evidence that the policy would not have been issued by the insurance company if it had known of these chattel mortgages; and if false representations with reference thereto were made by the plaintiff a perfect defense to this action is made out. It seems, however, that the plaintiff, when asked the question as to incumbrances, stated to defendant's agent that there were two small mortgages upon it; plaintiff testifying that he considered them small mortgages from the fact that they covered considerable other property, and that he did not mention a third mortgage because he understood it had been paid. If plaintiff's version of the conversation is correct, he was not called upon at that time to more definitely describe the mortgages. McNew, by his testimony quoted above, inferentially denied the making of these statements by plaintiff, but does not make any specific denial thereof. Carl Lavoni, the other person present at the time, was not called as a witness by either party. The question, then, whether or not plaintiff gave the information was one of fact for the jury, who found for the plaintiff. The situation we must assume, then, is that the agent of the defendant who prepared the application was notified by the plaintiff of the existence of two mortgages upon the subject of insurance, but considering them unimportant wrote the answer "no" in the application. Such a situation is not new in this state, and it has been held that, where the applicant makes a truthful dis-

closure as to the situation of the property relative to incumbrances and the solicitor of the insurance writes false answers in the application, he acts as the agent of the insurance company, and the latter is estopped from claiming the representation is false.

In *State Ins. Co. v. Jordan,* 29 Neb. 514, it was held: "Where it appeared that the insured was unable to read and write, and the application was made out by the agent of the insurance company, who testified that he read it over to the insured, while the latter testified that the agent did not so read it, and he had no knowledge of its contents, there being thus a conflict of evidence on this point, and the jury having found for the plaintiff, *held,* that if the insured was not aware of the contents of the application, he would not be bound by statements therein."

And in *Home Fire Ins. Co. v. Fallon,* 45 Neb. 554; "An insurance company is liable on its policy issued on a written application misstating the facts, where such misstatements were written in the application by the company's agent, the insured having correctly stated the facts and acted otherwise in good faith, not consenting to or knowing of the misstatements."

And in the opinion with reference to the *Jordan* case it is stated, it is true, that in that case it appeared that the insured was unable to read. But we do not think the distinction in the cases material. When the insured states the facts correctly to the company's agent, he is not bound to exercise vigilance thereafter to determine whether the agent is exercising care or good faith in his transactions on behalf of the company. In other words, the company is estopped from seeking to avoid its contract because of a mistake or fraud committed by its own agent, the insured having acted in good faith, although, perhaps, somewhat negligent. It is not necessary to cite further cases. We are of the opinion that those already referred to rule the case at bar, and that the finding of the jury cannot be disturbed.

A further contention of defendant is that, when the

plaintiff accepted the policy of insurance which contained a copy of the application with the false answer referred to, it was his duty to read it, and whether he did or not he was bound to know of the false statement in the application and notify the insurance company thereof, and that having failed to do so he cannot now be heard to deny that the statements thus made are his own, and cites *Hayes v. Automobile Ins. Exchange*, 126 Wash. 487, which sustains that proposition. The case might be distinguished, in that it appeared that the applicant signed a blank application and the agent of the insurance company filled in the false statements, and the policy contained the express provision: "By the acceptance of this policy * * * the insured makes and warrants to be true each of the following statements, and the Exchange hereby issues the policy, relying upon the truth thereof." The court distinguishes that case from those wherein the assured is held not responsible where the company's agent has advised him that the statements are proper ones to make, and from *Eaton v. National Casualty Co.*, 122 Wash. 477, wherein the agent incorrectly recorded truthful answers given by the assured. We think that case is not authority in this. Moreover, in *Insurance Co. v. Bachler*, 44 Neb. 549, it was held that the assured's acceptance of the policy under the circumstances of that case was not a representation that the insured property was free from incumbrance. We think it would be too harsh a rule in all cases, and especially under the circumstances shown in the case at bar, to hold that the mere acceptance by the assured of a policy containing misstatements of fact bound him thereby as false representations made by him.

The objection to a portion of instruction No. 2 given by the court, quoted in appellant's brief, is not well taken when the entire instruction is considered. The jury were plainly told in that instruction that, if Lavoni & Son were not the agents of the defendant, authorized to receive the money, and the money did not reach defendant's home

office at Lincoln until after the fire had occurred, the plaintiff could not recover.

All questions of fact were fairly submitted to the jury, and finding no error in the record, judgment must be affirmed.

AFFIRMED.

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4. Apparent authority of an agent which will bind his principal is such as the agent appears to have by reason of actual authority conferred. *Mangiameli v. Southern Surety Co* 801

Principal and Surety.

1. The maker of one of several notes procured by fraud and transferred to a bank as collateral may have the loss apportioned before payment of the debt to the bank. *Vian v. Hilberg* 232
2. The principal is not a necessary party to a suit for contribution between cosureties. *Vian v. Hilberg* 232

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1. Where defendants served seek the same relief as plaintiff, summons to another county is unauthorized. *Vian v. Hilberg* 232
2. Question of want of jurisdiction, not appearing on face of record, may be presented by answer. *Vian v. Hilberg* 232
3. Waiver of objection to jurisdiction by one defendant *held* not to operate as a waiver by others. *Vian v. Hilberg* 232
4. "Residence" essential to jurisdiction is a legal one equivalent to "domicile." *Mudge v. Mudge* 403
5. Place where husband lived with paramour *held* "unusual place of residence" for service of summons. *Mudge v. Mudge* 403

Public Lands.

1. A sale of school lands is governed by the law in force at time of contract. *State v. McKelvie* 224
2. The board of educational lands and funds has only express powers, and such as are implied to give effect to those granted. *State v. McKelvie* 224
3. Appraisers of school lands are presumed to have performed their statutory duty. *State v. McKelvie* 224
4. Acceptance of an invalid deed of school lands will not estop vendee from demanding a proper deed. *State v. McKelvie* 224

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Position of teacher *held* an "office," for which *quo warranto* lies. *Eason v. Majors* 288

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1. A railroad company must exercise reasonable care to avoid injuring persons on its tracks or grounds. *Engel v. Chicago, B. & Q. R. Co* 21
2. An automobile driver approaching a railroad crossing where there is restricted vision is required to look and listen. *Kepler v. Chicago, St. P., M. & O. R. Co* 273

Rape.

1. The carnal knowledge of a female under 15 years of age by an offender over 18 is rape. *Bennett v. State* 552
2. Corroborative evidence may be circumstantial. *Bennett v. State* 552
3. Evidence *held* to sustain conviction. *Bennett v. State* 552
4. Under an information charging rape by force on a chaste child under 18 years of age, a conviction may be had though the evidence shows consent. *Cook v. State* 590

Receiving Stolen Goods.

One who knowingly participates in using an embezzled stock certificate as collateral is guilty of receiving embezzled property. *Kenyon v. State* 175

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Taking a default on the day accused was recognized to appear *held* an irregularity, and no defense to an action against the sureties on a bail bond. *State v. Ingoldsby* 787

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1. Measure of damages for breach of contract by purchaser, stated. *Bell Oil & Gas Co. v. A. B. A. Independent Oil & Gasoline Co* 18
2. In an action for breach of contract, seller must prove that property tendered complied with material requirements of the contract. *Bell Oil & Gas Co. v. A. B. A. Independent Oil & Gasoline Co* 18
3. Receipt of seed corn inferior to sample *held* not an acceptance. *Kron v. Robinson Seed Co* 147
4. Where the contract is silent, test of seed corn may be made before delivery by sample. *Kron v. Robinson Seed Co* 147
5. Knowledge of purchaser *held* to require inquiry as to seller's title. *Wallich v. Sandlovich* 318
6. Evidence *held* to sustain judgment for plaintiff in action of replevin. *Wallich v. Sandlovich* 318
7. A sale of personal property may be rescinded for breach of warranty. *Sedlacek v. Welpton Lumber Co* 677
8. Rescission of sale must be prompt. *Sedlacek v. Welpton Lumber Co* 677
9. Purchaser *held* precluded by delay from rescinding contract for purchase of a warranted tractor. *Sedlacek v. Welpton Lumber Co* 677

Schools and School Districts.

1. A schoolhouse site cannot be changed at a meeting of the district electors without previous notice. *State v. Cruise* 114
2. The county superintendent may determine location of school site only when no site can be selected by the electors. *State v. Cruise* 114
3. County superintendent *held* to be without power to determine location of schoolhouse site under the facts. *State v. Cruise* 114
4. A subcontractor is not bound by an arbitration clause in the principal contract. *Central Nebraska Millwork Co. v. Olson & Johnson Co* 396
5. Reference to contract between original contractor and

third party *held* to be for governing method of work and character of materials. *Central Nebraska Millwork Co. v. Olson & Johnson Co.* 396
6. Two or more adjoining common school districts comprising part of a county high school district may unite to form one rural high school district. *State v. Smith* 757
7. A consolidated high school district may join with two or more adjacent common school districts to form a rural high school district. *State v. Smith* 757

Specific Performance.
1. In a suit to establish and enforce an oral contract of adoption, evidence *held* insufficient to support plaintiff's claim. *Sower v. Wells* 334
2. A vendor must either substantially perform or tender performance of the contract before he is entitled to specific performance or a suit to foreclose. *Miller v. Ruzicka* 815
3. Specific performance denied, and defendants *held* entitled to recover amount paid on the contract. *Miller v. Ruzicka* 815

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2. Valuation of property of complainant *held* to be at its actual value. *Chicago, R. I. & P. R. Co. v. State* 362
3. Discrimination in assessments of different classes of property is prohibited. *Chicago, R. I. & P. R. Co. v. State* 362
4. In reviewing assessments of interstate railroad property within the state, the supreme court may only consider facts in evidence and those of which it may take judicial notice. *Chicago, R. I. & P. R. Co. v. State* 362
5. Valuation of interstate railroad property on a mileage basis *held* proper. *Chicago, R. I. & P. R. Co. v. State* 362
6. There are no infallible rules for ascertainment of the actual value of railroad property for taxation. *Chicago, R. I. & P. R. Co. v. State* 362
7. Parties collaterally attacking an assessment must show fraud or intentional discrimination. *Chicago, R. I. & P. R. Co. v. State* 362
8. Proceedings to review assessments may be remanded for correction of error where manifestly wrong. *Chicago, R. I. & P. R. Co. v. State* 362
9. An assessment reasonably uniform and proportionate on all classes of property will not be set aside because all property is not assessed at its actual value. *Chicago, R. I. & P. R. Co. v. State* 362
10. The exclusion of labor costs in valuation of improvements on lands is erroneous. *Chicago, R. I. & P. R. Co. v. State* 362

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1. It is not error to refuse to direct a verdict where there is a substantial conflict in the testimony on a material point. *Davoll v. Lincoln Traction Co* 88
2. Where the evidence tends to sustain the petition, and the petition states a cause of action, the case should be submitted to the jury. *Curtice Co. v. Estate of Jones* 166
3. Refusal to instruct on contributory negligence *held* error. *Dolan Fruit Co. v. Davis* 322
4. The court may direct a verdict where the facts are undisputed. *Kelly v. Wehn* 446
5. Instruction setting out the substance of the petition *held* not erroneous. *Hager v. Burnham* 481
6. Refusal to direct a verdict at the close of plaintiff's case will not preclude direction of verdict at the close of all the evidence. *Tady v. Warta* 521
7. A party desiring a more explicit instruction should offer one. *Hannah v. American Live Stock Ins. Co* 660
8. Instruction assuming as true facts established without controversy *held* not erroneous. *Gibson v. Glens Falls*

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5. Where a land contract calls for a title satisfactory to vendee's attorney, his decision is final. *Flower v. Coe* ... 296
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7. Alteration by vendor of a contract for the sale of land *held* a fraud entitling purchaser to relief. *Barnes v. Lucas* 410

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5. Flood-waters of a river are not surface-waters. *Krueger v. Crystal Lake Co* 724
6. Owners of property fronting a lake are riparian owners, and are entitled to have flood-waters run in their natural channels. *Krueger v. Crystal Lake Co* 724
7. One unlawfully obstructing flood-channels cannot enjoin restoration of a lake to its natural level. *Krueger v. Crystal Lake Co* 724
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