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JOHN F. IDEN, V. STATE OF NEBRASKA.

FILED JULY 18, 1924. No. 23639.

1. **Criminal Law:** ATTORNEY AND CLIENT. The statute does not prohibit an attorney, acting for a party interested in a civil suit, from afterwards maintaining or prosecuting a criminal action for an offense committed during the trial of the civil suit.
2. ———: EXHIBITS. It is within the discretion of the trial court to allow the jury to take exhibits received in evidence to the jury room.
3. ———: ASSIGNMENTS OF ERROR. It is the duty of counsel who assign errors for review to point out clearly and specifically in what manner and wherein the action of the trial court was erroneous and prejudicial, or the assignment will be disregarded.
4. **Evidence** examined, and *held* to sustain the verdict.

ERROR to the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Allen G. Fisher and *Holmes, Chambers & Mann,* for plaintiff in error.

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

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

LETTON, J.

From a conviction on an information charging perjury, plaintiff in error, hereinafter designated defendant, appeals.

The essential charge of the information is substantially as follows: Defendant did in a matter material to the cause wilfully and feloniously depose, in a certain foreclosure suit against him, that at the time of the execution and delivery of three promissory notes signed by him and described in the information, "a certain clause appearing on the face of said notes and typewritten in green ink reading in substance as follows, to wit, 'This note is given as extension of time on certain note secured by deed of trust

on lands in Dawes Co. Nebr., was not on the said notes at the time he signed the same, and with respect thereto in response to questions propounded to him upon said trial did depose, say and testify as follows, to wit, the following being in substance the questions so propounded and answer so made by the said defendant, to wit, 'Question. You say this typewriting in green, reading as follows,' "This note is given as extension of time on certain note secured by deed of trust on lands in Dawes Co. Nebr.," was not on the notes at the time you signed them? Answer by John F. Iden: No, sir; that was not there. Question. Will you say positively it was not there? Answer by John F. Iden: I say positively it was not there.' Whereas, in truth and in fact, the said clause was on said notes at the time the said John F. Iden signed the said notes as the said John F. Iden then and there well knew, and that said answers and testimony of the said John F. Iden were wilfully, corruptly, unlawfully and feloniously false and untrue, and he the said John F. Iden then and there well knowing that the said matters and testimony so as aforesaid testified to, deposed and declared by him to be true were then and there false and untrue, contrary to the form of the statute," etc.

The errors assigned may be grouped as follows: The county attorney and assistant county attorney were disqualified by reason of pecuniary interests in the result of the suit in the case of Giffen et al. v. Iden et al., out of which the prosecution in this case arose; that the county attorney and his assistant prevented defendant from procuring the testimony of certain witnesses, and from having a timely preparation for such trial, because of the disobedience of the county attorney of the order of the trial court to allow depositions to be taken, made March 26, 1923; that the facts stated in the information are insufficient to constitute an offense; that the verdict is contrary to the law and to the evidence; that the court erred in giving instructions Nos. 3, 5, and 8, and in refusing to give defendant's instructions numbered 1 to 22, inclusive.

The positive and direct testimony of R. F. Poynter, the cashier of the bank named as payee, is to the effect that he

drew up the notes, that he placed the typewriting upon them, and that it was upon the notes at the time they were signed. Other testimony tends to support this. The question whether the typewriting upon the exhibits was written before or after the signatures was also submitted to a number of witnesses testifying as experts that the words were typewritten before the notes were signed.

For the defense defendant went upon the witness-stand and admitted that he was a witness and testified as charged in the information. In justification he said that at the time he was testifying to the best of his recollection and memory as to the fact; that he did not dispute signing the notes; that his intention was to say that he did not remember that when he signed them the typewriting was there; that it was over a year before he gave the testimony when he last had seen the notes. He also testified in the present case: "If that was in there, of course I don't remember seeing it when I signed it;" that after he had been arrested he carefully considered the matter a good many times. "Now, then, after you have carefully and truthfully considered the matter from that time until now, do you have any different positive recollection about them now than you did then? A. Yes; I thought possibly I might have been mistaken on that. Q. That is, it had occurred to you now that you might have been mistaken? Yes, sir. Q. And did you think you were mistaken at that time? A. No; I didn't think I was mistaken, but I possibly might have been mistaken." Mrs. Iden testified that she signed exhibits F and G, two of the notes in controversy, after her husband had signed; that he then doubled the notes up and put them in his pocket, and that was the last she saw them until the time of the trial; that the witness Poynter was not present at that time, and her daughter, Zepha Giffen, was; that the notes were made payable to the Bank of Fortescue. but now the name of the bank is scratched out and they are made payable to R. L. Poynter, and that the green typewriting was not upon the notes at that time. Zepha Giffen testified that two of the notes were signed at the

family home near Bigelow, Missouri; that she saw them at that time; that she read each of the notes over and did not notice any typewriting upon them at that time, and that her recollection is Mr. Poynter's name was not written in the notes when signed, but the name of the Bank of Fortescue appeared as payee. A number of witnesses testified to the good standing of defendant in the community in which he resided, and there was testimony that it is almost impossible to tell merely by inspection whether writing or typewriting has been superimposed. There was sufficient evidence to support the verdict if the jury believed the testimony on behalf of the state, and that the testimony was wilfully and intentionally false and perjured.

There is no basis for the assignment that the county attorney and his assistant were disqualified by reason of having appeared as attorneys for the plaintiff in the foreclosure suit in which the perjury was alleged to have been committed. While the statute forbids a county attorney from being attorney or counsel, "other than for the state or county, in any civil action depending upon the same state of facts upon which any criminal prosecution commenced or prosecuted shall depend," there is no prohibition against an attorney or a party interested in a civil suit from afterwards maintaining or actively prosecuting a criminal action for an offense committed during the trial of the civil suit.

The record does not substantiate the assignment that the county attorney and his assistant prevented defendant from procuring the testimony of witnesses and from having a timely preparation for a fair trial "because of the wilful disobedience of the county attorney of the order of the trial court to allow depositions to be taken, which order was given March 26, 1923." No such order appears in the record and there is absolutely no proof of any acts on the part of the county attorney and his assistant of the nature charged.

It is assigned that the court erred in allowing the jury to take the three notes in controversy to the jury room and

in failing to let the jury examine the exhibits offered in evidence in behalf of the defendant. After the jury had retired to consider, they requested permission of the court to inspect the notes, and this was given. This was within the discretion of the court and was not erroneous.

A general assignment of error is made with respect to a number of instructions, but no error has been pointed out in giving or refusing instructions, either in the oral argument or in the printed brief. It is the duty of counsel who assign errors to point out clearly and specifically in what manner and wherein the action of the court was erroneous and prejudicial, or the assignment will be disregarded. The offered testimony of the witness Hopper was upon an immaterial point. The facts alleged were remote from the issues, and the court did not abuse its discretion in refusing this offer.

Finding no prejudicial error in the record, the judgment of the district court is

AFFIRMED.

Note—See District and Prosecuting Attorneys, 18 C. J. p. 1312, sec. 39 (1925 Ann.); Criminal Law, 16 C. J. p. 1083, sec. 2543; 17 C. J. p. 181, sec. 3475—Perjury, 30 Cyc. p. 1448.

LOTON R. MCCAW, APPELLANT, V. CHARLES H. SWALLOW, APPELLEE.

FILED JULY 18, 1924. No. 22878.

1. **Vendor and Purchaser:** CONTRACT. Where a transaction for the exchange of interests in real estate is evidenced by several instruments, each being dependent on the others, they should be considered together for the purpose of determining the rights and liabilities of the parties.

2. ———: DAMAGES. In a transaction for the exchange of interests in two separate tracts of land, the trading price of one tract, though stipulated to be a payment on the other tract, is not necessarily the measure of relief in an action to recover back in money the payment thus made, where defendant repudiated or rescinded the entire transaction and surrendered the interest he had agreed to accept from plaintiff.

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

J. J. Harrington and *Doyle & Halligan,* for appellant.

Burkett, Wilson, Brown & Wilson and *M. V. Beghtol, contra.*

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

ROSE, J.

This is an action to recover $29,797.50 as a first payment on an unperformed agreement by defendant to sell and convey to plaintiff 130.38 acres of land in Hidalgo county, Texas, for $39,114, plaintiff agreeing to execute notes for the unpaid balance of $9,316.50 and to secure them by a vendor's lien on the land purchased. The initial payment mentioned was not made in cash, but plaintiff pleaded that he made it by assigning to defendant a contract to purchase from Glen Troth and Roy Brownell 1,160 acres of land in Holt county, Nebraska, plaintiff and defendant agreeing in writing that the assignment should be the first payment of $29,797.50 on the Texas land. Plaintiff also pleaded that he executed and delivered the assignment, and that it was accepted by defendant, who entered into possession of and leased the Holt county land; that plaintiff on his part performed, or tendered performance of, all his contractual obligations to defendant, but that the latter repudiated his agreements, failed to convey the Texas land to plaintiff, and refused to refund the first payment therefor. The written contracts signed by the parties were set out in the petition.

In the answer defendant did not deny the execution of the instruments pleaded by plaintiff, but alleged in effect that they evidenced a trade of defendant's Texas land for plaintiff's equity in the Holt county land, there being in favor of defendant on the basis of such a trade a difference of $9,316.50, for which plaintiff agreed to give notes secured by a vendor's lien; that plaintiff failed to assign the

precise equity traded by him to defendant, who, as a consequence, legally rescinded the exchange without owing plaintiff any sum whatever.

The reply contains, among denials, and other things, a specific admission that plaintiff entered into a written agreement with defendant to trade the Texas land for plaintiff's equity in the Holt county land.

After evidence had been adduced at great length by both sides, the district court directed a verdict in favor of plaintiff for nominal damages. From a judgment on the verdict, each party to pay his own costs, plaintiff has appealed.

Assigned error in the giving of the peremptory instruction presents the controlling question on appeal. Did plaintiff make a *prima facie* case for any recovery in excess of nominal damages? Plaintiff narrowed his action to the right to recover back in money the first payment alleged to have been made by him on his purchase of the Texas land. He takes the position that the first payment, though made by the assignment of an equity in land, must be paid back in money. Though the contract for the sale of the Texas land, considered by itself, contains a provision for a first payment of $29,797.50 and recites that "the first payment is paid by an assignment of equity in contract of purchase" of the Holt county land, the sale of the former cannot be separated from the trading transaction for the purpose of making such first payment the indisputable measure of relief. This sale contract of the Texas land was a part only of the transaction between the parties. Each part is related to and is dependent on the whole and must be so considered. The pleadings and the proofs show conclusively that plaintiff and defendant entered into a trade or an exchange of interests in two separate tracts of land. The writings constituting the entire transaction consist of three instruments—the agreement of plaintiff to buy and of defendant to sell the Texas land; the contract by plaintiff to purchase the Holt county land from Troth and Brownell; the assignment to defendant of the equity in the Holt county land. The repudiation or rescission of the assign-

ment extended to the agreement for the transfer of the Texas land.

Assuming defendant wrongfully violated the terms of the trade in its entirety and, without cause, refused to perform any of his contractual obligations, what is the measure of relief in this action to recover back in money the stipulated first payment of $29,797.50, which plaintiff alleges he paid by his assignment? The assignment was ultimately rejected. Plaintiff did not acquire title to the Texas land. His agreement to purchase it and his obligation to execute notes for the balance of the purchase price are at an end, since defendant rescinded the entire transaction and plaintiff acquiesced in the rescission by bringing this action to recover back the alleged payment of $29,797.50 or nothing. The agreement by plaintiff to purchase from Troth and Brownell the Holt county land and the assignment tendered by plaintiff to defendant were turned back to the former. At the time of the trial the title to the property which each had agreed to convey to the other remained as it stood before the signing of the contracts. Disregarding loss or profit as a result of defendant's failure to comply with the terms of the trade, the equity of plaintiff in the Holt county land was restored to and retained by him. No witness testified to the value of either tract of land or to loss of profits or to actual damages. There is no proof that plaintiff made the payment for which he sues, unless evidence of that fact is found in the agreement that the assignment is a payment or in the rejected tender of the assignment itself. With the trade rescinded and the title to the property which each party had agreed to trade to the other remaining as it stood before the signing of the contracts, do the recital of payment and the rejected tender of the assignment prove either a completed payment or substantial damages? If plaintiff prevails on his own theory, his adjudicated profit in the rescinded trade will be $29,797.50—the entire trading price of the Texas land, excepting deferred payments aggregating $9,316.50 only. The agreement that the assignment of plaintiff's equity in the

Holt county land is a first payment of $29,797.50 on the Texas land was inserted in the exchange contract in contemplation of mutual performance. It was not intended as a stipulation for liquidated damages in the event of nonperformance. So considered, it would be unconscionable on the face of the writings. There being conclusive evidence that the exchange was rescinded, that the assignment and the tender were rejected, and that the equity constituting the agreed payment was restored to plaintiff, there was no proof whatever of substantial damages or of the completed payment on which the action is based. Plaintiff, therefore, did not make a case for any recovery in excess of nominal damages. It follows that there was no error to the prejudice of plaintiff in the peremptory instruction.

AFFIRMED.

Note—See Exchange of Property, 23 C. J. p. 203, sec. 31; p. 232, sec. 82.

ROBERT I. CAHOON, ADMINISTRATOR, APPELLANT, V. FIRST NATIONAL BANK OF FREMONT: UNION NATIONAL BANK OF FREMONT, SUBSTITUTED DEFENDANT, APPELLEE.

FILED JULY 18, 1924. No. 22882.

1. **Abatement.** The main purpose of abating a civil action is to prevent unnecessary or vexatious litigation.
2. ———. As a general rule a civil action may be abated where a former action relating to the same subject-matter is pending between the same parties in the same court or in another court of the same sovereign.
3. ———: PROCEDURE. The usual method of making the objection that a former action relating to the same subject-matter is pending between the same parties is the filing of a plea in abatement, but, where those facts are shown without dispute by the pleadings as a whole and the evidence, the subsequent action may be abated.

APPEAL from the district court for Dodge county: FREDERICK W. BUTTON, JUDGE. *Reversed, action and counterclaim abated.*

J. E. Daly, for appellant.

Courtright, Sidner, Lee & Gunderson, contra.

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

ROSE, J.

This is an action commenced November 26, 1921, in the district court for Dodge county by Robert I. Cahoon, administrator of the estate of Ira E. Cahoon, deceased, against the First National Bank of Fremont and its receiver, Bernard Ulrich. Ira E. Cahoon died April 23, 1921, having on deposit in the First National Bank of Fremont subject to check $681.90, which his administrator seeks to recover in this case. The Union National Bank of Fremont purchased the assets and assumed the liabilities of the First National Bank of Fremont and was substituted as defendant. The answer admitted the deposit pleaded by the administrator and alleged that it was applied July 20, 1921, on two unpaid promissory notes, each for $2,000, one dated February 20, 1921, and the other February 25, 1921, both due 90 days after date, executed by Ira E. Cahoon and payable to the First National Bank of Fremont. The answer also contained a counterclaim for judgment on the notes less the deposit of $681.90 for which the administrator brought suit. The reply, among other things, alleged that the deposit in controversy was converted to the use of defendant July 20, 1921, and that the notes and other items of indebtedness had been presented to the county court of Washington county as claims against the estate of decedent. The district court for Dodge county permitted the parties to try the issues on their merits, found the notes to be valid claims in favor of defendant and against the estate of decedent, allowed the deposit as a credit on the notes, though they were not due when the depositor died,

and entered judgment against plaintiff for $3,776.72 on the counterclaim. The latter has appealed.

The position of plaintiff seems to be that the administrator was entitled to the deposit as an asset of the estate; that the crediting of the deposit on the unmatured notes amounted to a conversion, and that the counterclaim should be abated, because it was pending between the same parties in the county court of Washington county, where the decedent's estate must eventually be settled. The reasons for abating the counterclaim apply also to the action for the deposit. The administrator cannot separate the claims for the purpose of maintaining his own and defeating that of defendant, where the right to apply the deposit on the indebtedness evidenced by the notes is a litigable question. The evidence shows that these identical notes, less credit for the deposit, were presented to the county court of Washington county as claims against the decedent's estate. The main purpose of abating a civil action is to prevent unnecessary or vexatious litigation. The general rule is that an action may be abated where a former action relating to the same subject-matter is pending between the same parties in the same court or in another court of the same sovereign. It is insisted, however, that there is no proper plea in abatement in the present instance. The pleadings, considered together with the evidence, show that the parties and subject-matter in both courts are identical. The answer to the petition of plaintiff pleads the notes and a credit of $681.90 on account of the deposit, and alleges:

"This answering defendant further shows that said notes have been presented as claims against the estate of Ira E. Cahoon in the county court of Washington county, Nebraska, and have been by said court duly allowed."

The reply to the answer and to the counterclaim contains, among other things, the following:

"Plaintiff demurs to the answer of defendant in that as appears upon the face of such pleading and the files herein there is another action pending between the same parties for the same cause."

While abatement is not pleaded according to the technical rules of pleading, the allegations of both parties and the evidence show without dispute that the present action for the deposit and the counterclaim for judgment on the notes should have been abated. In an article on abatement it is said:

"The usual manner of raising the objection is by a plea in abatement in the nature of a bar, though a demurrer may sometimes be proper." 1 R. C. L. 19, sec. 9.

The county court of Washington county, the court of original jurisdiction in the settlement of estates, was the first to acquire jurisdiction and should be permitted to retain it for the purpose of determining in a single proceeding the controversies between the parties. Determination of the same issues between the same parties in the different courts was unnecessary and vexatious. The judgment of the district court is therefore reversed. The action for the deposit and the counterclaim for judgment on the notes are abated. Plaintiff, being the first to invoke the jurisdiction of the district court for Dodge county, should pay the costs in that court and also in the supreme court.

REVERSED, ACTION AND COUNTERCLAIM ABATED.

Note—See Abatement and Revival, 1 C. J. p. 45, sec. 38; p. 101, sec. 151.

FARMERS STATE BANK OF KRAMER, APPELLEE, V. VACLAV AKSAMIT, JR., APPELLANT.

FILED JULY 18, 1924. No. 22858.

1. **Banks and Banking: SIGHT DRAFT, WITH BILL OF LADING.** Where a bank receives a sight draft, with a bill of lading attached, and without specific instructions, such bank may do one of two things, namely, collect from the consignee the sum named in the sight draft and deliver it and the bill of lading to the consignee and transmit the proceeds to the forwarder of the sight draft; or, if payment is refused by the consignee, it is the bank's duty to return the sight draft and the bill of lading to the forwarder with notice that payment is refused.

2. **Bills and Notes**: SIGHT DRAFTS: ACCEPTANCE. A consignee of a shipment of hay obtained possession of a sight draft and a bill of lading thereto attached from a bank to which the sight draft was sent for collection only, the consignee having first delivered his check to the receiving bank for the required amount. Within about an hour thereafter the consignee delivered the bill of lading to the agent of the carrier and stopped payment of his check on the ground that the hay was in a badly damaged condition. *Held*, that, having obtained possession of the instruments in question, and having delivered the bill of lading to the carrier, it became the consignee's legal duty to honor the sight draft which, by his acceptance, became a valid and subsisting obligation against him.

3. **Damages**: DIRECTION OF VERDICT: ATTORNEY'S FEES. Ordinarily, in an action at law, and in the absence of statutory authority, it is error for the trial court in an instructed verdict to include therein an attorney fee against either party.

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

Bartos & Bartos, for appellant.

Robert R. Hastings, contra.

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

DEAN, J.

Farmers State Bank of Kramer sued to recover from Vencl Aksamit and Vaclav Aksamit, Jr., $471.79 on account of a sight draft drawn against Vaclav Aksamit, Jr., for a car-load of alfalfa hay bought from Dewitt Grain Company of Lincoln and shipped to Kramer. Subsequently the action was dismissed as to Vencl Aksamit and the trial proceeded against Vaclav Aksamit, Jr., as sole defendant. When the shipment arrived at Kramer, defendant delivered his check in payment of the sight draft, written on the Bank of Wilber, to the order of the Kramer bank, but, on the same day, after obtaining possession of the sight draft and the bill of lading, he stopped payment of the check

on the ground that the hay was badly damaged and unfit for feed. Defendant having refused to accept the shipment, it was sold for demurrage by the railroad company a little more than 60 days after its arrival at Kramer. The plaintiff bank established the fact that, in an action begun by the grain company in the district court for Lancaster county, it was compelled to make good for the sum named in the sight draft pursuant to a judgment rendered against it in that behalf. Hence, this action was brought to recover the money which the plaintiff bank was compelled to pay in satisfaction of the judgment.

When the evidence was submitted, the court, over defendant's objection, sustained plaintiff's motion for an instructed verdict in the sum of $498.47 and costs. Of this sum $50 was for an attorney fee. Judgment was thereupon rendered in that sum, and defendant, contending that the facts should have been submitted to the jury, and that the court erred in allowing plaintiff an attorney fee, has brought the record here to have it reviewed.

The sight draft was introduced in evidence by the plaintiff bank, its counsel having received it from defendant's counsel the day before the trial. It is indorsed: "Refused a/c wet and moldy hay." The cashier made this explanation in respect of the indorsement. He testified that, early in the forenoon of the day in which the sight draft and bill of lading were delivered to defendant, and while defendant was in the bank, Vencl Aksamit, the father of defendant, came to the bank and said that he had just come from the railroad yard and found that the car of hay was wet and moldy and advised his son not to accept it; that he, the cashier, at that time made the indorsement, which is above noted, on the sight draft, in good faith and in the belief that defendant did not intend to accept the shipment, and that the indorsement was made solely because of what defendant and his father said to him at the time in respect of the damaged condition of the hay; that defendant and his father then left the bank together, and in about an hour defendant returned and said he would ac-

cept the hay and, leaving his check with the cashier for the required amount, the sight draft, with the indorsement unerased, and the bill of lading were both surrendered to defendant. Elsewhere in the record it appears that defendant, immediately after obtaining possession of the instruments in question, went to the depot and delivered the bill of lading to the railroad's agent and at the same time telephoned the Wilber bank to stop payment on the check. It was not denied that the sight draft was in defendant's continuous possession, or in possession of his counsel, until this action was tried.

True, defendant testified that, when he obtained possession of the sight draft and the bill of lading, the cashier told him to give the bill of lading to the depot agent. This was denied by the cashier. But, in view of all the facts, whether defendant was so informed by the cashier appears to be immaterial. Of course, if defendant intended to accept the shipment, he would ordinarily be required to surrender the bill of lading to the carrier's agent. And the fact that defendant took up the bill of lading and accepted and retained possession of the sight draft, until the present case was tried, completed and made binding his obligation in the premises.

Defendant, though a young man of 28, was not a novice in business affairs of this character. The record shows that in recent years he had purchased hay which was shipped to him in car-load lots on several occasions and must therefore have known the legal effect of delivering a bill of lading to the agent of the carrier and of taking up and keeping possession of an unpaid sight draft for more than three years.

In respect of recovery in this action, the court did not err in directing a verdict for plaintiff, except as to the allowance of an attorney fee, to which reference is hereinafter made. It is elementary that the bank's authority was limited in the premises. It could do one of two things: Either return the sight draft and the bill of lading to the forwarding bank, on the ground that payment was refused

by the consignee, or collect from the consignee the sum named in the sight draft and deliver it and the bill of lading to him and transmit the proceeds to the forwarding bank. Having parted with possession of the sight draft and the bill of lading, and having failed to collect the sum named in the sight draft, the grain company, as hereinbefore noted, began an action on the draft and recovered judgment against plaintiff on the alleged ground of negligence. But none of this excused defendant from performance of his legal duty to honor the sight draft which became a valid and subsisting obligation against him when he obtained it and the bill of lading from the plaintiff bank and retained possession of both instruments.

Much evidence was introduced in respect of the condition of the hay, and it was conclusively shown that, on arrival, it was in a badly damaged condition. But, under the facts, defendant's redress for such damages did not lie against the bank.

As above noted, plaintiff recovered an attorney fee of $50 which was in addition to the amount recovered on the sight draft and was included in the judgment. The allowance of this fee was evidently for services in defending the suit brought against the Kramer bank by the Dewitt Grain Company. There is no warrant in law for the allowance of such fee. It follows that, from the face of the judgment, this amount must be deducted.

The judgment of the district court is affirmed, except as to the attorney fee of $50, and in respect of this sum it is directed that it be deducted from the judgment.

The judgment is

AFFIRMED IN PART AND REVERSED IN PART.

Note—See Banks and Banking, 7 C. J. p. 613, sec. 274; Bills and Notes, 8 C. J. p. 320, sec. 491; Damages, 17 C. J. p. 807, sec. 133.

TREVETT, MATTIS & BAKER COMPANY V. HARRY A. REAGOR ET AL.: V. S. HALL, APPELLANT: STATE BANK OF BLADEN, APPELLEE.

FILED JULY 18, 1924. No. 22853.

1. **Homestead:** CONVEYANCE. "The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." Comp. St. 1922, sec. 2819.
2. **Acknowledgment:** MORTGAGE ON HOMESTEAD. A mortgage upon a homestead acknowledged by a notary public who was likewise an officer and stockholder of the corporation, mortgagee, is void.
3. **Homestead:** INVALID MORTGAGE. A mortgagee, holding a mortgage upon a homestead, properly executed and acknowledged by husband and wife, may ordinarily take advantage of the invalidity of a prior mortgage upon the homestead which is invalid because not properly acknowledged.

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

Bernard McNeny, for appellant.

F. J. Munday, contra.

Heard before MORRISSEY, C. J., DAY, GOOD and THOMPSON, JJ.

DAY, J.

The record presents a contest between V. S. Hall and the State Bank of Bladen, two mortgagees, each claiming a prior lien upon the mortgaged premises. The action was brought by plaintiff to foreclose a mortgage upon certain lands executed by Harry A. Reagor and his wife, the then owners of the premises. Subsequently the title to the land was conveyed to Kate Crow, who with her husband executed the mortgages to Hall and the State Bank. A number of parties claiming interests in the lands were made defendants, who in cross-petitions set up their various claims. The court found, and entered a decree accordingly, that the plaintiff's mortgage was a first lien upon the

premises; that the mortgage of defendant Baker was a second lien; that the mortgage set out in the first count of Hall's cross-petition was a third lien; that the mortgage of the State Bank was a fourth lien; and that the Hall mortgage as set out in his second cause of action was a fifth lien. This last-described mortgage will be referred to hereinafter as the Hall mortgage. The defendant Hall has appealed from that part of the decree adjudging that his mortgage was a fifth lien on the premises, and junior and inferior to the mortgage of the State Bank.

The record shows that the Hall mortgage was dated April 29, 1921, and was recorded August 31, 1921. The mortgage of the State Bank was executed May 7, 1921, and recorded on May 10, 1921. The testimony is clear that, at the time of the execution of the bank's mortgage, it had no notice of the existence of the Hall mortgage. The bank's mortgage having been recorded first would be a superior lien over the Hall mortgage, if the question of priority is to be determined solely by the provisions of the recording act.

It is the contention of appellant, Hall, that the bank's mortgage is void because not properly acknowledged. The record shows that, at the time of the execution of the bank's mortgage, the premises conveyed by the mortgage were the homestead of the mortgagors, and that mortgagors were husband and wife. It also appears that the notary who took the acknowledgement was at the time an officer and stockholder in the mortgagee bank. Section 2819, Comp. St. 1922, which was in force at the time of the execution of the mortgage, provides as follows: "The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." Ordinarily, a mortgage is good between the parties thereto without an acknowledgement; but where the premises sought to be conveyed or incumbered are the homestead of a married person, then by the plain provisions of the statute an acknowledgement is a necessary part of the instru-

ment. In *Solt v. Anderson,* 71 Neb. 826, it was held: "The acknowledgement by both husband and wife of an instrument whereby it is sought to convey or incumber a homestead is an essential step in the due execution of such instrument."

In *Wilson v. Griess,* 64 Neb. 792, an assistant cashier of a bank, who was also a director and stockholder thereof, took an acknowledgement of a mortgage on a homestead, the bank having a beneficial interest in the mortgage. The mortgagors attacked the validity of the mortgage. It was held that the notary could not lawfully take the acknowledgement; that he was disqualified to act as such officer on account of his direct pecuniary interest in the matter; "and that the acknowledgement and the mortgage were both void." In *Chadron Loan & Building Ass'n v. O'Linn,* 1 Neb. (Unof.) 1, it was held: "A mortgage upon a homestead acknowledged by a notary who was likewise an officer and stockholder of the corporation, mortgagee, is invalid." To the same effect, see *Horbach v. Tyrrell,* 48 Neb. 514; *Hedbloom v. Pierson,* 2 Neb. (Unof.) 799.

It appears that the mortgagors made no objection to the validity of the mortgage. The State Bank now contends that Hall has no standing to urge the invalidity of the mortgage; and that this question could be raised only by the mortgagors. The decisions upon this precise point are not numerous. It is clear that mortgagors had the right to set up the invalidity of the mortgage, and it would seem that any one in privity with them would have the same right. In *Dye v. Mann,* 10 Mich. 291, it was held: "A subsequent mortgagee whose mortgage is executed by both husband and wife may take advantage of the invalidity of a mortgage given by a married man upon his homestead without his wife's signature. Such mortgage by the husband alone is void for all purposes, and not merely as to the homestead interest." This principle is sustained in *Dorsey v. McFarland,* 7 Cal. 342; *Hill v. Alexander,* 2 Kan. App. 251; *Whelan v. Adams,* 44 Okla. 696. In *Bolton v. Oberne, Hosick & Co.* (79 Ia. 278), 44 N. W. 547, it was held:

"Since the conveyance of a homestead by a husband, in which his wife does not join is declared by the Code of Iowa, section 1990, to be void, such conveyance, when made to a daughter, may be attacked by any one having an interest in the property, though all the beneficiaries to the homestead have apparently acquiesced in the conveyance since it was made." It would seem, therefore, that Hall stood in such relation of privity with the mortgagors that he had the right to plead the invalidity of the bank's mortgage.

The State Bank, in its answer and cross-petition, alleged that the Hall mortgage was invalid because the mortgagors did not sign the mortgage in the presence of the attesting witness. This objection is not sustained by the evidence: While there is some testimony which tends to show that the Hall mortgage was not signed in the presence of the subscribing witness, the weight of the testimony, as we view it, is to the contrary. The subscribing witness stated positively that the mortgage was signed in his presence by the mortgagors.

No complaint is made as to the amount due upon the respective mortgages. Upon a consideration of the entire record, we are of the opinion that the Hall mortgage should have been decreed a fourth lien upon the premises. In view of the fact that the mortgagors are making no complaint, the State Bank's mortgage should be decreed a fifth lien.

The judgment of the district court is reversed and the cause remanded, with directions to enter judgment in accordance with the views herein expressed.

REVERSED, WITH DIRECTIONS.

Note—See acknowledgements, 1 C. J. p. 806, sec. 113; Homesteads, 29 C. J. p. 908, sec. 304; p. 925, sec. 333.

STATE, EX REL. CLARENCE A. DAVIS, ATTORNEY GENERAL, V. FARMERS STATE BANK OF BENEDICT: ORMAN S. JEFFERY ET AL., APPELLEES: C. H. KOLLING, RECEIVER, APPELLANT.

FILED JULY 18, 1924. No. 23731.

1. **Banks and Banking:** GUARANTY FUND: DEPOSITS. "In order to create a deposit which will be protected by the guaranty law, as the term 'deposit' is understood in section 8033, Comp. St. 1922, it is necessary that money or its equivalent shall in intention and effect be placed in or at the command of the bank under circumstances which do not transgress specific limitations of the bank guaranty law." *State v. Farmers State Bank*, 111 Neb. 117.

2. ———: ———: ———. Under the facts shown by the record and set out in the opinion, *held*, that the transaction between the claimants and the bank was a deposit, and entitled to the protection of the guaranty law.

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

W. L. Kirkpatrick and *C. M. Skiles*, for appellant.

Bernard McNeny, Gilbert & Perry and *Stewart, Perry & Stewart, contra.*

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

DAY, J.

This is an appeal by the receiver of the Farmers State Bank of Benedict from a judgment of the district court allowing the claim of Orman S. Jeffery and Anna M. Jeffery, as a preferred claim against the bank, and directing that it be paid out of the depositors' guaranty fund.

It is the contention of the claimants that they deposited in the Farmers State Bank $39,580 on December 30, 1921, under an agreement with the bank that they were to receive interest on said sum at the rate of 5 per cent. per annum; that they thereby became depositors in the bank; and

that the sum so deposited was under the protection of the guarantee fund. The receiver objects to the allowance of the claim as a preferred claim, and to its payment out of the guaranty fund, but concedes that it is a general claim against the bank. The objection of the receiver is based upon the theory that the transaction between the claimants and the bank, upon which the claim is founded, was a loan to the bank, as distinguished from a deposit in the bank. It is the claim of the receiver that the bank agreed to pay interest at a greater rate than 5 per cent. upon the amount placed in the bank, and therefore the claimants are not entitled to have their claim paid out of the guaranty fund.

Did the transaction between the claimants and the bank constitute a deposit in the bank? In *State v. Farmers State Bank*, 111 Neb. 117, it was held: "In order to create a deposit which will be protected by the guaranty law, as the term 'deposit' is understood in section 8033, Comp. St. 1922, it is necessary that money or its equivalent shall in intention and effect be placed in or at the command of the bank under circumstances which do not transgress specific limitations of the bank guaranty law."

Section 8008, Comp. St. 1922, in part, provides as follows: "No banking corporation transacting a banking business under this article shall pay interest on deposits, directly or indirectly, at a greater rate than 5 per cent. per annum."

In *Iams v. Farmers State Bank*, 101 Neb. 778, the claimant Iams was the holder of a certificate of deposit issued to him by the bank, regular on its face, and providing for the payment of the principal sum with interest at 5 per cent. Iams had a secret agreement with the bank by which he was to be paid by the bank an additional 1 per cent. It was held that the transaction was not a deposit within the protection of the guaranty law, because it violated specific limitations of the law. We come now to consider the transaction between the claimants and the bank in the light of the principles of law announced in the foregoing decisions.

It appears that on June 7, 1921, W. S. Jeffery, the father of Orman S. Jeffery, with others, had signed a contract of guaranty, whereby the signers jointly and severally guaranteed the payment of any and all indebtedness owing by the Farmers State Bank of Benedict to the City National Bank of York, Nebraska, not exceeding in amount $80,000. W. S. Jeffery died in September, 1921, leaving a considerable estate to be administered. Orman S. Jeffery was one of the heirs, and also administrator of the estate. The claimants were desirous of having the estate of W. S. Jeffery relieved from the obligation of the guaranty. The Farmers State Bank had become indebted to the City National Bank in a large sum of money, and was in need of ready cash to conduct its affairs. An arrangement was entered into between the claimants and F. R. Ward, vice-president of the Farmers State Bank, acting for the bank, by which the claimants were to borrow money on their farm to the extent of $40,000 and deposit the same in the bank upon certificates of deposit drawing interest at the rate of 5 per cent. The loan could not be negotiated for less than 6½ per cent. interest, and in addition thereto a commission to be paid to the brokers procuring the loan. Ward in his individual capacity thereupon agreed that he would personally pay the commission upon the loan, and also the 1½ per cent. interest upon the loan, the same being the difference between the 5 per cent. which the bank agreed to pay and the 6½ per cent. which the claimants were required to pay to secure the loan. On December 3, 1921, the claimants executed a note and mortgage to the Provident Life Insurance Company for $40,000, drawing interest at 6½ per cent. payable semi-annually, and delivered the same to the bank. Thereupon on the same day the bank issued a certificate of deposit to the claimants for $40,000, drawing interest at 5 per cent. and due in six months. At the same time a certificate of deposit for $300 was issued by the bank and delivered to the claimants, due in six months without interest, Ward stating at the time that he had paid for the $300 certificate. On June 3, 1922, the claimants surren-

dered to the bank these two certificates and received another certificate for $40,000, and likewise one for $300, upon the same terms as before. The bank thereupon sent a draft to the Provident Life Insurance Company for $1,300 being the semi-annual interest due upon the loan. The entries on the books of the bank with respect to this payment of interest were improperly recorded, and the books of the bank did not properly record the transaction of the issuance of the certificates of deposit. No record was made of the issuance of the certificates of deposit in the regular course of business of the bank. Before the certificates of June 3, 1922, became due, the bank failed.

It further appears that on or about December 29, 1921, a draft was received by the bank from the First Trust Company of Lincoln for $39,580.56, which represented the proceeds of the loan with accrued interest for 25 days, less the commission charged for securing the loan. No proper entry was made on the books of the bank of this transaction. It does appear, however, that this draft was sent to the City National Bank and proper credit given to the Farmers State Bank for that sum. Whereupon the City National Bank released a large amount of securities held by it for the indebtedness of the Farmers State Bank, and also surrendered the guaranty signed by W. S. Jeffery and others. It is clear that the Farmers State Bank secured the benefit of the draft for $39,580.56. When the claimants discovered the situation as disclosed in the records of the bank they offered to surrender the certificate of deposit for $40,000, and made claim only for $39,580 with interest from the date that sum was received by the bank. If the claimants' version of the transaction be the true one, the bank should have received $40,000, because Ward was to personally pay the commission for securing the loan. It seems clear that the claimants were acting in perfect good faith. If Ward had personally paid to the bank the amount of the commission upon the loan, and the additional 1½ per cent. interest for which the $300 certificate was issued, as he agreed to do, the bank would not have paid more than

5 per cent. upon the amount of money received by it out of the transaction. The mere fact that Ward failed to carry out his part of the agreement does not in our view militate against the rights of the claimants as depositors in the bank. Suppose a person would take money to the bank and deposit it in the regular course of business, but the bank officials failed to make a proper entry of the transaction upon its books. Could it be claimed that the transaction was not a deposit, and that it was not within the protection of the guaranty law? We think not. It was within the province of Ward as an officer of the bank to make an agreement on behalf of the bank to pay 5 per cent. interest on the claimants' money. It was also within his province as an individual to agree to pay the commission on the loan together with the additional 1½ per cent. interest. So far as claimants knew he had kept his agreement.

In support of the contention of the receiver that the bank agreed to pay interest at a greater rate than 5 per cent., an agreement was offered in evidence which was signed by the bank and the claimants. By the terms of this agreement it appears that the bank agreed to pay interest upon the $40,000 in excess of 5 per cent. The claimants, however, testified that they did not read the agreement when it was signed by them, and that it was prepared by Ward from data which they handed him and which they supposed he correctly transcribed. Ward did not testify. Another witness testified that he interviewed Ward with reference to this contract, and that Ward stated in substance that the claimants did not sign the contract they thought they were signing. We think the explanation of the claimants was sufficient to show that the so-called agreement was not knowingly entered into by them.

Considering the entire record, we are of the opinion that the transaction between the claimants and the bank was a *bona fide* deposit on the part of the claimants, and that they might well have made claim to the entire sum of $40,000.

The facts in this case do not bring it within the rule of the *Iams* case hereinbefore cited. In that case the agree-

ment to pay the extra interest was made by the bank.

The trial court allowed the claimants $39,580 with interest thereon at 5 per cent., which was the amount prayed for. We think this judgment is fully sustained by the record, and it is, therefore,

AFFIRMED.

GOOD, J., dissents.

Note—See Banks and Banking, 7 C. J. p. 485, sec. 15 (1925 Ann.).

WILLIAM H. MENKING, APPELLANT, V. ARTHUR W. LARSON, APPELLEE.

FILED JULY 18, 1924. NO. 22823.

1. Torts: JOINT TORT-FEASORS: SETTLEMENT WITH ONE: ORAL EVIDENCE. "Settlement with one of several joint wrongdoers and payment of damages is not a defense to an action against another, unless it was agreed between the parties to the settlement that such payment was in full of all damages suffered. If the settlement is in writing, oral evidence is competent to show the intention of the parties thereto in an action against one not a party to the settlement." *Fitzgerald v. Union Stock Yards Co.*, 8[illegible] Neb. 393.
2. Principal and Agent: FRAUD OF AGENT. A provision in a contract for the purchase of real estate, to the effect that vendee agrees that he has made personal inspection of the property covered by the contract and is buying it solely on his own investigation and not on any representations made by any one else as to any material matter affecting such property or his purchase thereof, will not relieve the vendor, or his agent, from responsibility for fraudulent representations, made by vendor's agent, concerning the subject-matter of the contract, for the agent has ostensible authority to make representations as to the subject-matter of the sale, and his fraud, committed within the limits of such authority, will fix responsibility both upon the principal and the agent.

APPEAL from the district court for Fillmore county: RALPH D. BROWN, JUDGE. *Affirmed on condition.*

F. B. Donisthorp, for appellant.

Waring & Waring, contra.

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

GOOD, J.

This is an action upon a promissory note by the holder, an indorsee, against the maker. Defendant in his answer alleged that the note was given in part payment of the purchase price of land in Colorado, and that he was induced to make the contract of purchase by fraud and misrepresentations practiced by the vendor and its agents, and set up a counterclaim for damages, alleging that plaintiff was one of the agents of the vendor who made the misrepresentations and induced the making of the contract, and that the vendor and plaintiff were joint tort-feasors. The trial resulted in a verdict for defendant in the sum of $3,000 on his counterclaim, and relieving him of liability on the note in controversy. Plaintiff appeals.

The facts disclosed by the record, so far as necessary to an understanding of the questions for determination, may be summarized as follows: The Twin Lakes Land & Water Company (hereinafter referred to as the land company) was engaged in selling lands and water rights for irrigation purposes in Crowley county, Colorado. Menking, the plaintiff, resided in Fillmore county, Nebraska, and was agent for the land company. He and the defendant were well acquainted and had had other business dealings, and the defendant reposed confidence in the integrity of the plaintiff. In January, 1918, plaintiff, with other agents of the land company, induced the defendant, also a resident of Fillmore county, with other prospective purchasers, to visit the Colorado land. The party arrived at the village of Manzanola, Colorado, were met at the train by automobiles and taken over some of the land owned by the land company and made a casual examination. At that time there was about six inches of snow on the ground. They were taken to the home of one Bowers, an alleged prosperous farmer in the vicinity, who, it later developed, was also an agent

or employee of the land company. There they had the evening meal and remained over night. The next morning they again visited the land and then returned to the Bowers home, where defendant executed a contract to purchase 240 acres of land for the price of $150 an acre. He paid $3,000, in cash or by check, and gave a series of notes, aggregating $33,000, for the remainder of the purchase price. On the trip from Nebraska to Colorado and while there, defendant was kept constantly in the company of the agents or employees of the land company and was not given an opportunity to see or make inquiries from disinterested parties about the land. Plaintiff and the other agents represented to defendant that the land was of a high character of chocolate loam and would produce bountiful crops; made representations as to the amount of wheat, oats, corn and other crops that could be grown upon the land, and as to the supply of water for irrigation purposes, and other facts that would materially affect the value of the land, and induced the defendant to believe that the land was a bargain at $150 an acre. Later the defendant, on ascertaining facts that led him to believe that he had been defrauded, employed an attorney, who effected a settlement with the land company. This settlement provided that the contract of purchase should be canceled, and all of the defendant's notes, except two, aggregating $2,800, were returned to defendant. The two notes which were not returned to the defendant were not then in the possession of the land company. One of these notes, for $1,800, is the one in controversy in this action.

The defendant was not present when the contract of settlement between defendant's attorney and the land company was effected. That contract is in writing and is in part as follows: "In further consideration of first party surrendering to second party the notes executed by second party and running to first party in connection with the purchase of said land, with the exception of said two notes aggregating $2,800, and in consideration of each of the parties hereto releasing, relieving and discharging the oth-

er of said parties from any and all liabilities whatsoever growing out of the purchase of said described premises and water rights and any and all payments made thereunder, it is agreed between the parties hereto in manner following, that is to say:

"First party shall surrender and deliver and does hereby surrender and deliver unto second party all the promissory notes executed by second party as aforesaid and given to first party in connection with the purchase of said described lands and water rights, with the exception of said note No. 3036 in the sum of $1,000 and said note No. 3037 in the sum of $1,800, and releases and discharges said second party, his heirs and assigns from any and all claims and demands of every nature whatsoever growing out of said contract of purchase and said promissory notes.

"Second party accepts said notes in full settlement and satisfaction of any and all claims and demands of every character whatsoever which he has, claims or holds against first party growing out of the execution and delivery of said contract of purchase, the execution and delivery of said promissory notes and contract, and the cash payment made on account thereof.

"It is mutually agreed between the parties hereto that the contract of purchase executed in duplicate by the parties hereto covering the premises and property above described shall be surrendered and canceled."

Plaintiff insists that this contract of settlement was a complete accord and satisfaction of any cause of action for damages against either the land company or plaintiff, and that it contemplated that the defendant should pay the note in controversy, together with the other note for $1,000, as a part of the settlement. Defendant, on the other hand, contends that the settlement with one joint tort-feasor, whereby he is relieved from liability, does not relieve the other tort-feasor from liability, unless the settlement effected was intended to be of the entire cause of action.

The rule applicable to the situation that obtains in this state is clearly set forth in *Fitzgerald v. Union Stock Yards*

Co., 89 Neb. 393, as follows: "Settlement with one of several joint wrongdoers and payment of damages is not a defense to an action against another, unless it was agreed between the parties to the settlement that such payment was in full of all damages suffered. If the settlement is in writing, oral evidence is competent to show the intention of the parties thereto in an action against one not a party to the settlement; affixing a private seal to such writing is without effect." This rule has been followed and reaffirmed in *Hauth v. Sambo*, 100 Neb. 160, and *Tankersley v. Lincoln Traction Co.*, 101 Neb. 578.

We think it will not be controverted that the terms of the settlement contract, standing alone, are sufficient to indicate that it was the intention of the parties to make a complete settlement of the cause of action. But, under the rule as above announced, in an action against one who is not a party to the contract of settlement, parol evidence is admissible to show the intention of the parties. In the instant case, parol evidence to explain the intention of the parties to the settlement was offered, wherein it was disclosed that it was not the intention of the parties that defendant should be liable upon the two promissory notes, not then in the possession of the land company. This testimony is uncontradicted and is to the effect that it was the understanding of the parties that defendant would not pay the two notes which were not surrendered. The reservation went no further than this. The contract must, therefore, be held to be a complete settlement of the cause of action, except as to the right of defendant to make a defense to the two notes, one of which is the note in controversy in this action.

We conclude, therefore, that the court erred in submitting to the jury the question of the right of the defendant to recover upon the counterclaim, and that the judgment in favor of defendant on his counterclaim is not supported by the evidence. It is quite plain that if the land company had retained possession of and brought suit upon the note in question it would not be entitled to recover.

The effect of the settlement contract, as explained by oral evidence, was to reserve to the defendant the right to make any defense he might have to the note for $1,000 and to the one on which plaintiff's action is founded.

The contract of purchase between the land company and defendant contained this clause: "First party states and agrees that he has made personal inspection of the property covered by the within contract, and is buying it solely on his own investigations, and not on any representations made by any one else as to any material matter affecting said property, or his purchase thereof." Plaintiff insists that this clause in the contract cannot be varied by parol testimony, and that it effectually bars defendant from maintaining any action for damages for fraud or deceit, and also deprives him of any defense on those grounds to the notes given as part of the purchase price.

In *Schuster v. North American Hotel Co.*, 106 Neb. 679, it is held: "A provision in such a contract, to the effect that the agent cannot bind the company by any representations, statements or agreements, will not relieve the principal from responsibility for the fraudulent representations, made by its agents, concerning the subject-matter of the contract, as distinguished from the agreements and promises which are to be undertaken, for a sales agent has ostensible authority to make representations as to the subject-matter of the sale, and his fraud, committed within the limits of such authority, will fix responsibility upon his principal." See, also, *Stroman v. Atlas Refining Corporation, ante*, p. 187.

If the effect of such a clause will not relieve the principal from liability for fraud or deceit practiced in obtaining the contract, we think it is quite clear that it will not relieve the agent who made the representations and practiced the fraud or deceit. The recital in the contract does not even purport to protect any one other than the party to the contract, and the agent committing the wrongful act cannot shield himself from his wrongdoing by such a clause in the contract of his principal.

Plaintiff argues that the evidence is insufficient to sustain the charge that the note was obtained by fraud and deceit. We have examined the record, and, while there is a conflict in the testimony, there is ample evidence tending to show that defendant was grossly deceived and defrauded in the transaction. It is evident from the whole record that he will lose the $3,000 cash payment that was made, as well as the $1,000 note which he has been compelled to pay to an innocent holder, and that he has received absolutely nothing for the note in controversy. That plaintiff is not an innocent holder in due course is plainly evident. The question was one for the jury, and the verdict thereon is conclusive.

Complaint is made of a number of instructions of the court, but we find no error in them save in those which submitted to the jury the right of defendant to recover on his counterclaim. Complaint is also made of rulings on admission of evidence. We have examined the record and find no error in this respect.

Because of the error of the court in submitting to the jury the right of defendant to recover on his counterclaim, the judgment must be reversed and the cause remanded for a new trial, unless defendant shall, within 20 days, file a remittitur of the whole of the judgment on his counterclaim. If such remittitur is filed, the judgment will be affirmed; otherwise, reversed and remanded.

AFFIRMED ON CONDITION.

Note—See Agency, 2 C. J. p. 856, sec. 541; Compromise and Settlement, 12 C. J. p. 344, sec. 37; Evidence, 22 C. J. p. 1292, sec. 1725.

WILLIAM BRAUN, APPELLEE, V. THOMAS QUINN ET AL., APPELLANTS.

FILED JULY 18, 1924. No. 22832.

1. **Venue.** An action for the recovery of a money judgment, when the defendant is a resident of this state, must be brought in the county where he resides or may be served with summons.

2. Judgment: VALIDITY: JURISDICTION. If an action for a money judgment only is begun against but one defendant in a county where he does not reside and cannot be served with summons, the court does not acquire jurisdiction over his person by summons served on him in the county of his residence. If defendant fails to appear, a judgment rendered upon such service is void.
3. ———: RELIEF IN EQUITY. In a suit by a judgment debtor to enjoin the enforcement of a judgment, on the ground that it is void because the court wherein it was rendered had not acquired jurisdiction over his person, a court of equity will not grant affirmative relief unless it is made to appear that he had a meritorious defense to the cause of action on which the judgment was based.

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

H. M. Uttley, for appellants.

J. A. Donohoe, contra.

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

GOOD, J.

This is an action to enjoin the enforcement of a judgment, on the ground that it is void for want of jurisdiction in the court wherein it was rendered. To the petition the defendants demurred generally and also on the ground of misjoinder of causes of action. The demurrer was overruled, and, defendants electing not to further plead, decree was entered enjoining the enforcement of the judgment, in accordance with the prayer of the petition. Defendants appeal.

The salient facts set forth in the petition are as follows: December 13, 1920, Thomas Quinn commenced an action against William Braun in the district court for Holt county, Nebraska, upon a contract, and prayed for a money judgment. On the same day Quinn filed an affidavit for attachment, setting forth as ground therefor that the defendant Braun had fraudulently incurred the obligation for which suit was brought. On the same day a summons

and order of attachment were issued, directed to the sheriff of Holt county. The sheriff made return to the summons that the defendant could not be found in his county, but levied the order of attachment upon real estate of the defendant Braun. On the 28th day of December, 1920, an alias summons was issued out of said court and directed to the sheriff of Platte county, Nebraska, which was served upon Braun. There was attached to this summons a certificate, giving information that a writ of attachment had been issued in the action and levied upon certain described real estate. Braun made no appearance in that action, and on the 26th day of October, 1921, a default judgment, personal in form, was rendered in favor of the plaintiff Quinn, and the court directed that an order of sale should issue, commanding the sale of the attached real estate, or a sufficient amount thereof to pay the judgment, with costs. Pursuant to this order the sheriff advertised the real estate for sale, and then the present action was brought.

It is alleged in the petition in the instant action that at all the times complained of plaintiff was a resident of Platte county and was not at any of the time a resident of or within Holt county. Plaintiff further alleges that he had been the owner of the real estate levied upon, but had since conveyed the same and was liable to his grantee upon the warranties in his deed of conveyance, and also alleges that he was the owner of other particularly described real estate in Holt county, and that the purported judgment obtained against him was a cloud upon the title to his real estate. Plaintiff prays that the purported judgment be decreed null and void, that proceedings to enforce it be perpetually enjoined, and that his title to all the real estate be quieted against the claims of the defendants.

It is contended that the facts pleaded do not show that the judgment is void, but, at most, merely voidable, and that, even if void, plaintiff may not enjoin its enforcement, because he has not set forth in his petition that he had a valid defense to the cause of action on which it was based.

According to the averments of the petition, which are ad-

mitted by the demurrer, when Quinn filed his petition in Holt county, Braun was then a resident of Platte county and at no time since has Braun been a resident of or within Holt county. The action, being for a money judgment only, could not be commenced and maintained except in a county where defendant resided or could be served with process. The law did not authorize the issuance of a summons to Platte county. The service in that county of summons on Braun did not give the court jurisdiction over his person. The judgment subsequently rendered was void for want of jurisdiction. *Ayres v. West*, 86 Neb. 297; *Fogg v. Ellis*, 61 Neb. 829; *Chicago, B. & Q. R. Co. v. Hitchcock County*, 60 Neb. 722; *Walker v. Stevens*, 52 Neb. 653; *Mosher v. Huwaldt*, 86 Neb. 686.

Defendant contends that the petition does not state facts sufficient to entitle the plaintiff to the relief demanded, because plaintiff failed to allege that he had a valid or meritorious defense to the cause of action on which the judgment was founded. The plaintiff, on the other hand, contends that, the judgment being void, its enforcement may be enjoined without alleging the existence of a meritorious defense to the cause of action on which it was based. The authorities upon this question are not uniform, and the decisions of our own court are not entirely harmonious.

Plaintiff cites and relies upon *Bauer v. Deane*, 33 Neb. 487; *Cobbey v. Wright*, 29 Neb. 274, and *Ayres v. West, supra*. In none of these cases is the question raised or discussed as to whether, in an action to enjoin the enforcement of a void judgment, it is necessary to allege the existence of a meritorious defense to a cause of action on which the judgment was founded. For aught that appears, in the case of *Ayres v. West, supra*, a valid defense may have been alleged. In *Bauer v. Deane, supra*, the action was by one judgment creditor to enjoin the enforcement of a void judgment by another judgment creditor, and in that action it was disclosed that the plaintiff in the injunction suit had acquired a valid and superior lien, so that, in effect, he showed a meritorious defense to the cause of ac-

tion, in so far as it related to the rights of plaintiff in the injunction action. In *Cobbey v. Wright, supra,* the petition alleged facts showing a meritorious defense.

But more directly to the point, this court has held in *Kaufmann v. Drexel,* 56 Neb. 229: "An action may be maintained to enjoin the enforcement of a void judgment when there is a concurrence of the following conditions: (1) The judgment must be without any legal or equitable basis; (2) its invalidity must not appear on the face of the record; and (3) the party complaining must be without an adequate remedy at law."

In *Bankers Life Ins. Co. v. Robbins,* 53 Neb. 44, it is held: "A party against whom a judgment has been rendered by default, which judgment is void for want of jurisdiction over the person of the defendant, is not entitled to an injunction to restrain the enforcement of such judgment unless he makes it appear, both from his pleadings and proof, (1) that he has a meritorious defense to the cause of action on which the judgment is based; (2) that he has no adequate remedy at law; and (3) that his plight is in no wise attributable to his own neglect."

In *Janes v. Howell,* 37 Neb. 320, it is held: "A court of equity will not vacate a judgment at law merely on the ground that the officer's return, that he had served the summons on the defendant to the judgment by leaving a copy of the process at his usual place of residence, was false. It must also be averred and proved that the defendant to the judgment has a meritorious defense to the same."

In *Osborn v. Gehr,* 29 Neb. 661, it is held: "A court of equity will not set aside a judgment at law, regular on its face, when it is not shown that the judgment was rendered where no cause of action existed." In other words, the petition in that action did not allege facts showing a defense to the claim on which the judgment was founded.

In *Pilger v. Torrence,* 42 Neb. 903, it is held: "When one against whom a judgment has been rendered seeks the affirmative aid of a court of equity to relieve him from that judgment, he must aver and prove that he had a merito-

rious defense to the action in which judgment was rendered. This is true even though the judgment be void, provided at least its invalidity does not appear on the face of the record."

The reason usually given for the rule against relieving from a void judgment unless a meritorious defense to the cause of action is averred is that equity will not do a useless thing, and it would subserve no useful purpose to set aside a judgment for want of jurisdiction, if the party seeking the injunction had no defense to the cause of action upon which it was based. Another reason is that it is not enough that the judgment assailed be unlawful. It must be against conscience as well.

We think the correct rule, and the one supported by the weight of authority, is laid down in 1 Black, Judgments (2d ed.) sec. 376, in the following language: "It is generally held that where a judgment at law is void for want of jurisdiction, no summons or notice having been served on the defendant, nor opportunity given him for defense, nor any appearance entered by or for him, equity will relieve against the judgment, if it be shown that there is a meritorious defense to the action."

While the summons served on Braun in Platte county was insufficient to give the district court for Holt county jurisdiction over his person, it did apprise him of the fact that he was named as the defendant in a petition filed in that court, and that a judgment was being asked against him. He could have entered a special appearance and, by timely objection, have prevented entry of the judgment against him. This he failed to do. His present plight is attributable to his own neglect. Whether he had a valid or meritorious defense is not disclosed. Unless he had such a defense, the judgment is not unconscionable. He is not entitled to affirmative relief in a court of equity unless he makes it appear that he had a meritorious defense and that the judgment is therefore against conscience. It follows that the district court erred in overruling the demurrer.

The judgment is reversed and the cause remanded, with

leave to the plaintiff, if he so elects, to amend his petition and set forth therein facts showing any defense he may have to the cause of action on which the judgment was based.

REVERSED.

Note—See Judgments, 33 C. J. p. 1074, sec. 35; p. 1086, sec. 47—Venue, 40 Cyc. p. 96.

FARMERS NATIONAL BANK, APPELLEE, V. L. D. OHMAN ET AL., APPELLANTS.

FILED JULY 18, 1924. No. 22873.

1. **Bills and Notes**: ACCOMMODATION MAKER. One to be an accommodation maker of a promissory note must not receive any benefit or consideration directly or indirectly by way of the transaction of which the note was a part, and the transaction must be one primarily for the benefit of the payee.
2. ———: CONSIDERATION. "A consideration moving to one of several joint makers of a promissory note is good as to all." *First Nat. Bank v. Golder*, 89 Neb. 377.
3. **Evidence**: PAROL EVIDENCE. A promissory note, in the usual commercial form, is a complete contract in itself, and its terms cannot be varied or contradicted by parol evidence.
4. **Banks and Banking**: AGENCY. One whose note to a bank is past due, and who is required to procure additional security in order to obtain renewal thereof, in so doing is not acting as the agent of the bank, even if the bank's officers suggest that he procure a certain person.
5. ———: AUTHORITY OF OFFICERS. In an action on a promissory note by the payee against the maker, the latter set up as a defense that at the time he made the note he was orally promised by the president and the cashier of the bank that he was not to be liable thereon. The making of such a promise, if it could be proved, was not, under the facts disclosed, within the apparent scope of these officers' authority, and is not binding on the bank, unless specially authorized, or, with knowledge of the fact, approved by the bank's directors.
6. **Bills and Notes**: DEFENSES. An agreement pleaded as a defense to an action on a promissory note, brought by the payee bank,

that at the time of its execution and delivery it was agreed between the payor and the payee that the note was to be used for the sole purpose of enabling the payee bank to satisfy the demands of the national banking authorities then being made upon it, does not constitute a defense; the fraud, if any, being in this agreement, and not in the note, nor in the consideration for it.

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

George A. Eberly, for appellants.

D. C. Chase and *Hugo M. Nicholson, contra.*

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

THOMPSON, J.

The plaintiff alleges, in substance, as a basis of recovery, that it is a corporation, organized and doing business at Pilger, Nebraska, as a national bank; that on the 26th day of April, 1921, the defendants executed and delivered to it their promissory note, in the usual commercial form, for the sum of $7,500, drawing interest at 10 per cent. per annum, due six months after date; that the same was long past due and that no part thereof had been paid, and prayed judgment accordingly.

The defendant L. D. Ohman answered, in substance, alleging, first, a general denial; second, that the note was signed by the defendant without consideration and solely for the accommodation of the payee named therein.

The defendant M. D. Ohman for answer alleged, in substance, first, that the note was signed by the defendant solely for the accommodation and benefit of the payee and wholly without consideration received by the defendant, or parted with by plaintiff; second, that in signing the note she did so pursuant to, and relying upon, an oral agreement made and entered into by and between the plaintiff and herself, and in her behalf; that the agreement constituted the condition upon which the note was signed and

delivered; that it was agreed that the note was for the purpose of aiding and assisting plaintiff, and solely to enable plaintiff to satisfy the demands of the bank examiner and the national banking authorities, then being made upon said plaintiff; that she thus signed the note with the defendant L. D. Ohman wholly and solely upon the condition that it was to be accommodation paper for the purpose named in the oral agreement; that the plaintiff, in consideration, agreed with her that the aforesaid note was to be used solely for the purpose of satisfying the bank examiner and national banking authorities; that the defendant would not be required to pay the note and that there should be no recourse to her by the plaintiff. The third paragraph is but a repetition of the first and second.

It will be noticed that this answer of M. D. Ohman, by not denying, admits every allegation in the petition well pleaded, and seeks to avoid the effect or consequences by a plea that the same is accommodation paper, signed by her without consideration and for the sole benefit of the plaintiff.

The plaintiff for reply to each of the answers filed a general denial.

The case came on for trial and at the close of defendants' evidence plaintiff moved for an instructed verdict in its favor in the sum of $8,233.36, the amount of the note and interest to that date. Motion sustained, and the court instructed the jury as follows: "You are instructed by the court to return a verdict for the plaintiff in this case against both defendants in the sum of $8,233.36." Defendants jointly except, and jury return a verdict for the amount. Judgment by the court entered thereon. Defendants separately file motion for a new trial, alleging as grounds therefor: "That the court erred in instructing the jury to render verdict in favor of plaintiff: that the verdict is not sustained by the evidence and is against the weight thereof; that the verdict is contrary to law." Motion overruled. Case appealed by the defendants, M. D. Ohman giving her separate supersedeas bond.

The instruction quoted in defendants' brief is not found in the transcript, but is taken from statements made by the court, as shown by the bill of exceptions, leading up to the giving of the instruction heretofore quoted.

From the pleadings it will plainly be seen that the main issue raised thereby, so far as M. D. Ohman was concerned, was as to whether or not the note sued on was as to her an accommodation note given for the primary benefit of the payee, and without consideration directly or indirectly running to her from the payee; the other facts pleaded in her answer, as to the desire on the part of the bank to satisfy the bank examiner and national banking authorities, being simply an amplification of the plea necessary in a case of accommodation paper. The pleading is without an allegation of intentional fraud, deceit, or charge of wrong-doing as to any of the parties. In considering the effect of a directed verdict, we are not unmindful of the rule announced by us in *O'Hara v. Hines*, 108 Neb. 74.

Defendant M. D. Ohman is the mother of defendant L. D. Ohman, and we shall refer to them as mother and son, respectively.

The evidence, in substance, further shows that at the time of the execution and delivery of the note in question the plaintiff bank still held a past-due note for $5,000 signed by the son and his mother; also an enforceable note signed by the son alone in the like sum of $7,500; that the national bank examiners had objected to the plaintiff bank longer carrying the latter note with only the signature of the son, and requested plaintiff bank to demand additional security, which it did of him at his home in Stanton county, telling him at the time that the bank examiner had been at the bank, examined the notes, and demanded that his $7,500 note be paid, or an additional signer thereon obtained; that he said he did not like to ask his mother to sign the note with him, as debts worried her; that Chace, president of the bank, said: "We will give you plenty of time, and you can renew the note from time to time so that this will give you a chance to pay it, and your mother need not be troubled;"

that at the same time the note in question was prepared, signed by the son and left with him, he sent the note to her, and, as shown by his evidence, stated to her in a letter submitting the same: "I wrote to her that the examiner was demanding another signature on the paper, and that I had the promise of Mr. Chace and Mr. Larson that if mother would sign the note with me she would not be troubled for payment, that they would give me three or four years to work it out myself."

After receiving the letter and the note, the mother signed the latter, returned it to the son, and he delivered it to the bank, at which time he was told that the bank examiner had been there and that the bank had informed him that they were expecting the mother to sign the note with him, and the examiner said he would then let the matter rest until the new note was executed and returned to the bank, or words to that effect. That afterwards, and just before the note was due, the bank officials went to the son's farm and requested that he secure the $5,000 note, and the note in question, interest on each, and $600 interest unpaid on the note renewed, amounting in all to the sum of about $14,000. That the son declined to secure the said amount on his lands for the reason that he wanted to make some other disposition of them; and that they then went to the mother to have her secure the $14,000 and she said she would want some days to consider it; that she afterwards informed the bank that she had concluded not to mortgage her farm, and further said, at any rate she thought they were not going to trouble her.

In this case, the examiners acted as duty demanded, the bank carried the demand to the maker of the note, and requested payment thereof or another name. The mother had previously signed one note with the son for $5,000 payable to the bank; and the most natural thought to come to both the bank officers and the son was to have the mother go on the note with the son. And just as natural for the officers to say to the son, it is security we are after, and if you will get your mother to sign the note with you

we will give you time to make the payments yourself if you desire, and we will not trouble the mother. The son so understood it and a fair construction placed on the letter to the mother will so interpret the language used.

We first notice defendants' contention that the note in question was given without consideration as an accommodation note. They urge that the plaintiff bank parted with nothing of value when the note in question was received. This contention cannot be sustained. Induced by the receipt of it, plaintiff bank credited the son upon its books with $7,500 as payment on the original note, and by extending time of payment thus relinquished its right to sue on this note *pro tanto*. Also, the original consideration for the note renewed was sufficient. We consider the law to be correctly stated in 8 C. J. 217, sec. 352, as follows:

"The existing debt may already be represented by the maker's own bill or note, and the surrender of such instrument will be a good consideration for the new obligation, and this is so, although the old note is not surrendered, provided there was no agreement to return the old note, and where the old note has not been transferred to one other than the payee of the new note. So a note given in renewal of the maker's note is based on a consideration, and in such case the consideration for the original paper supports the renewal."

In *Perrin v. Royal*, 42 Ind. 132, suit was brought on a promissory note given in renewal of six others. In the opinion the court say: "The old notes, or the debts evidenced thereby, furnished an ample consideration for the execution of the new, whether the old ones were surrendered at the time, or not."

When the mother signed the note, the consideration for it on the part of the son was a sufficient consideration as to her, as: "A consideration moving to one of several joint makers of a promissory note is good as to all." *First Nat. Bank v. Golder*, 89 Neb. 377. On page 381 the following instruction given was approved by us: "If the jury believe from the evidence that the defendant Hopper signed

said note at the request of one of the other signers, Huntington, then in that case the consideration received by the other signer, Golder, would be a sufficient consideration for the defendant Hopper for signing said note, and the defendant Hopper in that case would be liable for the full amount of said note and interest thereon." This case is as to facts pleaded similar to the instant case, as is shown by paragraph 4, page 379.

In *Neal v. Wilson,* 213 Mass. 336, a check was given by third persons to a bank without consideration, at the solicitation of the cashier, and immediately passed to the credit of a depositor's over-due account, to make the account whole. Held, the check was given for the accommodation of the depositor rather than of the bank. Accord, *Nalitzky v. Williams,* 237 Fed. 802; *Skagit State Bank v. Moody,* 86 Wash. 286; *German American State Bank v. Watson,* 99 Kan. 686.

Then the defendants admitted, and it is made a part of the evidence, that the note in suit was a renewal of a note of the same face value which had been given for full value. This admission alone would and did render nugatory the contention that it was an accommodation note, and took the case out of the rule announced in *Citizens Bank v. Fredrickson,* 83 Neb. 755, and brought it within the rule announced in *Security Savings Bank v. Rhodes,* 107 Neb. 223, especially the rule announced in *Greenway v. Orthwein Grain Co.,* 85 Fed. 536, which was followed and approved therein. One to be an accommodation maker of a note must not receive any benefit or consideration directly or indirectly by way of the transaction of which the note was a part. Thus it will be seen that the note was signed and delivered by each of the defendants for a consideration, and in no legal sense an accommodation note, and on that plea the defense fails.

Defendants each, also, rely upon an alleged oral agreement entered into betweeen themselves and James R. Chace and Robert Larson, president and cashier of plaintiff bank, respectively, "to the effect that she, the mother, would not

be called upon to pay the note, that it was to be used solely for the purpose of satisfying the demands of the bank examiner." The note is a complete contract in itself, and its terms cannot be varied or contradicted by extraneous parol evidence. *Van Etten v. Howell*, 40 Neb. 850; *Western Mfg. Co. v. Rogers*, 54 Neb. 456; *Security Savings Bank v. Rhodes*, 107 Neb. 223; *German American State Bank v. Watson, supra; Skagit State Bank v. Moody, supra.* This note was not, and was not intended to be, a sham as to any of the contracting parties; therefore this case is distinguishable from the case of *Coffman v. Malone*, 98 Neb. 819. The fact is that no communication, oral or written, ever passed between Chace or Larson, or the bank, and the mother prior to her signing the new note, or in reference to it. She lived in Bellevue, Nebraska, some distance from Pilger, the home of the plaintiff bank, Chace, Larson, and the son. The only request for her signature was the contents of the letter written to her by the son.

Counsel for defendants argue that L. D. Ohman acted as agent for the bank in securing M. D. Ohman's signature. We hold that one whose note to a bank is past due, and who is required by the bank to procure additional security in order to obtain a renewal thereof, in so doing is not acting as the agent of the bank, even if the bank suggests that the debtor secure a person by it designated. Thus the evidence does not sustain this contention of defendants' counsel.

Furthermore, Chace and Larson could not bind the bank to such an agreement, which, if made by them, was clearly outside the scope of their authority. *Security Savings Bank v. Rhodes, supra; Bank of United States v. Dunn*, 6 Pet. (U. S.) 51. It is not within the recognized duties of managing bank officers to promise persons whose names appear upon commercial paper of the bank that they are not to be held liable thereon, in plain contradiction of the obligation expressed by the paper.

There is no evidence that the bank knew of the agreement, if any there was. Thus this case is distinguishable from *First Nat. Bank v. Felt*, 100 Ia. 680, relied on by

defendants. There the directors ratified the arrangement; the approval of the directors of the plaintiff bank in this instant case is wholly lacking.

The defendants insist that this action is one coming under the rule of law that, where a contract is based on an illegal consideration, the court will leave the parties where it finds them and will not grant relief to either. It is considered by us that defendants have not pleaded nor proved such a case. However, *arguendo,* if all that the defendants have pleaded, with fraud and intentional deceit added, as to the purpose of the execution and delivery of the note as a means of misleading and deceiving the government authorities, as to its true status, was admitted or proved, it would not amount to a defense. In *Skagit State Bank v. Moody,* 150 Pac. 425 (86 Wash. 286) the court, in deciding a similar case, said: "An oral understanding between the parties, that a note given by a director of the bank in payment of overdue interest on another note, to comply with the demands of the state bank examiner, should be held only until after the examination of the bank and then returned to the director, does not invalidate the note, even between the original parties, since the fraud was in the collateral, oral understanding, not in the note itself or in the consideration." The reasoning is logical and is by us approved. In *German American State Bank v. Watson, supra,* we read as follows: "The maker of a note cannot defend an action thereon by showing that it was executed without benefit to him, under an agreement exempting him from liability, in order to enable the bank to which it was payable to make an additional loan to a customer who had already borrowed to the limit allowed by law, for the reason that having voluntarily signed the note in order that the examiner might believe it to be an asset to the bank he ought not to be permitted to deny it that effect."

Courts prefer and should seek to find a legal rather than an unlawful motive for the acts of the parties litigant.

The court did not err in directing the jury to return a

verdict in favor of the plaintiff. The record discloses no conflict in the evidence for the jury to decide. The questions arising were purely questions of law for the court, and this justified the trial court in directing the verdict and entering judgment thereon.

From a careful consideration of the admissions in the respective answers, and made at the trial, together with the evidence, and the law governing each and all questions presented, it is found and considered by us that the judgment of the trial court is correct; that it did not err in instructing the jury as it did; that the verdict is sustained by the law, and warranted by the evidence; that the judgment rendered should be and is in all things

AFFIRMED.

Note—See Banks and Banking, 7 C. J. p. 524, sec. 122; p. 559, sec. 164; Bills and Notes, 8 C. J. p. 211, sec. 343; p. 253, sec. 400; p. 786, sec. 1046 (1925 Ann.); Evidence, 22 C. J. p. 1089, sec. 1443.

BLUE RIVER POWER COMPANY, APPELLANT, V. FRANK HRONIK ET AL., APPELLEES.

FILED JULY 18, 1924. NOS. 22890, 22891.

1. **Eminent Domain:** IRRIGATION AND WATER-POWER. Proceedings for condemnation of rights of way for irrigation or water-power purposes, including the right of overflow and damage caused to upper riparian lands by the construction and maintenance across a stream of a dam for either of said purposes, may be maintained under the provisions of chapter 69, Laws 1895 (Comp. St. 1922, sec. 8452 *et seq.*).

2. ———: ———: PETITION. In order to confer jurisdiction, the petition by which such proceedings are instituted must with substantial accuracy describe the lands to be crossed, the size of the works to be constructed, and the quantity of land required to be taken.

APPEAL from the district court for Saline county: RALPH D. BROWN, JUDGE. *Affirmed.*

Thomas, Vail & Stoner, for appellant.

Glenn N. Venrick and *John E. Mekota, contra.*

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

BLACKLEDGE, District Judge.

This is a proceeding under the law of eminent domain seeking the condemnation of rights for the overflow of lands caused by the erection and maintenance of a dam across the Blue river, which is being constructed for water-power purposes. There are two appeals involving the same issue which will be treated as one case.

The petition was filed November 26, 1920. It alleges the corporate capacity of the plaintiff, that it is the owner of three irregular tracts of land in sections 34 and 35, township 7, range 4, Saline county, containing an aggregate acreage of 20.35. It is also alleged:

"That the Blue river runs through and across the above described tract of land; that your petitioner has been duly authorized to construct a dam across the Blue river upon said real estate to the height of sixteen (16) feet for water-power purposes; that your petitioner duly submitted a plan of its proposed dam to the state board of irrigation, highways and drainage of the state of Nebraska, for examination and approval, and that said state board duly approved the same March 2, 1918, and authorized its construction to a height of sixteen (16) feet; that your petitioner is the owner in fee simple of both sides of said river where said dam is being constructed as aforesaid and has the legal title thereto, that said dam is in the course of construction and nearly completed and said water-power plant will be ready for operation within a few days.

"Your petitioner alleges that there are no lands below the site of said dam that will be overflowed or injured by reason of the construction of said dam or the operation of said power plant.

"Your petitioner further alleges that the real estate hereinafter mentioned and not owned by it, situated in township 7 north, of range 4 east of the 6th P. M. in Saline county, Nebraska, and hereinafter specifically described,

are lands situated above the site of said dam and through which said Blue river flows, which are or probably will be overflowed or injured by reason of the construction and erection of said dam and the operation of said power plant."

It then gives 19 separate descriptions of lands owned in which rights are sought to be acquired by condemnation. One description is: "That Frank Hronik is the owner of the N. E.¼ of the N. W.¼ of Sec. 35; the S. E.¼ of the S. W.¼ of Sec. 26; all of the S.W.¼ of the S. W.¼ of Sec. 26, except a tract of land at the south end thereof lying south of the channel of the Big Blue river and containing about 4½ acres more or less; also that portion of the S. E.¼ of the S. E.¼ of Sec. 27, lying east of the channel of the Big Blue river and containing 2½ acres more or less, of which tracts about 41.67 acres will be taken, overflowed or damaged; and that Bessie Hronik is the wife of the said Frank Hronik."

It is further alleged that the petitioner has not been able to agree with the several owners and parties interested touching the compensation and damages that will be sustained by the construction of the dam and operation of the plant, and prayer is made for the appointment of appraisers to ascertain the damage and determine the compensation to be made.

A summons was issued on the same date to the sheriff requiring him to summon certain appraisers to appear at or on the lands December 10, 1920, at 10 o'clock a. m., "to severally appraise the damages sustained by the parties hereinafter named to the lands hereinafter described." There follows a description of lands as in the petition. A notice containing the same description was issued on the same date by the petitioner and served by the sheriff notifying the owners that the petitioner was about to complete the construction of a dam for water-power purposes across the Blue river at or near the south line of the northwest quarter of the northwest quarter of section 35, township 7, range 4, and that appraisers would proceed on the lands December 10, 1920, at 10 o'clock a. m., to determine

and assess the damage. December 9 and 10 certain objections were filed by some of the owners, and on December 10 a supplemental petition was filed which seeks to bring in a new party and other real estate not before described in the petition. Also, a motion to amend each description in the petition by inserting the acreage was filed and a motion to amend the summons to conform to the petition as amended and the supplemental petition. The objections of the owners were all overruled. The amendments asked by petitioner were all allowed.

December 14 a report of the appraisers was filed and thereupon appeals were perfected both by the petitioner and by the owners to the district court. In the district court the owners, as appellants in one case and appellees in the other, renewed the objections made by them before the county judge, and upon hearing in that court the objections of the owners were sustained and a judgment entered dismissing the petition and annulling all proceedings had thereunder; from which judgment the power company has appealed to this court.

It is stated by counsel for both parties that two questions are presented by the appeal: First, whether the proceedings were properly had under the provisions of section 3429 *et seq.*, Rev. St. 1913 (Comp. St. 1922, sec. 8452 *et seq.*). Second, whether the petition of the power company, the summons and notice were sufficient to confer jurisdiction on the county judge or the county court to proceed in the matter.

It is stated in argument that the district court held the proceedings to have been properly had under the provisions of the statute designated and that its judgment was based upon the ground of the insufficiency of the petition and proceedings; but the judgment as entered is a general one, not designating the ground upon which it is based, so that both propositions are here presented for review.

Without entering into a detailed consideration of the matter of statutory authority, we think it is apparent that such proceedings may properly be had under the provisions

of the statute designated. The act of 1889 (Laws 1889, ch. 68) was entitled "An act to provide for water rights and irrigation, and to regulate the right to the use of water for agricultural and manufacturing purposes." The amendatory act of 1893 (Laws 1893, ch. 40) was entitled "An act to promote the development of water-power for manufacturing and other industrial purposes." And the act of 1895 (Laws 1895, ch. 69), which is in substance our present law, was entitled, in part, "An act prescribing regulations for the appropriation, distribution and use of water in the construction and maintaining of canals, ditches and storage reservoirs for the purpose of irrigation, evaporation and water-power." It is true that at that time the need primarily considered was the matter of irrigation, which was then in its early development in this state, but we think it equally clear that the purpose of the act was to establish a code for the regulation of the use and application of the waters of the state which were made subject to appropriation, and that it was intended to be complete for that purpose. It contains ample provisions for the acquisition of sites, right of way and other matters incidental to the use of water, provides for the institution of condemnation proceedings by sections 8452, 8453, Comp. St. 1922, and that the subsequent procedure shall be according to the provisions of law for the condemnation of rights of way for railroad corporations. The act provides that canals and other works constructed for irrigation or water-power purposes, or both, are declared to be works of internal improvement; and, with reference to the priority of rights, that the use of water for domestic purposes shall have preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. While it is insisted that what is known as "The Mill Dam Act" (Rev. St. 1913, sec. 3974 *et seq.*; Comp. St. 1922, sec. 3377 *et seq.*) should be followed, we do not think it necessary to determine that question. Nothing is pointed out with reference to the act sought to be followed in this instance wherein it is not suffi-

cient or adequate in all respects to protect the rights of the parties and afford means for determination thereof. We therefore hold that such proceedings may properly be had under the sections of the statute to which reference is made, and now appearing as section 8452 *et seq.*, Comp. St. 1922.

Upon the other branch of the case, it is strenuously argued that the petition and proceedings were not sufficient to give jurisdiction, and this position is grounded, principally, upon the propositions that the proceeding is not a judicial proceeding and that in his acts in reference to it the county judge was a ministerial and not a judicial officer; that the petition did not sufficiently or accurately describe the works of the petitioner then being or about to be constructed, nor the land to be taken; that there was no authority for allowance of the amendment to the petition and summons whereby the amount of acreage in each description, which had previously been left blank, was inserted, and that the amendment could not relate back so as to affect the notice to the landowners or cure the summons to the appraisers which had already been issued more than ten days before.

Upon the other hand, it is as vigorously asserted that the petition was sufficient, the amendment authorized, and that the allegations of the petition were such that they could be made certain, in that a skilled person, such as a surveyor, could thereby determine the quantity and location of the lands to be overflowed, and therefore were sufficient.

In support of its argument and of the petition, the appellant relies upon the cases in this court of *Fremont, E. & M. V. R. Co. v. Mattheis,* 39 Neb. 98, and *Dettman v. Pittenger,* 89 Neb. 825. These cases, we think, do not control the instant case, and the reasons therefor will be stated in connection with our consideration of other cases by which we think it is controlled.

The statute under which the proceeding is had requires that the petition in such cases shall (1) describe the lands to be crossed, (2) state the size of the ditch, canal or works,

(3) state the quantity of land which is required to be taken. In *Mattheis v. Fremont, E. & M. V. R. Co.*, 53 Neb. 681, this court held that the proceeding for condemning real estate for right of way of a railroad is not instituted in nor conducted by the county court; that it is conducted by the county judge, the sheriff and the appraisers selected by the former; that these constitute a tribunal not to try a civil action but simply to assess the damages, and that the powers conferred upon the county judge, and the duties required of him, are not judicial but are purely ministerial. There is little, if any, conflict in the decisions of any of the courts with respect to the fact that the petition by which such proceedings are instituted must accurately describe the property sought to be taken and that such a description is necessary to confer jurisdiction. This in our judgment does not mean meticulous accuracy, but substantial accuracy—that certainty by means of which a reasonably competent person could take the instrument and therefrom, aided by such inquiries as it suggests, locate the identical property.

In *Omaha & R. V. R. Co. v. Rickards*, 38 Neb. 847, considering condemnation proceedings wherein the property had been described by governmental subdivisions only, and although it was vacant and unoccupied land, but had previously been laid out in lots and blocks and was within the corporate limits of the city, it was held that such description was insufficient and the railroad company acquired no title or rights thereby. In the more recent case of *Daily v. Missouri P. R. Co.*, 103 Neb. 219, wherein a variance in the petition consisted in a misstatement of the depth of the property sought to be condemned, it being stated as 115 feet when in fact it was 140 feet, was such a substantial inaccuracy as to render the proceedings void.

In the earlier case of *Fremont, E. & M. V. R. Co. v. Mattheis*, 39 Neb. 98, which was a rehearing of the same case reported in 35 Neb. 48, the decision was undoubtedly right upon the facts on which it was based. In that case there was in addition to the description written in the petition, a plat annexed thereto in and by which the property was

designated with sufficient certainty that it could be accurately determined. In the instant case there is no reference to any plat in the petition and none appears in the record. It appears to the writer that in this sort of case a properly drawn plat is the most accurate and illuminating method of description that could be adopted. The surface of the ground is necessarily uneven and the outlines of the land which will be overflowed, it seems, could be more accurately and plainly shown by means of a proper plat than in any other manner. The petitioner must have had the information at hand which would enable it to supply such a designation, else it would be unable to compute the acreage itself. Upon the question of acreage we do not think that the amendment aided the petition to any appreciable extent. In the description hereinbefore quoted there was designated four separate 40-acre tracts, and it is said in the petition as amended that about 41.67 acres will be taken, overflowed or damaged; which would furnish little, if any, information to the owner as to the location or form of the part of his land to be taken, or whether it was all in one body or in a number of tracts. It made a material difference to the landowner as to the exact location of the submerged portion in respect to his land and his improvements of all kinds. It is said that the petition is sufficient because a surveyor or skilled person may take it and ascertain the lands; but we have failed to discover how such a person, however skilled, could take this petition and make any definite ascertainment. There is to be a dam to the height of 16 feet across the Blue river somewhere upon the 20-acre tract of land owned by the petitioner. A great deal may, and doubtless does, depend upon the particular location of the dam and of each end thereof and its direction and length as to the overflow that will be produced thereby. The petition shows that certain lands for the distance of more than four miles upstream are to be overflowed and affected by this dam. It follows that a very little difference in the height and location of the dam will make a large difference in the land to be overflowed. The skilled person who would determine the exact location of

these lines must have a starting point, and we fail to discover one in the petition. The dam is said to be 16 feet high. From what point does the measurement proceed? Is it from the low water mark or the bed of the stream? And, if the bed of the stream, is it the lowest part thereof or is it what is sometimes called the flow line, and how determined or how may it now be found? The dam is shown to be incomplete in its construction and therefore the top of it as actually constructed cannot be ascertained from the petition. In other words, where is the base point or bench mark from which the surveyor must start in order to determine his course, distance or levels? The petition gives no information which the statute requires as to the size or location of the works, which in this instance is the dam, and the body of water which will be impounded thereby. Neither does it give any information as to the particular tracts and locality of the land to be taken from the different landowners so that they might determine, not only the land itself, but how adjacent land or improvements might be affected by the overflow, and the addition of the term "about ten acres," when applied to a 40-acre or an 80-acre tract gives no definite information.

Now, if a condemnation proceeding fully completed, because it described vacant, unoccupied land by governmental subdivisions, when it has been laid out in lots and blocks, or because it made a variance of a little less than 20 per cent. in the depth of certain property, is so fatally defective that no rights were acquired thereby, it must necessarily follow that, when objection is made in the inception of a proceeding that the description is so indefinite as that contained in the petition here, and as incapable of being made definite by anything therein stated, it is likewise fatally defective and insufficient to confer jurisdiction.

It follows from these considerations that the judgment of the district court was right, and it is

AFFIRMED.

Note—See Eminent Domain, 20 C. J. p. 575, secs. 56, 57; p. 953, sec. 364; p. 957, sec. 365.

ARTHUR BOYCE, JR., APPELLEE, V. J. R. BURLEIGH, APPELLANT.

FILED JULY 18, 1924. No. 24062.

1. **Master and Servant: INJURY: COURSE OF EMPLOYMENT.** Where an employee received an accidental injury while upon the master's premises and subject to the master's directions, though at the time not actually engaged in doing any work for the master, the accident occurred in the course of the employment.

2. ———: ———: ———. Where an employer operated a chicken hatchery and kept upon the premises a gun to be used in shooting pigeons which were in the habit of devouring the food scattered upon the ground for the chickens, *held*, that an injury to an employee, resulting from the accidental discharge of the gun in the hands of a fellow servant, arose out of the employment.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

Sorensen & Bollen and *Sterling F. Mutz*, for appellant.

Frank M. Coffey, contra.

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

REDICK, District Judge.

This is an action for compensation under the employers' liability law. Compensation was denied by the commissioner, but upon appeal to the district court plaintiff was awarded the expense of hospital and doctor bills and $6 a week for 150 weeks, and a penalty of 50 per cent. for waiting time. The injury to plaintiff was caused by the accidental discharge of a shotgun in the hands of a fellow employee, and resulted in the loss of his right foot. The defendant has appealed to this court. The defendant conducts a chicken hatchery and employed the plaintiff, Arthur Boyce, of the age of 19 years, and several other boys of about the same age, among others Rex Hazelrig, who was handling the gun contrary to orders at the time it was accidentally discharged. By the terms of the employ-

ment plaintiff was to do a number of things and whatever he was called upon to perform in connection with the business of the hatchery, and was to receive wages in the sum of $6 or $7 a week and his board and lodging on the premises of the employer. No hours of services were fixed, but plaintiff was expected to remain upon the premises subject to the directions of his employer. The meals were taken with the employer's family and the rooms where the boys slept were in a separate building from the hatchery. The office was on the first floor of the hatchery building and consisted of a room in which the office desk and other furniture was separated from the part used by the public by a banister or railing. The office was used in the evenings by the boys as a place of recreation, reading matter and a phonograph being provided for their entertainment. In another room of the building was a pool table upon which the boys were permitted to play. Plaintiff's employment commenced May 20, 1923, and continued until the date of the accident on June 30, following. There is some dispute in the evidence as to whether the work of the day was all done before the evening meal, but we think that an inference fairly arises from the testimony that such was not one of the requirements of the employment, and that in practice quite a number of chores were done after supper. Plaintiff so testified and he is supported in this by Hazelrig. Two week's after plaintiff's employment commenced the defendant procured a shotgun and shells for the purpose of being used to shoot or scare away pigeons which were in the habit of devouring the feed spread upon the ground in the feed lots where the chickens were kept, and the same had been used a number of times by the defendant for that purpose prior to the accident. It was a single-barreled shotgun and when not in use was kept unloaded in the office behind the door, the shells being kept in the desk. The boys had been warned not to use the shotgun, but on several occasions, during the absence of the defendant, plaintiff had taken it out and shot pigeons or shot it in the air. Hazelrig had never had the gun in his hands until just before the accident,

which occurred on Saturday evening after supper between 6 and 7 o'clock. On that evening supper was had a little earlier than usual, about 5:30, and defendant was going to take the plaintiff down town to get a hair cut, but upon telephoning his mother she forbade him going, and after defendant left plaintiff took the gun and went out and shot at pigeons, brought it back and stood it unloaded in the corner where it was kept. A short time thereafter, while the boys were in the office, Hazelrig picked up the gun, procured a shell from the desk and loaded the gun, and, as he was passing through the room to go out, it was accidentally discharged, striking the plaintiff in the right ankle and injuring him to such an extent that his foot had to be amputated. Plaintiff testifies that a part of his work consisted in filling a pail with water and leaving it in the cellar by the furnace for the use of Mrs. Burleigh, who had charge of the heating apparatus connected with the incubators, and that he generally performed that work after supper. He further testified that just before the accident he was passing by the stove in the office on his way to secure the bucket for the purpose of filling it and placing it by the furnace in the cellar, when the gun was discharged and he received his injury. Hazelrig testified that he thinks plaintiff was leaning over a desk at the time the gun went off, and that he does not think plaintiff had the pail with him, but plaintiff's testimony was to the effect that he was going after the pail. We do not think this dispute is of much importance for reasons which will be stated later on.

The defendant makes two contentions as grounds for reversing the judgment of the district court: (1) That the accident did not occur during the course of the plaintiff's employment; and (2) that plaintiff's injury did not arise out of the employment.

As to the first contention, we are of the opinion that the finding of the district court that the accident occurred during the course of the plaintiff's employment is amply sustained by the evidence and therefore should not be disturbed, if the testimony of plaintiff is believed, he was actually

engaged, at the time of the accident, in the performance of work for which he was employed; but beyond this, there is ample authority to the effect that the relation of master and servant continues during the time that the servant is upon the premises of the master and subject to his orders, whether or not actually employed at the moment in performing some of the master's work. *City of Milwaukee v. Althoff*, 156 Wis. 68; *Haller v. City of Lansing*, 195 Mich. 753; *In re Bollman*, 73 Ind. App. 46; *International & G. N. R. Co. v. Ryan*, 82 Tex. 565; C. J. Treatise, Workmen's Compensation Acts, p. 80, sec. 72, and cases cited. And especially in this case, where it was a part of the contract of employment that the servant as a part of his compensation received board and lodging upon the premises where the business of the master was carried on, and was required to remain there subject to orders, it may justly be said that the relation of master and servant existed, the employment continued, and the accident occurred during the course of such employment. See *Bollman* and *Ryan* cases, *supra*.

As to the second contention, that plaintiff's injuries did not arise out of employment, we are also of the opinion that the finding of the district court in the premises is correct. In *Socha v. Cudahy Packing Co.*, 105 Neb. 691, we held:

"Where the nature of the employment is such as to expose a worker to a wrongful act by another worker, which may reasonably be said to have been induced by the peculiar conditions of the employment, the manner in which it was carried on, and the appliances required, such an act may reasonably be said to 'arise out of the employment.' "

In that case a fellow servant, in a spirit of playfulness, applied to the person of claimant's decedent the nozzle of a compressed air hose, in such a manner as to rupture decedent's intestines, causing his death, and in the opinion the court quotes with approval the following excerpts from *McNicol's Case*, 215 Mass. 497:

"It 'arises out of' the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under

which the work is required to be performed and the resulting injury under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as the result of the exposure occasioned by the nature of the employment, then it 'arises out of' the employment. * * * The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of the master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

The court then reviews a number of cases where the principle has been applied, which are very instructive as applied to the instant case. The shotgun in question was an instrumentality employed in the conduct of the business of the hatchery for the purpose of preventing wild pigeons from consuming the food distributed to the chickens. That a shotgun is a dangerous instrument to have around premises where young boys are employed, who may have access to it, needs no argument, but the defendant himself appreciated that fact and warned the boys against using it. It nevertheless existed as one of the conditions surrounding the performance of the work in which the servants were employed. If the accident had happened while the gun was in the hands of the defendant for the purpose of shooting pigeons, no one would question but that it arose out of the employment; but the negligent or improper use of instrumentalities employed in the industry, by a fellow servant, is as much a risk or hazard of the employment as the same instrumentality in the hands of the master, and in our judgment furnishes equally sound reasons for a like holding. When it is considered that the plaintiff was upon the premises of the master as required by the contract, and received his injury in consequence of conditions surrounding the regular conduct of the business of the master,

the causal connection between the industry and the accident is complete.

Counsel for defendant refer to the case of *Hibberd v. Hughey*, 110 Neb. 744, in which the distinction is made between disobedience of orders as to the manner in which the work shall be done and as to the place where it shall be done; but at the time of the accident in this case the plaintiff was not disobeying orders and was in the proper place for performance of his work, and so the case cited has no application.

Defendant argues with much earnestness that the disobedient act of plaintiff in using the gun was the inducement for Hazelrig using it, and that therefore plaintiff brought the injury upon himself. We are unable to perceive the logic of this contention. There is no claim that the plaintiff suggested to Hazelrig to use it, and his act was quite independent of plaintiff, and without his knowledge prior to the accident. If the boys had been engaged in a joint undertaking with the gun, a different question might arise, though this we do not decide; but clearly in the absence of any intention on the part of plaintiff to influence Hazelrig's conduct with reference to the gun, the mere force of bad example furnishes no causal connection between the two acts.

It is finally contended that plaintiff was guilty of wilful negligence when he took the gun out and used it; but his act was not the proximate cause of his injury. It had spent its force so far as its potentiality for harm may have existed. The proximate cause was the act of a fellow servant.

The judgment of the district court is affirmed, and appellee is allowed an attorney's fee of $200 on the appeal to be taxed as costs.

AFFIRMED.

Note—See Workmen's Compensation Acts, p. 73, sec. 64; p. 80, sec. 72.

MARGARET ALLEN, APPELLANT, V. LOUIS H. TRESTER ET AL., APPELLEES.

FILED JULY 31, 1924. No. 22739.

1. **Master and Servant:** INJURY TO MINOR: RIGHT OF ACTION. A common-law right of action by a parent for loss of wages of his minor son during minority on account of injuries caused by negligence of his employer is not barred or taken away by the workmen's compensation act of this state.
2. ———: WORKMEN'S COMPENSATION ACT: CONSTITUTIONALITY. That part of section 4, ch. 85, Laws 1917, amending section 3656, Rev. St. 1913 (Comp. St. 1922, sec. 3038, subd. 2) by adding to subdivision 2 the following words, "No parent or guardian of an injured minor employee shall be entitled to recover any damages by reason of said injury other than as expressly provided in this article," is unconstitutional for the reason that said amendment is not germane to the subject-matter of the section amended.
3. **Paupers:** RIGHT OF ACTION. No cause of action arises at common law in favor of an indigent person against a negligent employer for injuries disabling one who is liable under section 5140, Comp. St. 1922, if of sufficient ability, to support said poor person, and since no statute confers such right upon such poor person no such cause of action exists.
4. **Master and Servant:** INJURY TO EMPLOYEE: LIABILITY OF FOREMAN. A foreman of a corporation employer, whose negligence caused personal injuries, is a joint tort-feasor and liable jointly and severally with the corporation in an action to recover losses caused by such injuries.

APPEAL from the district court for Lancaster county; WILLARD E. STEWART, JUDGE. *Reversed.*

Sterling F. Mutz and *W. C. Parriott,* for appellant.

Fawcett, Mockett & Tou Velle, F. B. Baylor and *A. Moore Berry, contra.*

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

PER CURIAM.

This action is brought by the plaintiff, Margaret Allen,

surviving parent, to recover damages which she claims to have been sustained by reason of personal injuries suffered by her minor son, Delbert Allen, alleged to have been caused by negligence of the defendants. It is alleged that said minor son is totally incapacitated both mentally and physically by reason of said injuries, that plaintiff is a poor person wholly dependent upon her son for her support, that he has been precluded by his injuries from earning money or furnishing her further support, and that she has been damaged in the sum of $15,598.33 by reason of the premises.

Plaintiff's action is of a dual character: First, an action at common law to recover her pecuniary loss of wages of her son during minority occasioned by negligence of the defendant; and, second, an action based upon the pauper statute, Comp. St. 1922, sec. 5140, for loss of support, she being dependent upon her son's earnings. A demurrer to the petition was sustained by the lower court, and plaintiff declining to plead further the action was dismissed. Plaintiff brings the case here for review.

The question presented by the record is a new one in this jurisdiction. Plaintiff's son and his employer, Trester Wrecking Company, are within the provisions of and governed by the workmen's compensation act of this state, so, as between them, all other methods of compensation, except as provided by that act, are barred. The question for decision is whether or not the action of the plaintiff, under the common law, or under the pauper statute, one or both, are also barred by that act. As the act stood prior to 1917 there was no express provision in it by which the right of action of the parents for the loss of such services was affected and the common law action of the parent for loss of services remained unimpaired. In some states the statutes in specific words, or by clear implication, deprive the parents of minor workmen coming under the compensation act of the right to bring the common-law action. The Nebraska statute contained no such provision prior to 1917. Evidently, this omission having been observed by interested parties, it was brought to the attention of the legislature, and an at-

tempt was made to amend section 15 of the original act, (Laws 1913, ch. 198), being section 3656, Rev. St. 1913 (later appearing as section 3038, Comp St. 1922). The section is as follows, so far as pertinent to the present case: "The terms 'employee' and 'workman' are used interchangeably and have the same meaning throughout this article. The said terms include the plural and all ages and both sexes, and shall be construed to mean: * * * (2) Every person in the service of an employer who is engaged in any trade, occupation, business or profession as described in section 97 of this chapter, under any contract of hire, express or implied, oral or written, including aliens and also including minors who are legally permitted to work under the laws of the state, who for the purpose of making election of remedies under this Code shall have the same power of contracting and electing as adult employees." The intention was to amend by adding the following: "No parent or guardian of an injured minor employee shall be entitled to recover any damages by reason of said injuries other than as expressly provided in this article." If this amendment is valid and effectual, plaintiff has no cause of action. and the judgment must be affirmed.

Plaintiff contends that the amendment is unconstitutional because (1) the title of the act is not broad enough to cover the amendment. (2) The amendment is class legislation and discriminatory. (3) The amendment is not germane to the section amended. We think the first objection is not well taken as the title of the original act is broad enough to include any provision touching the liability of an employer to any person on account of injuries to the employee. The second objection we need not consider in view of our conclusions upon the third. It is the settled law of this state that where the title to a bill is to amend a particular section of an act no amendatory legislation not germane to the subject-matter of the section proposed to be changed is permissible. *Miller v. Hurford,* 11 Neb. 377; *State v. Tibbets,* 52 Neb. 228, in which the cases are collected and the subject considered at length; *State v. Bowen,* 54 Neb. 211; *Armstrong v. Mayer,* 60 Neb. 423.

Is the amendment germane to the subject-matter of the original section? We are forced to a negative conclusion. The subjects of the original section 15 were: (1) The description or definition of those who should be considered employees under the act, including minors who might be legally employed; and (2) giving minors the same authority to contract and elect under the act as is possessed by adults. It cannot be doubted that any amendment affecting the status of the minor as an employee, or his newly conferred power to contract and elect, would be proper and germane to the subject of this section, but we are unable to perceive any relation of those subjects to common law or statutory rights of action existing in the parent. The language of section 15, prior to the amendment, suggests no thought of remedies, or of the rights of parents or guardians. These are subjects entirely foreign to the section. Again, these matters are the subject of section 11. The amendment in question would doubtless be germane to the subject of section 11. Section 11 does not purport by the contract of the minor to bind the parent, but only the "employee himself, *and for compensation for his death* shall bind his *legal representatives, his widow, and next of kin,*" etc. We must declare the law as we find it, and we are driven to the holding that the amendment is not germane to section 15 and violative of section 11, art. III of the Constitution, and is therefore ineffectual. While, as before stated, the title to the original act is broad enough to cover the subject of this amendment, the title is no part of the enactment, and, therefore no matter how broad the title, the particulars of the law must be found, it at all, in the body of the act.

The next question requiring attention is the contention of defendant that the employers' liability law is a surrender of any compensation to any person on account of injuries to the employee, other than as provided in the act. Except in the single case of death, the language of the act does not purport to affect any claims other than those of parties to the contract, it being: "Such agreement or the election hereafter provided for shall be a surrender *by the*

parties thereto of their rights to any other method, form or amount of compensation." Comp. St. 1922, sec. 3034. The statute having expressly provided who shall be bound by the contract and under what circumstances, persons, such as parents, not included in its terms, are not bound upon the familiar principle of construction, *"Expressio unius est exclusio alterius."* If the construction contended for by defendants is proper, the amendment was unnecessary. The legislature evidently considered that the matter of the amendment was not covered by sections 11 and 15. We cannot attribute to the legislature an intention not deducible from the language of the act and hold that the act provides for surrender of the parent's rights.

Defendant Trester cites the following cases: *Adkins v. Hope Engineering & Supply Co.*, 81 W. Va. 449. This holds that if the provisions of the statute as to giving notice by the employer have been followed, the workmen's compensation act deprives the father of his common-law action for loss of wages and service of a minor son. A like provision is in the statute of New Jersey, Laws 1911, ch. 95, sec. 2, par. 9. In *Hartman v. Unexcelled Mfg. Co.*, 93 N. J. Law, 418, the point actually decided is not applicable here, though it is said in the opinion: "The act provides for no suit by a parent for compensation *per quod.*" *Buonfiglio v. Neumann & Co.*, 93 N. J. Law, 174, was like the present case, by the parent for pecuniary loss caused to him by an injury to his minor son, and it was held that, under the statute of New Jersey providing that "the agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in section 2 of this act," the common-law action of the parent was barred. The decision was based upon the provision that, in the absence of notice of election by either party to the contract, the contract of hiring shall be presumed to have been made with reference to the provisions of section 2 of the act (providing compensation regardless of negligence) and that "in the employment of minors, section 2 shall be presumed to

apply unless the notice be given by or to the parent or guardian of the minor." The holding of the court as contained in the syllabus was: "Where a father permitted his minor son to work for defendant without giving the notice that the provisions of section 2 of the workmen's compensation act were not intended to apply, he accepted the provision of the statute and thereby surrendered his right to any other method or form of compensation than that therein provided." Our attention has been called to the recent case of *Novack v. Montgomery-Ward & Co.*, 158 Minn. 505. The decision is based in a large part upon the decision in the New Jersey case of *Buonfiglio v. Neumann & Co., supra*, but, as we have seen, the New Jersey statute is different from that of Nebraska, and the case does not seem to us to be proper to follow.

The Nebraska statute contains no such or similar provisions assuming to bind the parent of the minor employee except in cases where death results from the injuries, and we are clearly of the opinion that, owing to the difference in the statutes, the holdings of the New Jersey courts are not authority in this jurisdiction. Other actions have been expressly barred in several states. Kentucky Laws 1916, ch. 33, sec. 11: "And no other person shall have cause of action or right to compensation for an injury to or death of such minor employee or loss of service on account thereof, by reason of the minority of such employee." Remington's Comp. St. Wash., sec. 7673: "All civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished."

"Shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries." *Connors v. Semet-Solvay Co.*, 159 N. Y. Supp. 431.

"Save as herein provided, no employer shall be liable for any injury for which compensation is recoverable under this act." *Shade v. Ash Grove Lime & Portland Cement Co.*, 92 Kan. 146.

Perhaps the leading case on this subject in this country

is *King v. Viscoloid Co.*, 219 Mass. 420, which was an action at common law by the mother and surviving parent of a minor employee who sustained personal injuries in the course of his employment, to recover expenses incurred by her on account of such injuries and for the loss of her son's services, it was held, under the statutory provisions, that the right of no one except the employee was affected by the act, and that the waiver or election of the employee could not affect the common-law right of the plaintiff. And it was said: "The express provision in the act, that his right of action is waived or discharged by his failure to give a notice that he claimed his common-law rights, is, by recognized canons of statutory construction, an indication that it was not intended to take away the right of anybody but himself. * * * In our statute there is no direct enactment taking away the parent's right of action, and we find nothing which takes it away by necessary implication. The legislatures simply have not covered the case, as in *Parsons v. Merrill*, 5 Met. (Mass.) 356. * * * We have no right to conjecture what the legislature would have enacted if it had foreseen the occurrence of a case like this; much less can we read into the statute a provision which the legislature did not see fit to put there, whether the omission came from inadvertence or of set purpose. *Hull v. Hull* 2 Strob. Eq. (S. Car.) 174; *Kunkalman v. Gibson*, 171 Ind. 503; *United States v. Starn*, 17 Fed. 435; *United States v. Musgrave*, 160 Fed. 700."

The reasoning of the court in that case appeals to us as sound. The legislature simply have not covered the case. We are clearly of the opinion that the plaintiff's action for loss of services while her son was a minor is not barred by the employers' liability law.

Defendant Louis H. Trester, foreman of the wrecking company, is joined as being guilty of the negligent act causing the injuries to the plaintiff's son, and it is claimed that he was not an employer nor a third party, but an employee of the company, and therefore not liable. Whatever the ruling on this proposition would be in a proceeding for

compensation under the statute, this being an action at common law, it is common practice to join with the employer the servant directly responsible for the negligent act, on the principle that they are joint tort-feasors. *Churchill v. Stephens,* 91 N. J. Law, 195; *Webster v. Stewart,* 210 Mich. 13.

The remaining question for determination is whether the petition states a cause of action under the pauper act of this state. Section 5140, Comp. St. 1922, after declaring the liability, *inter alia,* of a son for the support of his indigent parent, if of sufficient ability, and that every person who shall refuse to support the indigent relative named, when directed by the county board, shall pay the county board not exceeding $10 a week. "And *provided,* further such poor person entitled to support from any such relative may bring an action against such relative for support in his or her own name and behalf." This fixes a legal liability upon the son which can be enforced either by the county board, when the conditions have been complied with, or by a direct suit by the "poor person." There is no new right of action granted against third persons by this act. No such action is known to the common law. The cases cited by appellant to support a right of action for this cause, with two exceptions, were brought under statutes which expressly confer the right, and the expressions used in each of these cases on this point are pure *obiter dictum.* These cases will now be examined.

In *Yost v. Grand Trunk R. Co.,* 163 Mich. 564, the only point involved was whether the mother, where the father had deserted the family, was entitled to bring an action for the loss of the services of the minor. The question raised in the case does not seem to have been considered by the court, or to appear from the opinion to have been within the issues, although in the last paragraph of the opinion it is said *arguendo:* "If the plaintiff is poor, under the provisions of sections 4487 and 4490, Comp. Laws, it would be the duty of the minor child, if able, to maintain her. If the duty of the maintenance of the minor child is

upon the mother when living separate from her husband, it would be hard lines to say that if his services could be of any value to her, she should not be entitled to them." The judgment was for only $300. Nothing in the opinion indicates that the mother seeks to recover under the pauper statute, and the amount of the recovery seems to show that she only sought to recover for loss of services during the period of his minority. This remark then can only be considered as *dictum*. In the present case the petition alleges the death of the father, so the question as to the right of the mother to sue for loss of services before majority is not involved.

The other case is *Gulf, C. & S. F. R. Co. v. Hall,* 34 Tex. Civ. App. 535. This holds that a parent cannot recover damages for loss of pecuniary benefits to be expected from his son after he reaches the age of 21, by reason of personal injuries to the son, unless such damages are pleaded. This implies that, if pleaded, they were recoverable, but does not so decide, and also is *obiter*.

The common-law right of action is for the value of services of the minor for the reason that all these services belong to the parent until the minor attains the age of 21 years. The pauper statute does not give the indigent parent the right to all the services of the minor. It confers no right to any services whatever, and if the minor is not of sufficient ability to support the parent the law then imposes the duty upon others. This statute does not in terms confer a right of action upon a parent for lack of support against any one but the persons within the classes named therein. The decisions resting upon the fact of minority can throw no light upon the present problem; neither can the statutes which expressly confer a right of action, such as the federal employers' liability act and the statute against liquor dealers. Such statutes expressly grant the right to bring actions to a class of persons not theretofore entitled to maintain an action. If the pauper statute had expressly provided that a parent should have a right of action against a negligent employer, if the

result of the injury interfered with his right of support from his child, whether of full age or not, the condition would be different. To sum up, at common law no such right of action existed, and no statute having been enacted creating such right, it does not exist. The right of action does exist in the mother, the father being deceased, to recover for loss of services of her minor son, if she establishes the negligence charged.

So far as the petition states a cause of action for the loss of services of the minor until he attains his majority, it is not vulnerable to a demurrer, but so far as it is based upon any right to recover against a third party under the pauper act, it fails to state a cause of action. This necessitates a reversal of the judgment of the district court.

REVERSED.

SAMUEL GIBSON, APPELLEE, V. JAMES B. KELKENNY, APPELLANT.

FILED JULY 31, 1924. No. 22841.

Negligence: INSTRUCTION. In an action to recover damages for personal injuries, where each party charges the other with negligence and supports the allegation by proof, it is error, under the statute on comparative negligence, to instruct the jury, in effect, that a recovery by plaintiff is not barred unless his contributory negligence was gross in comparison with that of defendant, slight negligence of plaintiff being the legal test for the purpose of comparison. Comp. St. 1922, sec. 8834.

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

Montgomery, Hall & Young and *H. M. Johnsen*, for appellant.

John W. Cooper, contra.

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

ROSE, J.

This is an action to recover $25,000 in damages for negligence resulting in personal injuries to plaintiff. In Omaha defendant owns and manages the Plaza Hotel. It is equipped with an automatic passenger elevator accessible from the different floors. By means of a push-button on the outside of the elevator shaft on each floor the car is automatically moved to the proper entrance. This operation unlocks the closed shaft door. On the inside the passenger starts the car by pressing another push-button indicating the floor at which he wishes to stop. Plaintiff entered the lobby of the hotel and went to the elevator shaft on the main floor, intending to visit his daughter, a guest of the hotel on a floor above. He claims to have read on a card by the door to the elevator shaft a direction to the effect that the door would not open unless the car was at the floor level. He alleged the door was not entirely closed, and that he pulled it wide open and stepped in. The car at the time was at the top of the shaft and plaintiff fell into the pit, receiving the injuries of which he complains. He charged defendant with negligence in failing to maintain the operating devices in a condition to prevent the shaft door on the main floor from standing open when the car was not there; in creating an unguarded, dangerous pitfall; in concealing the absence of the car by dark and dingy surroundings.

In the answer the defendant denied the negligence imputed to him and alleged that the operating devices, after a proper inspection duly made, were in perfect repair and in working order; that plaintiff's injuries were the result of his own negligence in purposely manipulating the lock and in opening the door; in failing to observe that the car was not at the main floor entrance; in negligently stepping into the open shaft without any regard for his own safety.

Upon a trial of the issues the jury rendered a verdict in favor of the plaintiff for $2,500 and from a judgment thereon defendant appealed.

Defendant insists that the district court erred to his

prejudice in misdirecting the jury on the law of negligence. Each party charged the other with the negligence resulting in the plaintiff's injuries. Negligence of defendant and contributory negligence of plaintiff may be inferred from the evidence adduced. With the record in this condition the district court gave instructions containing the following language:

"Should you find that the plaintiff was guilty of contributory negligence and that said contributory negligence was gross as compared with the negligence, if any, of the defendant, then plaintiff will not be entitled to recover and in that event your verdict should be for the defendant."

"If the defendant, as proprietor of said hotel, was negligent in one or more of these particulars in respect to the elevator in question, occurring at the time the accident to the plaintiff occurred, the defendant would be liable therefor unless you further find from the evidence that plaintiff himself was negligent and that his negligence was gross as compared with that of the defendant, if any."

These instructions are at variance with the statute which declares:

"The fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison." Comp. St. 1922, sec. 8834.

Referring to this provision it was said in a recent opinion:

"The true rule is that, if plaintiff is guilty of negligence directly contributing to the injury, he cannot recover, even though defendant was negligent, unless the contributory negligence of plaintiff was slight and the negligence of defendant was gross in comparison therewith. If, in comparing the negligence of the parties, the contributory negligence of the plaintiff is found to exceed in any degree that which under the circumstances amounts to slight negligence, or if the negligence of the defendant falls in any degree short of gross negligence under the circumstances,

then the contributory negligence of the plaintiff, however slight, will defeat a recovery." *Morrison v. Scotts Bluff County*, 104 Neb. 254.

The doctrine of the statute as thus understood has been consistently recognized. *Francis v. Lincoln Traction Co.*, 106 Neb. 243; *Bauer & Johnson Co. v. National Roofing Co.*, 107 Neb. 831; *Johnson v. City of Omaha*, 108 Neb. 481; *McMullen v. Nash Sales Co., ante*, p. 371.

The instructions quoted are erroneous for the reason they do not permit the barring of a recovery by plaintiff on account of contributory negligence, if any, unless it was gross in comparison with that of the defendant. It is when the contributory negligence of plaintiff is slight that a recovery by him is not barred. The legislature, not the courts, created degrees of negligence for the purpose of comparison. The instructions as a whole do not quote or recite the provisions of the statute or otherwise advise the jury that the court's expressions relating to negligence mean the statutory terms. It is clear from the instructions that plaintiff was permitted to recover damages on conditions not sanctioned by law and on terms not accorded to other litigants similarly situated. There does not seem to be any substantial ground for holding that the error was not prejudicial to defendant. The judgement is therefore reversed and the cause remanded for further proceedings.

REVERSED.

Note—See Negligence, 29 Cyc. p. 657.

MARTINA OLSON, APPELLANT, V. ELVIS H. WOODHOUSE ET AL., APPELLEES.

FILED JULY 31, 1924. No. 22844.

1. **Vendor and Purchaser**: TITLE. Title to land is not necessarily unmarketable, because incumbered by a lien which may be discharged with purchase money at the time fixed by a contract of sale for the delivery of the deed.

2. ———: CANCELATION OF CONTRACT. A vendee who demands the cancelation of a contract to purchase real estate for nonperformance by vendor must show compliance with its terms or tender of performance on his part.

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

Rodman & Rodman and *H. Halderson,* for appellant.

L. L. Raymond and *Ray E. Lee, contra.*

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

ROSE, J.

This is a suit to cancel an agreement by plaintiff to purchase from defendants a section of land in Banner county for $54,400, to recover a judgment for payments aggregating $10,200 on the purchase price and to make them a lien on the land. Arthur Olson and Maynard Olson, acting for plaintiff, their mother and their undisclosed principal, signed a contract of purchase August 20, 1920. Payments were to be made as follows: Cash in hand, $5,000; October 1, 1920, $5,000; November 1, 1920, $5,000; January 2, 1921, $6,600; existing mortgage assumed, $12,800; execution of an additional mortgage maturing at later dates, $20,000. The contract was also signed by Elvis H. Woodhouse and Elizabeth J. Woodhouse, defendants, as the vendors, but they did not then know that plaintiff, the undisclosed principal of the vendees, was the real purchaser. After the disclosure of that fact plaintiff herself and Elvis H. Woodhouse, January 24, 1921, signed a memorandum for the sale of the land to the former. The purchase price was $54,400, payable as follows: Credit for payments already made, $10,200; February 5, 1921, liberty bonds at par $2,000; cash due March 1, 1921, $3,000; March 1, 1921, executed mortgage, $26,400; mortgage assumed, $12,800. Performance by plaintiff March 1, 1921, entitled her to a deed conveying a good and sufficient title. She alleged as grounds of relief that she had been ready and willing to perform the contract on her part, but that the defendants were unable, on account of liens, to convey the title for which she had contracted; that they repudiated their contractual obligations and abandoned the sale. The suit

was defended on the grounds that plaintiff was unable to make the payments as they fell due; that she made default in her payments and abandoned the land after harvesting a crop of wheat; that, except for the failure of plaintiff to make her payments on time, the title would have been transferred to her according to her contract of purchase. Upon a trial of the case the district court found the issues in favor of the defendants, denied the relief sought by plaintiff and ordered a specific performance of the contract dated January 24, 1921. Plaintiff appeals.

An examination of the evidence shows that plaintiff was first in default. Had she made the cash payment of $3,000 when due March 1, 1921, the money would have enabled vendors to discharge all liens except the mortgage indebtedness assumed by plaintiff, to clear the title and to transfer it to plaintiff according to the terms of the contract. Vendors had a right to sell their incumbered land in contemplation of receiving the purchase price when due. Their failure to convey title to the land purchased by plaintiff was due to nonperformance on her part. She had no legal ground to refuse payment or to treat the purchase as rescinded or to recover back what she paid. It is clear from the evidence that she was unable to raise money to pay the purchase price as the payments matured and that this was the cause of the controversy resulting in the litigation. Otherwise the vendors would have made the transfer.

Title to land is not necessarily unmarketable, because incumbered by a lien which may be discharged with purchase money at the time fixed by a contract of sale for the delivery of the deed.

A vendee who demands the cancellation of a contract to purchase real estate for nonperformance by vendor must show compliance with its terms or tender of performance on his part.

Under the rules of law and the principles of equity applicable to the facts, plaintiff is not entitled to the relief sought by her.

On the controlling issues, the conclusions on appeal conform to the findings of the district court.

AFFIRMED.

Note.—See Vendor and Purchaser, 39 Cyc. p. 1422; p. 1487 (1925 Ann.).

ANDREW JOHNSON V. STATE OF NEBRASKA.

FILED JULY 31, 1924. NO. 23714.

1. **Homicide**: STATEMENT BY VICTIM: QUESTION FOR COURT. In a prosecution for murder, the admissibility of a statement by the victim of the homicide that he was shot by defendant is a question of law for the court.

2. ———: ———: ADMISSIBILITY. In a prosecution for murder, a statement by the victim of the homicide that he was shot by defendant may be admitted in evidence, if made under a sense of impending death, and the foundation for its admission may be shown by circumstances.

3. ———: ———: ———. The time elapsing between the making of a dying declaration and dissolution is not necessarily a factor in determining the admissibility of the declaration as evidence.

4. ———: ———: ———. In a prosecution for murder, a statement by the victim of the homicide that he was shot by defendant, *held* admissible in evidence as a declaration made under a sense of impending death, the circumstances being outlined in the opinion.

5. **Criminal Law**: DEFENSE OF DRUNKENNESS: QUESTION FOR JURY. Where the evidence in a prosecution for murder shows that defendant shot and fatally wounded his victim, the defense that the former, a dipsomaniac, was drunk and unconscious at the time of the shooting presents a question for the jury, if the testimony on that issue is conflicting, but sufficient to sustain a conviction.

6. ———: NONAVAILABLE ERROR. In a criminal prosecution, the admission of evidence to which defendant objects may not be available as error, if he subsequently adduces evidence of the same import.

7. **Harmless error** in an instruction does not require the reversal of a conviction in a criminal prosecution.

ERROR to the district court for Dodge county: FREDERICK W. BUTTON, JUDGE. *Affirmed.*

Dolezal, Spear, Mapes & Stevens, and *J. J. Gleeson*, for plaintiff in error.

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

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

ROSE, J.

In a prosecution by the state in the district court for Dodge county, Andrew Johnson, defendant, was charged with murder in the first degree. He pleaded not guilty and upon trial was convicted of manslaughter. For that felony he was sentenced to serve a term of not less than 12 nor more than 14 months in the penitentiary. As plaintiff in error defendant presents for review the record of his conviction.

The principal argument is directed to the assignment that the trial court erred in admitting in evidence proof of statements or declarations by the victim of the homicide after he had been fatally wounded. This and other assignments of error require a consideration of the evidential facts.

William Jurging died October 31, 1922, from a gunshot wound inflicted in North Bend, October 26, 1922, between 5:30 and 7 o'clock in the afternoon. Andrew Johnson, defendant, was accused of firing the fatal shot. Disregarding for the moment all objections to evidence admitted at the trial, there is testimony tending to prove the following facts: Defendant, a dipsomaniac, was 64 years of age. He was a painter and lived alone. He met Jurging and James Herbert in a barber shop in North Bend about 5:30 in the afternoon, October 26, 1922. Jurging said he had a bottle, and defendant replied that he had one too, at home. Jurging then suggested going to the home of the defendant. The three, Jurging, Herbert, and defendant, left the barber shop together and departed in the latter's automobile. A little later, defendant driving, they arrived at his home a few blocks from the barber shop. Jurging and defendant, and

perhaps Herbert, had been drinking. Defendant unlocked the door of his garage, drove his automobile in, and came out and relocked the garage. All three went into his house and took turns in drinking from the contents of two bottles. Between 6 and 7 o'clock, approximately 6:15 or 6:30, defendant knocked at the door of Hans Anderson, a near neighbor and said: "There is a dead man outside." Anderson investigated and, in front of his house, found Jurging apparently helpless on the ground in the street between the sidewalk and the curb. Within a few minutes neighbors helped Jurging into an automobile, assuming he was drunk, and took him about half a mile to the home of Herman Haasch, where he had been living. There it was immediately discovered that he had a bullet hole in his breast. A physician arrived promptly in response to a call. Jurging remained at the Haasch home perhaps two hours or more, but it was not lighted by electricity, and for that reason he was taken a short distance to the home of Leroy Widener, where an operation was performed before midnight. Not long after Jurging had been taken off the street, an officer found defendant on the ground in a drunken stupor in front of Anderson's home, took him home, put him in bed with his clothes on, locked the door, and left him there alone, not knowing Jurging had been shot. Later in the night, with his position and condition apparently unchanged, the sheriff broke in, aroused him with difficulty and took him to Fremont and imprisoned him in the county jail. While searching the defendant's home at the time of the arrest, two partially emptied bottles were standing on the kitchen table and there was a revolver under a cloth on a desk in the sitting room. The revolver contained four loaded cartridges, and one empty shell which still retained the odor of recently exploded powder. The bullet afterward found in the body of Jurging corresponded to those remaining in the revolver. Herbert, who perhaps knew what occurred at the spree, disappeared. Jurging died five days after he was shot. Defendant was a witness at the trial, but did not tell the story of the homicide. He testified he

was a dipsomaniac; became unconscious during the drinking in his kitchen; knew nothing that occurred until restored to consciousness in the county jail the next morning; had no recollection of intervening events. Notwithstanding this testimony, he said he did not shoot Jurging—evidence relating to an event which occurred during his estimated period of unconsciousness. This statement, however, may have been based on the theory that he was mentally irresponsible and incapable of a homicidal act.

Over the objections of defendant, the state was permitted to adduce proof of a statement by Jurging, while at Haasch's, before he was taken to Widener's, that defendant shot him in the latter's home after the three had been drinking there. There were also objections to other testimony of a similar nature.

Were the rulings prejudicially erroneous? The admissibility of the statements to which objections were made was a question of law for the court, determinable under the circumstances disclosed. *Johnson v. State*, 88 Neb. 328. If the statements were admissible as having been made under a sense of impending death, their inadmissibility as *res gestæ* is immaterial. *Fitzgerald v. State*, 11 Neb. 577. If the statements were dying declarations, the time elapsing between their utterance and dissolution is not a determining factor. *Rakes v. People*, 2 Neb. 157.

Jurging had been shot in the breast. He was found practically helpless. Though conscious, he spoke with difficulty. He knew he was being attended by a physician who had warned him of his critical condition. He expressed the conviction that his injury was fatal. He manifested no ill will or malice toward defendant. What occurred at the spree was reluctantly told by him. Had he survived, he would have been a competent witness to the circumstances attending the shooting. It may fairly be inferred that the taking of an oath as a witness in the presence of defendant would not have been a more effective means of eliciting the truth than the solemn impression of impending death. While the statements were made in response to questions, this did not

make them inadmissible. No improper influence was exerted. On a record disclosing the circumstances outlined, error does not appear in the overruling of the objections. Furthermore, defendant was not prejudiced by this feature of the state's case. Defendant himself called an attending physician as witness and from him elicited testimony that Jurging declared defendant had shot him and that the shooting was accidental. Proof of the same kind on behalf of the state that defendant shot Jurging, therefore, is not available as error, but it was for the jury to determine from all the circumstances whether the shooting was accidental or otherwise.

It is also insisted that the evidence is insufficient to sustain the conviction. The principal theory of the defense was that defendant was a dipsomaniac and that he was drunk and incapable of a criminal act. His testimony on this issue was given with apparent candor. It makes a strong appeal to reason and judgment and is strengthened by the opinion of an expert that defendant was a dipsomaniac who lost control of his mental faculties when intoxicated. Science, however, does not settle this question in favor of defendant as a matter of law, for the reason there is evidence tending to show that defendant, a few minutes before and a few minutes after the shooting, performed acts which seemed to be directed by rational operations of the mind. The issue, therefore, was one for the jury and there is sufficient evidence to sustain the verdict.

Complaint is also made because the district court overruled objections to statements made by Jurging while at the Widener home. The jury were instructed to disregard this testimony, but it is argued that defendant, nevertheless, was prejudiced by it. Other testimony of a similar nature was properly admitted and consequently the error, if any, was not prejudicial.

The giving of an instruction, defining the term *"res gestæ"* and permitting the jury to consider as such the statement that defendant shot Jurging, is assigned as error,

but does not require a reversal because that statement was properly admitted for reasons already stated under another assignment of error.

No error prejudicial to defendant has been found in the record.

AFFIRMED.

Note—See Criminal Law, 17 C. J. secs. 3557, 3688; Homicide, 30 C. J. secs. 493, 497, 504, 507, 585.

ANDERSON D. KING, APPELLEE, V. DAVID F. DE TAR ET AL., APPELLEES: WALTER C. SMITH, INTERVENER, APPELLANT.

FILED JULY 31, 1924. No. 22810.

1. **Appeal:** TRIAL DE NOVO. When a suit in equity is appealed to this court wherein review of some or all of the findings of fact is asked by appellant, it becomes the duty of this court to retry the issues of fact involved in the findings of fact complained of and, upon trial *de novo* of such questions of fact, to reach an independent conclusion under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof. Comp. St. 1922, sec. 9150.

2. **Vendor and Purchaser:** DEEDS: UNAUTHORIZED SUBSTITUTION OF GRANTEE. The unauthorized substitution of a grantee in a deed is such a material alteration as will avoid the deed, and such deed can convey no rights to the grantee whose name has been inserted.

3. ———: ———: ALTERATION: QUESTION FOR COURT. "Whether erasures and alterations in a deed are material, or not, is a question of law, to be decided by the court. The construction of words belongs to the court, and the materiality of an alteration in a deed is a question of construction." *Steele's Lessee v. Spencer*, 1 Pet. (U. S.) *552.

4. ———: ———: PURCHASER FROM SUBSTITUTED GRANTEE. When, after the delivery of a deed for the conveyance of real estate, the name of the grantee is erased and the name of another person is inserted in his place, a purchaser from the substituted grantee acquires no right to the property though such purchaser was innocent of the substitution of the name of the real grantee and had no notice that another name had been substituted in his place.

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

Lee Basye and *Stewart, Perry & Stewart,* for appellant.

Mitchell & Gantz, contra.

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

DEAN, J.

The petition alleges that Anderson D. King is the owner in fee simple of an 80-acre tract of land, namely, the south half of the northwest quarter of section 31, township 26, range 49, west sixth P. M., in Box Butte county, Nebraska, and that defendants David F. DeTar and Ethel DeTar, his wife, pretending to be owners, executed and delivered to Joshua Palmer a mortgage for $1,200, dated March 26, 1913, recorded March 28, 1913; that Palmer and wife executed and delivered to Walter C. Smith, intervening defendant, a mortgage for $833 on the land in suit, dated March 31, 1917, and recorded May 25, 1920. The foregoing instruments, and others in question here, are shown by an abstract. The petition invokes the court to decree that the mortgages, and also certain other conveyances hereinafter referred to, be declared null and void and canceled of record, and that the cloud thereby alleged to be cast upon the title be removed.

Walter C. Smith, intervener, in an amended answer and cross-petition, alleging ownership as grantee of the Palmers, avers that Anderson D. King never had any right, title or interest in or to the land in question, and that some one erased the name of David F. DeTar, as grantee, from the granting clause of a deed, dated March 25, 1913, wherein Inez Palmer, unmarried, was grantor, and in place of DeTar's name inserted the name of "Anderson D. King" in the granting clause of the deed and caused the deed, so changed, to be filed in the office of the county clerk, and *ex officio* register of deeds, for Box Butte county, Nebraska. The court held the King deed valid and quieted the title

in those claiming under him. Defendant Smith has appealed.

The beginning point, if not the main point in the case, has to do with the Inez Palmer deed which purports to convey the title to the land in suit to Anderson D. King. The original deed is not in the record, but a typewritten copy appears therein which is certified by the register of deeds for Box Butte county as having been recorded March 19, 1917. The copy follows:

"Warranty Deed. Inez Palmer to Anderson D. King. Know all men by these presents: That Inez Palmer (single) of the County of Lancaster, and State of Nebraska, for and in consideration of the sum of ——— Dollars in hand paid, do hereby grant, bargain, sell, convey and confirm *unto Anderson D. King*, of the County of Lancaster, and State of Nebraska, the following described real estate situated in Sec. 31, T. 26, R. 49, in Box Butte County, and State of Nebraska, to wit: The south half (½) of the northwest quarter (¼) of section thirty-one (31), town twenty-six (26), Range 49 (49).

"To have and to hold the premises above described, together with all the tenements, hereditaments and appurtenances thereunto belonging, *unto the said David F. DeTar*, and to his heirs and assigns, forever.

"And I do hereby covenant with the said grantee, and with his heirs and assigns, that I am lawfully seised of said premises; that they are free from incumbrance. that I have good right and lawful authority to sell the same; and I do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever. And the said ——— hereby relinquishes all ——— in and to the above described premises. Signed this 25th day of March, A. D. 1913. Inez Palmer. In presence of Geo. M. Gates."

In respect of material recitals contained in the deed, when it was executed by Inez Palmer, as grantor, three witnesses testified on the part of Smith, namely, Inez Palm-

er, now Mrs. Inez Olson, David F. DeTar, and Joshua Palmer.

Mrs. Inez Olson testified that she never saw nor heard of Anderson D. King until about the time the case was tried; that David F. DeTar was the grantee named in the deed, and that she never authorized the erasure of DeTar's name and the insertion of King's name in DeTar's place as grantee; that the land was owned at the time by her father, and she, at his request, executed the deed.

David F. DeTar testified that he bought the land from Joshua Palmer in 1913, and that to secure the purchase price he executed a mortgage for $1,200 in favor of Palmer; that Inez Palmer was grantor and that he was the grantee named in the deed; that he never authorized any person to erase his name and insert therein the name of King or any other person as grantee; that he did not record the deed because he thought the land was of small value; that in April or May, 1914, he conveyed the land in suit by quitclaim deed to a man named Hale, in consideration of Hale assuming payment of the Palmer mortgage; that Hale never recorded his deed nor paid the Palmer mortgage, and that he, DeTar, afterward gave a quitclaim deed to Joshua Palmer in consideration of being released from payment of the $1,200 purchase price mortgage debt.

Joshua Palmer is Inez Olson's father. He corroborated her evidence and that of Mr. DeTar in every essential particular in respect of the material facts which attended the execution of the DeTar deed, and testified that he never heard of King nor received any consideration from him or any person in his behalf for the land, and further testified that he assigned the $1,200 note and mortgage to Walter C. Smith and executed and delivered to him an $833 note secured by mortgage on the land.

Walter C. Smith testified that Palmer and wife executed and delivered to him a quitclaim deed to the land in suit in satisfaction of both the DeTar $1,200 mortgage, formerly assigned to him by Palmer, and the $833 note and

mortgage executed and delivered to him by Palmer and wife; that he had no knowledge of King claiming any interest in the land nor of any person claiming any interest under him until about a year after he obtained the quitclaim deed from Palmer, and that he then tried, but unsuccessfully, to locate King.

Mr. Allie H. Mabin, in whose name the title was quieted, testified that he bought the land from Frank I. Olson. The Olson deed is dated January 23, 1920, and the consideration named is "$1 and exchange of properties." Mr. Mabin testified, however, that he paid $1,600 in cash for it and did not know why the expression "exchange of properties" was written in the deed, because no property was exchanged in the transaction. In respect of the King deed he testified that he did not know that any one claimed that the deed was "made to a man by the name of DeTar and somebody had erased the name of DeTar and inserted the name of Anderson D. King."

Frank I. Olson, Mabin's grantor, is a resident of Grand Island. He testified that Anderson D. King was an Oklahoma Indian, and that King told him he bought the land from a man named Hale; that he paid King $1,600 for the land, the deed being dated May 11, 1917, recorded February 2, 1920; that King told him "there was a mortgage of record against this land given by one DeTar, but he said that had been investigated and there was nothing to it, and he would quiet the title. So the deed was withheld from record." To avoid confusion in tracing the title, it may here be observed that Inez Palmer, now Inez Olson, is not the wife of Frank I. Olson.

By the decree the court canceled and held for naught all instruments referred to in the record which adversely affected the title of Allie H. Mabin to the land in suit and forever quieted and confirmed the title thereto in him.

This being an equity case, we have examined the record *de novo*, and we conclude that the court erred and that the judgment must be reversed. *Miller v. Baker, ante*, p. 375, and cases there cited. There is no conflict in

the evidence of Inez Olson, David F. DeTar and Joshua Palmer in respect of the fact that David F. DeTar was the sole grantee named in the deed executed by Inez Palmer.

From a review of all the evidence it seems clear to us that the deed from Inez Palmer to DeTar was fraudulently altered in a material respect and as such it became void, and no person, not even a *bona fide* purchaser, could take anything by such deed. 1 R. C. L. 1002, sec. 33. The unauthorized substitution of a grantee in a deed is such a material alteration as will avoid the deed, and such deed can convey no rights to the grantee whose name has been inserted. "Whether erasures and alterations in a deed are material, or not, is a question of law, to be decided by the court. The construction of words belongs to the court, and the materiality of an alteration in a deed is a question of construction." *Steele's Lessee v. Spencer*, 1 Pet. (U. S.) *552. *Dorsey v. Conrad*, 49 Neb. 443. In the *Steele* case, in the body of the opinion, the court observed: "If the name of William Steele was inserted in the deed as grantee, after its full execution and attestation, instead of the name of some other grantee, which was stricken out, no doubt the alteration was very material, and nothing could in that case pass by the deed to William Steele."

In a comparatively recent case it was held that a deed in which the name of the grantee was altered after delivery is a material alteration, and that a deed so altered is void as a forgery, and that purchasers from the grantee named after the forgery aquire no right to the property, though they were innocent of the forgery and had no notice thereof. *Lowther Oil & Gas Co. v. McGuire*, 189 Ky. 681.

It appears to us that the unreleased mortgage in the sum of $1,200 from DeTar to Joshua Palmer dated March 26, 1913, and recorded March 28, 1913, was clearly sufficient to put a reasonably prudent person on inquiry in respect to the condition of the title, not to mention the obviously discordant recitals in the instrument purporting to be a deed from Inez Palmer to Anderson D. King, where-

in the granting clause, as shown herein by the copy of the deed, contains the name of *King*, as grantee, and the habendum clause of the same deed contains the name of *DeTar*. Of this conveyance in the abstract it is said: "Instrument recites 'conveys unto Anderson D. King' and further along also recites 'unto the said David F. DeTar.'" The abstract further shows that Inez Palmer acquired title January 16, 1913, her deed being recorded March 15, 1913.

At the trial it was shown that Mr. Mabin was the owner of almost 1,000 acres of land in Box Butte county, and it seems that a man who had acquired an estate of such magnitude was sufficiently familiar with the recording acts of the state to know, or upon even casual inquiry should have discovered, that the recorded presence of an unreleased mortgage in the chain of title to real estate was a circumstance which was sufficient to put him upon inquiry in respect of title. And the same observation may be applied to the recitals in the conveyance dated March 25, 1913, to which he traces title.

We have examined the authorities submitted to us by counsel for plaintiff, but they do not seem to be in point. The great weight of authority supports the rule which we have adopted and which we have applied to the facts.

The judgment of the district court is reversed and the cause remanded, with directions that title to the land in suit be quieted in the answering intervener, Walter C. Smith.

REVERSED, WITH DIRECTIONS.

Note—See Alteration of Instruments, 2 C. J. secs. 75, 217; Deeds, 18 C. J. sec. 232—Vendor and Purchaser, 39 Cyc. p. 1691.

CARL FUNKE ET AL., APPELLANTS, V. ROBERT J. FRAAS, APPELLEE.

FILED JULY 31, 1924. No. 22825.

1. **Deeds**: BREACH OF WARRANTY: PLEADING. In an action for damages based upon a breach of the covenants of warranty in

a deed, plaintiff must allege and prove an actual eviction or surrender to a paramount title which was outstanding at the date of the covenant.

2. Trial: DIRECTION OF VERDICT: FINDINGS. "Where, at the close of the trial of a law action, each party moves for a directed verdict, the motion of one of the parties being sustained, the finding of the court takes the place of a verdict by the jury and will be so treated on appeal." *Modern Woodmen of America v. Berry*, 100 Neb. 820.

3. Evidence examined, and *held* to sustain the judgment.

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

Holmes, Chambers & Mann, for appellants.

Boehmer & Boehmer, contra.

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

DEAN, J.

This action was begun by Carl Funke and Claire Funke Storey, plaintiffs, against Robert J. Fraas, defendant, to recover damages for an alleged breach of the covenants of warranty title in a deed executed by defendant to Lillie H. Funke. At the close of the testimony both parties requested the court to instruct the jury to return a verdict in his favor, whereupon the jury were instructed to return a verdict for defendant. Judgment was rendered thereon and plaintiffs appeal.

The record shows that plaintiffs are the sole heirs at law of Lillie H. Funke, deceased. It also appears that on June 13, 1912, defendant conveyed to Lillie H. Funke an 80-acre tract of land located in Rawlins county, Kansas, the deed of conveyance containing the usual covenants of warranty as to title. It also appears that on March 25, 1917, a decree was entered in the district court for Rawlins county, quieting the title to the land in suit in a man named M. A. Wilson and he went into possession of the land under the decree.

Lillie H. Funke died May 16, 1913. Plaintiffs did not learn that Wilson had obtained a decree quieting the title in the land in himself until sometime in September, 1920, when they filed a motion in the Kansas court to set aside the decree which quieted the title to lands in Wilson. This motion of the plaintiffs was overruled.

Plaintiffs' present action is based upon the theory that they have been dispossessed of the land by a paramount title existing at the time the defendant executed the deed to Lillie H. Funke. Defendant's title was based on a decree foreclosing a mortgage upon the land and a sale thereunder which was confirmed by the court, the defendant becoming the owner thereof by mesne conveyances from the purchaser at the foreclosure sale. The mortgage was executed by Angeline C. Vincent in February 1887. She was then the owner of the land. She later married James S. Tolen and in September, 1888, she and her husband conveyed the land to Mattie J. Goodrich.

It is the claim of plaintiffs that Mattie J. Goodrich was never made a party in the foreclosure action; that her equity of redemption has never been foreclosed and that the decree quieting the title in Wilson is based upon a quitclaim deed obtained from Mattie J. Goodrich, dated October 23, 1916. The decree of foreclosure was rendered June 23, 1890, and the sale confirmed February 11, 1891, the purchaser being Charles B. Wilkinson.

The record is in a very confused condition mainly owing to the fact that the Rawlins county courthouse was destroyed by fire and many of the records pertaining to this case were destroyed. The evidence shows, however, that plaintiffs had failed to pay the taxes for a number of years; that the property had been sold for taxes and that Wilson had become the owner of the tax sale certificate. In his action to quiet title his petition recites that the "plaintiff claims title in said land in fee simple." The petition does not disclose on what facts his claim was founded. It cannot be determined whether the decree quieting his title rested upon his ownership of the Goodrich title.

Mrs. Goodrich testified to the effect that within a year or two after she obtained the deed from Mrs. Vincent, and long before the foreclosure action, she reconveyed the land by deed to Mrs. Vincent, and that at the time she made the quitclaim deed to Wilson, in 1916, she did not claim to have any interest in the land and so informed Wilson at the time. She further testified that she made the deed on the representation of Wilson that it was needed to clear up the title and that it would save him the necessity of a lawsuit.

Without reviewing the testimony in detail, we are convinced that the trial court was fully justified in directing the jury to return a verdict for defendant.

In order to prevail it was incumbent on the plaintiffs to establish by a preponderance of the evidence that they had been ousted by a paramount title existing at the time the deed to them was executed. But they did not do so.

The record shows that for more than a quarter of a century Mattie J. Goodrich neither had nor claimed any interest in the land in suit. So that, at all times after her first conveyance, she had no title or interest in the land which she could convey to any person. "In an action on a warranty deed for a breach of covenants of title and for quiet enjoyment, the plaintiff must allege and prove that he has been turned out of the possession of the granted premises, or some part thereof, or compelled to yield the possession thereof to one having a paramount title." *Merrill v. Suing*, 66 Neb. 404.

As herein noted both parties at the close of the testimony moved for a directed verdict in his favor. In such case the rule is well settled that for the purpose of review the findings of the court on questions of fact will have the same force and effect as the verdict of a jury. *Modern Woodmen of America v. Berry*, 100 Neb. 820.

Reversible error does not appear. The judgment is

AFFIRMED.

Note—See Appeal and Error, 4 C. J. sec. 2872; Covenants, 15 C. J. secs. 198, 210, 218.

KROTTER & P. J. FITZGERALD, APPELLEE, V. JAMES C. DAVIS, DIRECTOR GENERAL, APPELLANT.
FILED JULY 31, 1924. No. 22846.

1. **Appeal:** HARMLESS ERROR. An erroneous instruction is not a ground for reversal, unless the complaining party is shown to have been prejudiced thereby in a substantial right.
2. ———: AFFIRMANCE. When an action is brought to recover for damages to a freight shipment while the railroad was under control of the director general of railroads, and the railroad corporation, upon whose line the damage occured, was named as a party defendant in the same suit, and upon a demurrer and a plea in abatement being both confessed and the action against the railroad corporation being thereupon dismissed, and trial thereafter proceeding against the director general alone, *held*, that the judgment obtained against the director general should not be reversed on the ground that the railroad company had also been named as a party defendant.
3. **Evidence** examined, discussed in the opinion, and *held* that the judgment is without reversible error.

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

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

Scott & Scott, contra.

Heard before MORRISSEY, C. J., ROSE, DEAN, GOOD, and THOMPSON, JJ.

DEAN, J.

Plaintiff is a partnership engaged in the live stock business at Imperial, Nebraska. July 26, 1919, the firm shipped a car-load of hogs consisting of a mixed lot of 66 head from Imperial to the St. Joseph market over defendant's railroad. The shipment arrived at destination about 10 or 11 o'clock in the nighttime of July 27, and was not unloaded until about 6 or 7 o'clock the next morning. It was then found 15 of the hogs were dead. During the time the shipment was in transit the temperature prevailing over the section of country through which it passed, as shown by an official

government report, and by witnesses produced at the trial, was extremely and unusually high. In fact defendant concedes this. Plaintiff's allegation of negligence is based on the fact that, among other things, defendant did not sufficiently drench the hogs *en route*, and that, by reason of its carelessness and negligence in this respect, the hogs perished. This action was therefore brought to recover $995.25 for the loss of the hogs. When the evidence was submitted the jury brought in a verdict for $950 upon which judgment was rendered. Defendant has appealed.

The contention is that when the hogs were delivered to defendant they were in good, sound and normal condition and that during all of the time the shipment was in transit the hogs were under defendant's exclusive control and supervision, no caretaker having accompanied the shipment.

Defendant denied generally all of the material allegations of plaintiff's petition, and alleged, among other things, that the death of the hogs "was due to the inherent vice and propensities of the animals being transported, and to the usual and ordinary movement of freight cars and trains, and to matters over which defendant had no control," and was not caused by any fault or negligence of the defendant.

The railroad conductors who had separate charge of the train over the five railroad divisions upon which the shipment was carried testified that the hogs were drenched at different stations on the journey. Whether the drenching was thorough or whether it was performed in a perfunctory manner does not appear. The witnesses seem to have arrived at a conclusion and they testified to such conclusion as being an established fact. One conductor testified that he "watered" the hogs at certain designated places, but whether it was meant that the thirst of the hogs was quenched or that they were "drenched" by having water poured over them in considerable quantities the jury were not informed. And these important facts were all within the exclusive knowledge of defendant. In a comparatively recent case we held that, where a shipment of live stock was delayed by the carrier and loss was thereby occasioned to the shipper, who did not accompany the shipment, the

cause for the delay was peculiarly within the knowledge and power of the carrier and was matter of defense. *Cram v. Chicago, B. & Q. R. Co.*, 85 Neb. 586, 26 L. R. A. n. s. 1022; *Chicago, B. & Q. R. Co. v. Cram*, 228 U. S. 70. We think that substantially the same principle is involved here and the rule is therefore applicable to the facts.

Defendant, of course, in recognition of the danger which attends the shipment of hogs in extremely hot weather, instructed the trainmen to drench all hog shipments at every watering station if the shipment was not accompanied by a caretaker. But whether the hogs were sufficiently drenched, in view of the prevailing excessive heat, was for the jury, and there appears to be sufficient evidence to support a finding that plaintiff's hogs did not have such attention in this respect as the condition of the temperature reasonably required.

Dr. W. H. Bailey is a veterinary surgeon and is connected with a weighing and inspection bureau at the St. Joseph stock-yards. On direct examination he testified, on defendant's part, that he saw the 15 dead hogs about 8 o'clock, upon their arrival, the morning of July 28, and that "four of those were decomposed and eleven were fresh," and that some of the dead hogs were small and some were quite heavy, and that excessive heat would be sufficient to produce the condition which he found. Continuing he frankly testified that the hogs "died from congestion of the lungs, induced by heat, fatigue and lowered resistance of the body." On this point defendant argues that the four decomposed hogs were in such a state of decomposition as to render it impossible to determine the cause of death. But it seems to us that if upon arrival almost 25 per cent. of the dead hogs, some large and some small, were in the advanced state of putrefaction which the evidence discloses, the jury were justified in concluding that culpable negligence was clearly shown and that it was reasonable to believe that such negligence was continuously present throughout the trip.

Defendant complains of certain instructions which were

given and of tendered instructions which were refused. Upon examination it appears that defendant's contention is without substantial merit. It is well settled in this jurisdiction that an erroneous instruction is not a ground for reversal unless the complaining party is shown to have been prejudiced thereby in a substantial right. No prejudice has been shown in this respect. *Rocha v. Payne*, 108 Neb. 246; *Moore v. Muller*, p. 551, *post*. From a review of the record we conclude that the verdict is amply supported by the evidence.

Another objection is raised by defendant. June 22, 1920, the petition was filed wherein the defendant railroad company "and John Barton Payne, federal agent for the United States railroad administration," were named as defendants. August 30, 1920, John Barton Payne demurred, on the ground of a defect of parties plaintiff. On the same day the defendant railroad company filed a plea in abatement on the ground that plaintiff's cause of action, under the federal law, should have been brought only against John Barton Payne, Federal Agent, etc., and not against the defendant railroad. November 17, 1921, the demurrer and plea in abatement were confessed in open court and the cause was dismissed as to the defendant railroad company. Plaintiff's counsel filed no additional or supplemental pleading, nor was the petition amended. However, on the same day an answer was filed, wherein defendant was designated as "James C. Davis, Federal Agent, etc. Defendant." Plaintiff's reply designated "James C. Davis, Director General of the Railroads, as agent provided for in section 206 of the Transportation Act of 1920, Defendant." Thereupon the case at once proceeded to trial.

Extended argument is now interposed to support the contention that the petition does not state a cause of action against Director General Davis and that it does not support the judgment. In view of plaintiff's confession, and the dismissal of the railroad company, pursuant to defendant's plea, we do not think the argument should prevail. The contention is based on purely technical grounds, and

in view of the answer and in view of the director general having pleaded to the merits and having proceeded to trial, and the evidence of the parties having been submitted, without objection by defendant on this feature of the case, counsel cannot now be heard to raise the question here. It clearly appears that counsel waived the objection which is now urged.

This is not a case where a demurrer was sustained and the pleader refused to amend. On the contrary, the demurrer and plea in abatement were both confessed and, apparently by an oversight, the petition was not amended. To reverse the judgment and to remand the case, in the present state of the record, would be to apply an obviously technical rule of practice to the pleading which defendant now attacks and thereby cause a mistrial. We decline to go so far. Reversible error has not been shown.

The judgment is affirmed, with leave to plaintiff, if so advised, to amend its petition to conform to the theory on which the action was tried.

AFFIRMED.

Note—See Appeal and Error, 4 C. J. p. 1029, sec. 3013; p. 926, sec. 2898 (1925 Ann.).

EMIL J. ELIASON, APPELLEE, V. S. H. BURNHAM, JR., ET AL., APPELLANTS.

FILED JULY 31, 1924. No. 22885.

Evidence examined, and *held* not sufficient to sustain the verdict and judgment.

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

Stout, Rose, Wells & Martin, C. L. Stewart, H. A. Reese and *Bruce Fullerton,* for appellants.

Waring & Waring, contra.

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

DAY, J.

Action by plaintiff to recover damages against the defendants based upon alleged misrepresentation and fraud on part of defendants in inducing plaintiff to purchase 160 acres of land in Jefferson county, Idaho. The answer of the defendants denied any misrepresentation or fraud in the transaction. The trial resulted in a verdict for plaintiff for $16,000 with interest thereon, aggregating $17,900.81, for which judgment was rendered. Defendants appeal.

At the close of plaintiff's testimony the defendants moved the court to instruct a verdict in their favor. This motion was overruled. Thereupon defendants introduced no evidence, and made no argument to the jury. The defendants contend that there is no evidence in the record to sustain the verdict and judgment.

Upon the issue as to whether there was misrepresentation and fraud in procuring the contract, we think the evidence was sufficient.

It is contended that there was no evidence upon which the jury could base its verdict for damages. It was plaintiff's theory, as disclosed by his petition and the opening statement to the jury made by his counsel, that his damages were the difference between the value of the land in the condition it was in and its value had it been as represented. There is evidence in the record tending to show that the land was practically valueless for agricultural purposes or for pasture. Plaintiff attempted to show by a witness what the value of the land would have been had it been as represented by defendants. This question was put in three or four different forms, but in each instance an objection to the testimony was sustained. There is no testimony in the record as to what the value of the land would have been had it been as represented, and therefore there was no basis for the jury to arrive at a verdict in the amount found.

The court correctly instructed the jury as to the measure of damages, and also instructed them that they must base their verdict upon the evidence. Under the state of the

record, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

Note—See Fraud, 27 C. J. p. 108, sec. 269½.

FRANK S. MOORE, APPELLEE, V. FRITZ MULLER, APPELLANT.
FILED JULY 31, 1924. No. 22950.

Appeal: HARMLESS ERROR. "This court will not reverse a judgment of the trial court for an erroneous instruction, when it appears from the whole record that the party complaining has not been prejudiced thereby." *Smith v. Roehrig*, 90 Neb. 262.

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

Fawcett & Mockett, for appellant.

Fred C. Foster, O. K. Perrin and *S. M. Kier, contra.*

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

DAY, J.

Action by Frank S. Moore against Fritz Muller upon an appeal bond signed by the latter. Defendant admitted the obligations of the bond, but pleaded a set-off to a part of the amount due. The matters constituting the set-off were denied by the plaintiff. The jury returned a verdict in favor of the plaintiff for $12,026.34, and also found against the defendant on his set-off. Judgment was rendered upon the verdict, and defendant appeals.

The set-off alleged in substance that the plaintiff was engaged in selling stock of the Huffman Brothers Motor Company, and that the plaintiff requested the defendant to go with him to Blue Hill, Nebraska, where the defendant was well acquainted, and introduce the plaintiff to the residents and assist the plaintiff in making sales of stock in the company; that the plaintiff agreed to pay the defendant for such services one-half of the commissions received by plaintiff on sales made at Blue Hill; that on account of the

efforts of the defendant the plaintiff obtained subscriptions for stock and collected from the residents of Blue Hill $73,500, upon which plaintiff was to receive a commission of 15 per cent., one-half of which was to be paid to the defendant; that no part of the amount due the defendant has been paid; and that there is owing to him on account of the services rendered $5,512.50, with interest.

The principal ground of error relied upon by the defendant for a reversal of the judgment is the giving of instruction No. 7, which reads as follows:

"One of the contentions of the plaintiff is that the defendant Muller is not the real party in interest. You are instructed that a lawsuit, such as this, must be brought in the name of the real party in interest; in other words, by the party who is entitled to the avails of the suit. If the evidence satisfies you that any recovery by the defendant on his set-off or cross-petition would not be the personal property of the defendant, then the defendant would not be entitled to recover."

It is argued by the defendant that the giving of this instruction was error, because there was no evidence to support the issue that the defendant was not the real party in interest. There was no evidence to justify the giving of this instruction. The plaintiff called the attorney for the defendant as a witness on this issue, and attempted to show that the Huffman Brothers Motor Company was the real party in interest. The testimony elicited from the witness utterly failed to establish that the defendant was not the real party in interest. It does not follow, however, that the giving of an erroneous instruction necessitates the reversal of a judgment. It is well settled that the giving of an erroneous instruction is not ground for reversal, unless it fairly appears it probably prejudicially affected the substantial rights of the complaining party. *Smith v. Roehrig*, 90 Neb. 262; *Stocker v. Stocker*, p. 565, *post*. We are quite convinced that the instruction, while erroneous, was not prejudicial.

It is next urged by defendant that the court erred in ex-

cluding certain proffered testimony of the witness Schmidt, who was called on behalf of the defendant. It appears, however, that later during the examination of this witness he was permitted to testify concerning the same matters which the sustaining of the previous objection excluded.

No substantial error appearing in the record, the judgment of the trial court is

AFFIRMED.

Note—See Appeal and Error, 4 C. J. p. 1029, sec. 3013.

ADOLPH VAVRA ET AL., APPELLEES, V. FRED H. CLARIDGE ET AL., APPELLEES: JAMES E. HART, RECEIVER, APPELLANT.

FILED JULY 31, 1924. No. 23162.

1. **Contracts**: RESCISSION. One who seeks to rescind a contract, the execution of which was procured by fraud, must act within a reasonable time after the discovery of the fraud. A delay of two weeks, when no injury is shown to have accrued to the adverse party, is not an unreasonable delay.
2. **Banks and Banking**: TRANSFER BY OFFICER: WANT OF CONSIDERATION. When property is transferred to a bank by an officer thereof without consideration, the bank acquires no greater right than that of the transferrer.
3. ———: DEPOSITS: SUBROGATION. Where money is deposited in a bank in the name of a party, which in equity belongs to another, the equitable owner in a proper action may establish his ownership to the fund, and thereby becomes subrogated to the rights of the original depositor, and entitled to be paid out of the guaranty fund.
4. **Evidence** examined, and *held* sufficient to sustain the judgment.

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

Gaines, Van Orsdel & Gaines, for appellant.

Norval Bros., Colman, Landis & Mastin, Thomas, Vail & Stoner, James A. Clark, J. A. Singhaus, E. B. Carrigan, F. Dolezal, and *E. A. Coufal, contra.*

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

DAY, J.

On May 29, 1920, Adolph Vavra and Ruzena A. Vavra, his wife, brought this action against Fred H. Claridge to rescind an exchange of lands made between the parties, upon the ground of misrepresentation on the part of Claridge and his agent in procuring the exchange. Other parties who had acquired an interest in the lands traded by plaintiffs were made defendants. The plaintiffs tendered back to Claridge a deed to the lands received by them, and prayed that the lands conveyed by them be restored; that a certain note and mortgage for $68,610 executed by them as a part of the transaction be canceled and set aside; and for other equitable relief. Claridge answered denying that there was any misrepresentation in procuring the exchange of the lands. Anton Policky and his wife answered that they in good faith had purchased from Claridge 166 acres of the lands received by him in the transaction; that they paid Claridge $3,760 in cash, and executed and delivered to him two notes for $10,000 and $15,000, respectively, secured by mortgages upon the lands purchased and also upon other lands. They prayed to be dismissed. Pending the litigation the Banking House of A. Castetter, of which Claridge was president, failed, and James E. Hart was appointed receiver of the bank. On April 27, 1921, Hart, as receiver, filed a petition of intervention claiming that the bank in due course of business received from Claridge certain deeds and assignments which conveyed to the bank the following property in controversy in this action: 340 acres of land in Seward county, Nebraska; 160 acres in South Dakota; a note and mortgage for $68,610 executed by plaintiffs; and two notes aggregating $25,000 executed by Policky and wife to Claridge as a part of the purchase price of 166 acres of the land sold by Claridge. The receiver denied that there was any fraud in the transaction between the plaintiffs and Claridge. The plaintiffs tendered issue with the receiver as to the bank's good faith ownership of the lands, as well as the notes, and also claimed that the $3,760 in cash paid by them was deposited in the bank by Claridge; that in equity this sum was held by the

bank in trust for the plaintiffs; and they asked that this sum should be paid to them as a depositor in the bank. Other pleadings were filed by other parties which seem unnecessary to be considered.

Upon the issues thus tendered the trial court found generally in favor of the plaintiffs, and entered a decree restoring to the plaintiff Adolph Vavra the title to the 340 acres in Seward county held by the bank, which it had received from Claridge, and canceled the note and mortgage for $68,610 executed by plaintiffs to Claridge. The court also found that Anton Policky and his wife were good faith purchasers of the 166 acres from Claridge, the title to which was in Ruzena A. Vavra before the trade was made, and decreed that the two notes aggregating $25,000 executed by Policky and wife be transferred by the bank to Ruzena A. Vavra; that the bank also transfer the title to the 160 acres in South Dakota to Ruzena A. Vavra, and that she recover a judgment against the bank for $1,531.33, the balance due upon an accounting of the $3,760 deposited in the bank by Claridge. From this decree Hart, as receiver, has appealed.

It appears that in August, 1919, Claridge was the owner of a tract of land in Burt county, consisting of 680 acres, upon which there was a mortgage of $68,000. He had purchased this land a few months before for $150 an acre, paying $34,000 in cash, and executing a mortgage for the balance of $68,000 due in 10 years. He listed the lands for sale for $300 an acre with certain real estate agents, among them being the defendant James M. Dixon. Vavra was the owner of 340 acres of land in Seward county, and his wife was the owner of 166 acres in Seward county and also held the title to 160 acres in Lyman county, South Dakota. The Seward county farms were subject to a mortgage of $35,000. After some negotiations between the plaintiffs and the agent, Dixon, a contract of exchange of lands was entered into between Claridge and the plaintiffs. In making the exchange Claridge's land was considered worth $300 an acre, or a total of $204,000, Claridge's equity in the land

being $136,000. The value of the three tracts of land owned by the plaintiffs was considered to be $102,390, the plaintiffs' equity in their land being $67,390. The difference in the values of the respective tracts was $68,610, in favor of Claridge. The difference was to be secured by a note and mortgage executed by the plaintiffs upon the Claridge tract. A contract embodying these terms was signed by the respective parties on August 26, 1919, and later, on May 15, 1920, the deeds and mortgages of the respective parties were formally delivered. In the fall of 1919 the plaintiffs entered upon a part of the land and did some fall plowing. On March 1, 1920, the plaintiff and his family moved upon the Burt county land. The plaintiff testified that after the deeds had been delivered he discovered for the first time that the land was so near level that it would not drain. He also discovered that the land was not such as it was represented to be, and on May 31, 1920, he tendered back to Claridge a deed to the Burt county land, and demanded a rescission of the contract.

It is the theory of the plaintiffs that they were induced to enter into the contract of exchange of the lands upon certain representations of the defendant Claridge and his agent, upon which they relied, concerning the value, character of soil, slope and drainage of the Claridge land, and that the representations were not in fact true. It seems unnecessary to set out in any considerable detail the evidence, which covers 836 pages of the bill of exceptions. Some of the alleged statements made by the agent Dixon were mere matters of opinion, and would form no basis for a rescission of the contract on the ground of misrepresentation. We think, however, the evidence shows that misstatements were made with respect to the land being of sufficient slope to drain the surface water, which could not be discovered by the plaintiffs upon a reasonable examination of the land. Also, some statements were made with respect to the character of the soil, especially that part covered by grass, which was not apparent until an attempt was made to cultivate it. Among other things, Dixon stated that he

was well acquainted with the character of the soil of the entire valley; that the uncultivated lands were exactly of the same quality as that portion which was cultivated: that it was a black rich loam, no gumbo, that there was a fall of from 4 to 7 feet to the mile; that there was no trouble by water standing on it; that the water readily drained off; and no tiling was necessary. About 280 acres of the land was in cultivation, the balance being in grass. It appears that during the light rains in the early spring the soil readily absorbed the surface water falling upon the land, and farming could be carried on without serious inconvenience. After heavy rains which occurred in the middle of May, the water would not drain off the land at all. It was shown that, instead of having a fall of from 4 to 7 feet to the mile, the general average was from 1 1-2 to 2 feet to the mile; that the uncultivated land was what is known as "gumbo," and required tiling before it could be successfully cultivated.

The appellant contends that the evidence shows that the land did have a slope of from 4 to 7 feet to the mile. This is true if the calculation is made from the highest point on the land. It appears that there was a high point which abruptly sloped to the general level of the land. Taking the entire testimony, it is clear that the representation was intended to create the impression that the water would readily drain from the land and not interfere with farming. Without further reviewing the testimony, we are convinced that the evidence upon the issue of fraud fully sustains the finding of the trial court.

It is urged by the appellant that the attempted rescission was not timely made, and that therefore the plaintiffs may not recover in this form of action. The rule is well settled in this state that one who seeks to rescind a contract of purchase upon the ground of fraud, must act promptly upon discovery of the untruthful statements respecting the subject-matter of the purchase. *Pollock v. Smith,* 49 Neb. 864. We think in the case before us the rescission was timely made. The matter of whether the

water would readily drain from the land could not reasonably be discovered until the period of the heavy rains, which came the middle of May. The rescission was tendered and suit instituted within about two weeks from the discovery of the real conditions. No injury is shown to have accrued to the defendants on account of the delay in rescinding the contract during that period.

It also appears from the record that Claridge assigned to the bank the note and mortgage for $68,610; that he assigned to the bank the two notes and mortgages aggregating $25,000, executed by Policky; that he deposited in the bank $3,760, being the cash payment received from Policky; and also executed a deed to the bank to the 340-acre tract in Seward county, and the land in South Dakota. Claridge testified that there was no consideration moving from the bank for these conveyances. It seems clear, therefore, that at the time the bank failed, it had no greater title or right than Claridge to the notes, mortgages and deeds above described.

It is finally urged that the court erred in rendering a judgment in favor of the plaintiffs against the bank for $1,531.33. While not specifically stated, it seems clear that this judgment was more than an allowance of the amount as a preferred claim against the bank. The evidence is clear that the deposit in the bank made by Claridge was the proceeds of the cash payment made by Policky upon his purchase from Claridge of the Seward county land. Upon a balancing of the accounts of moneys received and paid out by Claridge and the plaintiffs, upon their respective lands, the sum deposited in the bank was reduced to $1,531.33. It seems clear that Claridge was a depositor in the bank, and that the amount of his deposit was protected by the guaranty fund. In equity Mrs. Vavra was the owner of the 166 acres, and so became subrogated to the rights of Claridge in this deposit. The judgment of the trial court holding that the sum of $1,531.33 was a claim against the guaranty fund in favor of Mrs. Vavra appears to be fully sustained. As between the plaintiffs the court did not at-

tempt to apportion their respective rights.

Upon a consideration of the entire record, we are satisfied that the decree of the trial court was right, and the judgment is, therefore,

AFFIRMED.

Note—See Contracts, 13 C. J. sec. 671; Banks and Banking, 7 C. J., secs. 15, 223 (1925 Ann.)—Vendor and Purchaser, 39 Cyc. p. 2067.

BLANCHE M. BISHOP, APPELLEE, V. CHARLES A. LISTON, APPELLANT.

FILED JULY 31, 1924. No. 22871.

1. **Rape**: CIVIL LIABILITY. If a male person over the age of 18 years has carnal knowledge of a previously chaste maiden under the age of 18 years, he is liable to her, in a civil action, for such damages as she may sustain as the proximate result of such unlawful act.
2. ———: ———: DAMAGES. In an action by a female to recover damages for her defilement under circumstances which, in law, would constitute a rape, and where such wrongful act has resulted in her giving birth to a child, loss of social standing is a proper element of damages.
3. **Appeal**: REFUSAL OF INSTRUCTION. It is not error to refuse an instruction, the substance of which is embodied in the charge by the court on its own motion.
4. **Rape**: EVIDENCE. In a civil action for the recovery of damages for rape, it is proper for the plaintiff to testify that she told others of the wrongful act immediately, or very soon, after its occurrence.

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

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

Halligan, Beatty & Halligan, contra.

Heard before MORRISSEY, C. J., DAY, GOOD and THOMPSON, JJ., and BLACKLEDGE, District Judge.

GOOD, J.

Plaintiff recovered a judgment for damages for felonious assault, committed on her person by defendant, and the latter has appealed.

In her petition plaintiff alleged, in substance, that on the night of September 5, 1920, while she was an over-night guest at the home of defendant and sleeping in a room by herself, defendant wrongfully and forcibly entered her room through a window and, without her consent, made an assault upon her and carnally knew her; that by reason thereof she became pregnant and will in due time give birth to a child, and that at said time she was 17 years of age, chaste and unmarried. Defendant's answer was a general denial. The case was submitted to the jury upon the theory that the rape was accomplished without force. There was a verdict for the plaintiff in the sum of $7,000 and judgment thereon.

There are numerous assignments of error, but they may be grouped and disposed of under five heads, the first of which is that the evidence is insufficient to warrant the finding that the defendant committed the assault complained of.

From the record it appears that defendant owned and lived upon a ranch in Lincoln county, Nebraska; that plaintiff's parents lived in one of defendant's houses, quite near defendant's home, and that her father was in the employ of defendant; that plaintiff was frequently at the home of defendant; sometimes was employed as a domestic by some of the families in the neighborhood, and that on a number of occasions defendant took her in his car to her place of employment and back to her home. Plaintiff testified that on a number of these occasions defendant made indecent proposals, which were spurned; that on the night in question, at the request of Mrs. Stoetzel, who was employed by defendant, plaintiff stopped over night at defendant's home; that she occupied a room alone, and that during the night defendant entered her room through a window and accomplished his purpose; that on May 29, 1921, plaintiff gave birth to a fully developed child.

Defendant is a married man, 51 years of age, and of large stature. On the witness-stand he denied that he had made indecent proposals to plaintiff, or that he had entered her room, or had ever carnally known her. Plaintiff testified that on the night in question the window in her bedroom was open to its full height and that the next morning the screen was hanging by hinges or hooks at the top and unfastened at the bottom. The evidence on behalf of defendant was to the effect that the woodwork of the bedroom, occupied by plaintiff, had been painted during the latter part of the previous July; that, at that time, the window was raised six or eight inches, and that the paint caused the sash to adhere to the window frame or casing, so that it could not be raised or lowered from that position, and that it remained in this condition until the latter part of the following December; that the screen was securely fastened from the inside, and that it was utterly impossible for the defendant, under the circumstances, to have entered, through the window, the room occupied by plaintiff.

Whether the screen was securely fastened from the inside and whether the window was raised to its full height, as claimed by plaintiff, or was stuck at a height of six or eight inches, so that it could be neither raised nor lowered, and whether defendant entered the room through the window and committed the assault on plaintiff, are all questions of fact that were properly submitted to the jury upon conflicting evidence. Under such circumstances, their verdict is conclusive.

Defendant's second proposition is that, under the common law, which he asserts is in force in this state, as applied to actions of this character, a civil action for damages will not lie, where there is consent on the part of the female; that the maxim *volenti non fit injuria* applies; that plaintiff, having consented to her defilement, is precluded from recovering damages therefor. It is doubtless true that at common law an adult female could not recover where she consented to her ravishment, but the conduct of plaintiff short of consent was no justification. 33 Cyc.

1521, and the cases there cited. Section 3085, Comp. St. 1922, provides: "So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed by the legislature of this state, is adopted and declared to be law within the state of Nebraska."

This does not signify, however, that the common law is in full force and effect in Nebraska. If it is inapplicable to our needs and conditions, or conflicts with constitutional or statutory provisions, it is not in force. At common law, rape was the unlawful carnal knowledge of a woman over the age of ten years, forcibly and without her consent, or such carnal knowledge of a female child under the age of ten years, either with or without her consent, but this has been modified by statute in Nebraska. Section 9551, Comp. St. 1922, provides in part as follows: "Whoever shall have carnal knowledge of any other woman, or female child, than his daughter or sister, as aforesaid, forcibly and against her will; or if any male person, of the age of eighteen years or upwards, shall carnally know or abuse any female child under the age of eighteen years, with her consent, unless such female child so known and abused is over fifteen years of age and previously unchaste, shall be deemed guilty of a rape." The evidence in this case discloses that the plaintiff was under the age of 18 years and was previously chaste, and that defendant was above the age of 18 years, to wit, 50 years, at the time the offense was committed. It follows that the act constituted rape within the meaning of the Nebraska statute.

Defendant, however, contends that it was not the intent or purpose of the legislature, in changing the criminal law, to enlarge the civil liability in that respect. The precise question has not been decided by this court.

The question of the civil liability of a male person for having carnal knowledge of a female of such tender years as to constitute rape, regardless of the fact that she may not have resisted her defilement, has been before the courts

of New York, Oklahoma, Oregon and Texas, and in all those states the ravisher is held liable. *Dean v. Raplee,* 145 N. Y. 319; *Boyles v. Blankenhorn,* 153 N. Y. Supp. 466; *Priboth v. Haveron,* 41 Okla. 692; *Watson v. Taylor,* 35 Okla. 768; *Hough v. Iderhoff,* 69 Or. 568; *Altman v. Eckermann,* 132 S. W. (Tex. Civ. App.) 523. In all those states, like our own, the common law, so far as applicable and except as modified or abrogated by constitutional or statutory provisions, is in force. Our attention has not been called to, nor in our search have we found, any decision holding to the contrary, where a similar condition as to the statutory definition of rape prevails. The purpose of the legislature in changing the common law, as to the facts necessary to constitute rape, was to protect the virtue and chastity of female children of tender years who have not attained such a degree of mental development as to fully comprehend and realize the nature and effect of the immoral and unlawful act. The statute says that up to a certain age they are incapable of giving consent to the violation of their persons, with the consequent degradation, humiliation and shame, to which it will subject them. It further says to the libertine, who would rob a virtuous maiden, under the age of 18 years, of the priceless and crowning jewel of maidenhood, that he does so at his peril. There was no consent to the wrongful act of defendant because plaintiff was not legally capable of consent. His liability is the same as if he had accomplished his vile purpose by force and violence.

We therefore hold that if a male person, above the age of 18 years, has carnal knowledge of a previously chaste maiden, under the age of 18 years, he is liable to her, in a civil action, for such damages as she may sustain as the proximate result of such unlawful act.

Defendant complains because the jury were instructed, in determining the amount of plaintiff's recovery, if any, to consider her loss of social standing resulting from the wrongful act complained of. Defendant contends that loss of reputation or social standing is not a proper element of

damages in cases of this character, and cites, as sustaining this view, *Atkins v. Gladwish*, 25 Neb. 390, and 33 Cyc. 1525. *Atkins v. Gladwish, supra,* is the only case cited as sustaining the text in Cyc. That case was one to recover damages for indecent assault. Over objection, plaintiff was permitted to prove that defendant, both before and after the assault, had made defamatory remarks to others concerning her, and in the instruction the jury were directed to consider these remarks. While the language of the learned jurist writing the opinion might indicate that loss of reputation or social standing was not a proper element of damages in cases of this character, we think it evident, from a careful reading of the opinion, that what he sought to condemn was permitting a recovery for loss of reputation resulting from the slanderous utterances which had not been charged as a part of plaintiff's cause of action. We think that loss of social standing resulting from the criminal assault was not under consideration.

In the instant case, plaintiff alleged, as an element of damages, the loss of social standing. It must not be overlooked that as a result of defendant's wrongful act plaintiff is the mother of a bastard child. This fact is known to the people of the community. No argument is required to make it plain that her social standing has been seriously and injuriously affected. Sound reasoning and authority justify a recovery for the loss of social standing, where the female has been forcibly ravished and the fact is known to the public. *Kurpgeweit v. Kirby*, 88 Neb. 72; *Wolf v. Trinkle*, 103 Ind. 355; *Kelley v. Kelley*, 8 Ind. App. 606; *Valencia v. Milliken*, 31 Cal. App. 533. As heretofore pointed out, the law rendered plaintiff, because of her youth and consequent immature judgment and understanding, incapable of consent. Her right to recover for loss of social standing is the same as if she had resisted her ravishment.

Defendant alleges error in the refusal of the court to give an instruction by him requested, to the effect that plaintiff could not recover unless the jury found from the evidence that the assault occurred at the time, place, in the

manner, and under the circumstances as testified to by plaintiff. The court in one of its instructions set forth in detail the time, place and manner in which the assault was alleged to have occurred, and, as a condition to plaintiff's recovery, told the jury they should find that the assault must have occurred substantially as alleged, and by another appropriate instruction told the jury not to guess or speculate that any other facts might have taken place or existed, except such as were proved or might be properly inferred from the evidence. The charge to the jury should be considered as a whole, and, when so considered, the alleged error seems to be groundless.

Defendant urges that error was committed in permitting plaintiff, over objection, to testify that on the morning following the assault she related the fact to Mrs. Stoetzel. She did not detail the conversation, but simply testified that she had told her of the outrage. Cases cited by defendant in support of his contention are to the effect that a defendant cannot insist on such fact being submitted to the jury in a criminal case, where a rape was committed without force, and that it is not proper to admit such evidence in cases where prosecutrix does not take the witness-stand. The authorities cited are not in point. That such evidence is admissible is the general rule, and is sustained by ample authority. *Wood v. State,* 46 Neb. 58; *Welsh v. State* 60 Neb. 101; *Henderson v. State,* 85 Neb. 444; *Totten v. Totten,* 172 Mich. 565; *Gardner v. Kellogg,* 23 Minn. 463.

No error is found. Judgment

AFFIRMED.

Note—See Rape, 33 Cyc. pp. 1521, 1523, 1525.

GUSSIE E. STOCKER, APPELLEE, V. HARRIET STOCKER, APPELLANT.

FILED JULY 31, 1924. NO. 23549.

1. **Witnesses: HUSBAND AND WIFE. PRIVILEGED COMMUNICATIONS.** That part of section 8835, Comp. St. 1922, which makes husband and wife incompetent to testify "concerning any communication made by one to the other during the marriage," and section 8838, Comp. St. 1922, which provides that "neither husband nor wife

can be examined in any case as to any communication made by the one to the other while married," were enacted for the purpose of affording protection to the marital relation, to foster mutual confidence between husband and wife, and to prevent the disclosure of any confidential communication from one to the other.

2. **Damages:** PRESUMPTION. In an action for the recovery of damages, the presumption obtains, in the absence of a contrary showing, that the jury did not consider any element of damages that was unsupported by evidence.

3. **Appeal:** AFFIRMANCE. The giving of an erroneous instruction is not ground for reversal, unless it fairly appears that it probably prejudicially affected the substantial rights of the complaining party.

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

C. C. Flansburg, for appellant.

Paul Jessen, G. E. Hager, and *Kelligar & Ferneau, contra.*

Heard before MORISSEY, C. J., ROSE, DAY and GOOD, JJ., BLACKLEDGE and REDICK, District Judges.

GOOD, J.

In an action for alienating her husband's affections, plaintiff, Gussie E. Stocker, recovered a judgment against her mother-in-law, Harriet Stocker, for $10,000. Defendant appeals.

Plaintiff and Reggie Stocker were married at Auburn, Nebraska, in June, 1916, and immediately went to the home of Reggie's parents in Lincoln, Nebraska, and made that their home until the young people separated in July, 1921. At that time plaintiff left the home of her husband and parents-in-law, and went to the home of her parents in Auburn, where she has since resided, apart from her husband. In October, 1921, Reggie Stocker sued his wife for a divorce. A trial of that case resulted in a decree giving his wife an allowance for separate maintenance and the custody of their little daughter, which decree was afterwards affirmed by this court, *Stocker v. Stocker, ante*, p. 201. Defendant

contends that the verdict is not supported by the evidence; that the proof shows that plaintiff did not lose the affections of her husband until after the separation in July, 1921, and that there is no evidence to show any act on the part of defendant, after that separation, which would cause the loss of affections complained of.

There is evidence tending to establish the following state of facts: Defendant was not pleased with her son's choice of a wife. Shortly after marriage she began to ill-treat the plaintiff; would not allow plaintiff's parents to visit her in the home; would not allow plaintiff to partake of delicacies and other articles of food that would be placed upon the family table; made it so unpleasant that plaintiff's friends would not call at the home; required plaintiff to retire to her room upstairs early after the evening meal; and would not allow her to have a light in her room except long enough to disrobe in retiring; frequently said the plaintiff was untruthful, dirty and dishonest; frequently called her a liar and a thief and other words not fit for the printed page, and on more than one occasion physically assaulted the plaintiff and falsely accused plaintiff of assaulting and wounding defendant. These things were done in the presence of plaintiff's husband and some of them in the presence of neighbors. Defendant told plaintiff she was not wanted in the home and to leave and not return, and subjected her to such indignities that no woman of spirit and self-respect could or would endure the treatment. As time went on, the conditions became worse and less endurable. On the morning that plaintiff left she was told by defendant's husband not to return; that Reggie would pack and send her things to her. When married, plaintiff weighed 115 pounds and at the time of the separation weighed but 94 pounds. Because of the constant harassment to which she was subjected, the plaintiff became nervous and ill, her peace of mind was destroyed and her health was well-nigh ruined. She frequently besought and begged her husband to provide a home apart from that of his parents, no matter how humble. Her husband at all

times refused to provide a separate home for his child and her. At first he would refuse to partake of such articles of food as were denied his wife; ere long he changed and ate food his wife was denied, saying that there was no use in denying himself simply because she was denied. On one occasion, at night, Reggie came from his mother's room to his wife and told her they would never have a separate home; that if he should leave the parental roof his mother would commit suicide and bring shame and disgrace he could not bear, and that she would disinherit him if he were to leave.

After the separation in July plaintiff was at the home of her parents in Auburn, but 90 miles distant from Lincoln. Her husband did not visit her and his little daughter for two months, and the occasion of that visit was the transaction of business for his parents at Auburn, and then he called upon his wife. It is true that in the interim several letters passed between plaintiff and her husband, but it is significant that he kept carbon copies of all the letters he wrote at that time, as well as of previous letters. He again visited his wife in October and, when she was unwilling to return to the home of his parents and submit to the conditions above described, divorce was talked of, and he shortly afterwards began his action for divorce.

We think the evidence, fully and fairly considered, shows that Stocker's affection for his wife waned with the lapse of time, and, while he still professed an affection for her after the separation, that the jury were justified in the belief that he cared little for his wife, or he would not have insisted that she return to the home where she had been so cruelly mistreated. Had he then entertained for her the love, affection and consideration that a husband should entertain for his wife, he would have shielded her from the indignities to which she was subjected at his parents' home, and would have provided a home elsewhere. We find nothing in the record that would justify an inference that plaintiff's loss of her husband's affection was caused by anything other than the conduct of defendant. We are satisfied that the evidence amply sustains the verdict.

During the progress of the trial plaintiff was permitted, over objection, to testify to communications between her and her husband where such communications were not in the presence of defendant. It is urged that the error was committed in the admission of such evidence, on the ground that it was hearsay and incompetent, and because under the statute a wife is incompetent as a witness to testify as to communications between her and her spouse that were made during the existence of the marriage relation.

While evidence of what the husband said out of the presence of the defendant would ordinarily be hearsay and incompetent to prove such wrongful conduct of defendant as would tend to cause the husband to lose his affection for his wife, such evidence may be properly received to show the state of the husband's feelings toward his wife, and in this case the court, by proper instruction, informed the jury that such evidence was received only for that purpose. That such evidence is admissible to prove the state of the husband's feeling has been held by this court and is sustained, we think, by the weight of authority. *Hope v. Twarling*, 111 Neb. 793; *Melcher v. Melcher*, 102 Neb. 790; *White v. White*, 140 Wis. 538; *Hardwick v. Hardwick*, 130 Ia. 230.

It is strenuously urged that the provisions of sections 8835, 8838, Comp. St. 1922, make the wife incompetent to testify concerning any communication made to her by her husband during the marriage, and that error was committed in receiving such evidence. Section 8835, *supra*, so far as applicable, provides: "The following persons shall be incompetent to testify: * * * Third. Husband and wife, concerning any communication made by one to the other during the marriage, whether called as a witness while that relation subsists or afterward." And section 8838, *supra*, provides: "'Neither husband nor wife can be examined in any case as to any communication made by the one to the other while married, nor shall they, after the marriage relation ceases, be permitted to reveal, in testimony, any such communication made while the marriage subsisted."

To determine whether error was committed, it is proper to consider the purpose for which these statutes were enacted, and whether the communications that were received in evidence violate the spirit and purpose of the statute. It is not sufficient to exclude such evidence that it falls within the letter of the statute, unless it is also within its spirit and purpose. The statute is founded on wise public policy of affording protection to the marital relation. The happiness of the parties to the marriage contract requires unlimited confidence between husband and wife, and this the statute undertakes to secure by providing that such confidence shall be inviolable, and that in no way shall either spouse be compelled to disclose a confidential communication of the other. It was the mutual and confidential communications that were intended to be protected. To hold to the strict letter of the law and exclude every communication between husband and wife would be to destroy the beneficent purpose of the statute. It was not intended to shield the wrongdoer, who by his own misconduct sought to destroy the marital relation existing between others, by protecting him from the effect that such communications might have, if given in evidence. The statute was not enacted to protect the destroyer of the marital relation, and such would be the effect of it, were we to apply the statute literally.

This subject has received the consideration of numerous law writers. Wigmore, in his work on Evidence (2d ed.) vol. 1, sec. 2336, says: "The essence of the privilege is to protect confidences only." And, as observed by Bishop, J., in the case of *Sexton v. Sexton*, 129 Ia. 487, 2 L. R. A. n. s. 708: "This must be true, because there can be no reason arising out of public policy, or otherwise, requiring that every word spoken between husband and wife shall be privileged, irrespective of the presence in which spoken or the subject or occasion thereof. And, within our observation, no court has ever gone so far as to so hold. The spirit of the rule as enforced at common law, and, within our understanding, the meaning to be gathered from the statute, is

that the privilege shall be construed to embrace only the knowledge which the husband or wife obtains from the other, which, but for the marital relation and the confidence growing out of it, would not have been communicated, or which is of such a nature or character as that, to repeat the same, would tend to unduly embarrass or disturb the parties in their marital relations. It is the marital communication, then, that is sought to be protected, and this is so because there can be no purpose of public policy to interfere, except to guard and foster the marital relation. Any other construction would be intolerable, and would lead to most absurd results." Other authorities bearing on and tending to support the same view are: *Lloyd v. Royal Union Mut. Life Ins. Co.*, 245 Fed. 162; *New York Life Ins. Co. v. Mason*, 272 Fed. 28; *In re Estate of Van Alstine*, 26 Utah, 193.

After a careful examination of the evidence to which objection is made, we are constrained to hold that no communication which could be said to be confidential in its nature, or which would embarrass or disturb the marital relation between plaintiff and her husband, was revealed.

Defendant complains of instruction No. 15, relative to the measure of damages, which told the jury that if they found for plaintiff they should consider "her loss of support, if any she has suffered. You should not make any award for support in so far as the same has been provided for and paid in the divorce action and in so far as it will be furnished her in the future under court order in such divorce case, or otherwise outside of this lawsuit." It is argued that the instruction is erroneous because plaintiff's support had been fully provided for in the divorce action, and also because there was no evidence of the value of her support. Defendant cites us to an instruction given in the case of *Scott v. O'Brien*, 129 Ky. 1, as stating the correct rule. In that instruction the jury were directed to award plaintiff "such damages as you believe will fairly compensate her * * * and for the loss of her husband's support, if there was such loss, except to the extent that he

has contributed, or may by law be compelled to contribute to her support."

We are unable to perceive any substantial difference between the two instructions. However, under the facts disclosed in the instant case, we question the propriety of the instruction given. Since plaintiff's support had been judicially admeasured in the divorce action and the order of the court had been complied with, we think that loss of support was not a proper element of damage to submit to the jury. It does not necessarily follow, however, that the instruction was prejudicially erroneous. The evidence discloses the amount awarded to plaintiff in the divorce action, and that all payments which were then due had been paid, and it further discloses that a part of plaintiff's support had, since her marriage, been furnished by her parents, particularly her clothing, and the jury were directed to exclude these items. There is no evidence as to the value of the support that plaintiff was entitled to receive from her husband and no evidence to indicate that the amount awarded in the divorce action and that furnished by her parents were not ample. These items were particularly excluded from the consideration of the jury. They were further directed in another instruction that plaintiff assumed the burden of proving her cause of action by the preponderance of the evidence. In the absence of any showing to the contrary, the presumption obtains that the jury did not consider any element of damages that was unsupported by evidence. Aside from the amount of the verdict, there is nothing to indicate that the instruction was prejudicial to defendant. When it is considered that the plaintiff and her husband are comparatively young, that she had a prospect of many years of happy conjugal relationship with her husband and their child, that this happy outlook has been utterly destroyed, that her hopes and happiness have been blighted and thwarted by the wrongful act of defendant, we cannot say that defendant was in any way prejudiced. The giving of an erroneous instruction is not ground for reversal unless it appears that it probably preju-

dicially affected the substantial rights of the complaining party. *Smith v. Roehrig*, 90 Neb. 262.

There are other assignments of error, relative to the giving and refusal of instructions and to rulings on admission and exclusion of evidence. They have all been examined, but we find no prejudicial error.

The judgment is

AFFIRMED.

Note.—See Appeal and Error, 4 C. J. p. 781, sec. 2732; p. 1029, sec. 3013—Witnesses, 40 Cyc. p. 2353.

ALFRED JORGENSEN, APPELLEE, V. J. C. ROBINSON SEED COMPANY, APPELLANT.

FILED JULY 31, 1924. No. 22877.

1. Sales: CONTRACT: ENFORCEMENT. Defendant contracted with plaintiff to furnish him seed corn to plant, plaintiff to care for, harvest, store, and deliver the matured crop of corn, shelled, to defendant at North Loup not later than the following January, the crop raised to be in a named condition. If not merchantable as field corn at time of delivery, then defendant could refuse to take it; if merchantable as such, then it would pay plaintiff the market price on delivery. Defendant was then to have time to test it as to germinating qualities (provided a prior test had not been had). If it tested 90 *per centum*, then defendant was to pay plaintiff $1.75 a bushel. *Held*, that, on delivery, defendant owed plaintiff the market price at North Loup, and if it stood the test, or had stood the test, in addition to the market price, the difference between that price and $1.75 a bushel; and *held*, that the corn after delivery at North Loup was at the risk of the defendant; and *held*, that as the contract set out in the opinion did not provide a specific time for testing the corn as to its germinating qualities, the test made before delivery was sufficient, and the entire amount became due and payable on delivery; and *held*, that the contract set out in the opinion made the agent the managing agent of defendant company, and legal service of summons upon him, as such, was legal service on the company. Comp. St. 1922, sec. 8577; *Kron v. Robinson Seed Co.*, 111 Neb. 147.

2. Trial: REFUSAL OF INSTRUCTION. It is elementary that error cannot be predicated on the refusal of the court to give a tendered instruction, where the court of its own motion properly

instructed the jury on the points covered by the instruction offered and refused.

3. Pleading: WAIVER. Where a petition states facts which amount to a pleading of waiver, it will be considered as such, even though the word waiver is not used.

APPEAL from the district court for Valley county: BAYARD H. PAINE, JUDGE. *Affirmed.*

Davis & Davis and *Brown, Baxter, Van Dusen & Ryan*, for appellant.

Munn & Norman, contra.

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

THOMPSON, J.

Plaintiff prosecutes this action to recover from the defendant $1,737.75 and interest since March 15, 1921, for 993 bushels of Sanford Flint corn, sold and delivered to defendant by him, under and in accordance with a seed corn contract, attached to and made a part of his petition. He alleges performance of all conditions precedent, and that he was ready and desired to deliver the corn in November, 1920, but owing to defendant's lack of sacks it requested him to wait; that in the meantime defendant called for fair samples of the corn to be placed in sacks by the plaintiff, and delivered to its agent at North Loup, to be forwarded by him to defendant at Waterloo for test; that he complied with the request, and the test was made by defendant; that it then notified him as follows, "The said test made showed the corn O. K. and that it was acceptable;" that the corn was then in good condition, and remained so until delivered to defendant at North Loup, March 9 to 15, inclusive, and received by its agent; that at the time he demanded the market price for field corn at North Loup, as per the contract, but at defendant's request waited; that afterwards defendant's agent, acting for defendant, drew a draft in his favor for the 993 bushels at $1.25 a bushel,

field corn market price, which draft was never paid. He therefore prays judgment for the agreed price of $1.75 a bushel.

The contract, so far as is necessary for the purpose of this opinion, is contained in defendant's brief, and is as follows:

"First party agrees to furnish second party stock seed sufficient to plant the acreage of vine seeds and corn hereinafter described; and second party agrees to properly prepare the ground and plant said seed in a proper and careful manner and in season, and to carefully care for and cultivate the crops springing from said seed, and to harvest the same in season, and to deliver the entire merchantable increase or crop therefrom on or before the dates hereinafter stated to the first party at his seed house at North Loup, Nebraska.

"Said seeds and corn, * * * when delivered by second party, shall be in a bright, well-cured and merchantable condition, the seeds retaining their natural color, and the corn to be well sorted at the sheller, * * * and all field corn to have germinating quality which will test at least 90 per cent. When field corns are delivered the market elevator price at the point of delivery shall be due and the balance to be due as soon as a proper test for germination has been made. * * * Provided, that in case said vine seeds or corn are not in merchantable condition, as above provided, at the time of delivery, first party may, at his option, reject any part or all of such seeds or corn. * * *

"There shall be planted the acreage and pounds of seeds, for which prices shall be paid as follows:

Acres.	Variety No.	Date of Delivery.	Price.
Thirty	Field Corn, Sanford Flint	Delivery on or about January 1, 1921.	$1.75 per bu. 56 lbs.

"The compensation of second party for the performance of his part of this agreement shall be such sum as may be derived from all the marketable vine seeds and corn so delivered under this contract at the prices above specified,

and less any expense herein provided to be deducted therefrom, in case there shall be any such expense, and less a quantity of seed of like character and amount as that furnished by the first party for planting. * * *

"Witness the signatures of the parties hereto the day and date above stated.

"The J. C. Robinson Seed Co.,
"By J. F. Earnest."

The service of summons was had by serving on Earnest at North Loup, as defendant's managing agent. Defendant appeared specially, and objected to the jurisdiction of the court, alleging by way of motion and affidavits that Earnest was not its managing agent. Counter affidavits were filed by the plaintiff. Motion overruled. Defendant presents the ruling on this motion as a reversible error.

Defendant answered, pleading the jurisdictional question raised in its special appearance, and admitting the contract and the incorporation of the defendant; that plaintiff had furnished the samples and it had tested same for germinating qualities, "and they were found to conform to the requirements of the contract." It is then alleged that the samples were not "a fair average sample of the seed corn so grown, but for the purpose of deceiving defendant and in the effort to obtain the acceptance by the defendant of the corn so grown, selected samples of only the very best of such corn which he specially prepared to the end that it would apparently conform to the terms of the contract as being in a merchantable condition for seed purposes;" that plaintiff knew the corn he contracted to sell the defendant was for seed purposes; that when the corn was received by it at Waterloo it was "not in accordance with the contract requirements;" that it was compelled to and did sell the corn at auction, and received $427, which it tendered to the plaintiff, and brought the same into court for that purpose; and closed its answer by a general denial of plaintiff's allegations except those specifically admitted.

Plaintiff for reply interposed a general denial, except

wherein the answer admitted facts set forth in the petition.

Case tried to a jury, verdict and judgment for plaintiff for $1,737.75, with interest as prayed. Motion for a new trial overruled, and defendant appeals.

As we construe the contract it made Earnest the defendant's managing agent. *Kron v. Robinson Seed Co.*, 111 Neb. 147. He executed the contract for and on behalf of the company, using his own discretion as to the person or persons with whom he would contract, and for what defendant would contract. The matured crop was to be delivered at defendant's place of business at North Loup, of which he had charge; he was to inspect and pass judgment on the corn at delivery, and pay plaintiff the field corn market price at the time at North Loup, ascertaining and determining the price as between the parties. Thus, it will be seen that Earnest was an agent at this particular place, invested with the general management of the business of this domestic corporation, and clothed with the exercise of judgment, discretion, determination, conduct, and control of its affairs, and was in fact its managing agent. The evidence by way of affidavits also supported the court's ruling. Its holding is in harmony with our decisions running from *Porter v. Chicago & N. W. R.* Co., 1 Neb. 14, to *Kron v. Robinson Seed Co., supra*, and error was not committed.

Instruction No. 13, given by the court on its own motion, is complained of by defendant, for the reason that the case was without pleading or evidence calling for an instruction on waiver. The defendant at the trial, and here, contends that the fact that it received the corn was not a waiver of its right to inspect after delivery, and the fact that it had tested samples before delivery, was not a waiver of its right to test after delivery.

The plaintiff insists that under the contract the defendant had a right to but one test of the corn for germinating purposes, and that, as it tested the corn before delivery, it waived its right to test afterward.

The petition alleges that a test as to the germinating

qualities was had at defendant's request, prior to the delivery of the corn. Defendant admits that it called for samples, received the same, examined them and approved them. Then at the trial, as we glean from the evidence, and from the presentation of the case in this court by the parties, this question of waiver was before the court and became a factor in the trial. This was the theory upon which the case was heard, and must be followed by us in determining the question presented. It is considered by us, and we so find, that prejudicial error was not committed by reason thereof.

The instructions given, as a whole, were favorable to the defendant, and fairly covered its every contention. The court did not err in refusing to give instructions 5 and 6, requested by defendant.

Defendant urges, in substance, that the verdict is contrary to the evidence and the weight thereof. The evidence, up to and including the delivery on March 9 to 15, 1921, clearly preponderates in favor of the plaintiff. No question is raised as to the manner of planting, maturing, gathering, or housing the crop, or as to its condition up to and including the time of delivery at North Loup. While the contract, as will be seen, does not specifically call for a test of the corn before delivery, defendant asked for fair samples of the corn to be sent to it in December, 1920; January 1, 1921, being the last date of delivery under the contract. Earnest furnished sacks for that purpose. The samples were placed therein, and forwarded by Earnest to the Waterloo office for test. Defendant made the test and reported, as alleged in plaintiff's petition, viz., "that the said test made showed the corn O. K., and that it was acceptable." This is admitted in defendant's answer, wherein it states that it had tested the samples for germinating qualities, "and they were found to conform to the requirements of the contract."

Thus, it will be seen that the issue raised by reason of this test is not that the samples did not test up to each and every requirement for seed corn purposes contained in the

contract, but, it is urged, that the samples were not fairly representative of the corn in bulk, and were designedly selected with the intent to deceive and mislead the defendant to its injury. This being the issue, let us apply the evidence. Kron, a third person, was given the sacks by agent Earnest, and requested to obtain the samples. He did so, both as to his own corn and that of plaintiff. He swears he did so fairly and with impartiality, as he selected the ears from the crib in different places indiscriminately, and also testifies, in substance, that the corn left was in every way as good as the sample. In this he is corroborated by other witnesses, whose evidence amply sustains his contention.

As we construe the contract, the entire merchantable crop was to be delivered to the defendant's seed house in North Loup, on which delivery, if it was not then refused as unmerchantable, plaintiff was to be paid the market elevator price at that point for field corn. This delivery is final so far as plaintiff is concerned. The defendant, thereafter, if he has not previously tested, may test for germination, within a reasonable time. If the corn, when so tested, does not show 90 *per centum* germinating quality, then the market price, which under the contract was to be paid at delivery, pays for the corn. If, however, it does show or has shown a 90 *per centum* germinating quality, then the defendant is to pay plaintiff the difference between the market price which should have been paid at the time of delivery, and the $1.75 a bushel named in the contract. Defendant could not reject the corn after it received it at North Loup, for any reason contained in the contract, for after receiving the corn it was bound to pay at least the field corn market price. If it desired to reject the corn for the reason that it was not in a merchantable condition, it should do so at the time of delivery. Otherwise, the option is waived. This contract does not provide for a Waterloo test, forfeiture or option. Nor is there any evidence of a general custom, of which plaintiff had knowledge, that the corn was to be tested at Waterloo after delivery

at North Loup. The test, if subsequent to delivery, is as to germination only, and, as we conclude, must be had within a reasonable time. While there is evidence showing a subsequent test at Waterloo, there is a lack of evidence proving or tending to prove the care given the corn after it was received at North Loup, or while on its way to Waterloo. If the corn, when it reached Waterloo, was in the condition some of defendant's witnesses testified it was, and when delivered at North Loup was in the condition shown by plaintiff's evidence, then something not shown must have happened to it, either at North Loup after delivery, or while on its way to Waterloo. This evidence was submitted to the jury under proper instructions, and they found that the corn complied with the contract requirements, by finding for plaintiff. There is ample evidence to sustain this finding, and the same should not, and will not, be disturbed.

Other assignments of error presented have been considered by us; but, in view of our conclusion, we do not find it necessary to discuss them.

The judgment is AFFIRMED.

Note—See Corporations, 14A C. J. p. 807, sec. 2910—Pleading 31 Cyc. p. 60; Sales, 35 Cyc. pp. 102, 227 (1925 Ann.), 344; Trial, 38 Cyc. p. 1711.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1924.

ROLLIE CHURCH V. STATE OF NEBRASKA.

FILED OCTOBER 7, 1924. No. 24090.

ERROR to the district court for Hamilton county: LOVEL S. HASTINGS, JUDGE. *Reversed and dismissed.*

J. H. Grosvenor and *Patterson & Patterson*, for plaintiff in error.

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

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

PER CURIAM.

Defendant prosecutes error from a conviction had under section 9612, Comp. St. 1922. The crime is alleged to have been committed April 10, 1920. The complaint on which the prosecution rests was filed September 24, 1923. Defendant pleaded the bar of the statute of limitations, Comp. St. 1922, sec. 9931. To meet this issue, the state alleged in the information that, during the time intervening between the alleged commission of the crime and the filing of the information, defendant was a fugitive from justice, and, therefore, the statute of limitations had not run. We have carefully examined the record on this point and reach the conclusion that at no time was defendant a fugitive from justice within the contemplation of the statute. The

prosecution was, therefore, barred. The judgment of the district court is reversed and the proceedings dismissed.

REVERSED AND DISMISSED.

ALLEN G. FISHER, APPELLEE, V. BOARD OF EQUALIZATION OF DAWES COUNTY, APPELLANT: W. H. SMITH, TAX COMMISSIONER, ET AL., APPELLEES.

FILED OCTOBER 7, 1924. No. 24130.

APPEAL from the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Reversed and dismissed.*

F. A. Crites and *E. D. Crites*, for appellant.

Allen G. Fisher and *Samuel L. O'Brien, contra.*

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

PER CURIAM.

Upon an examination of the record, proceedings and briefs, and upon a consideration of the arguments at the bar, we are of the opinion that there is no competent evidence to sustain the finding of the district court for Dawes county that the assessments on the property involved in this action were not accurately equalized by the county board of equalization. The district court, therefore, erred in directing said board to reconvene and correct assessments and valuation of real estate within the city of Chadron by requiring an equalization on the basis of 68 per cent. of the assessor's valuation of the property in controversy. In this respect there is error in the proceedings and judgment of the trial court. On the record made by the plaintiff and his associates, they are not entitled to any relief. The judgment of the district court is therefore reversed and the proceedings dismissed at the costs of the plaintiff.

REVERSED AND DISMISSED.

WILLIAM R. MANSFIELD, APPELLEE AND CROSS-APPELLANT, V. FARMERS STATE BANK OF CRAIG, CROSS-APPELLEE: EVERETT J. MARTIN, APPELLANT.

FILED OCTOBER 7, 1924. No. 22794.

Appeal: INCONSISTENT VERDICT. "A verdict in favor of one defendant and against another, based upon conflicting evidence, which is the same as to both defendants, cannot be permitted to stand as to either." *Gerner v. Yates*, 61 Neb. 100.

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

J. A. Singhaus and *Smith, Schall, Howell, Howard & Sheehan*, for appellant.

North & Pollock, contra.

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

MORRISSEY, C. J.

Plaintiff filed a petition in which he alleged he had suffered damages in the sum of $10,000 by reason of false and fraudulent representations made by defendants, the Farmers State Bank of Craig and Everett J. Martin, its cashier and managing officer. It charged that on July 19, 1919, plaintiff was a farmer engaged in work upon his premises when he was visited by defendant Martin and certain representatives of a corporation then doing business under the name of the Missouri Valley Cattle Loan Company. These parties are alleged to have made to him false and fraudulent representations, which are set out in detail in the petition, as to the business of the corporation just mentioned and as to the value of its shares of capital stock. It is alleged that the plaintiff relied upon these representations, and, so relying, purchased capital stock of the corporation of the par value of $10,000; that in payment thereof he executed one promissory note in the sum of $5,000 payable to the corporation, and executed a second note in the sum of $2,500, payable to the defendant bank, and executed and

delivered his check in the sum of $2,500 which was cashed in due course of business and charged against his account; that the capital stock purchased was of no value, and that because of the fraud and deceit practiced upon him he was damaged in the sum of $10,000.

Many of the allegations made are either admitted in the pleadings or stipulated to be true. Among these it is admitted that plaintiff executed the notes and the check, and delivered them as alleged, and that the stock was without value. The record appears to show also that the note for $5,000 payable to the Missouri Valley Cattle Loan Company, has not been paid, is past due, and is still in the hands of the payee, which is a bankrupt, and any defense on the grounds of fraud such as outlined in the petition in this case will be available to plaintiff in case suit is brought upon that note. The check for $2,500 had been paid and that amount had been wholly lost to the plaintiff. The note for $2,500 which was made payable to the defendant bank had been renewed after payment of some interest, and a note for a like amount had been executed to the same bank, and was then due and unpaid. The proof showed that defendant bank had purchased the original note through its managing officer, defendant Martin, and had paid the full face value therefor.

At the close of the testimony, defendant bank on motion of its attorney was dismissed out of the case so far as any liability for any false representations it had made was concerned; but it had filed an answer and cross-petition and prayed judgment on the unpaid note which it then held and the court submitted to the jury the question whether or not the bank should recover on the note. In other words, the jury were left to determine whether or not the bank was a good faith purchaser of the note, and the jury found in favor of the bank on this issue.

Defendant Martin, at the close of the testimony, requested the court to direct a verdict in his favor. This motion was overruled and the court left the jury to determine from all the evidence whether or not Martin, as one of the alleged

coconspirators, had been guilty of making the false and fraudulent representations which induced plaintiff to make the investment whereby he suffered the loss alleged. The jury returned a verdict finding against Martin on the issue of fraud and assessed the amount of plaintiff's recovery as against him in the sum of $5,000. Defendant Martin has appealed from the judgment entered against him, and plaintiff has filed a cross-appeal from the judgment entered in favor of defendant bank.

Several assignments of error are made by appellant Martin because of the judgment entered against him, while plaintiff, as cross-appellant, makes assignments of error because of the judgment entered against him and in favor of the bank. We shall first take up the appeal of appellant Martin. What seems to be the controlling assignment deals with the verdict and alleges that it is inconsistent with itself. Plaintiff's cause of action, as will be noted from what has already been said, rests upon the fraud alleged to have been practiced upon him by those who induced him to purchase the shares of stock in the Missouri Valley Cattle Loan Company and to give his promissory note and check in payment therefor. It is conceded that during the time when the various transactions occurred defendant Martin was the majority stockholder and managing officer of defendant bank. The allegations of plaintiff's pleadings charging Martin with participation in the fraud and alleging that the bank was not a good faith holder of the note were denied by these defendants. The proof of plaintiff on the one hand and of defendants on the other is in irreconcilable conflict. On this conflicting evidence the effect of the verdict is to find that Martin perpetrated the fraud as alleged and that he consciously assisted in inducing plaintiff to make and deliver his notes and check for the worthless stock of the Missouri Valley Cattle Loan Company. Having made this finding, which they might well do under the evidence, the jury made a finding as to the bank which is wholly inconsistent with the finding as to Martin. The jury found that the bank was an innocent

holder in due course. These findings cannot both be right. Martin was not guilty of the fraud or the bank was not an innocent holder in due course. The knowledge of Martin as to the fraud would be the knowledge of the bank, and, conversely, if the bank was an innocent holder of the note, Martin was not a participant in the fraud. The verdict cannot be reconciled with itself.

"A verdict in favor of one defendant and against another, based upon conflicting evidence, which is the same as to both defendants, cannot be permitted to stand as to either." *Gerner v. Yates*, 61 Neb. 100. See, also, *Zitnik v. Union P. R. Co.*, 91 Neb. 679.

On behalf of cross-appellant, a number of propositions of law have been advanced, but they are not tenable under the condition of the record. The main point urged is covered in the opinion filed herewith in *Farmers State Bank v. Lydick*, p. 586, *post*.

It is unnecessary to discuss the other assignments as the case must be tried again and they are not likely to arise on the second trial.

Reversed and remanded generally on all the issues presented on the pleadings.

REVERSED.

Note—See Trial, 38 Cyc. p. 1883.

FARMERS STATE BANK OF CRAIG, APPELLEE, V. SAMUEL J. LYDICK, APPELLANT: EVERETT J. MARTIN, APPELLEE.

FILED OCTOBER 7, 1924. No. 22805.

1. **Trial: WITHDRAWAL OF ISSUE.** When, on the trial of a law action, the party having the burden of proof as to certain of the issues presented fails to offer a quantum of proof sufficient to sustain a verdict in his favor on these issues, it is proper for the court to withdraw them from the consideration of the jury.
2. **Sufficiency of Evidence.** The evidence has been examined, and *held* sufficient to sustain the verdict.
3. **Rulings Sustained.** The several rulings of the court on the matter of instructions to the jury are found free from error.

4. Bills and Notes: "HOLDER IN DUE COURSE." "A payee who receives a negotiable instrument in good faith, for value, before maturity, and without notice of any infirmity therein, from a holder, not a maker or drawer, to whom it was negotiated as a completed instrument, is a holder in due course within the purview of the negotiable instruments law (Rev. St. 1913, secs. 5319-5513) so as to preclude the defense of fraud and failure of consideration between the maker or drawer and the holder to whom the instrument was delivered." *Bank of Commerce & Savings v. Randell*, 107 Neb. 332. See Comp. St. 1922, secs. 4612-4809.

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

M. L. Donovan and *North & Pollock*, for appellant.

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

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

MORRISSEY, C. J.

The Farmers State Bank of Craig brought this action in the district court for Burt county against Samuel J. Lydick on a promissory note for $3,000, which note was dated March 17, 1920, payable six months after its date. Lydick filed an answer and cross-petition in which he alleged that the note in suit was given as a partial payment of a prior note executed by him in the sum of $5,000 payable to plaintiff bank, and that he received no consideration for the original note of $5,000, or for other notes payable to the Missouri Valley Cattle Loan Company, given in payment of certain shares of stock in the Missouri Valley Cattle Loan Company which he was fraudulently induced to purchase. At the time the original notes were executed and delivered, Everett J. Martin was cashier of plaintiff bank and at the time this suit was instituted he was president and principal stockholder of plaintiff bank. Lydick's answer and cross-petition alleged that Martin, acting both for himself and for the bank, was one of a group of conspirators who had deceived plaintiff as to the character of the Missouri Valley

Cattle Loan Company, and that through their false representations he had been induced to make the purchase of stock and execute the original notes heretofore mentioned. The bank and Martin filed separate answers and made separate defenses. The action proceeded as one by the bank to recover judgment for the amount of the note it then held, and as a suit by Lydick to defeat recovery on the note held by the bank and to recover from Martin and the bank the damages defendant had sustained by reason of the fraud alleged. At the close of the testimony the court directed the jury to return a verdict in favor of the bank and against Lydick on the allegations of his cross-petition whereby he sought to recover an affirmative judgment against the bank. The court submitted for the jury's determination the question whether or not the bank "was a purchaser of the note in question for value without notice of any defect in title, in the usual course of business, before maturity, in good faith." The jury found in the affirmative and returned a verdict in favor of the bank for the amount due on the note. The court also submitted for the determination of the jury the question whether or not Martin had made representations as alleged in count one of defendant's cross-petition as to the Missouri Valley Cattle Loan Company and the value of its stock, etc. On this issue the jury returned a verdict in favor of Martin.

The cross-petition contained a second count relating to a subsequent purchase of shares of stock by plaintiff. The court withdrew this issue from the jury. The court's ruling was proper. There is a total lack of competent evidence to sustain the allegations of the cross petition as to this issue. The court submitted to the jury the only questions at issue on which reasonable minds might differ as to the conclusion to be reached. The evidence sustained the verdict returned and it will not be disturbed.

Complaint is made of certain instructions given, and of the rulings of the court in denying certain instructions tendered. We have examined the instructions given and find that they correctly state the issues. Each instruction

tendered and refused is either covered in substance in the charge given by the court on its own motion or it contains some element which does not find support in the evidence, or is contrary to the established law of this state, and each was, therefore, properly refused.

Without further discussion we will pass to a proposition of law announced by counsel in their brief and which appears to be the main point relied upon for reversal, to wit: "Where a stock salesman procured a subscription for worthless corporate stock by false and fraudulent representations and accepted a negotiable note on the printed form of the plaintiff bank on which the bank was the payee of the instrument, the bank cannot be a holder in due course of the unindorsed instrument which was never negotiated, the bank being an original party thereto; and, to recover, the bank must meet any defense, such as fraud in the inception or failure of consideration, which would be a defense if it were a nonnegotiable instrument." This theory was advanced by the defense upon the trial and the instructions offered and refused were drafted so as to give expression to the rule announced by counsel. It will be noted that the main point sought to be made is based upon the fact that the original note was made payable, not to the Missouri Valley Cattle Loan Company, or the agent who sold its stock, but directly to plaintiff bank. Sections 4663, 4666, 4667, 4669, Comp. St. 1922, relating to negotiable instruments, are cited in support of this contention. A number of authorities from other states are also cited, but the question is not an open one in this jurisdiction. True, these sections had not been construed with reference to the question presented at the time the cause was tried in the district court. It has, however, been fully discussed and determined adversely to the contention of appellant in *Bank of Commerce & Savings v. Randell*, 107 Neb. 332, and it is there held:

"A payee who receives a negotiable instrument in good faith, for value, before maturity, and without notice of any infirmity therein, from a holder, not a maker or drawer, to

whom it was negotiated as a completed instrument, is a holder in due course within the purview of the negotiable instruments law (Rev. St. 1913, secs. 5319-5513) so as to preclude the defense of fraud and failure of consideration between the maker or drawer and the holder to whom the instrument was delivered." See Comp. St. 1922, secs. 4612-4809.

A further proposition of law is announced to the effect that the bank is liable under the same circumstances as a natural person for the consequences of its wrongful acts or for acts committed by its managing officer in its behalf, and that the knowledge of such officer of fraud in the inception of the note would be knowledge to the bank. It is sufficient to say that the court left the jury to determine from the evidence whether Martin, the managing officer of the bank, was a party to the fraud practiced upon defendant, and the answer was in the negative. In holding that the verdict of the jury is sustained by the evidence we have disposed of this question.

Other propositions of law are announced in the brief, but, holding as we do, that the court properly submitted to the jury the only disputed questions of fact having sufficient evidence to support a verdict in favor of appellant, it is unnecessary to discuss them. The court properly applied the law to the issues as developed by the evidence. The record is free from error and the judgment is

AFFIRMED.

Note—See Bills and Notes, 8 C. J. p. 470, sec. 686—Trial, 38 Cyc. p. 1533.

GROVER J. KOEHLER, APPELLANT, V. FARMERS STATE BANK OF CRAIG ET AL., APPELLEES.

FILED OCTOBER 7, 1924. No. 22806.

1. **New Trial:** JOINT MOTION. "Where a verdict is returned against a plaintiff and in favor of several defendants, on different, distinct and separate defenses pleaded separately by them, a single joint motion for a new trial against them all is insufficient, and

it should be overruled if the verdict is good as to any one of the defendants." *Lydick v. Gill*, 68 Neb. 273.

2. **Banks and Banking: FRAUD: DIRECTION OF VERDICT.** When, on the trial of a suit against a bank based upon an alleged fraudulent conspiracy in which the managing officer of the bank is alleged to have participated, the proof wholly fails to show that the officer of the bank was acting within the scope of his employment as an officer of the bank, or that what he did inured to its benefit, or that the acts alleged were intended to inure to its benefit, it is not error for the court to direct a verdict in its favor.

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

M. L. Donovan and *North & Pollock*, for appellant.

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

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

MORRISSEY, C. J.

Plaintiff brought this suit against defendants seeking to recover damages because of the false and fraudulent representations which he alleged were made by the several defendants, the Farmers State Bank of Craig, the Missouri Valley Cattle Loan Company, Everett J. Martin, Verne W. Gittings, J. G. Sayles, and one Brown, whereby he was induced to purchase capital stock of the par value of $5,000 in the Missouri Valley Cattle Loan Company. He alleges that in payment of the stock he executed two promissory notes, one in the sum of $2,500 payable to the Missouri Valley Cattle Loan Company, and another in the sum of $2,500 payable to the Farmers State Bank of Craig. It is not clearly shown by the record whether or not the note given to the Missouri Valley Cattle Loan Company has been paid, but the note given to the Farmers State Bank of Craig was paid soon after maturity, and, in this suit, plaintiff seeks to recover for the amount of these two notes.

We shall not set out in detail the allegations of fraud al-

leged to have been practiced. They may be summarized by saying that plaintiff, a farmer, alleges that defendants, acting in concert, falsely represented the character of the corporation, the Missouri Valley Cattle Loan Company, and the value of its stock, and, in order to induce him to invest in its capital stock, represented that defendant Martin had already invested $10,000; that defendant Farmers State Bank of Craig had made an investigation of its character and worth, etc., and that, relying upon these representations, plaintiff made the investment whereby he suffered the loss alleged.

The defendants, Farmers State Bank of Craig and Everett J. Martin, who was at all the times mentioned in the petition the majority stockholder and chief managing officer of the bank, appear to be the only defendants served with process or who made an appearance in the litigation. Each filed a separate answer denying generally the allegations of fraud contained in the petition. At the close of all the testimony, on motion of defendant bank, the court directed a verdict in its favor, and overruled a similar motion made on behalf of defendant Martin. The court submitted to the jury the issues raised by the pleadings as to defendant Martin. The jury returned a verdict in his favor. Plaintiff filed a joint motion for a new trial, which was overruled by the court, and judgment was entered in favor of both defendants and against plaintiff. Plaintiff has appealed.

It is well established that:

"Where a verdict is returned against a plaintiff and in favor of several defendants, on different, distinct and separate defenses pleaded separately by them, a single joint motion for a new trial against them all is insufficient, and it should be overruled if the verdict is good as to any one of the defendants." *Lydick v. Gill*, 68 Neb. 273. See, also, *Davy v. Aevermann*, 110 Neb. 62.

It is sufficient then to ascertain if the judgment is correct as to either defendant. With this rule in mind we will consider the record as it pertains to defendant bank.

Whatever proof there is as to a conspiracy or the participation of the bank or Martin in the fraud alleged goes no further than to show that Martin made certain representations as to the character of the Missouri Valley Cattle Loan Company and the value of its shares of stock.

Counsel for appellant cites us to section 3343, 5 Fletcher, Cyclopedia Corporations, which lays down the rule that:

"Where an officer, agent or servant of a corporation maliciously or wrongfully, but in the course of his employment, enters into a conspiracy to defraud or commit other wrongs against another for the benefit of the corporation, the latter will be liable."

In the instant case there is a total lack of proof that in making these representations Martin was acting within the scope of his employment as an officer of defendant bank, or that what he did inured to the benefit of the bank, or that the acts alleged were intended to inure to the benefit of the bank. The representations alleged were not made at the bank or under such circumstances as to raise an inference that they were made for and in its behalf.

The court was, therefore, clearly right in directing a verdict in favor of the bank, and it follows that there was no error in overruling the motion for a new trial, and the judgment is in all things

AFFIRMED.

Note—See Banks and Banking, 7 C. J. p. 757, sec. 570—New Trial, 29 Cyc. p. 925.

THORNLEY T. HOPPE V. STATE OF NEBRASKA.

FILED OCTOBER 7, 1924. No. 24155.

1. **Appeal:** PLEA IN ABATEMENT. The holding of the court on the issue presented on the plea in abatement, *held* free from error.
2. **Intoxicating Liquors:** INSTRUCTIONS. On the trial of one charged with the unlawful possession of a still by the first count of an information and with the unlawful possession of mash by the second count of the information, an instruction which tells the jury that, if they find defendant was in possession of a still

and of mash, they may presume that these articles were kept for the unlawful purpose of making intoxicating liquor, unless defendant has satisfactorily accounted for and explained his possession, is proper.

3. ———: SUFFICIENCY OF EVIDENCE. The evidence has been examined and found sufficient to show that the substance exhibited to the jury and denominated "mash" was a mixture of grain, etc., and also that on the general issue the evidence sustains the verdict.

ERROR to the district court for Richardson county: JOHN B. RAPER, JUDGE. *Affirmed.*

Reavis & Beghtol and *R. C. James,* for plaintiff in error.

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

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

MORRISSEY, C. J.

The county attorney of Richardson county filed an information in two counts charging defendant with a violation of the liquor laws of the state. The first count charged that on February 16, 1919, on a designated farm in Richardson county, defendant unlawfully had in his possession a still designed for the purpose of manufacturing intoxicating liquor; the second count charged that on the same day and on the same premises defendant had in his possession a certain quantity of corn mash, or material, which was designed for and then and there being used in the process of manufacturing and distilling intoxicating liquor, without first having obtained a permit, etc.

Prior to the filing of the information, the sheriff had procured to be issued a search warrant describing a farm claimed to be occupied by defendant as a tenant. The warrant was directed against John Doe. At the time alleged in the information, the sheriff and one of his deputies went to the farm and, upon searching the barn and barnyard, found a still and two half barrels of mash; the still

was secreted in the hay-loft and the half barrels containing the mash were secreted in the barn-yard. The sheriff found no person on the premises, but after taking into his possesion the still and mash, he went to the village of Stella and there placed defendant under arrest. Defendant filed a plea in abatement based upon section 3274, Comp. St. 1922, which provides, among other things: "If no one is found in the possession of the premises where said liquors may be found, the officer taking the same shall post in a conspicuous place on the building or premises a copy of his warrant." In the plea in abatement it is alleged that the sheriff did not post a copy of the warrant. To the plea in abatement the county attorney filed an answer admitting that the warrant was not posted, but alleging in substance that, although defendant was not personally present upon the premises at the time the search was made, nevertheless he was in possession of the premises within the contemplation of the statute. A jury was waived upon the plea in abatement and the issue submitted to the court, who found against defendant on the issue presented. The brief does not make clear the importance of this issue, but, in any event, we find no prejudicial error in the holding of the court.

The next assignment deals with an instruction given by the court in which he told the jury in a single clause that, if they found defendant was in possession of the still and mash, they might presume that they were kept for the unlawful purpose of making intoxicating liquor, unless defendant satisfactorily accounted for and explained his possession. It is said that this instruction makes no distinction between the possession of the still and the mash, and that, under the law, the mere possession of a still is not sufficient to warrant the presumption that it was intended for an unlawful purpose. In support of this proposition counsel cite *Blevins v. State*, 109 Neb. 183. A careful analysis of that opinion, however, shows that the paragraphs of the syllabus covering the point under discussion merely hold:

"In order to constitute the possession of a still unlawful under section 3252, Comp. St. 1922, it must be established that the still was intended to be used for the manufacture of intoxicating liquor, without permission being given as required by the statute. The possession of a still for legitimate purposes, such as the manufacture of distilled water, or other innocuous liquids, is not a crime under said section."

Section 3273, Comp. St. 1922, provides: "The possession by any person of any intoxicating liquors, still, mash, preparation or equipment for manufacturing same, except under permit as in this act authorized, shall be presumptive evidence of the manufacture, keeping for sale, selling, use or disposal of such liquors in violation of this act, unless after examination he shall satisfactorily account for and explain the possession thereof, and that it was not kept for an unlawful purpose."

It will be noted that in this section of the statute the possession of a still is dealt with in the same terms as is the possession of mash. And in *Blevins v. State, supra*, it is said: "By the provisions of section 3273, Comp. St. 1922, the possession of mash except under permit, as by law required, is presumptive evidence of the manufacture of intoxicating liquors in violation of the act, unless the person having the same in possession 'satisfactorily account for and explain the possession thereof, and that it was not kept for an unlawful purpose.'" Extending this rule, as the language of the statute requires, to the possession of a still, it is clear that the instruction was proper.

There is the further claim that the evidence is insufficient to show that the substance denominated "mash" was a "mixture of grain or malt," etc. It is true that the proof of the presence of grain or malt in this substance is meagre, however the substance itself was before the jury, and on the examination of the sheriff he was asked about the presence of corn therein, and his answer, when considered in connection with the exhibit before the jury, is sufficient to

support a finding that it was mash within the contemplation of the statute.

There is the general assignment that the evidence is insufficient to support the verdict. It may be admitted that, considering the good reputation of the defendant, a reviewing court may entertain doubts of defendant's guilt, but the disputed questions of fact were submitted to the jury, and we cannot say the verdict is wholly without support in the evidence. The judgment is

AFFIRMED.

Note—See Intoxicating Liquors, 33 C. J. p. 683, sec. 383; p. 758, sec. 502; p. 791, sec. 547.

STATE, EX REL. CLARENCE A. DAVIS, ATTORNEY GENERAL, V. FARMERS STATE BANK OF WINSIDE: B. N. SAUNDERS, RECEIVER, APPELLEE AND CROSS-APPELLANT: OMAHA NATIONAL BANK ET AL., APPELLANTS AND CROSS-APPELLEES: FRED W. WEIBLE, APPELLEE AND CROSS-APPELLEE.

FILED OCTOBER 7, 1924. No. 23567.

1. **Equity**: FORFEITURE. "The intent, not the letter, of the statute constitutes the law A court of equity is always reluctant in the last degree to make a decree which will effect a forfeiture." *National Bank v. Matthews*, 98 U. S. 621.
2. **Banks and Banking**: VOIDABLE CONTRACTS. A contract by a state bank to borrow money in excess of the debt limit authorized by its charter is voidable, and not void; and where such contract has been fully performed, by the lending of money to such state bank and the execution and delivery of notes therefor, the borrowing bank cannot refuse payment of the notes, in the absence of a statute which so provides.
3. ———: NONCOMPLIANCE WITH STATUTE. Where certain restrictions are imposed by statute upon officers of state banks for their government in the borrowing of money, it is not competent for the judiciary, in the absence of a statute therefor, to impose a penalty by forfeiture on the grounds of noncompliance with the statute.

APPEAL from the district court for Wayne county: ANSON A. WELCH, JUDGE. *Affirmed in part, and reversed in part.*

Stout, Rose, Wells & Martin and *Byron G. Burbank*, for appellants.

Fred S. Berry, C. M. Skiles and *Charles H. Kelsey, contra.*

Heard before MORRISSEY, C. J., LETTON, DEAN, DAY, GOOD, and THOMPSON, JJ.

DEAN, J.

On and before November 7, 1921, the Farmers State Bank of Winside was in a failing condition. On that date all of the bank's affairs and its assets came under the control of the department of trade and commerce. December 6, 1921, the attorney general filed a petition in the district court for Wayne county upon information from the department of trade and commerce to the effect that, from an examination of the reports made to the department by officers of the Winside bank, it appeared to be inexpedient for it to further transact business as a banking corporation. The Winside bank entered its voluntary appearance, confessed the truth of the averments in the attorney general's petition and consented that the court appoint a proper person as receiver to perform the duties required by law.

April 29, 1922, under direction of the department of trade and commerce, the receiver, recently theretofore appointed, began suit against the Omaha National Bank of Omaha, and Fred W. Weible, W. T. Waldron, and L. D. Spalding, being at different times officers and stockholders of the Winside bank, to recover certain collateral obtained by the Omaha bank, and the proceeds thereof, all of which were in possession of and held by the Omaha bank, as security for loans of money made by it to the Winside bank. It appears that the loans were considerably in excess of

two-thirds of the capital stock and surplus of the borrowing bank. The receiver prevailed in part, and all defendants appealed, except Mr. Weible. The receiver filed a cross-appeal from that part of the judgment which was adverse to him.

For several years the Omaha bank has been the Omaha correspondent of the Winside bank, and the latter, as occasion required, became a borrower of money from the Omaha bank, and to secure the payment of such loans, as they were made, it pledged, assigned and delivered its bills payable, and other securities, to the Omaha bank. The promissory notes given for the loans were in large part, if not all of them, signed by Weible, Spalding or Waldron, or other Winside bank officers.

The substance of the receiver's contention now is that the Omaha bank unlawfully obtained, and now retains, the bills payable, and the collateral notes and securities, which form the basis of this suit, and which at any time came into its possession, together with all avails and proceeds thereof, as security for the loans in question, and that such collateral, and its proceeds, in excess of two-thirds of the paid-up capital and surplus of the Winside bank, do not belong to the Omaha bank, but lawfully belong to the state of Nebraska for the benefit of the depositors' guarantee fund. Sections 8024-8028, Comp. St. 1922.

From the fact that the loans considerably exceeded the amount which the law permitted the Winside bank to borrow, under its charter, it is argued that the collateral given as security, and the proceeds thereof, should therefore be forfeited by the loaning bank, the latter being chargeable with knowledge of the law and of the limitation of the borrowing capacity of the Winside bank under its charter.

To support this contention the receiver points out that section 5 of the articles of incorporation of the Winside bank reads: "The highest indebtedness of this corporation shall at no time exceed two-thirds of its paid-up capital except for deposits."

In respect of the formation of corporations he cites the following act:

"The articles of incorporation must fix the highest amount of indebtedness or liability to which the corporation shall, at any one time, be subject, which must, in no case, exceed two-thirds of the capital stock: Provided, however, the above limitation shall not apply to * * * deposits in banks." Comp. St. 1922, sec. 462.

Our attention is also directed to the following statute:

"The business of banking, or the receiving of deposits, money or instruments of credit subject to be repaid upon check, draft, certificate, passbook or order; the discounting, negotiating of promissory notes, drafts, bills of exchange, and other evidences of debts; and the loaning of money upon personal or other security is hereby declared to be a quasi-public business and subject to regulation and control by the state." Comp. St. 1922. sec 7983.

It appears, however, that the receiver depends mainly on section 8005, Comp. St. 1922. In a supplemental typewritten memorandum brief he says: "That the legislature intended to, and did, prohibit" the acts complained of in the present case, "by enacting section 8005, cannot be gainsaid."

Section 8005, among other things, provides:

"The aggregate amount of the rediscounts and bills payable of any corporation transacting a banking business in this state shall at no time exceed the amount of its paid-up capital and surplus, except for the payment of its depositors."

It will be noted that this section provides no penalty and, of course, in the absence of legislation providing a penalty, in an act upon which the state relies, we are powerless to supply a penalty. To do so would be judicial legislation of the most pronounced type. It seems that a consideration of the legislation on this subject in this state leads irresistably to the conclusion that the law-making body intended the act, relied upon by counsel, to be directory, and not mandatory. It is interesting to note that

section 8005, as amended in 1923, contains a provision which reads in part:

"Provided, however, any bank may, with the written consent of the secretary of the department of trade and commerce, rediscount paper in an amount in excess of its paid-up capital stock and surplus, and no bank shall, without such consent, transfer as collateral to its obligation assets with a face value of more than one and one-half times the amount of such obligation. Any transfer of assets of a state bank in violation of this section shall be void as against the creditors of such bank, and any officer or employee of such bank who does, or permits to be done, any act in violation of this section, and any other person who assists in the violation of this section, shall be guilty of a felony and shall be punished by a fine of not more than one thousand dollars ($1,000), or by imprisonment for not more than five years." Laws 1923, ch. 190, sec. 1.

Of course it goes without saying that the 1923 amendment can have no direct application to the facts before us. But it shows that the legislature was evidently of the opinion that the act, as it formerly stood, did not provide a penalty for its violation, hence an amendment was added which, with other matter in respect of rediscounts, now, in specifically drastic terms, provides a penalty. So that, by the subsequent amendment, we have the legislative view that section 8005, Comp. St. 1922, prior to the amendment, did not contemplate the penalty of forfeiture for which the receiver contends. Otherwise, it seems that the act would not have been amended.

In this connection defendants point out, in their supplemental brief, on reargument, that, while section 8005 provides no penalty, the following sections of the banking act, namely, sections 7984, 7994, 8001, 8002, 8008, 8010, 8012, 8013, 8018, 8025, and 8034, Comp. St. 1922, all provide penalties, either by fine or imprisonment, or both, for a violation by state bank officers of the things which state banks and their officers are, in the enumerated statutes, herein, respectively prohibited from doing. But it is not contended

that the case before us, in its present form, comes within the terms of any of the foregoing sections of the act which provide penalties for their violation. Clearly it does not do so.

The questions involved here are not altogether new in this state. And, besides, the supreme court of the United States has many times had occasion to pass upon questions involving the same principle which is here under discussion and the cases will be presently noted.

In a recent case we held that, where a corporation retains the fruits of an unauthorized contract, it cannot successfully plead that the contract was *ultra vires* of its charter. *Griffin v. Bankers Realty Investment Co.*, 105 Neb. 419. In *Smith v. First Nat. Bank*, 45 Neb. 444, it was argued that it was *ultra vires* of the bank to lend money on certain security therein described. But Judge Irvine, in writing the opinion for the court, said that, even if it were *ultra vires*, this would not render a mortgage void which was given to secure a loan then made and that the borrowers could not successfully attack it for that reason. The opinion continues: "The violation of law in this respect does not avoid the transaction, and only the government, by appropriate proceedings, can attack it. This also answers the contention that the security was void because the loan was more than 10 per cent. of the bank's capital."

In the *Smith* case, last above cited, the court invokes the rule announced in *National Bank v. Matthews*, 98 U. S. 621. In this case Hugh B. Logan and Elizabeth Matthews executed and delivered to Sterling Price & Company their joint and several promissory note for $15,000 for a certain debt contracted by them. Payment was secured by a deed of trust executed by Elizabeth Matthews covering certain land owned by her. Shortly thereafter, the note and deed of trust were assigned to the Union National Bank of St. Louis by Price & Company as security for a loan of money. The debt was not paid at maturity and the bank directed the trustee, named in the deed of trust, to sell the land. Elizabeth Matthews, as plaintiff in the Missouri

court, thereupon sought to enjoin the sale of her land on the ground that the loan by the bank to Price & Company was made upon real estate security, which was forbidden by law, and that the deed of trust was therefore void. She prevailed in the trial court and the decree was affirmed by the supreme court of Missouri. On appeal to the supreme court of the United States the judgment was reversed. Mr. Justice Swayne delivered the opinion of the court, and among other things said:

"The intent, not the letter, of the statute constitutes the law. A court of equity is always reluctant in the last degree to make a decree which will effect a forfeiture. The bank parted with its money in good faith. Its garments are unspotted. Under these circumstances, the defense of *ultra vires*, if it can be made, does not address itself favorably to the mind of the Chancellor. * * * We cannot believe it was meant that stockholders, and perhaps depositors and other creditors, should be punished and the borrower rewarded, by giving success to this defence whenever the offensive fact shall occur. The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other contemplated by congress. That has been always the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application. A private person cannot, directly or indirectly, usurp this function of the government."

See, also, *Iowa State & Savings Bank v. City Nat. Bank*, 106 Neb. 397, citing *Thompson v. St. Nicholas Nat. Bank*, 146 U. S. 240, wherein Mr. Justice Blatchford, at page 251, said:

"Moreover, it has been held repeatedly by this court, that where the provisions of the national banking act prohibit certain acts by banks or their officers, without imposing any penalty or forfeiture applicable to particular transactions which have been executed, their validity can be questioned only by the United States, and not by private

parties. *National Bank v. Matthews*, 98 U. S. 621; *National Bank v. Whitney*, 103 U. S. 99; *National Bank of Xenia v. Stewart*, 107 U. S. 676."

In *Grand Valley Water Users' Ass'n v. Zumbrunn*, 272 Fed. 943, this is said:

"The fact that notes given by a corporation for money loaned to it made its indebtedness exceed the amount authorized by its charter does not render the notes invalid, in the absence of a statute imposing such penalty. A contract by a corporation to borrow money in excess of the debt limit authorized by its charter is voidable, and not void; and where it has been fully performed, by the lending of money to the corporation and the execution of notes therefor, the corporation cannot refuse payment of the notes."

In *Fritts v. Palmer*, 132 U. S. 282, it was held that the penalty of personal liability imposed by statute upon officers, agents and stockholders of a corporation, in case of noncompliance with the provisions of a statute imposing a penalty for such violation, having apparently been deemed by the state legislature sufficient to effect its object, it was not competent for the judiciary to enlarge that penalty by forfeiture on the grounds of noncompliance with the statute.

As we review the legislation and the authorities, it seems to us that the legislature contemplated, as pointed out by Mr. Justice Swayne in the *Matthews* case, and equally emphasized in the *Fritts* case, that the impending danger of action by the state, under the penal sections of the banking acts, is doubtless "the check," upon bank officers, which was contemplated by the legislature.

The receiver cites *American Southern Nat. Bank v. Smith*, 170 Ky. 512, in support of his argument. We know of no other jurisdiction which holds to the rule of forfeiture announced in the above case, and, in view of the act in question, upon which the receiver relies, which does not provide a forfeiture, and in view of our former decisions and of other authorities, cited herein, holding to the

contrary under similar acts, we decline to adopt the views announced by the Kentucky court.

The conclusion is that the judgment is erroneous, and it is reversed in so far as it denies to the defendant bank the right to hold the collateral, and the proceeds thereof, as security for the full amount of the loans for which the collateral was pledged. In all other respects, the judgment is affirmed.

It is ordered that a judgment be entered in the district court in conformity with this opinion.

AFFIRMED IN PART AND REVERSED IN PART.

Note.—See Banks and Banking, 7 C. J. p. 596, sec. 240; Equity, 21 C. J. p. 100, sec. 76; p. 103, sec. 79—Statutes, 36 Cyc. p. 1106.

JOHN N. PHILLIPS V. STATE OF NEBRASKA.

FILED OCTOBER 7, 1924. NO. 23848.

1. **Rape: INSTRUCTIONS.** In a prosecution for rape, it is not error for the court to instruct the jury that, if it found that the defendant made the assault with intent to commit rape, but did not complete the act, in such case, the jury might find him guilty of an assault with intent to commit rape.
2. **Evidence** examined, and *held* that the court did not err in overruling defendant's motion for a new trial.

ERROR to the district court for Pawnee county: JOHN B. RAPER, JUDGE. *Affirmed.*

R. J. Organ, E. R. Otis, and *William P. Welch,* for plaintiff in error.

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

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

DEAN, J.

John N. Phillips, age 43, was informed against in Pawnee county and there charged with having committed rape, June 22, 1923, upon the person of Blanche McKnight, under the age of 18 years, to wit, of the age of 15 years, and not previously unchaste. The jury found defendant guilty of assault with intent to commit rape as charged in the information. He was sentenced to the penitentiary for a term of three years. Defendant prosecutes error.

Defendant conducted a moving picture theatre at Table Rock and some other business enterprises. It appears that a sister of the complaining witness assisted defendant at his theatre stamping dates on picture show bills, and, on the day in question, defendant called at the home of the prosecutrix and requested her to come to the theatre, with her sister, and assist in the work. She consented, and when she came she testified that he induced her, under some pretext, to go with him behind the theatre curtains, and while there, after some talk with her about her height and weight, as compared with that of her sister, he stood her up against the wall and, with a tape line, proceeded to take measurements of her head, neck, arms, bust, waist, thigh and ankle, and the length of her legs. She said that he measured over her clothing for the most part, but to get her leg measurement he took undue liberties with her person.

Prosecutrix also testified that defendant showed her some pictures of nude women and told her that they had been taken at the theater studio, and when he proposed taking a picture of her in the nude she refused. Without objection the prosecutrix testified that he told her that another girl had there acceded to his unlawful request. But we do not find it necessary to set out in this opinion the details of complainant's evidence in respect of the actual commission of the offense.

It seems from the evidence of the prosecutrix that very shortly after the assault she went home crying and told

her mother about all that had happened, and that her mother immediately returned with her to the theatre, and on arrival there her mother said to defendant: " 'You ought to be ashamed of what you have done.' He says, 'I am ashamed.' He says, 'Come in, I will make it right with you.' She says, 'You will not make it right with me, you will make it right with the old man.' She says, 'I am going to have you arrested.' "

A physician testified on the part of the defendant, that he examined the person of the complaining witness soon after the commission of the alleged offense, and that he did not observe any disarrangement of her clothing, nor did he discover any thing that would indicate that the girl had been mistreated, as charged by the state. But he admitted that he left what he called a "wash" for the complainant to use, and told the family that they could use it if they thought, from what the prosecutrix said, that it was necessary to prevent a possible conception.

Defendant denied his guilt. But it is significant that in some respects his evidence was merely evasive. The sheriff testified that when he went to defendant's home to make the arrest, accompanied by the county attorney, defendant said, "If I have done anything wrong I must have been crazy," and that defendant volunteered this statement before a word was said by him, the sheriff, or any person, about the object of his visit. He also offered evidence tending to establish an alibi. On this point he testified that at the hour when the act is said to have been committed, he was at the home of a Mrs. Herr, in Table Rock, doing some electrical work for her, but Mrs. Herr testified that he was not then at her home and did not arrive there until more than an hour after the time when the crime was said to have been committed. This was a question for the jury.

The evidence of the prosecutrix and her mother is corroborated by disinterested witnesses, in respect of the presence of complainant and her mother at the theatre, but it is not contended that these witnesses heard what

was there said by either Mrs. McKnight or the defendant.

Defendant complains of the court's refusal to give the following instruction:

"You are instructed that any man taking indecent liberties with a woman without her consent is guilty of an assault upon her; and if you believe from the evidence submitted in this case, beyond a reasonable doubt, that upon the 22d day of June, 1923, the defendant, while alone with the complaining witness, Blanche McKnight, took indecent liberties with her, but did not have sexual intercourse with her, and desisted of his own volition, without intervention of circumstances independent of the will of the defendant, you should find the defendant guilty of an assault."

While we do not find it necessary to pass upon the merits of the tendered instruction, we do not hesitate to say that error cannot be predicated upon this assignment of error, in view of the fact that the court informed the jury that, if they found that the defendant made the assault complained of with intent to commit rape, but did not complete the act, in such case, the jury might find him guilty of assault with intent to commit rape. And it was of this offense that the jury found defendant guilty.

We have examined all of the assignments of alleged error presented by defendant, and upon examination we find they are without merit. The verdict is amply sustained by the evidence.

The judgment of the district court is

AFFIRMED.

Note—See Criminal Law, 16 C. J. p. 1180, sec. 2707; Indictments and Informations, 31 C. J. p. 860, sec. 503.

GEORGE FARRIN V. STATE OF NEBRASKA.

FILED OCTOBER 7, 1924. No. 24023.

1. **Larceny: EVIDENCE.** Evidence examined and outlined in the opinion, *held* sufficient to establish that the property charged to

have been stolen was taken without the owner's consent; that the taking was with felonious intent; that the offense was committed in the county, as charged in the information; and that the verdict is sustained by sufficient evidence.

2. Criminal Law: PROOF OF VENUE. In a criminal prosecution it is not necessary that the venue of the crime should appear from the state's evidence, provided the venue as alleged appears from the record as a whole. It may be established by the testimony given by the defendant.

ERROR to the district court for Keya Paha county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

C. E. Lear, for plaintiff in error.

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

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

GOOD, J.

Plaintiff in error, hereinafter referred to as defendant, presents to this court for review the record of his conviction of the crime of stealing cattle in Keya Paha county, Nebraska.

The only error relied upon for a reversal is that the verdict is not sustained by the evidence. Defendant urges, first, that the evidence does not show that the property, one calf, was taken without the consent of the rightful owner; second, that the evidence fails to show that defendant took the calf from the premises of Wood, the alleged owner; and, third, that it is not shown that the crime, if any, was committed in Keya Paha county.

The record discloses that defendant and Milton M. Wood, the complaining witness, were neighboring ranchers in Keya Paha county, Nebraska. In the latter part of May, 1922, Wood missed two calves from his ranch. He made inquiry concerning the calves of his neighbors, including the defendant. The latter answered that he had not seen and knew nothing of them. On a subsequent visit

to defendant, Wood found one of the two calves on defendant's premises. Upon the demand of Wood, defendant returned the calf to the home of Wood. Later, Mr. Wood located the other calf on a ranch of one Bogardus, about 18 miles distant, and ascertained that it had been taken there by defendant. Wood, in company with the sheriff and his deputy, visited the defendant's home and again inquired if he had found the other calf. Defendant asserted that he had not seen and knew nothing of it, but, when informed that the calf had been found he offered to go after it and return it to Wood and pay the expenses incurred in the search for it. We think this conclusively shows that Wood did not consent to the taking of the calf.

It is argued that the calf may have strayed onto the premises of defendant, and, if so, that it was not taken with felonious intent. Conceding that the calf may have strayed upon the premises of the defendant, the fact that he took possession thereof, took it a distance of 18 miles, and had it placed with some of his own cattle, and afterwards denied any knowledge of the calf, sufficiently shows that there was an asportation of the property with a felonious intent.

With reference to the venue of the offense, the record shows that the trial was had at Springview, the county seat of Keya Paha county, and the information charged the theft to have occurred in that county. The evidence of Wood is to the effect that he had lived in the county for 40 years and had lived for about 20 years at his present location. There is no direct evidence on the part of the state that the home of the defendant was within Keya Paha county, but the defendant was a witness in his own behalf and stated upon his examination that he had lived in the county for more than 6 years and on the place where he then resided for more than 5 years. This evidence by defendant is sufficient to show that his home was in the county of the trial and of the alleged theft. The property was taken by him from his home to the ranch of Bogardus. It is not necessary that the venue should

appear from the state's evidence, but it is sufficient if it appears from the record as a whole, even though it may be by the testimony given by defendant.

It is argued that the identity of the calf is not sufficiently proved. At the time of his arrest, defendant did not claim to own the calf or any right to its possession, but apparently conceded that the identical calf claimed and taken by Wood was Wood's property. The calf was positively identified by Wood and by two of his children. We are of the opinion that the verdict is sustained by sufficient evidence.

The judgment is

AFFIRMED.

Note—See Criminal Law, 16 C. J. p. 767, sec. 1572; Larceny, 36 C. J. p. 899, sec. 483.

JAMES DRAPER ET AL., APPELLANTS, V. FRANK D. EAGER ET AL., APPELLEES.

FILED OCTOBER 7, 1924. NO. 23741.

1. **Executors and Administrators: WILL: POWER OF SALE.** A will containing the provision, "To the end that it shall not be necessary to make needless expense in that behalf it is my will that my executors for the purpose of carrying into effect any provisions of this will shall have full and complete power to make any deed or writing to convey a good merchantable title without any order of court or judicial decree, so that the deed of said executors when it is properly given will convey the same title I might give if I were then living, and grantor in the instrument," clothes the executors with complete authority to sell and convey lands belonging to the estate, when necessary to carry out the provisions thereof.

2. ———: ———: ———. Where a will authorizes executors to sell real estate when necessity demands it in the furtherance of the expressed or implied wish of the testator, they are the judges of whether or not such necessity exists, and their decision, as to such necessity, if fairly and honestly arrived at, is conclusive.

3. Wills: APPLICATION FOR CONSTRUCTION: NOTICE. An application made to a court by executors for a construction of a will under which they are acting, and for directions as to their duties thereunder, is not an adversary proceeding, and notice to interested parties is not necessary to give the court jurisdiction.

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

Sterling F. Mutz, for appellants.

Reavis & Beghtol, Boehmer & Boehmer, and *Bruce Fullerton, contra.*

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

THOMPSON, J.

Thomas W. Draper, Sr., was a resident of Lancaster county and the owner of lot 7, block 37, in the city of Lincoln, on which was situate a business building used for rental purposes. On the 5th day of May, 1917, he died testate, leaving his widow and three sons and a daughter, his heirs, as his legatees. The minor defendants hereinafter mentioned are the issue of one of the sons now deceased. In the codicil to his will, Charles E. Draper, Alice Draper Knowlton, and Nicholas Ress, were named as executors, who afterwards entered upon the discharge of their duties. That part of the will pertinent to the questions here presented is as follows:

"First: It is my will and I do direct that all of my just and provable debts be paid as soon as it can be conveniently done, and as same fall due, except as hereinafter provided in this will: in the debts thus to be paid I include the expenses of my last illness and burial, the charges for funeral, and all the expenses of administering my estate, and to the end that it shall not be necessary to make needless expense in that behalf it is my will that my executors for the purpose of carrying into effect any provisions of this will shall have full and complete power to make

any deed or writing to convey a good merchantable title without any order of court or judicial decree, so that the deed of said executors when it is properly given will convey the same title I might give if I were then living, and grantor in the instrument.

"Second: It is my will and I do direct that after the payment of my debts, proved and allowed against my estate in course of administration, that my executors hereinafter named, or whoever shall at such time, sustain such office, shall take complete control and charge of all of the estate then remaining, and hold and manage the same in trust, with the increment thereof for the following purposes: First, to pay to my beloved wife Julia Draper for her proper support and maintenance, in case she shall elect to abide the provisions and conditions of this will, during the term of her natural life a sum of money of not less than fifty ($50.00) each and every month; second, to pay from the earnings, rents and issues of the estate as the same shall come into the hands of the executors all interest charges and other fixed charges incident to administering the trusted estate, and to reduce as said executors shall find expedient the interest bearing debt from time to time as occasion may offer, and third, after the payment of the allowance to my said wife Julia Draper, and other payment provided for in this paragraph, said executors shall at intervals of one year make annual distribution of any surplus rents and issues, and pay the same in equal shares, except as hereinafter provided, to my children."

The fourth paragraph of the will provides for a distribution of the property remaining when the daughter arrives at the age of 30. This is changed to 50 in the codicil. The will provides that before any part of the distributive share is turned over to the son, Thomas Draper, Jr., $3,000 of his share shall be paid to the other heirs, the codicil raises this amount to $8,000.

On the 16th day of December, 1921, the executors then acting, Ress having died and E. C. Boehmer having been

appointed in his place, entered into a written contract for the sale of the lot to Frank D. Eager, defendant herein. That there might not be any doubt as to the authority of the executors to sell the lot and convey a merchantable title, it was agreed that the executors should institute an action in the district court for Lancaster county, praying for the construction of the will and codicil, as to their authority, as well as to the necessity for the making of the sale, and the reasonableness of the price agreed to be paid. Judgment was had on the 24th day of January, 1922, wherein it was determined, in substance, as follows: That the deceased left some estate, all of which had been reduced to money except the lot before mentioned; that the building on the lot is old and dilapidated, and to give the place a fair rental value, it is necessary to expend between $8,000 and $10,000 in repairing the building, plumbing and heating appliances; that the estate does not have funds to pay for these improvements; that there is now due a first mortgage of $7,000, and a second one for $10,000, due March 1, 1924; that some of this indebtedness was incurred by the testator; that the rents and profits for the last few years have not been sufficient, to pay the interest, taxes, insurance, and other expenses of the trust, such as allowance to the widow of not less than $50 a month. The court then found that it was necessary to sell this property in order to meet these expenditures and carry out the provisions of the will, and that the sale to Eager would leave the sum of $33,000 for the estate over and above the incumbrances on the property, which, when placed out at interest, would give the estate a net income of $2,000 annually. It then authorized and empowered the executors and administrator to enter into the agreement with Eager.

Following the decree, the contract with Eager was closed. the first instalment under it was paid, and possession of the lot turned over to him; he thereafter collecting the rents and profits.

Plaintiff, James Draper, is the legatee by that name designated in the will. He instituted this suit, seeking to

have the contract held for naught, the decree held void, and other equitable relief, alleging, in substance, that he is a son of the testator, who died testate, and, with other property, was the owner of the lot in question; that he is one of the legatees and thus part owner of the lot; that E. C. Boehmer is administrator *de bonis non,* and Charles E. Draper and Alice Draper Knowlton are executors named in the codicil, and have been duly appointed by the county court, and are acting; that on the 16th day of December, 1921, the executors entered into a written agreement with defendant Frank D. Eager for the sale of the lot to him; that afterwards they filed a petition in the district court for Lancaster county, the object and prayer of which was the construction of the will, and confirmation of their authority to sell and convey the property as per contract. The petition further alleges that the executors were without authority to enter into the contract, for the reason that no summons was served on plaintiff or other interested parties, nor no notice given of the pendency of the application to sell the real estate; and that the contract is illegal and void.

As a second cause of action, it is further alleged that the defendants, Charles E. Draper, Alice Draper Knowlton, and Julia Draper, were misled by false statements made to them by defendant Boehmer into the execution of the contract to Eager.

For a third cause of action, the petition alleges that defendant Eager has failed to comply with the terms of the contract on his part, and that the contract be declared at an end by reason thereof, and equitable relief granted.

Defendants William H. Draper and Maxine J. Marshall, by their guardian, answered by filing general denials.

Defendant Eager answered, admitting certain paragraphs of plaintiff's petition, and denying each and every other allegation.

Defendant Boehmer, for answer, states that he is administrator *de bonis non* of the estate; that the contract was made with defendant Eager; and that application

was made to the district court for Lancaster county, containing facts as to the condition of the trust, and asking construction of the will and authority to enter into the contract; that, after due and legal notice was given, the court found the necessity for the sale, that the executors had authority to sell, and authorized them to enter into the contract; that defendant Eager had complied with all of the conditions on his part. Trial had, and judgment in favor of defendants. Plaintiff appeals, in which he is joined by defendants Alice Draper Knowlton, Charles E. Draper, and Julia Draper, which defendants made no defense to the action in the district court.

Plaintiff submits for reversal of the trial court, first, that the will did not clothe the executors with the authority to sell the lot in question; second, that urgent necessity is expressly made a condition precedent to a sale by the executors, which did not exist; third, that the will itself negatives an intention on the part of the testator to grant power to sell. These will be considered together as they are each and all answered by a determination of the scope and purpose of the will in that regard.

The intention of the testator, as gleaned from a consideration of the entire will and codicil, taken together, is controlling. *Albin v. Parmele,* 70 Neb. 740, and cases cited in paragraph 2 of page 743 of the opinion.

The evidence shows, and we so find, that the widow elected to take under the will; that the property owned by the testator at the time of his death consisted of the lot with the improvements thereon, which were rented, and certain personal property; that in paying the debts the personal property had been exhausted, or nearly so; that no distribution had been had; that there were mortgages on the lot to an amount of many thousand dollars, much of which would soon become due, as heretofore set out, and as found by the district court on the application for construction of the will; that there were taxes unpaid; that the widow could not maintain herself on $50 a month; that the building on the lot was decaying, both within and without, and

was in dire need of repair; that the plumbing, as well as the heating plant in the building, was in a condition demanding the expenditure of a large sum of money; that the condition of the building was making it impossible to obtain or hold paying tenants; that the rentals were not sufficient to meet the expenses of the trust, as imposed by the provisions of the will, or otherwise; that there was no other property out of which to provide for the payment thereof, or for the $8,000 due from the son as legatee to the other legatees; that these conditions existed at the time the executors decided to, and did, enter into the contract with Eager.

These facts, with others, were submitted to the district court, together with the contract and other evidence, and the court found, as we find, that the will authorized the sale by the executors; it also found that $52,000 was the fair market value of the lot, together with the improvements; that the contract was without fraud or deception, and was one for the best interest of the trust; that there was necessity for the sale in order that the executors might carry out the provisions of the will and comply with their duties in the premises.

These were the conditions confronting the trustees. By accepting the trust they accepted the provisions of the will, defining their duties and responsibilities. They were accountable for wilful waste and failure to faithfully discharge the trust imposed. The widow having elected to take under the will, she was bound by its provisions, as were the other legatees, that the distribution was not to be had until the daughter was 50 years of age, she being at the time about 25. The trustees must provide for the widow, not less than $50 a month, and more if more were needed, during her natural life. They must care for the property and preserve it for the legatees. Distribution, if anything was left for distribution, could not be had until after a sale was made.

As we construe the will, they were authorized, and it was their duty to sell the lot in question, when, in their

judgment fairly exercised, the condition of the trust estate demanded it, and the provisions of the will authorized it. In this case authority and necessity joined at the time of the sale, and the will clothed them with full and complete power to enter into the contract of sale complained of; and, that without an order or decree of the court. It was such a purpose and condition the testator wisely framed his will to meet.

The decree confirming the contract of sale supports us in our conclusion as to the necessity for the sale and the judgment exercised by the trustees in entering into the contract. Then the executors' judgment, as to the contingency as well as the necessity, cannot be questioned unless it should appear that they erred wilfully, or from such gross negligence as would imply fraud or wilfulness, neither of which existed in this case. 21 R. C. L. 782, sec. 10; *Matthews v. Capshaw*, 109 Tenn. 480.

As to the proceedings had in the district court on the application for construction of the will and direction as to the Eager contract, the question of jurisdiction, save as to that raised by the claimed failure to give notice, is not before us, and is not considered. The proceeding was not one seeking a judicial sale of real estate. It was solely one for the construction of the will as to the scope of the executors' authority to sell the lot, and if it was found by the court that they were clothed with such authority on the happening of a certain contingency or condition as to and of the trust, and, whether or not $52,000 was the fair value of the lot. Such a proceeding was not an adversary action, and the notice to interested parties was not necessary to give the court jurisdiction. In this case, however, the court found that due and legal notice was given, and made the same a part of the decree. Then the court is one of general jurisdiction, and every presumption is in its favor until the contrary is proved, which in this case has not been done, and the judgment of the court is approved by us.

Having examined every question of law and fact present-

ed, it is considered by us that the findings, judgment and decree of the district court in favor of the defendants is in all things right, and should be, and hereby is,

AFFIRMED.

Note—See Executors and Administrators, 23 C. J. p. 1174, sec. 393; 24 C. J. p. 160, sec. 639; p. 162, sec. 640.

EDWARD MARES V. STATE OF NEBRASKA.

FILED OCTOBER 20, 1924. NO. 23992.

1. **Receiving Stolen Goods: PLEADING AND PROOF: VALUE.** In a prosecution under section 9616, Comp. St. 1922, it is neither necessary to allege in the information nor to find in the verdict the value of the property described.
2. **Indictment and Information: FILING.** It is not essential to the validity of an information in a criminal case that it show upon its face the term of court at which it was filed, or that it was filed during term time. Comp. St. 1922, sec. 10087.
3. **Instructions** of the court are *held* free from error.
4. **Evidence.** The evidence is *held* to sustain the the verdict.

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

Bartos & Bartos and *Crofoot, Fraser, Connolly & Stryker,* for plaintiff in error.

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

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

MORRISSEY, C. J.

Defendant prosecutes error from a conviction had under section 9616, Comp. St. 1922. The information on which he was tried was in two counts: The first charged that de-

fendant "on or about the 20th day of April, A. D., 1923, in the county of Saline, and the state of Nebraska aforesaid, then and there being in said county, did then and there unlawfully and feloniously receive one Ford five passenger touring automobile with the intent to defraud one Louis Mougey, who was then and there the owner of the said automobile," knowing the same to have been stolen. The second count was like unto the first, except that it alleged that defendant "did then and there unlawfully and feloniously buy one Ford five passenger automobile," with like knowledge. Section 9616, Comp. St. 1922, under which this prosecution was brought reads as follows:

"Any person who steals, or attempts to steal, an automobile or motorcycle, of any value, or who receives, or buys, or conceals, an automobile or motorcycle, of any value, knowing the same to have been stolen, with the intent thereby to defraud the owner; or who conceals any automobile or motorcycle thief, knowing him to be such, shall be deemed guilty of a felony, and on conviction, shall be imprisoned in the penitentiary not less than one year nor more than ten years. The possession of such property without the consent of the owner and without a certificate of registration issued to the possessor as required by law, shall be *prima facie* evidence of guilt."

It may be noted that this section makes it a felony to steal, buy, receive, etc., an automobile "of any value," while the information contains no allegation to the effect that the automobile was of any value. On the question of value, the instructions and verdict are as silent as the information. Defendant contends that this is reversible error. A superficial consideration of the question leads to that conclusion, but the holding in this jurisdiction is to the contrary. So far as the phrase "of any value" as it occurs in the statute, is concerned, it occupies the same relative position as the same phrase occurring in section 9602, Comp. St. 1922, relating to the stealing, or receiving of stolen horses, and section 9603, Comp. St. 1922, relating to the stealing or receiving of stolen cattle. For many years the rule as ap-

plied to these sections coincided with the contention now made by defendant. The incorrectness of that rule was first suggested in *Keller v. Davis*, 69 Neb. 494; however, it continued to be applied until the adoption of the opinion in *Griffith v. State*, 94 Neb. 55. In the latter case there is an extended review of the section now carried as section 9603, Comp. St. 1922, and of our earlier decisions construing the same. The earlier decisions are overruled, and it is definitely announced that in a prosecution under that section "the jury are not required to ascertain and declare in their verdict the value of the cattle stolen." It is true, however, that in the course of the discussion the author of the opinion points out that there was formerly a statute which vested large discretion in the trial judge in the imposition of a sentence, and for that reason it was well to show the value of the property involved, as "the court would not be likely to sentence one convicted of stealing a calf of the value of $10 to as long a term of imprisonment as one who had been convicted of stealing a number of animals of considerable value." The author of the opinion then points out that the statute he had just mentioned had been superseded by what is commonly known as the indeterminate sentence act. Counsel now urge that, under the present form of our statute, discretion as to the term of the sentence in this class of cases is again vested in the court, and that *Griffith v. State, supra*, should not longer be accepted as authority. This may be answered by saying that what the author of the opinion said as to the indeterminate sentence statute was by way of interpolation and was not a controlling reason for the conclusion reached. In definite language it is said: "The value has nothing to do with determining the grade of the crime. It is therefore unnecessary, for that purpose, for the jury to find the value of the property." It will be seen that we are not dealing with a new subject. The statute under which this prosecution is brought was enacted in 1917, while the opinion in *Griffith v. State, supra*, was adopted in 1913. It is therefore apparent that, when the section of the statute

under consideration was adopted, the legislature had knowledge of the construction placed upon the statute defining the crime of cattle stealing, and, with such knowledge, enacted the automobile statute in substantially the same language.

Counsel for defendant directs our attention to the opinion in *Lee v. State,* 103 Neb. 87, wherein error was found because the jury failed to find and return in their verdict the value of an automobile which had been stolen. However, in that case the prosecution was not based upon the section of the statute herein under consideration, which deals with crimes against automobiles and motorcycles. The information in that case was filed under the general larceny statute, and the court instructed the jury directly to that effect. It will be seen, therefore, that the case of *Lee v. State, supra,* is not authority in the instant case. The case of *Griffith v. State, supra,* by analogy, is binding upon the court in the instant case, and the rule there announced is adhered to. We therefore hold that, in a prosecution under section 9616, Comp. St. 1922, it is neither necessary to allege in the information nor to find in the verdict the value of the property involved.

Complaint is made because the information did not specify the term of court at which it was filed, but it is no longer necessary that this should be done. Comp. St. 1922, sec. 10087.

Criticism is made of certain of the instructions of the court. However, when they are construed in the light afforded by the whole record, no prejudicial error appears in any of them. The evidence supports the verdict and the judgment is

AFFIRMED.

Note—See Indictments and Informations, 31 C. J. p. 640, sec. 156—Receiving Stolen Goods, 34 Cyc. pp. 49, 50.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. SOUTH FORK STATE BANK OF CHAMBERS: CENTRAL NATIONAL BANK OF LINCOLN, CLAIMANT, APPELLANT: EDWARD ADAMS, RECEIVER, APPELLEE.

FILED OCTOBER 20, 1924. No. 24097.

1. **Banks and Banking**: BANK GUARANTY LAW: DEPOSIT. A check equivalent to money for banking purposes, if accepted by a bank as the consideration for a time certificate of deposit, may amount to a deposit as distinguished from a loan, within the meaning of the bank guaranty law.
2. ———: RECEIVERS. Ordinarily a receiver takes charge of banking affairs where the bank left them, and cannot generally, in absence of fraud, mistake, or violation of law, open closed transactions which would conclude the bank, if solvent.
3. ———: DEPOSIT: EVIDENCE. A plea that a time certificate of deposit was not protected by the bank guaranty fund because it was a mere renewal of former certificates fraudulently issued *held* not established by the evidence.

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

Field, Ricketts & Ricketts, for appellant.

C. M. Skiles, contra.

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

ROSE, J.

This is a controversy between the receiver of the South Fork State Bank of Chambers, insolvent, and the Central National Bank of Lincoln, claimant. In a proceeding to wind up the affairs of the insolvent, claimant interposed a a plea for the allowance of a claim for $6,000 and interest. While insolvent was conducting a commercial banking business August 30, 1922, it issued to Blake Maher a certificate of deposit for $6,000, maturing in two months, and bearing interest at the rate of 5 per cent. per annum. By indorsement of the payee, claimant acquired this paper in

the regular course of its banking business. Demands for payment resulted in the issuance of a draft by insolvent to claimant for $6,050 November 1, 1922, on the Bank of Benson. The draft was protested for nonpayment and was never paid. Insolvent went into the hands of a receiver. The relief sought by claimant was the allowance of this item as a deposit within the meaning of the bank guaranty law.

The receiver resisted the claim on the grounds that the transactions resulting in the issuance of the certificate in controversy amounted to a loan instead of a deposit, and that it was a mere renewal of former certificates of deposit issued by insolvent to the Old Line Insurance Company pursuant to a fraudulent arrangement to accept therefor premium notes without regard to their value as commercial paper, the fraud resulting in a loss to insolvent.

Upon a trial of the issues the district court allowed the item in full as a general claim against the assets of insolvent, but precluded a resort to the bank guaranty fund for payment. Claimant has appealed.

Did the 6,000-dollar certificate issued by insolvent to Maher August 30, 1922, evidence a deposit protected by the bank guaranty fund? The evidence shows that Maher gave insolvent his check for $6,000 and received therefor the certificate of deposit in question for a like amount. The check was paid and the bank received the proceeds thereof in full. The check, therefore, was the equivalent of money for commercial banking purposes. On its face the transaction with Maher was ordinary banking which the law sanctions as a basis for a deposit. Claimant, for full value in the ordinary course of business, acquired Maher's interests in this certificate of deposit and is the owner of the claim. In allowing the item as a valid claim against the assets in the hands of the receiver, the district court did not err.

Was the certificate of deposit on which claimant's case rests a renewal of former certificates tainted by fraud?

This defense may be outlined as follows: Maher was an agent and stockholder of the Old Line Insurance Company, and entered into a contract with an officer of insolvent to aid in procuring insurance risks, to accept part of the agent's commission, to buy premium notes and issue therefor to insurer certificates of deposit. It is argued that this arrangement did not contemplate the exacting of premium notes equivalent to money for commercial banking purposes; that many of the notes accepted by insolvent proved to be worthless, and that the certificates fraudulently issued therefor did not represent deposits of money or the equivalent thereof. It is further argued by the receiver that these certificates issued by insolvent and held by the Old Line Insurance Company were renewed by Maher's certificate of deposit for $6,000 while some of the premium notes, though obligations of insurer to insolvent, remained unpaid. This is a mere summary of the receiver's views.

The issuance of the original certificates were closed banking incidents when claimant's rights accrued. In relation to past banking transactions the powers and duties of the receiver, as a general rule, do not transcend those of the bank while solvent and open for the transaction of business. Ordinarily the receiver takes charge of the affairs of the bank where the latter left them. In the usual course of business, banks buy notes and issue certificates of deposit. The bank itself did not perpetrate a fraud. The arrangement pleaded by the receiver as a defense herein may have been unwise and censurable, but insolvent's officers could have protected the bank by rejecting all premium notes not equivalent to money for banking purposes. Lack of judgment and improvident dealings do not necessarily constitute fraud. This defense does not seem to be established by the evidence. The more convincing view of the proofs is that the bank, had it survived, could not have defeated Maher's certificate as evidence of a deposit, and that the receiver is in no better situation. The conclusion is that the claimant's certificate is not a renewal of fraudulent certificates previously issued. It

represents a deposit within the meaning of the bank guaranty law and should be protected as such. For the purpose of correcting the error in the finding to the contrary, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

Note—See Banks and Banking, C. J. p. 485, sec. 15; p. 737, sec. 503 (1926 Ann.).

PAUL W. KARR, APPELLEE, V. CURTIS L. BROWN, APPELLANT.

FILED OCTOBER 20, 1924. No. 22898.

Trial: SPECIAL FINDINGS. When a general verdict is inconsistent with special findings of the jury, the latter will control, unless manifestly wrong.

APPEAL from the district court for Nemaha county: JOHN B. RAPER, JUDGE. *Affirmed on condition.*

Lambert & Hawxby, for appellant.

Ernest F. Armstrong, contra.

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

GOOD, J.

This is an action to recover a balance due for the purchase price of a half interest in the merchandise business of K. E. Young & Company, hereinafter referred to as the company. Defendant admits the purchase of a half interest in the business, except that he avers that certain bills receivable of the company, of doubtful value, were not included in the transaction, and that he had, by assuming and paying one-half of certain bills payable of the company and cash payments, fully paid the agreed purchase price. The trial resulted in a verdict and judgment thereon for plaintiff in the sum of $422.04. Defendant appeals.

It appears from the record that in December, 1919, Paul

W. Karr and K. E. Young were equal partners in the merchandise business at Brownville, Nebraska, under the name of K. E. Young & Company. On the 12th day of December, 1919, a memorandum agreement was signed by Karr, Young and defendant Brown, wherein the latter agreed to purchase a one-half interest in the stock of merchandise and fixtures of the company. While the memorandum agreement would indicate that the company was selling a half interest to Brown, it is conceded by both parties that Karr, in fact, was selling his half interest to Brown, and that the payments to be made by Brown were to go to Karr. The memorandum provided for an invoice and the time and method of its taking. Plaintiff contends that defendant purchased a half interest in all of the assets of the company, including stock, fixtures, bills receivable and cash in bank to the credit of the company, and that he assumed and agreed to pay one-half of all the liabilities of the company. Defendant admits that he purchased a half interest in the stock, fixtures and cash in bank, and claims that he purchased a half interest in the bills receivable to the amount of $1,306.71, and that certain other bills receivable, aggregating about $700, which were not considered good, were excluded from consideration. He admits that he assumed and agreed to pay, and alleges that he has paid, one-half of certain itemized liabilities. The following items only are in dispute: Defendant insists that he did not agree to pay any part of the account of Andrews for drayage, amounting to $260, nor a rent item of $12, and a note, held by plaintiff and signed by K. E. Young, amounting to $736.84.

A number of special interrogatories were submitted to the jury, and they found specially that defendant Brown agreed to purchase one-half interest in the bills receivable, to the amount of $1,306.71, and no more, and also found that he did not assume and agree to pay one-half of all liabilities; that he did not assume and agree to pay one-half of the Andrews drayage account of $260; nor assume and agree to pay one-half of the rent item of $12;

but that he did assume and agree to pay one-half of the note, held by plaintiff, amounting to $736.84. Plaintiff took no exception to any of the special findings, filed no motion for a new trial, nor has he filed a cross-appeal in this court. The special findings of the jury, based on conflicting evidence, are therefore conclusively presumed to be correct. The facts admitted by both parties and as established by the special findings of the jury disclose the following situation:

Items in which defendant purchased a half interest.

Invoice of merchandise	$13,202.80
Fixtures	1,498.00
Accounts receivable	1,306.71
Cash in bank	261.00
Total	$16,268.51
One-half of this amount for which defendant became liable to plaintiff	$8,134.25

Items, one-half of which assumed and paid by defendant.

Note to First National Bank, Omaha	$ 4,000.00
Note to Brownville State Bank	2,500.00
Accounts due wholesale houses for merchandise	4,474.04
Total	$10,974.04
One-half of this amount	$5,487.02
Balance due from defendant to plaintiff	$2,647.23

It is obvious that the payment by defendant to plaintiff of this amount would fully discharge his obligation on the contract of purchase and would operate as a payment of one-half of the note for $736.84, held by plaintiff, and one-half of which was assumed by defendant. It is conceded that defendant has paid in cash and other items accepted as cash $2,584.40. This would leave still due a balance of $62.83, on which plaintiff was entitled to interest from January 22, 1920, to the date of the verdict,

February 18, 1922, at the rate of 7 per cent. per annum. This item of interest would be $9.13, which would make the total amount, for which plaintiff was entitled to a verdict, $71.96.

While the general verdict was $422.04, the special findings show that it should have been $71.96. When a general verdict is inconsistent with special findings of the jury, the latter will control, unless manifestly wrong. *Walker v. McCabe*, 110 Neb. 398; *Norfolk Beet-Sugar Co. v. Preuner*, 55 Neb. 656; *Story v. Sramek*, 108 Neb. 440; *Johnston v. Milwaukee & Wyoming Investment Co.*, 49 Neb. 68. It follows that the verdict is excessive and erroneous to the extent of $350.08.

If within 20 days plaintiff will remit from his judgment, as of its date, the sum of $350.08, the judgment of the district court will be affirmed; otherwise, reversed and the cause remanded for a new trial.

AFFIRMED ON CONDITION.

Note—See Trial, 38 Cyc. p. 1927.

EARL F. SALLANDER, APPELLEE, V. PRAIRIE LIFE INSURANCE COMPANY, APPELLANT.

FILED OCTOBER 20, 1924. No. 23998.

1. **Contracts**: CONSIDERATION. "Neither the promise to do nor the actual doing of that which the promisor is by law or subsisting contract bound to do is a sufficient consideration to support a promise in his favor." *Esterly Harvesting Machine Co. v. Pringle*, 41 Neb. 265.
2. **Pleading**: INSUFFICIENT PLEA. The failure to demur or the subsequent filing of an answer does not waive the right to object to a petition on the ground that it does not state facts sufficient to constitute a cause of action.
3. **Judgment**: INSUFFICIENT PLEA. A petition that does not contain facts sufficient to constitute a cause of action will not support a judgment rendered thereon.
4. **Evidence**: PRODUCTION OF DOCUMENT. The rule of evidence,

that you must either produce a document when it is called for or never, modified so as to meet the more liberal as well as practical spirit of sections 8901 and 8904, Comp. St. 1922.

5. ———: ———. If timely application is made to set aside an order for the production of books and papers and the latter are tendered to the opposite party, the same should ordinarily be granted.

6. Trial: DISCOVERY: PRESUMPTION: REBUTTAL. In instructing the jury to presume that a document shows what a party by affidavit says it shows, pursuant to section 8901, Comp. St. 1922, the court should also instruct that this is a rebuttable presumption.

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

W. R. King, for appellant.

McKenzie, Cox & Harris, contra.

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

THOMPSON, J.

Plaintiff, Sallander, a life insurance agent, sued the Prairie Life Insurance Company to recover $4,319.32 and interest alleged to be due him for services rendered it under two alleged oral contracts. The amended petition and the amendment thereto alleges, in substance, that the defendant is a Nebraska corporation; that on November 29, 1916, plaintiff and defendant entered into a written contract, by the terms of which plaintiff agreed, among other things, to "devote all of his time and attention to soliciting risks and procuring new business for defendant," for a specified commission; and that later defendant, acting through its officer M. M. Heptonstall, entered into an oral agreement with plaintiff for services as above stated, by the terms of which he was to receive additional commission for risks secured under the written contract; that he secured risks after the oral contract was entered into, thus entitling him to the additional commission; that defendant

refused to pay him therefor, though he had demanded same.

A second oral contract is alleged, but as the trial court removed any consideration of it from the jury and plaintiff has not appealed, we do not consider it.

As will appear later, we need refer only to that portion of defendant's answer which states, in part, that the alleged oral contracts set out in plaintiff's petition are "void for want of consideration, and constitute a mere alleged gratuity to be paid plaintiff on business for which he had already settled with defendant company."

At the close of plaintiff's testimony, defendant filed a motion for a directed verdict in its favor for the reason, among others, "that the amended petition on which this case is tried does not set forth facts sufficient to state cause of action against this defendant." This motion was overruled. The trial resulted in a verdict for plaintiff for $2,842.54 and judgment was rendered thereon. Motion for a new trial was overruled. To reverse this judgment, defendant appeals.

We first consider the ruling on defendant's motion for a directed verdict in its favor upon the ground of the insufficiency of facts in plaintiff's petition. As will be seen from the petition, at the time of the alleged oral promise of additional commission, plaintiff does not allege that he was legally obliged to do, or did, anything other or different in return for it than he was to do under the then existing written contract. Thus, no consideration is pleaded for the alleged oral promise. *Tarnow v. Carmichael*, 82 Neb. 1; *American Exchange Nat. Bank v. Fockler*, 49 Neb. 713; *Esterly Harvesting Machine Co. v. Pringle*, 41 Neb. 265. In the latter case we held: "Neither the promise to do nor the actual doing of that which the promisor is by law or subsisting contract bound to do is a sufficient consideration to support a promise in his favor."

If no consideration is stated in a petition in an action for breach of such a contract, it is a fatal defect which may be taken advantage of by demurrer, motion, or in any

manner sufficient to call the court's attention to the defect, at any stage in the proceeding, or the court on its own motion may and should consider same at the earliest opportunity. *Tait v. Reid,* 91 Neb. 235; *Burlington & M. R. R. Co. v. Kearney County,* 17 Neb. 511; *Citizens State Bank v. Worden,* 95 Neb. 53; Maxwell, Code Pleading (1892 ed.) pp. 100 and 108. The failure to demur or the subsequent filing of an answer does not waive the right to object to a petition on the ground that it does not state facts sufficient to constitute a cause of action. Comp. St. 1922, sec. 8612; *Burlington & M. R. R. Co. v. Kearney County, supra; O'Donohue v. Hendrix,* 13 Neb. 255; *Citizens State Bank v. Worden, supra.*

It will be seen from the portion of defendant's answer herein set out that this case does not come within the rule announced in *Beebe v. Latimer,* 59 Neb. 305, that " A defective or ambiguous petition may be aided and its infirmities cured by the averments of the answer."

When there is an omission to state a material fact in a petition, one necessary to show a cause of action, the presumption is that it does not exist. *Burlington & M. R. R. Co. v. Kearney County, supra; Burlington & M. R. R. Co. v. York County,* 7 Neb. 487.

Defendant's motion under consideration should have been sustained. We further conclude that, as the judgment was rendered on a petition which does not state a cause of action, it cannot be sustained, and should be and is set aside. *Thompson v. Stetson,* 15 Neb. 112; *Burlington & M. R. R. Co. v. Kearney County, supra.*

This is the second appeal in this case. The former opinion is reported in 110 Neb. 332, which case was " reversed and the cause remanded for further proceedings." On the first trial the record shows that plaintiff procured an order under section 8901, Comp. St. 1922, requiring defendant to produce certain of its books and papers covering a designated period, for inspection. Defendant permitted inspection of all asked for from September 1, 1913, up to December 31, 1917, and refused as to the rest for the reason

that "plaintiff is now in the employ, as a soliciting agent, of a competitive company, to wit, the Merchants Life Insurance Company, and to reveal to him the names, addresses, numbers and amounts of policies as requested by him would enable him to switch said policies from the defendant company to the company he now represents." Plaintiff introduced an affidavit as to what the books and papers would show, to which defendant excepted.

After the case was redocketed in Douglas county, and about six months before the trial, defendant filed a petition asking that the order to produce books and papers made before the first trial be set aside, alleging that the cause for its previous refusal above quoted no longer existed, and asking that it be permitted to produce all books and papers in court. A hearing was had and the request refused. This request should have been granted. Defendant continued its offer to plaintiff of all books and papers covered by the order, and the privilege of inspection and making copies, up to and including the trial, and objected to the introduction of secondary evidence of their contents. The plaintiff, notwithstanding the aforesaid facts and conditions appearing of record, was permitted to introduce, not the affidavit introduced at the first trial, but a new affidavit of the date of its introduction, covering not only the books and papers of which inspection had been refused in the first instance, but all covered by the original order made prior to the first trial, including those inspected, and refused permission to the defendant to introduce its books and papers, even if they were otherwise admissible. The contents of the affidavit were emphasized by being twice read to the jury. This was all permitted, notwithstanding the fact that the tender in open court of the books and papers for plaintiff's use and inspection continued through the trial.

We are not unmindful that courts, as well as text-writers of eminent ability, have announced the rule that a party who has refused to produce an original document, upon notice, cannot, after secondary evidence of its contents has been given by his adversary, introduce it either to the exclu-

sion of the secondary evidence, or as evidence in his own behalf. 22 C. J. 1067, sec. 1378; 1 Wharton, Evidence (3d ed.) sec. 157; 2 Wigmore, Evidence (2d ed.) sec. 1210. In *Doe v. Cockell*, 6 C. & P. (Eng.) *525, it was held: "You must either produce a document when it is called for or never." In *Jackson v. Allen*, 3 Stark. (Eng.) 74, plaintiff's counsel called for a deed which was not produced. Plaintiff then proved the possession of the deed by defendant, and then proved that a writing produced was a true copy of the deed. Later defendant's counsel produced the original, and objected to the reading of the copy, but the court held that the defendant could not at that stage object to the reading of the copy.

We have, however, carefully examined these authorities in connection with the statute in question, which reads as follows:

"Either party or his attorney may demand of the adverse party an inspection and copy, or permission to take a copy, of a book, paper or document in his possession or under his control, containing evidence relating to the merits of the action or defense therein. Such demand shall be in writing, specifying the book, paper or document, with sufficient particularity to enable the other party to distinguish it, and if compliance with the demand within four days be refused, the court or judge, on motion and notice to the adverse party, may in their discretion order the adverse party to give the other, within a specified time, an inspection and copy, or permission to take a copy, of such book, paper or document; and on failure to comply with such order, the court may exclude the paper or document from being given in evidence, or if wanted as evidence by the party applying, may direct the jury to presume it to be such as the party by affidavit alleges it to be. This section is not to be construed to prevent a party from compelling another to produce any book, paper or document when he is examined as a witness." Comp. St. 1922, sec. 8901.

We have also considered this section in connection with section 8904, Comp. St. 1922, which provides:

"The supreme or district court may, by rule, require the production of any papers or books which are material to the just determination of any cause pending before it, for the purpose of being inspected and copied by or for the party thus calling for them."

We conclude that ordinarily one who has refused to comply with such an order, but timely recants before secondary evidence is offered or introduced, and in open court so informs all parties interested, and complies with the court's order by producing all books and papers and tendering them to the plaintiff for his inspection and use both before and at the trial, as in this case, should not be denied the privilege, and neither should the plaintiff in such case be permitted to introduce by way of affidavit or otherwise secondary evidence of the contents of the books and papers so tendered. Neither should the defendant in such case be denied the right to introduce such books and papers in evidence on the trial, when proper before such order was made. This conclusion is in harmony with the above statutes, and the discretion reposed by them in the court. To deny to a litigant this privilege is an abuse of discretion and reversible error. Neither the common-law rule nor the statute looks to the exclusion of the best evidence, but outlines, in our view, a way to secure it; yet when the cause for the rule and the reason for its application cease, why should either be applied?

As to the word "presume" found in section 8901, *supra*, and applied to the affidavit of plaintiff received in evidence as to what the books and papers demanded showed, the defendant offered the following instruction, which was refused:

"You are instructed that the contents of defendant company's application register and policy cards, examination of which was demanded by the plaintiff and refused, so far as they tend to show the amount of renewal or overwriting commissions due and owing the plaintiff, are to be presumed by you to be as the plaintiff alleges them to be; but

you are further instructed in this connection that, should you find from the evidence that said application register and policy cards do not and cannot show the amounts of such commissions, as well as whether the plaintiff was credited therewith and received the same, then such presumption is not binding upon you in determining the amount, if any, due the plaintiff, and you may take into consideration such other evidence bearing upon the issue as has been admitted."

The court on its own motion gave the following instruction, and no other on the point involved:

"You are instructed that under the statutes of the state of Nebraska, relating to the examination of the books and papers in the possession of an adversary to a litigation, to which the court has already referred, it is not contempt of court for such person or party to refuse such examination or to refuse to obey an order of the court requiring such examination. You are further instructed that where, as in this case, the plaintiff relies upon a demand for an inspection of a particular book or record, the law simply prescribes that the court shall instruct you to presume the contents of the book, or record demanded, to show such facts and contents as the plaintiff sets up in the affidavit."

We have carefully considered these instructions in connection with the statute and the facts proved, and conclude that the instruction offered and refused was faulty in stating: "But you are further instructed in this connection that, should you find from the evidence that said application register and policy cards do not and cannot show the amounts of such commissions, as well as whether the plaintiff was credited therewith," etc. It would have correctly stated the law applicable had it contained in lieu of the above, the following: "While defendant cannot introduce evidence proving or tending to prove that the books do not show what is set forth in the affidavit, it has the right to prove by evidence, independent of the books, facts not in harmony with what the affidavit says the books show." Otherwise, the word "presume" would be given the force

and effect of the word " conclusive," a weight not warranted by the language used. The rule enforced in the present case is equivalent to the exclusion of all evidence on the part of defendant on a very important issue, and establishes a rule that would be preventive of justice. The danger of such an instruction is shown by the way the jury treated it. It simply took the $1,500 and the $716.70 named in the affidavit as owing to the plaintiff, added them, and computed the interest thereon, ignoring all other evidence to the contrary, which, as we view it, was forceful and much of it conclusive as against such finding.

For the foregoing reasons, the judgment of the district court is reversed and the cause remanded for further proceedings in harmony with this opinion.

REVERSED.

Note—See Contracts, 13 C. J. p 351, sec. 208; Discovery, 18 C. J. p. 1130, sec. 136 (1926 Ann.); Evidence, 22 C. J. p. 1068, sec. 1378—Pleading, 31 Cyc. p. 729—Judgments, 33 C. J. p. 1133, sec. 81; Trial, 38 Cyc. p. 1748.

FURNAS COUNTY FARM BUREAU, APPELLANT, V. L. L. BROWN ET AL., APPELLEES.

FILED OCTOBER 21, 1924. No. 24427.

1. **Agriculture: FARM BUREAU: REMONSTRANTS.** Under section 2, ch. 1, Laws 1923, remonstrators against the allowance of an appropriation by the county board for the support and continuance of a farm bureau and the payment of a county agricultural agent must be "*bona fide* residents of the county, actually and actively engaged in farming in said county."

2. ———: ———: ———. Wives and daughters of qualified remonstrators, who merely perform such duties and services as are ordinarily performed by wives and daughters residing on farms, not on their own behalf but in aid of the husbands and fathers, none of them having charge of the land used in farming, or owning, managing, controlling or disposing of the crops, are not "actually and actively engaged in farming," and are not qualified to sign a remonstrance against such appropriation.

3. Appeal: MOTION FOR NEW TRIAL. A motion for a new trial is unnecessary where all the facts are stipulated in the record before the district court, and the same is brought here by a case stated under rule 14 of this court (94 Neb. XIII), and the question presented is matter of law arising upon the face of the record.

4. ———: CASE STATED. Under rule 14 of this court, a case stated constitutes the bill of exceptions when allowed and certified by the trial judge, and no other bill of exceptions is necessary.

APPEAL from the district court for Furnas county: CHARLES E. ELDRED, JUDGE. *Reversed.*

Edward J. Lambe, for appellant.

Wade Stevens, contra.

Heard before MORRISSEY, C. J., LETTON, DEAN, GOOD and THOMPSON, JJ.

LETTON, J.

A petition was filed with the board of county commissioners of Furnas county praying that an appropriation be made, under the farm bureau act, chapter 1, Laws, 1923, for the purpose of promoting improvement in agricultural methods and continuing the maintenance of a county agricultural agent in said county. After a petition, signed by 861 qualified signers, had been filed with the county board, a remonstrance was filed. The county board held that the persons whose names appeared on the remonstrance were qualified remonstrators, and proceeded to order an election on the question of the continuance of the farm bureau. Proceedings were had in the district court, which affirmed the ruling of the county board. From that judgment this appeal is taken.

In order to expedite a decision, a case stated was settled and allowed in the district court under the rules of this court which was properly certified by the trial judge. The real question presented is whether the remonstrance was signed by a sufficient number of qualified remonstrators.

Section 2 of the act provides:

"If there is filed with the county clerk, within twenty days after such petition is filed, a remonstrance against the allowance of the budget, as aforesaid, the county board shall submit the question to a vote of the people of the county at the election held therein in the year 1924. * * * Provided also that said remonstrators shall be *bona fide* residents of the county, actually and actively engaged in farming in said county and shall be one-eighth more in number than there are signers on the petition so filed. Neither farm hands, day laborers, nor minors shall be eligible to sign either a petition or a remonstrance."

The statute requires that the remonstrators must be "actually and actively engaged in farming in said county." It is conceded and agreed:

"Four hundred ninety-two of the names appearing as remonstrators are the names of the wives and daughters of the qualified remonstrators, who merely perform such duties and services ordinarily performed by wives and daughters residing on farms, to wit, doing housework, raising chickens, milking cows, and making butter, working in the garden, etc., not on their own behalf, but in aid of the husbands and fathers; that the services performed by said women remonstrators contributed to the support and maintenance of the families and the accumulation of the profits derived from said agricultural pursuits; that said women remonstrators and none of them owned or paid taxes on the farming equipment and machinery and did not through title control or have charge of the land used in farming or the farming business, and did not own or manage, control or dispose of the crops produced, and that each of said women remonstrators resided on farms in Furnas county, Nebraska, at the time of signing such remonstrance." And it is stipulated that, if said 492 women signers to said remonstrance are qualified remonstrators, then the order of the county board is valid; otherwise, no election on the question shall be submitted.

It is a patent and well-known fact that in many cities and

towns within this state wives and daughters are engaged in "raising chickens, milking cows, making butter, and working in the garden," and this contributes to the support and maintenance of families, and yet the persons who carry on such an avocation cannot reasonably be said to be " actually and actively engaged in farming." Moreover, unless there is an actual business partnership between a husband and wife living upon a farm, the wife can in no sense be said to be "actually and actively engaged " in farming merely by reason of her performing the usual and ordinary work incidental to a woman's life upon a farm. Where the husband is in control of the farming operations. where the business is carried on in his name, where he receives and disburses the money received from the farming operations, it is he who is " actually and actively " engaged in farming in the contemplation of law, and not his wife or daughter who merely carry on the household and minor occupations incident to their position. There is no question of sex limitations here, since a woman, married or single, who is actually and actively engaged in farming, has the same right to remonstrate as a man. *In re Matson,* 123 Fed. 743; *In re Strawbridge,* 39 Ala. 367, 383.

The appellees argue that, since the statute provides that neither farm hands, day laborers, nor minors shall be eligible to sign either a petition or a remonstrance, under the maxim *"Inclusio unius est exclusio alterius,"* it could not have been the intention of the legislature to disqualify women as signers. This argument is inconclusive, since all women are not disqualified, but only those who are not actually and actively engaged in farming.

Appellees raise certain technical objections to the consideration of the case based upon the fact that no motion for a new trial was filed, and on the assertion that, the case being brought to the supreme court without a bill of exceptions, the only question that can be considered is the sufficiency of the pleadings to sustain the judgment. As to these contentions, a motion for new trial is unnecessary where the alleged errors are questions of law appearing up-

on the face of the record; and under rule 14 of this court the "case stated" constitutes the bill of exceptions when allowed and certified by the trial judge. No other or different bill of exceptions is necessary. *Nye-Schneider Fowler Co. v. Bridges, Hoye & Co.*, 98 Neb. 27; *Bank of Benson v. Gordon*, 101 Neb. 162.

The judgment of the district court is reversed.

REVERSED AND REMANDED.

Note—See Agriculture, 2 C. J. p. 989, sec. 3; Appeal and Error, 3 C. J. p. 966, sec. 861; 4 C. J. p. 331, sec. 1958.

CHARLES HOWARD, APPELLANT, V. JOHN D. SPRAGINS, APPELLEE.

FILED NOVEMBER 20, 1924. No. 22900.

Judgment: INJUNCTION: PARTIES. In an injunction proceeding to stay the enforcement of a void judgment. it is generally necessary to join as parties all persons whose rights would or might be affected by the allowance of the relief sought, and where the bill is directed solely against the judge who entered the judgment, the relief prayed should be denied.

APPEAL from the district court for Richardson county: JOHN B. RAPER, JUDGE. *Affirmed.*

F. N. Prout, for appellant.

J. E. Leyda, contra.

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

MORRISSEY, C. J.

This action was brought in the district court for Richardson county to enjoin the collection of a judgment alleged to be void, rendered by a justice of the peace in an action wherein one Given Spragins was plaintiff and appellant herein was defendant.

Defendant in this action was the justice of the peace who

rendered the judgment. Neither the judgment creditor nor any person other than the justice of the peace is in any way made a party defendant in this proceeding. The trial court denied the relief prayed and plaintiff has appealed.

In an injunction proceeding to stay the enforcement of a void judgment, it is generally necessary to join as parties all persons whose rights would or might be affected by the allowance of the relief sought, and where the bill is directed solely against the judge who entered the judgment, the relief prayed should be denied. 2 Spelling, Injunctions and Other Extraordinary Remedies (2d. ed.) sec. 977; 1 Black, Judgments (2d. ed.) sec. 393*b*.

The trial court did not err in refusing to grant the injunction and the judgment is

AFFIRMED.

Note—See Judgments, 34 C. J. p. 485, sec. 759.

STATE, EX REL. CLARENCE A. DAVIS, ATTORNEY GENERAL, APPELLEE, V. BROWN COUNTY BANK, APPELLEE: STOCK YARDS NATIONAL BANK, APPELLANT.

FILED NOVEMBER 20, 1924. NO. 22907.

1. **Banks and Banking**: NOTICE. The employment by a bank of clerks to perform purely ministerial duties does not constitute them such agents of the bank that notice of transactions passing through the bank in the ordinary routine of the bookkeeping of the institution is notice of the transactions to the bank, in the absence of any showing that these clerks imparted the knowledge they acquired to any officer of the bank, or that it was their duty so to do.

2. ———: GUARANTY FUND. When a bank receives the proceeds of a sale of chattels on which a third party held a valid first mortgage, with knowledge that the sale was made without the consent of the mortgagee, and that the ownership of the deposit is in the mortgagee, it is liable to the mortgagee for the sum deposited, and if the bank becomes insolvent before paying the same, the mortgagee may enforce payment from the guaranty fund.

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

Morsman, Maxwell & Haggart, for appellant.

O. S. Spillman, Attorney General, Harry Silverman, W. M. Ely and *C. M. Skiles, contra.*

Heard before MORRISSEY, C. J., LETTON, DEAN, GOOD and THOMPSON, JJ.

MORRISSEY, C. J.

Appellant, the Stock Yards National Bank, of South Omaha, filed its claim with the receiver of the Brown County Bank, of Long Pine, praying payment from the guaranty fund of a certificate of deposit issued December 23, 1920, by the Brown County Bank in the sum of $7,400 payable June 1, 1921, with interest at 5 per cent. per annum, payable to E. M. Sandy and by him indorsed and delivered to appellant. There was another item presented in the claim filed, but it is not involved in this appeal and need not be further noted.

The issues were presented to the district court for Brown county. The court allowed the certificate as a general claim against the bank of issue, but denied appellant the right to recover from the guaranty fund. From the order denying recovery from the guaranty fund, claimant has appealed.

There is little dispute as to the facts. In 1919, and for a long time prior thereto, the Brown County Bank conducted a banking business at Long Pine, Nebraska, and the Stock Yards National Bank conducted a banking business at South Omaha, Nebraska, and was the correspondent bank in that city for the Brown County Bank. In June, 1919, the Brown County Bank requested the Stock Yards National Bank to discount for it a promissory note for $33,000 which had been executed by E. M. Sandy and which was payable to the president and cashier of the Brown County Bank. The officers of the Brown County Bank represented to the claimant that this note was secured by a chat-

tel mortgage on all the cattle then owned by Mr. Sandy and that the security was sufficient to cover the amount of the note. After some correspondence, the claimant discounted this note and placed the proceeds to the credit of the Brown County Bank. In the fall of 1919, without the consent or knowledge of claimant, Sandy shipped a considerable number of the cattle covered by the chattel mortgage to South Omaha where they were sold through South Omaha commission firms. These sales amounted to $7,409.86. The money thus realized from the cattle was deposited, according to a custom prevailing at South Omaha, by the commission firms in the Stock Yards National Bank, that bank being the local correspondent of the Brown County Bank. Briefly, the method followed by the commission companies of making settlements and deposits is as follows: The commission firms keep on file cards furnished by the Omaha banks showing the Omaha bank with which each country bank in the territory does business. When a commission firm has money to remit, as in the case of the shipment heretofore mentioned, it makes out slips in triplicate and takes these slips together with its own check to the proper Omaha bank; the collection clerk in the bank puts the bank stamp on each of the slips; he then gives the duplicate to the commission firm and gives the triplicate and the original to the bank bookkeeper; the bookkeeper forwards the original to the country bank and preserves the triplicate for his own bank records from which to make up his statement of the transaction with the country bank. This method was followed in handling the money realized from the sale of the Sandy cattle and the money was thus deposited in the Stock Yards National Bank. The credits went through the claimant bank in the ordinary routine of business; the original slips were sent to the Brown County Bank and that bank was advised that the credit should be made to the Sandy account, which was done, and Sandy was subsequently permitted to check out the amount. Subsequent to these transactions, the $33,000 note executed by Sandy fell due. A partial payment had been made there-

on, but the fund did not come from the sale of any of the chattel security. The managing officers of the claimant, being without knowledge of the cattle shipment made by Sandy, took a renewal note to cover the amount remaining unpaid, to wit, $29,000. This note was subsequently renewed and a new chattel mortgage executed covering all the cattle owned by Sandy and purporting to include all the cattle covered by the original mortgage, notwithstanding the fact that many of these cattle had been sold at the South Omaha stock yards in the fall of 1919. The record clearly shows that the officers of the Brown County Bank, who had indorsed the original note and negotiated it to claimant, had full knowledge of this fact when the renewal mortgage was made. And when the Brown County Bank received the advices to credit the account of Sandy with the amount realized from the sales of the cattle, its officers knew, or ought to have known, the source of the fund and they knew that claimant did not have such knowledge. Instead of advising claimant of the facts, they assisted in concealing the transactions and in inducing claimant to take renewal notes and mortgages purporting to cover cattle which had been sold and the proceeds of the sale deposited in their bank. As soon as claimant discovered the facts as to the sale of the cattle and the deposit of the fund in the Brown County Bank, it demanded payment of that bank.

The president of the Brown County Bank does not directly admit that he acknowleged the liability of his bank for the fund, but that is the purport of his testimony. The representative of claimant who made the demand testified unequivocally that the liability of the Brown County Bank was admitted by its officers, but that they stated to him that the bank did not then have cash in hand to repay the sum demanded, and that, because of this fact, an agreement was reached under which the bank issued to Sandy the certificate here in suit and Sandy indorsed the certificate to claimant, and it was accepted by claimant in settlement of the deposit of its money realized from the sale of the mortgaged cattle.

It is urged by the attorneys for the receiver that claimant had possession of the fund and sent the same to the Brown County Bank with advice to place the same to the credit of Sandy, and that the Brown County Bank simply acted in accordance with this advice, and, therefore, claimant is chargeable equally with the Brown County Bank with knowledge of the source of the fund. The argument is appealing, but transactions must be judged in the light of all the facts disclosed. The officers of the Brown County Bank had full knowledge of the source of the fund, and their connection with the transaction from the beginning of the negotiations for the discount of Mr. Sandy's original note down to and including the renewals was such that they must be conclusively held to have known that the cattle were sold without the knowledge or consent of the mortgagee; that the security was inadequate to pay the note; that Mr. Sandy's resources were then about exhausted, and that they, the indorsers of the note, as well as the Brown County Bank, were on the verge of financial failure. As experienced bankers they knew that credit slips pass through a large institution, such as claimant, as part of the routine, handled by clerks who have no part in the management of the bank, and that in the regular course of business the entries would not be noted by the officers having control and management of the institution. The entries made by the clerks of claimant, who were merely charged with the ministerial duty of making entries, did not charge the bank with knowledge of the transactions, in the absence of any showing that these clerks imparted the knowledge they acquired to any officer of the bank, or that it was their duty so to do. 2 Pomeroy, Equity Jurisprudence (4th ed.) sec. 668; *Ætna Indemnity Co. v. Schroeder*, 12 N. Dak. 110; *Anketel v. Converse*, 17 Ohio St. 11.

When the Brown County Bank received the proceeds of the sale of the mortgaged property with knowledge that it was created by an unauthorized sale of Sandy's cattle, it could not rightfully pay out the fund except on order of its true owner. *Alter v. Bank of Stockham*, 53 Neb. 223.

As said by this court in the body of the opinion in *Bank of Stockham v. Alter*, 61 Neb. 359:

"Under well-known equitable principles, the defendant bank, having received the proceeds of the sale of the mortgaged property with notice of plaintiffs mortgage lien and prior claim thereon, could be held and charged as a trustee of such funds for the use and benefit of the plaintiffs."

Under the facts disclosed, the ownership of the fund in the Stock Yards National Bank is beyond dispute. The same may be said as to its deposit in the Brown County Bank. The owner of the fund had the right to demand its payment. It did so; but, failing to receive the same in money, it accepted the certificate of deposit which is, in fact, only an acknowledgment of the deposit. The status of neither party was changed by the issuance of the certificate, and, under the repeated holdings of this court, appellant is entitled to the allowance of his claim and to have the same paid from the guaranty fund. *State v. American State Bank, ante*, p. 182; *State v. American State Bank, ante*, p. 272; *State v. Farmers State Bank, ante*, p. 380; *Vavra v. Claridge, ante*, p. 553.

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

REVERSED.

Note—See Banks and Banking, 7 C. J. secs. 15 (1926 Ann.) 134; Chattel Mortgages, 11 C. J. sec. 347.

BILTWELL TIRE & BATTERY COMPANY ET AL., APPELLEES, V. JOHANNA BOOK, APPELLANT.

FILED NOVEMBER 20, 1924. No. 22918.

1. **Husband and Wife: NOTE: WIFE AS SURETY: CONSIDERATION.** A married woman may bind her separate estate as surety for her husband, and the extension of the time of payment of her husband's past-due indebtedness is a sufficient consideration to support her contract as his surety for such debt.

2. ———: ———: **LIABILITY.** A married woman who joins with

her husband in the execution of a promissory note which contains a clause by which she expressly charges her separate estate with the payment of the note is bound by her contract to the same extent as if she were a *feme sole.*

3. **Contracts: DURESS: ADMISSIBILITY OF EVIDENCE.** "Proof of threats wrongfully made to intimate relatives of a person upon whom duress is intended to operate, if communicated to him pursuant to the design of the wrongdoer, may be admitted in evidence on the issue of duress." *Farmers State Bank v. Dowler, ante,* p. 262.

APPEAL from the district court for Pierce county: WILLIAM V. ALLEN, JUDGE. *Reversed.*

M. H. Leamy, for appellant.

C. W. Peasinger and *Spillman & Muffly, contra.*

Heard before MORRISSEY, C. J., ROSE, DEAN, GOOD and THOMPSON, JJ.

MORRISSEY, C. J.

Plaintiff sued defendants, Andy Book, and his wife, Johanna Book, upon a promissory note in the sum of $2,401.59, executed by defendants and payable to plaintiff, which, in addition to the usual terms of a promissory note, contained the following clause: "Each of us personally hereby charges our own separate estate with the payment of this note." Defendants filed separate answers. The court directed a verdict against both defendants for the amount due on the note. Andy Book has not appealed and the nature of his answer is not material. Defendant Johanna Book by her answer pleaded that she was a married woman at the time of the signing of the note, and that it was not given with reference to her separate estate or business, and that she did not intend to bind her separate estate or property when she signed the note; that she signed as a mere surety for her husband; and that she was induced and persuaded to sign the note by reason of threats made by the manager of plaintiff company to the effect that, if she did not sign the note, her husband would be prosecuted

and committed to the penitentiary for having given a no fund check to plaintiff as a partial payment on the indebtedness represented by the note; and that she received no consideration whatever for signing the note. The reply denied generally the allegations of Johanna Book's answer.

After plaintiff had made its case and rested, appellant, as a witness in her own behalf, offered testimony in support of the allegations of her answer. The court sustained objections to the offered testimony. The proper record was made on behalf of appellant and the correctness of the court's ruling is presented here for review. Perhaps the issue, so far as it relates to the defense of coverture, cannot be better stated than in the language of the distinguished jurist who presided at the trial. He said: "I think it is due to counsel and to the defendants for me to state briefly and concisely the view I entertain of the issue in this case on the question of coverture. I hold that a married woman who deliberately makes a joint note with her husband, in which she agrees to bind her separate estate, is bound by that contract in the absence of fraud, accident, or mistake, or some circumstance that would relieve a person from such contract; that she thereby estops herself and is as much bound as the husband." The well-known rule is:

"Evidence is admissible which does not tend to vary or contradict the terms of a written obligation but merely shows the nature or extent of the liability of the obligors. Thus parol evidence may be admitted to show the relation *inter se* of the parties to commercial paper or other obligations for the payment of money, as who is principal and who surety in a note or bond; that as between themselves the relation of successive indorsers is that of cosureties or that successive accommodation indorsers had agreed to be jointly bound. It is also competent to show that a person signing a note, apparently as maker, signed only as a witness. But this rule does not extend so far as to authorize the admission of evidence which is inconsistent with, or contradictory of, the instrument itself, and accordingly parol evidence is not admissible to show that an indorse-

ment of a note was intended to be without recourse. It has also been considered that one who apparently signed a promissory note as maker cannot show by parol that he was indorser only." 22 C. J. 1228, sec. 1641.

Appellant cites a number of cases which it is claimed hold to the contrary of the ruling made by the trial court. None of these authorities, however, appears to have dealt with a note that contained a recital by which the wife expressly stipulated, as is done in the note in suit, that her separate estate should be charged.

A case closely in point is *Briggs v. First Nat. Bank*, 41 Neb. 17. In that case the note in suit contained a clause whereby the wife, who had joined her husband in the execution of a promissory note, pledged her separate estate. In defense of the suit brought upon the note, she averred that she had signed it only as a surety for her husband who had received the entire consideration paid, and she denied that the note was given with reference to her separate estate, etc. The court held the wife liable. In the instant case the proof shows that the note in suit was given in payment for goods theretofore sold and delivered to Andy Book, the husband of appellant, and the execution and delivery of the note procured for him an extension of the time of payment. This is a sufficient consideration to support her contract as surety for his debt. *Smith v. Spaulding*, 40 Neb. 339. We are unable to distinguish, in principle, the case of *Briggs v. First Nat. Bank, supra*, from the instant case, and we hold that the ruling of the trial court in so far as it dealt with the defense of coverture was proper.

A second assignment relates to the ruling of the trial court with reference to the defense of fraud, or duress. The evidence offered on this phase of the case was calculated to show that appellant's husband was engaged in the retail tire and automobile accessory business; that plaintiff was a jobber or wholesaler of these commodities; that as a partial payment on an account due from defendant Andy Book to plaintiff, Book issued a check payable to plaintiff

for the sum of $500; that Book did not have sufficient funds in the bank on which the check was drawn to meet the check, and payment of the check was refused by the bank for that reason; that, following the refusal of payment of the check by the bank, the representative of plaintiff called upon Book, demanded payment of the account, and made the threats alleged in the answer of appellant; that Book communicated these threats to appellant, and because of these threats she executed the note, as alleged in her answer. The court held that the evidence offered was incompetent. This ruling was improper under the holding of this court in *Farmers State Bank v. Dowler*, *ante*, p. 262, where the authorities are reviewed and the rule announced that—"Proof of threats wrongfully made to intimate relatives of a person upon whom duress is intended to operate, if communicated to him pursuant to the design of the wrongdoer, may be admitted in evidence on the issue of duress."

Because of the last mentioned ruling of the court, the judgment is reversed and the cause is remanded.

REVERSED.

Note—See Contracts, 13 C. J. sec. 964 (1926 Ann.); Husband and Wife, 30 C. J. secs 580, 585, 588.

FRANK L. CARMONY, APPELLANT, V. MARTHA A. CARMONY, APPELLEE.

FILED NOVEMBER 20, 1924. No. 24024.

1. Divorce: DECREE: VACATION. The district court has the same power to set aside a decree in a divorce suit within six months of the date of the decree as it has in ordinary actions during the term at which a judgment or decree is rendered.
2. ———: ———: ———. After a decree of divorce has been set aside, the cause stands for further proceedings or trial in the same manner as other actions.
3. ———: ———: VACATION AFTER TERM. After the term at which an order setting aside a divorce decree has been made,

such order can only be set aside or modified in the same manner and upon the same notice as in other cases where it is sought to set aside a judgment or order after the term at which it was rendered.

4. ———: ———: ———. An order setting aside an order made at a previous term and reinstating a decree formerly set aside, if made without notice to, or appearance by, the adverse party, is void for want of jurisdiction.

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

A. L. Sutton, Max Fromkin, and *Albert S. Ritchie,* for appellant.

A. H. Murdock and *Joseph Rapp, Jr., contra.*

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

LETTON, J.

This action was begun by the filing of a petition for divorce by the plaintiff, Frank L. Carmony. His wife, Martha A. Carmony, denied the allegations of the petition and filed a cross-petition praying for divorce on the ground of extreme cruelty. On October 24, 1922, a decree was rendered finding against the plaintiff and granting a divorce to the defendant. On March 14, 1923, at the next term of court, the attorney for the wife produced to the court a certificate of marriage reciting that Frank L. Carmony had intermarried with another woman in Council Bluffs, Iowa, on March 3, 1923. The statutory six months period not having elapsed since the rendition of the decree, the court vacated and set aside the decree entered October 24, 1922. At another and later term of court, an application was filed by Frank L. Carmony asking to set aside the order of March 14, 1923, and to reinstate the decree of divorce as of that date. The application recites that before March 14, 1923, the plaintiff remarried, believing that he had lawfully entered into a marriage contract; that he continued to live with his second wife under such marriage

relation, and that shortly afterwards she became pregnant, and is now in that condition; that he married without any intent to violate the laws of Nebraska and was under the impression that the statutory six months period had elapsed; that his present wife is an innocent party to this transaction, and unless the court reinstates the former decree the unborn child of plaintiff and his wife will be born out of wedlock. No notice was given of this application and no appearance was made by Mrs. Carmony. On October 27, 1923, the application was granted and an order made setting aside the order of March 14, 1923, and reinstating the decree of divorce as of that date.

On December 7, 1923, a special appearance was made by the defendant, Martha A. Carmony, "appearing specially," alleging that the court was without jurisdiction to make the latter order for the reason that the term at which the order was made adjourned *sine die* on May 5, 1923, and that no notice was given defendant of the application, and that the final order of March 14, 1923, is in full force and effect. After a hearing the court found that it was without jurisdiction to enter the order of October 27, 1923, and set aside the order made on that date reinstating the decree of divorce. Plaintiff appeals.

Within six months after the rendition of the decree, upon its being called to the attention of the court that the party against whom the divorce had been granted had remarried, the court set aside the decree of divorce. This it had full authority to do, without notice, at the same term of court at which the decree was rendered. *Douglas County v. Broadwell,* 96 Neb. 682; *Bradley v. Slater,* 58 Neb. 554. Under the divorce statute (Rev. St. 1913, sec. 1606) providing that a decree of divorce shall not become final or operative until six months, except for the purpose of review, and that the " district court may, at any time within said six months, vacate or modify its decree," the court had the same power, after the term and before the six months had expired, to set aside the decree as it formerly had during the term before the enactment of this statute.

Everson v. Everson, 101 Neb. 705. When the order setting aside the decree of divorce was made the cause was left pending and the case stood upon the docket for trial. No further action could be taken in the matter except in the usual and customary method. While matters were in this condition, the application to set aside the order of March 14 and to reinstate the decree of divorce was filed. This application or motion, being made after the term at which the order complained of was entered, required notice to be given. The only method by which the order could be disturbed was that which the statute prescribes. Comp. St. 1922, secs. 8668, 8670, 9160. *Goldenstein v. Goldenstein*, 110 Neb. 788. The order being made without notice and after the term was therefore made without jurisdiction. The divorce case is still pending, and the parties may proceed to trial upon proper notice. While the hasty action of the original plaintiff and his ignorance or defiance of the statute have apparently worked a needless hardship and a wrong upon an innocent individual, this fact cannot confer jurisdiction upon a court to do that which the statute does not authorize. Perhaps the result of a new trial may aid him to legitimatize any offspring of the unauthorized union and thus partly atone.

The judgment of the district court is right, and is

AFFIRMED.

GOOD, ROSE and DEAN, JJ., dissent.

ELMER C. BAKER V. STATE OF NEBRASKA.

FILED NOVEMBER 20, 1924. No. 24051.

1. **Criminal Law**: WITNESSES: CREDIBILITY. It is elementary that where, in a criminal prosecution, the evidence conflicts in respect of material facts, the credibility of the respective witnesses is for the jury.

2. **Embezzlement**: DE FACTO OFFICERS. Where a person is employed in the office of a county treasurer and as such employee

performs the duties which regularly devolve upon a deputy county treasurer, and, by his conduct, holds himself out to the public as such official, but has not given the required statutory bond nor taken the required statutory oath, such person thereby becomes, and is, a deputy county treasurer *de facto* and is a county officer, and as such is liable to prosecution, in a proper case, for embezzlement of public money belonging to the county, under section 9634, Comp. St. 1922.

3. **Officers De Facto.** "Where an office exists under the law, it matters not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is enough that he is clothed with the insignia of the office, and exercises its powers and functions." *Norton v. Shelby County*, 118 U. S. 425.

4. **Criminal Law:** CHANGE OF VENUE: AFFIDAVITS: REVERIFICATION. Where a defendant moves for a change of venue in a prosecution for a felony, and it apears that the counter affidavits in resistance of defendant's motion have been verified by a notary public who is an attorney of record for the state, it is not reversible error for the court to permit such affidavits to be withdrawn from the files for reverification before a competent authority and be thereafter refiled.

5. ———: ———. An application for a change of venue is addressed to the sound judicial discretion of the court. Even where the existence of prejudice is shown to have once existed, it is not error to refuse a change of venue where it appears that the prejudice has subsided and a fair and impartial jury can be obtained.

6. ———: ASSISTANT COUNSEL. Where a county attorney requests, and the court appoints counsel to assist in the prosecution of a felony case, a verdict will not be vacated for that reason in the absence of a showing which discloses that the defendant has been thereby prejudiced in his substantial rights.

ERROR to the district court for Lincoln county: J. LEONARD TEWELL, JUDGE. *Affirmed.*

Beeler, Crosby & Baskins, for plaintiff in error.

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

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

DEAN, J.

An indictment was returned in Lincoln county wherein Elmer C. Baker, defendant, was charged with embezzling, and converting to his own use, $9,853.80, the property of Lincoln county, while he was the duly appointed, qualified and acting deputy county treasurer. The jury returned a verdict of guilty and fixed the amount of the embezzlement at $4,000. Thereupon defendant was sentenced to serve a term in the penitentiary of not less than three nor more than ten years and in addition thereto a fine was assessed against him in the sum of $8,000 under a statute which requires that, where a jury finds a defendant guilty of embezzling public money, in addition to the sentence, he shall be fined by the court in double the sum of the embezzlement as found by the jury. Comp. St. 1922, sec. 9634. Defendant, alleging error, has brought the record here to have it reviewed.

H. E. Crandall is a county treasurer examiner. Sometime in April, 1923, he went to North Platte to check the county treasurer's office. From his evidence it appears that Mr. Souder, the county treasurer, was not in the office when he first called, and that the defendant, "Mr. Baker, was then in charge," and that he immediately began his examination, but did not see Mr. Souder until "just before closing time that day." He found three certificates of deposit issued by the "Bank of Lincoln County at Hershey," in the sum of $5,000 each, which "ran to S. M. Souder, treasurer," and he "accepted them as part of the cash." It was subsequently disclosed, however, that the county treasurer had no authority to negotiate for the certificates of deposit in question.

Mr. Larsen is an accountant. With his assistants he made an investigation of the condition of the county treasurer's office. He arrived at North Platte to begin work sometime in the last week of April and began his investigation the first week in May, 1923. On the evening of his arrival, or in the nighttime, a fire was discovered in the courthouse by which it was so greatly damaged that it could no longer

be used by the county. The search for such records as would assist in the investigation of the county treasurer's office was begun the third day after the fire. Some of the records of this office were found in piles on the floor of the district courtroom, " pretty closely together " and not " over three or four feet apart," in that part of the courtroom which some witnesses designated as " the oil spot," a place where some sort of oil had apparently been applied to the documents which were discovered on the floor. The charred fragments of the three $5,000 certificates of deposit, referred to by witness Crandall, were identified and are in the record. It may be noted that the county treasurer's office was located on the first floor of the courthouse, but the district courtroom, where the data of the county treasurer's office were found, was located on the second floor.

All of the data above referred to, which included more than 30 of defendant's salary checks, in sums ranging from $83 to $150 each, with his signature indorsed thereon, and which were cashed by him, and over 400 exhibits, called " I O U " slips, and marked " I O U Receipts of E. C. Baker," with his signature thereon, and also certain verifying slips of adding machine tape, are in evidence. The "I O U" receipts designated sums of money, varying from $3 to $100 each, and this money the state contends was taken, from time to time, from the money drawer by defendant. Some of the checks and " I O U " receipt exhibits, in evidence, were blackened and charred to some extent by the fire and some were apparently so thoroughly soaked with oil that it became necessary to run them through a wringer to extract the oil. These checks and " I O U " exhibits for the most part were found in the so-called " oil spot " upstairs in the district courtroom. A few exhibits more damaged than the rest, it was found necessary, for the purpose of the trial, to preserve in envelopes which are attached to the record. But, for the most part, the exhibits are plainly decipherable. Defendant's salary checks bore the name of S. M. Souder over the printed designation " County Treas-

urer," and below that designation, with one exception, appeared the letter "B" just in front and to the left of the printed designation "Deputy." It appears that on these exhibits the name of "S. M. Souder" was written by defendant, and the letter "B" to designate himself, with the one exception noted above, was written in by defendant below the treasurer's name and opposite the printed designation "Deputy" which appeared in the check. Defendant testified that these salary checks were written by authority of the county treasurer.

In his own behalf defendant testified that his employment in the county treasurer's office began in the early part of 1919 and continued while Mr. Souder was county treasurer; that at first his salary was $1,000 a year and later was raised to $105 a month, and subsequently, and for a greater part of the time, it was $150 a month; that for about three years of his employment he knew the combination of the safe in the treasurer's office; that it was with Mr. Souder's consent that he secured advancements on his salary by taking cash from the money drawer and placing an "I O U" slip therein showing the amount so taken; that such "I O U" slips were carried in the drawer as cash until the end of the month, when the remainder of his salary was taken from the drawer, in cash, and the "I O U" slips were thrown into the back part of the drawer in a separate compartment, and that, as at times happened, "when he made money outside, he would sometimes put the cash in the drawer and take up the slips and throw the slips in the back part of the drawer." Mr. Baker denied that he ever at any time removed any of the "I O U" slips which represented the advancements taken from the cash drawer without replacing the cash item and that he did not know "what finally became of those accumulating receipts and slips and matters of that kind."

The contention of the state is that, after deducting defendant's salary for the period of his employment from the amount of money that came into his possession during the same period, the remaining amount, as shown by the state's

evidence and the exhibits, was over $4,000, that being the amount embezzled as found by the jury. But defendant in his brief says: "It is impossible in any way to handle the evidence in this case to make up the sum of $4,000." True, the indictment charged defendant with the embezzlement of $9,853.80, and it is also true that the record does not show why the jury brought in a verdict against defendant in the sum of $4,000 when the evidence would have supported a verdict for a larger sum. Nor is there now, in the present state of the record, any way by which this inscrutable fact may be found out from the record before us. But it is sufficient if the evidence supports the verdict. And while the discrepancy is trifling in amount, nevertheless it is favorable to defendant. To be sure, in the absence of confession, it is to be expected that the evidence will conflict. However, the issues involved questions of fact and, notwithstanding an able defense, it appears that the jury rejected the evidence of defendant and, except as to a trifling sum, they accepted as true the evidence of the state, and on this point it supports the verdict.

Counsel contend that the conviction of defendant cannot stand in any event because, as argued, he was not a deputy county treasurer *de jure*, or *de facto*, until January 3, 1923, when he filed a bond and took an oath, and that not until then did he become a deputy county treasurer. Counsel also contend that, even if defendant was a regularly appointed and qualified deputy county treasurer, during all of the period involved in this action, or if he was a *de jure* or *de facto* deputy county treasurer during this period, he did not come within the language or the meaning of section 9634, Comp. St. 1922, under which the indictment was drawn, in that he was not, as argued in the brief, " a public officer or other person charged by law with the collection, receipt, safe keeping, transfer or disbursement of public moneys." Section 9634, so far as applicable here, reads:

" If any officer or other person charged with the collection, receipt, safe-keeping, transfer or disbursement of the public money or any part thereof, belonging to the state or

to any county or precinct, organized city or village or school district in this state, shall convert to his own use * * * any portion of the public money * * * received, controlled or held by him for safe-keeping, transfer or disbursement, * * * every such act shall be deemed and held in law to be an embezzlement of so much of the said moneys or other property as aforesaid, as shall be thus converted, * * * which is hereby declared to be a high crime, and such officer or person or persons shall be imprisoned in the penitentiary not less than one year nor more than twenty-one years, according to the magnitude of the embezzlement, and also pay a fine equal to double the amount of money or other property so embezzled as aforesaid."

In the use of the word deputy it will be presumed that the legislature used it in its ordinary and legal sense. 1 Bouvier's Dictionary; Webster's New International Dictionary.

Sections 5064, 5065, and 5070, are a part of article XVIII, ch. 53, Comp. St. 1922. This chapter refers generally to both state and county officers. Section 5064 provides, among other things, that each county treasurer may appoint a deputy, for whose acts he shall be responsible, and from whom he shall require a bond. Section 5065 provides that, " in the absence or disability of the principal, the deputy shall perform the duties of his principal pertaining to his own office." Section 5070 provides that "each deputy shall take the same oath as his principal." This section makes no distinction as between state and county officers. Section 5039, Comp. St. 1922, among other provisions, contains this: " All official bonds of county * * * officers must be * * * made payable to the county."

It is clear that defendant, at all times material to this action, held himself out to the public as deputy county treasurer and performed the duties of the office in the absence of his principal. From his brief it appears that he was the only employee in the office who had " the combination of the money safe " and that he was the " only one who could write checks." Defendant admitted the official

capacity in which he served the county. Mr. L. J. Butcher, deputy state fire marshal, went to North Platte immediately after the fire to make an investigation. This officer testified that defendant told him that he had been the deputy county treasurer for more than four years last past. And the record verifies Mr. Butcher's statement. Beginning with December, 1919, there are many delinquent tax notification cards in evidence which bear this printed inscription: "Office of the County Treasurer of Lincoln county, Nebraska. S. M. Souder, Treas. E. C. Baker, Deputy." And on redemption notices and letter-heads and personal tax notices appear the printed names of Souder and Baker as treasurer and deputy, respectively. We do not think defendant's contention can be upheld, in view of the law and of his admissions and of the facts.

To support his argument in respect of nonliability, defendant cites *Moore v. State*, 53 Neb. 831. This case is not in point. It appears that Moore was the auditor of public accounts and, as such state officer, he was charged with the embezzlement of certain public moneys which, by some means, came into his hands. In an exhaustive opinion by Judge Irvine, in which a judgment of conviction was reversed, the writer at page 848 concludes with this observation: "To hold that the auditor is a person charged with the collection, receipt, safe-keeping, transfer, or disbursement of the public money, when the law expressly forbids him to receive it or handle it, would certainly go beyond the plain import of the words of the statute, and create a crime by construction in the plainest violation of the law." It is obvious that the *Moore* case does not support defendant's argument.

Defendant also cites *State v. Meyers*, 56 Ohio St. 340. In this case Meyers, a deputy county treasurer, was charged with embezzling $100 of public money belonging to the city of Canton which came into his possession, as alleged, by virtue of his office and in the discharge of his duties. In respect of the statute under which the prosecution was

brought the court held Meyers immune from prosecution thereunder and said:

"The law goes no further than to authorize the county treasurer, at his pleasure, to appoint one or more deputies, who hold their appointment only during the pleasure of the principal, who is answerable for the proceedings and misconduct of the deputy, and may, for his own protection, take a bond with sureties for the faithful performance of the services required of the deputy; but the latter takes no oath of office, nor gives bond to any public authority, and is in no sense a public officer, but a mere agent of the treasurer."

In view of the wording of the Ohio statute, and of the meaning placed thereon by the supreme court of that state, it clearly appears that the *Meyers* case is not in point.

In Iowa the statute which provides for the punishment of public officers for the embezzlement of public money is substantially the same as the Nebraska statute. There is, however, a distinction between the Iowa statute and our statute in that the former contains a provision under which a public officer may be prosecuted, as for embezzlement, for such public money as may come into his hands and is, by such officer, "unaccounted for." *State v. Brandt*, 41 Ia. 593. In this case Brandt, a deputy state treasurer who was prosecuted for embezzlement, contended that he was not a state officer within the meaning of the act as it then existed, and was therefore not indictable thereunder. But the court expressly held that a deputy state treasurer was a state officer and that the law embraces an officer *de facto* as well as one *de jure*. Brandt's conviction however, was reversed, but on another ground, namely, that the indictment against him did not charge that the public money that came into his hands was "unaccounted for," and that this averment in the indictment, under the facts, was required under section 4243 of the Revision under which the indictment was drawn.

An accepted authority says this in respect of the status of deputies generally:

" Whether deputies appointed by public officers are to be regarded as public officers themselves depends upon the circumstances and method of their appointment. Where such appointment is provided for by law, and *a fortiori* where it is required by law, which fixed the powers and duties of such deputies, and where such deputies are required to take the oath of office and to give bonds for the performance of their duties, the deputies are usually regarded as public officers. * * * But where the deputy is appointed merely at the will and pleasure of his principal to serve some purpose of the latter, he is not a public officer but a mere servant or agent. So a special deputy employed only in a particular case is not a public officer." Mechem, Public Officers, sec. 38. *McMillin v. Emery,* 59 Utah, 553.

In *Norton v. Shelby County,* 118 U. S. 425, this was said by Mr. Justice Field:

" Where an office exists under the law, it matters not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is enough that he is clothed with the insignia of the office, and exercises its powers and functions."

" The doctrine which gives validity to acts of officers *de facto,* whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices and in apparent possession of their powers and functions."

In view of the statutes and of the authorities, and for the reasons appearing herein, we conclude that defendant, prior to the time when he admits that he took the oath of office and filed the statutory bond, was the *de facto* deputy county treasurer of Lincoln county, and as such was a county officer, and was therefore subject to prosecution under section 9634, the same as one taking the oath and giving a bond.

Defendant moved for a change of venue from Lincoln county on the alleged ground that public sentiment was so adverse to him that a fair and impartial jury could not be obtained therein. The court overruled his motion and he contends that in this the court erred.

True, the burning of the courthouse, which was charged in the newspaper exhibits to have been of incendiary origin, naturally created a great deal of discussion in the county. An organization, composed of persons from all parts of the county, was formed to inquire into the facts pertaining to the alleged incendiarism and also to investigate the alleged unlawful expenditure of a large sum of public money in connection with the erection of a new courthouse, then in the course of construction, and also to investigate the facts in respect of the public business of the county generally, and in respect of alleged embezzlement of public money.

In this connection it may be noted that much evidence, mostly in the form of affidavits, in addition to that of defendant, and also many newspaper clippings, mostly from county papers, are in the record, and in support of defendant's motion, and these were introduced to show the existence of a general hostility to defendant which was alleged to exist in Lincoln county. But the state filed many counter affidavits which tended to prove the contrary. The contrary also fairly appears from the *voir dire* examination of the jurors at the trial which occurred long after the events referred to in the exhibits. The record before us, altogether aside from the transcript and the exhibits, consists of more than 2,000 pages. We cannot of course reproduce the evidence on this point in the space that should be allotted to this opinion. But from an examination of the affidavits introduced by defendant, and the counter affidavits introduced by the state, we conclude that, as hereinafter pointed out, this assignment of alleged error is not tenable. It may be observed that the state alleges, and it is not denied by defendant, that only two indictments were returned against him, while approximately 140 indictments were

returned against Mr. Souder, and, in the excerpts from the newspapers, and in the affidavits, it appears that the references to defendant are negligible as compared with the references to his principal. And, after defendant was informed against, approximately six months elapsed before his trial came on. During this interval, he was at liberty under bond. So that, it is reasonable to believe, there was time for such adverse public sentiment, as may once have existed, to subside so far as such sentiment might have prejudicially affected defendant in the selection of a jury.

Defendant also assigns as reversible error the fact that a large part of the counter affidavits which were filed by the state, in resistance of defendant's motion for a change of venue, were originally verified by the respective affiants before notaries public who were counsel for the state. When the court's attention was directed to this fact many of the affidavits, so verified, were permitted to be refiled after being reverified before a notary public against whom this statutory inhibition did not exist. Comp. St. 1922, secs. 8633, 8879, 8884; *Horkey v. Kendall*, 53 Neb 522. It will not be presumed that the court would, or that it did, consider affidavits which were verified by counsel for the state, and particularly where, as in the present case, the counter affidavits which were subsequently verified, before competent authority, were sufficient in substance to overcome those filed by defendant.

Defendant admits that on the *voir dire* examination the prospective jurors, in substance, stated that if accepted as jurors they could hear the evidence and render a verdict the same as though they had not before heard anything about the case. The argument is that, regardless of the fact, such qualification was practically extorted from the proposed jurors because of adverse public sentiment. Surely it is not to be presumed that the multitude of citizens who were brought before the court and subjected to a searching *voir dire* examination so stultified themselves! Anyhow, in view of defendant's admission, a reviewable assignment of alleged error is not presented to us on this feature of the case.

It has been often said that an application for a change of venue is addressed to the sound judicial discretion of the court. Even where the existence of prejudice is shown to have once existed, a change of venue will not be granted where it appears that the prejudice has subsided and a fair and impartial jury can be obtained. 16 C. J. 203, sec. 306, 206, sec. 308. And it has come to be elementary that a motion for a change of venue, in a criminal prosecution, is addressed to the sound judicial discretion of the court, and in the absence of an abuse of such discretion in the court's ruling, the verdict will not be disturbed. *Goldsberry v. State*, 66 Neb. 312; *Simmons v. State*, 111 Neb. 644. Prejudicial error has not been shown in this assignment of alleged error.

We have examined the instructions given by the court, to which defendant excepts, and also the instructions tendered by defendant, and refused, and upon which several rulings defendant seeks to have the verdict vacated and the judgment reversed. But we do not find that prejudicial error appears in the rulings of the court thereon. We deem it sufficient to say that the instructions, as a whole, which were given by the court of its own motion, when considered together, seem fairly to reflect the law applicable to the facts. It also appears that in the given instructions the substance of such of defendant's requested instructions, as properly state the law, are sufficiently incorporated.

Defendant contends that the court erred in appointing Mr. William E. Shuman as counsel to assist the county attorney in the prosecution, on the ground that he had taken part in developing certain facts upon which the prosecution is in part based. But we are unable to find anything in the record growing out of such appointment which seems prejudicially to affect the substantial rights of the defendant and which should cause a vacation of the judgment. This appointment was requested by the county attorney, as provided by statute, and was addressed to the sound judicial discretion of the trial court, Comp. St. 1922, sec. 4916. An

abuse of such discretion does not appear and, in view of the record before us, we find that prejudicial error cannot be based thereon. Exceptions are also taken to the overruling of defendant's plea in abatement, upon which evidence was submitted to the court, and to the overruling by the court of defendant's demurrer to the information, but reversible error does not appear in the ruling of the court in respect of these assignments.

Reversible error has not been shown. The judgment is therefore

AFFIRMED.

Note—Criminal Law, 16 C. J. secs. 306, 308, 322, 2291, 2292; District and Prosecuting Attorneys, 18 C. J. sec. 81; Embezzlement, 20 C. J. sec. 46—Officers, 29 Cyc. pp. 1392, 1393.

LUCIUS B. PHELPS, APPELLEE, V. SNOW E. WILLIAMS ET AL., APPELLANTS.

FILED NOVEMBER 20, 1924. No. 22908.

1. **Bills and Notes: INNOCENT HOLDERS.** Where the payee of a negotiable promissory note, before maturity, in the usual course of business indorses and delivers it to a third person as collateral security for an usurious loan, the mere fact that such third party contracted for usurious interest will not deprive him of the character of an innocent holder.

2. ———: ———: **QUESTION FOR JURY.** In an action on a negotiable promissory note by an indorsee, the question as to whether plaintiff is an innocent holder in due course, where the evidence is in conflict, is one of fact for the jury.

3. **Appeal: ISSUES.** Where both parties to an action have assumed that their pleadings present a certain issue, and the case is tried and judgment entered upon such assumption, neither party can, for the first time on appeal, question the fact as to whether such issue was raised by the pleadings.

4. **Harmless Error.** The giving of an erroneous instruction is not ground for reversing a judgment unless prejudicial to the rights of the complaining party.

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

George J. Marshall, for appellants.

George Losey, contra.

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

GOOD, J.

October 10, 1920, Snow E. Williams and P. A. Williams executed and delivered to Harry Newman their promissory note for $10,000, due one year after date. December 4 following, Harry Newman indorsed and pledged this promissory note to Lucius B. Phelps as collateral security for a loan of $19,250, evidenced by the note of said Newman. Phelps, indorsee, brought this action against Snow and P. A. Williams to recover upon the promissory note given by them. Plaintiff alleged that he purchased the note for value and before maturity. The defendants admitted the execution of the note, and alleged want of consideration; that the note was obtained by false and fraudulent representations of Newman, the payee; denied that plaintiff purchased the note for value; denied the indorsement by Newman; and alleged that plaintiff had notice, prior to its delivery to him, that there was no consideration given for the note, and further alleged that plaintiff had received and holds money and property from Newman, the payee and indorser, to an amount largely in excess of the amount of the note which was received by plaintiff in payment and satisfaction of Newman's indebtedness to plaintiff, and that thereby the note has been fully paid and discharged. Plaintiff had a verdict and judgment thereon, and defendants appeal.

Defendants contend that the undisputed evidence shows that there was no consideration for the note; that it was was obtained by fraud; that plaintiff is not a holder in due course; and that the court erred in not sustaining their motion for a directed verdict. As to whether plaintiff had actual notice of any defense to the note at the time he took

it as collateral security, the evidence is in conflict and presents a question of fact for the determination of the jury. The evidence does disclose that the loan by plaintiff to Newman, for which the note in suit is pledged as security, was an usurious loan, and defendants assert that this fact deprives the plaintiff of the character of an innocent holder. Several cases are cited as sustaining this view, but an examination of the authorities cited discloses that they were based upon statutes which made usurious loans absolutely void. Under such a statute, plaintiff could not collect anything from Newman upon the loan, and of course could not maintain an action upon collateral security when nothing was due upon the principal obligation. However, such is not the law in Nebraska. The effect of usury in this state is only to deprive the usurer of any interest. The evidence in the instant case shows that Newman received $17,500 in money, so that plaintiff, in a suit against Newman, would have been entitled to recover that amount. Furthermore, in this state, usury as a defense " is personal to the borrower and his sureties and privies." *Cheney v. Dunlap*, 27 Neb. 401. While the defendants are not pleading usury as a defense, they are seeking to take advantage of the fact that there was usury in the contract between plaintiff and Newman.

This court has held in *Palmer v. Carpenter*, 53 Neb. 394:

" Where one executes his negotiable note payable to the order of a debtor and delivers it to him as an accommodation, and the debtor indorses and delivers the note to his creditor in payment of a usurious note due the creditor from the debtor, such accommodation note is not a renewal of the usurious note, and, in a suit on the accommodation note against the maker, he cannot interpose, as a defense thereto, the usurious contract existing between the creditor and debtor."

That the transaction between plaintiff and Newman was usurious does not, as a matter of law, establish the want of collateral security. Whether plaintiff was a holder for good faith in plaintiff in taking the note in controversy as

value in due course, without notice of infirmities, was submitted to the jury and their finding upon that point is conclusive.

Defendants urge that plaintiff did not plead that he was an innocent holder for value, but the record discloses that evidence of both parties was received upon that question, and the case was tried as though it were an issue. Where both parties to an action have assumed that their pleadings present a certain issue, and the case is tried and judgment entered upon such assumption, neither party can, for the first time on appeal, question the fact whether such issue was raised by the pleadings. *Auld v. Walker*, 107 Neb. 676.

Defendants urge that the evidence shows that Newman's note to plaintiff had been paid by the transfer to him by Newman of money and property to an amount greater than that due upon Newman's obligation. The evidence shows that Newman, after giving his note, transferred to a brother of plaintiff, as further security for his note, certain real estate and assigned a lease, but this was transferred as collateral security to the loan, and not in payment of it. The amount collected on the lease and as income from the real estate did not equal the expense incident to the care of the real estate. The transfer, under such circumstances, of course did not operate to extinguish the debt from Newman to plaintiff, nor operate to discharge the defendants' note held as collateral.

Complaint is made of the giving and refusal of certain instructions. We have carefully examined the instructions complained of and find that they were far more favorable to defendants than they were entitled to, and, while they may have been erroneous in some respects, the error was favorable to the defendants, rather than to plaintiff. That an instruction is erroneous is no ground for reversal unless prejudicial to the rights of the complaining party. The instructions requested by defendants and refused would have practically taken the case from the jury and were properly refused.

We find no error in the record prejudicial to the defendants. The judgment of the district court is

AFFIRMED.

Note—See Bills and Notes, 8 C. J. secs. 701 (1926 Ann.), 1376; Appeal and Error, 3 C. J. sec. 623; 4 C. J. sec. 3013.

The following opinion on motion for rehearing was filed February 17, 1925. *Former judgment of affirmance vacated, and judgment of district court reversed.*

Bills and Notes: INNOCENT PURCHASER. Where, in an action on a promissory note, the law imposes on the plaintiff the burden of proving that he acquired title to the note without notice of defense, and the transaction by which he acquired title was conducted by his agent, it is necessary to prove that such agent was, at the time, without notice of defense.

Heard before MORRISSEY, C. J., DEAN, DAY, GOOD, THOMPSON, and EVANS, JJ.

GOOD, J.

An opinion was heretofore adopted in this case, *ante*, p. 667, where a general statement of facts may be found. On motion for rehearing the case has been reargued and resubmitted. We are satisfied with the holding in our former opinion, save in the respects hereinafter pointed out.

The action is one on a promissory note brought by the indorsee against the makers. Plaintiff took the note in question from the payee as collateral security for an usurious loan to him. There is evidence tending to show that the note was procured from the makers by the payee without consideration and through fraud. Therefore, in order to recover, it is incumbent upon plaintiff to prove that he became the holder of the note in due course, for value, and without notice of infirmity. In our former opinion we held, in effect, that the evidence upon this point was in conflict, and that the matter was properly submitted to

the jury and its verdict was conclusive. One phase of the case was overlooked.

The evidence as to whether plaintiff personally had any knowledge of the defense to the note was in conflict, but the evidence discloses that in the negotiations for the loan from plaintiff to the payee, Newman, for which the note in question was taken as collateral, C. J. Phelps, a brother of plaintiff, and acting as his agent and attorney, conducted the entire transaction. It is evident that if the agent who conducted the transaction resulting in acquiring title to the note had knowledge of the defense, such knowledge would be attributable to his principal. Under the circumstances, it was not only incumbent on plaintiff to prove that he had no personal knowledge of the defense to the note, but it was likewise incumbent upon him to prove that his brother who acted as his agent in acquiring title to the note was also without notice of any defense to the note. On this question the record is practically silent.

It follows that plaintiff has not carried the burden that the law imposes upon him, and for this reason the judgment of the district court must be reversed.

Our former opinion, in so far as it affirms the judgment of the district court, is vacated, and the judgment reversed and cause remanded for further proceedings.

REVERSED.

D. S. ROGERS, APPELLANT, V. FRED E. BODIE, APPELLEE.

FILED NOVEMBER 20, 1924. No. 22916.

Courts: ERROR TO COUNTY COURT. Where a judgment of a county court is reversed by a district court in a proceeding in error, on other than jurisdictional grounds, the district court should retain such cause for trial on the merits.

APPEAL from the district court for Johnson county: JOHN B. RAPER, JUDGE. *Affirmed.*

F. C. Radke and *L. C. Chapman*, for appellant.

Jay C. Moore, contra.

Heard before MORRISSEY, C. J., ROSE, DEAN, GOOD and THOMPSON, JJ.

GOOD, J.

This is an action in replevin originally begun in the county court, where judgment was rendered for plaintiff. Defendant prosecuted error to the district court, in which court he appears as plaintiff in error, while plaintiff appears as defendant in error. For convenience, plaintiff in error will be referred to as defendant, and defendant in error as plaintiff. In the district court the petition in error was sustained, and the case set down for trial on its merits.

The district court granted leave to plaintiff to file a new affidavit and petition. Defendant objected to the district court setting the case down for trial on its merits and to the filing of a new petition and affidavit for replevin, and refused to further plead. Thereupon, a trial was had without the intervention of a jury, which resulted in a judgment for the plaintiff. Defendant appeals.

Defendant insists that in his petition in error from the county court the only grounds of error alleged went to the jurisdiction of the court over the subject-matter and the person of the defendant, and that when the district court sustained the petition in error it was without jurisdiction to retain the case for trial on its merits. This is the only question presented.

An examination of the petition in error filed in the district court shows that other errors were alleged than those going to the jurisdiction of the court. That the verdict of the jury was contrary to law and that the judgment of the court was contrary to law were among the assignments. An examination of the transcript discloses that the verdict and judgment in the county court were not in the form required by the statute and were clearly erroneous. The record further discloses that a petition and affidavit for replevin were filed in the county court and a replevin summons issued

and personally served on the defendant. While the petition and affidavit for replevin are far from being models of excellence, they were sufficient to give the court jurisdiction of the subject-matter, and the service of the summons upon the defendant gave the court jurisdiction over his person. The journal entry of the district court sustaining the petition in error does not show the grounds on which the order was based. Since there was manifest error in the record other than the jurisdictional ones alleged, and the record did not disclose that there was a want of jurisdiction in the court either over the person of the defendant or of the subject-matter, it will be presumed that the district court sustained the petition in error upon the ground of the errors that were apparent upon the record. We further think that it is manifest that the trial court must have sustained the petition in error on grounds other than jurisdictional ones, else it would not have retained the case for trial on the merits.

Section 9136, Comp. St. 1922, provides in part: "When the proceedings of a justice of the peace are taken on error, to the district court, * * * and the judgment of such justice shall be reversed or set aside, the court shall render judgment of reversal, and for the costs that have accrued up to that time, in favor of the plaintiff in error, and award execution therefor; and the cause shall be retained by the court for trial and final judgment, as in cases of appeal."

This court in *Maryott & McHurron v. Gardner*, 50 Neb. 320, 322, said: "The statute does not expressly provide that in case an error proceeding is prosecuted to a district court from a county court and the judgment of the latter court reversed, the district court may retain the case for trial; nor is there any provision of the statute requiring such case to be remanded; but section 26, chapter 20, Compiled Statutes, provides: 'In civil actions brought under the provisions of this chapter (probate courts) either party may appeal from the judgment of the probate court or prosecute a petition in error, in the same manner as provided by law in cases tried and determined by justices of the peace.'

Construing these two statutes together, we think that where a judgment of a county court is reversed by a district court in a proceeding in error the district court may retain such case for trial."

Under this authority, it was proper for the district court to set the case down for trial upon its merits. No error is found in the proceedings had in the district court. The judgment is

AFFIRMED.

CATHERINE DOUGHERTY ET AL., APPELLANTS, V. A. L. WHITE, APPELLEE.

FILED NOVEMBER 20, 1924. No. 22922.

1. **Homestead.** The homestead character of the family home, title to which is in the husband, is not divested because the wife obtains a divorce and, with the children, removes from the home, while the divorced husband alone continues to occupy the property as a homestead.

2. ———: ABANDONMENT. A divorced husband, living alone in the former family home, which was exempt as a homestead, rented a part thereof and, becoming ill, left the home and went to that of a neighbor, where he could have proper care and attention, and there remained for three or four months, until his illness terminated in death. *Held*, that such circumstances do not show abandonment of the homestead.

3. ———: DESCENT. If a divorced husband dies possessed of a homestead, which was selected from his separate property, it vests on his death in his heirs or devisees, and is not subject to the payment of any debt or liability contracted by or existing against him previous to or at the time of his death, except such as exists or has been created under the provisions of the homestead law.

4. **Judgment: REVIEW.** On the death of a judgment debtor, the judgment should be revived against the representatives of the decedent whose property rights would be affected by the revivor. If the revived judgment would affect only personal property in the hands of the executor or administrator, the revivor may be against him alone, but if intended to be a lien on or affect title

to real property, which on his death passed to his heirs or devisees, then it should be revived against the heirs or devisees.

5. **Execution: REVIVOR.** After the death of a judgment debtor, an execution cannot be lawfully issued and levied on the real estate, of which he died seised, until the judgment has been revived against the persons who took title to the real estate either by operation of law or as devisees.

6. **Quieting Title: OCCUPYING CLAIMANTS: IMPROVEMENTS.** An occupying claimant of land who, while in possession thereof under *bona fide* claim of title, places improvements thereon is entitled, on surrender of the premises to the rightful owner, to be reimbursed to the extent that his improvements have enhanced the value of the land.

7. ———: ———: **REIMBURSEMENT.** An occupying claimant of land who, while in possession thereof under *bona fide* claim of title, discharges and pays existing liens and taxes thereon is entitled, on surrender of the lands to the rightful owner, to be reimbursed for the amount of liens and taxes so paid, together with interest from the time of their payment.

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

Kingsbury & Hendrickson, for appellants.

W. V. Steuteville, and *J. J. McCarthy, contra.*

Heard before MORRISSEY, C. J., ROSE, DEAN, GOOD and THOMPSON, JJ.

GOOD, J.

This is an action to quiet title to a quarter section of land in Dakota county and for an accounting for rents and profits.

Plaintiffs are the children of Bernard Mahon, who died intestate in 1903, owning the land in question. The land was sold in January, 1904, under an execution on a judgment obtained against Mahon in his lifetime, and which after his death was revived as against his administrator before the execution issued. Defendant claims to be the owner of the land by mesne conveyances from the purchaser at the execution sale. Plaintiffs claim that the exe-

cution sale was void, first, because the judgment was never revived against them as the heirs of Mahon; second, because the judgment was dormant, no execution having been issued for more than five years after its rendition; and, third, because the land was a homestead and not subject to sale on execution. Defendant asserts that the revival of the judgment against the administrator was all that the law required, and that, the execution having been issued within five years after the revivor as against the administrator, the judgment was not dormant, and charges that Mahon in his lifetime had abandoned his homestead and that the sale under the execution vested a good title in the purchaser. A trial of the issues resulted in a decree for defendant. Plaintiffs appeal.

We will first consider whether the land was, in fact, a homestead at the time the execution issued. The record discloses that Mahon, with his wife and children, had resided upon the farm as their homestead for many years. In 1903 Mahon's wife obtained a divorce and was awarded the custody of the children and a judgment for $2,800 alimony. Prior to the decree she, with her children, had left the home and was residing with her parents. After the decree was entered Mahon continued to reside on the land for some time, when he became ill and went to the home of a neighbor, where he died some three or four months later. Previous to his removal, he had rented a part of the farm, but retained the buildings and lived thereon. When he went to the neighbor's home because of his illness, he left in the house and on the farm his personalty, and, some time after he left, the personal property, or at least the live stock and some of the other personal property, was removed from the premises; by whom or at whose direction is not disclosed. There is nothing in the record to indicate whether Mahon, when he went to the neighbor's home while ill, intended to abandon the homestead, or whether he intended to return. We have the bare fact that he was ill and perhaps knew that he was in a critical condition and was not likely to live long, and while in this condition he went to

the neighbor's home where he could have proper care and attention.

Do these facts show an abandonment of the homestead? It has always been the policy of this court, as well as of courts generally, to give a liberal construction to the homestead law for the purpose of protecting and preserving the home for those who would be benefited by its provisions. The law is settled that, where a husband and wife reside upon a homestead and the wife dies, the homestead character of the land continues and the surviving husband, although he may have no children or dependents residing with him, may still retain the homestead as such. *Palmer v. Sawyer*, 74 Neb. 108; *Dorrington v. Myers*, 11 Neb. 388; *Galligher v. Smiley*, 28 Neb. 189. The same rule obtains where the marriage relation has been dissolved by decree of court.

In this case, although the marital relation was dissolved, the husband was still liable for the support of his minor children. He was still, in law, the head of a family and was entitled to claim a homestead right, and that right continued until his death unless, by his voluntary act, he abandoned the homestead. Mahon had no other real estate which he could claim as his home. There is nothing in the record to indicate that it was his purpose to abandon his homestead. The fact that, when ill and with no one to care for him at his home, Mahon sought another place where he could have care does not evince a purpose to abandon the homestead. Suppose that Mahon, instead of going to a neighbor, had gone to a hospital for medical care and treatment. Would it be seriously urged that such an act on his part would work an abandonment of his homestead? It would certainly be a very harsh rule that would so hold and would not be in keeping with the legislative purpose as interpreted by judicial opinion. In our opinion, he did not abandon his homestead. Our statute provides:

"If the homestead was selected from the separate property of either husband or wife, it vests on the death of the person from whose property it was selected, in the survivor,

for life, and afterwards in decedent's heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor, by will." Comp. St. 1922, sec. 2832.

The trial court seems to have adopted the view that because, at his death, Mahon left no spouse surviving, therefore the heirs could not take the homestead divested of any liens for the debts of the decedent. In this we think the court erred. It would be a strange rule that where the husband died, leaving a wife surviving, she could take the property for her lifetime and then his heirs would take it, absolutely free from debt, and, because he left no spouse surviving, they would be cut off from any right to the homestead. Such is not the intention of the statute. The children of Bernard Mahon, on his death, succeeded to his homestead right in the premises.

It appears from the record that the judgment on which the execution sale was had was rendered on July 21, 1898, before a justice of the peace, and on March 1, 1899, a transcript thereof was filed in the office of the clerk of the district court. On November 10, 1903, the judgment was revived as against the administrator of Mahon, and notice of the revivor proceedings was not given to the plaintiffs, who are the children and heirs of Mahon.

Section 8981, Comp. St. 1922, provides: "If either or both the parties die after judgment, and before satisfaction thereof, their representatives, real or personal, or both, as the case may require, may be made parties to the same, in the same manner as is prescribed for reviving actions before judgment; and such judgment may be rendered and execution awarded as might or ought to be given or awarded against the representatives real or personal, or both, of such deceased party."

Section 8973, Comp. St. 1922, relating to the revival of actions before judgment, provides: "Upon the death of a defendant in an action, wherein the right, or any part thereof, survives against his personal representative, the revivor shall be against him; and it may also be against

the heirs or devisees of the defendant, or both, when the right of action, or any part thereof, survives against them."

The precise question here involved seems not to have been heretofore determined by this court, but there have been actions before this court in which there have been decisions bearing upon it. In *Urlau v. Ruhe*, 63 Neb. 883, it is held: "When a party to an appellate proceeding dies, and his interest in the litigation passes to his heirs, the heirs are necessary parties to the proceeding." That was an action for the foreclosure of a real estate mortgage where one of the mortgagors died before the litigation was terminated, and it was there determined that the heirs were necessary parties to the litigation, and that it should be revived as against them.

In *Vogt v. Binder*, 76 Neb. 361, it is held: "Proceedings to revive a judgment should not be had in the name of an administrator, except where the administrator has succeeded to the rights of the decedent."

And in *Rakes v. Brown*, 34 Neb. 304, it is held: "On the death of an intestate his lands immediately descend to his heirs subject to the right of possession by the administrator, pending administration, and to his power to sell the real estate to pay the debts of the estate, in case the personal property is insufficient for that purpose.

"Where, pending an action to set aside a deed to real estate, and to quiet title, the plaintiff dies intestate, the action may be revived and continued in the names of the heirs at law of such deceased person."

In *Currier v. Teske*, 98 Neb. 660, it is held: "In an action brought after her death to foreclose a mortgage given by the wife in her lifetime, the rights of her son and sole heir were not affected by the proceedings, since he was not made a party to the action." It is true that in these actions the question under consideration was the revival of judgments directly affecting real estate and did not relate to actions for a money judgment.

In 1 C. J. 232, sec. 489, it is said: "On the death of the owner of land pending a suit to enforce a lien thereon, the

suit should as a rule be revived or continued against his heirs or devisees, and not against his personal representatives." In 1 R. C. L. 26, sec. 18, it is said: "If the action involves real and personal property, it should be revived against both the personal representatives and the heirs." The rule is also similarly stated in 1 C. J. 232, sec. 491.

In *Erwin's Lessee v. Dundas*, 4 How. (U. S.) *58, *76, it is said: "This series of cases, coming down from the earliest history of the law on the subject, and the reasons assigned in support of them, necessarily lead to the result—and which has also been confirmed by express decision in all courts where the authority of the common law prevails—that an execution issued and bearing *teste* after the death of the defendant is irregular and void, and cannot be enforced either against the real or personal property of the defendant, until the judgment is revived against the heirs or devisees in the one case, or personal representatives in the other."

In *Mitchell v. St. Maxent's Lessee*, 4 Wall. (U. S.) 237, 242, it is said: "The writ of *fieri facias* on which Mitchell rests his title, was tested after the death of St. Maxent; and, according to a familiar rule of the common law, it was therefore void. The death of a defendant, before the *teste* of an execution, compels the plaintiff to sue out a writ of *scire facias*, 'for the alteration of the person altereth the process.' The heirs, devisees, and terre-tenants of the deceased must have notice before an execution can regularly issue, for they are the parties in interest, and should have an opportunity to interpose a defense, if any they have, to the enforcement of the judgment."

In *Helm v. Darby's Adm'r*, 3 Dana (Ky.) *185, it is held that lands devised to an executor for the payment of the testator's debts are equitable assets which a creditor can reach only through the aid of a court of equity and are not subject to execution on a judgment against the executor.

We think a fair construction of our statute, above quoted, in view of the decisions of this and other courts, requires that the revivor should be against the representatives of

the deceased person whose property rights would be affected by the revivor. If the revivor would affect only the personal property in the hands of the administrator, then it may be revived as against him, but, if it is intended to affect real property which passed, on the death of the judgment debtor, to his heirs, then it should be revived against such heirs at law, and, if the judgment is to affect, or does affect, both personalty and real estate, then it should be revived against both the personal representatives and the heirs. In the instant case, the revivor was not against the heirs at law of Mahon, and yet it was the real property which descended to them that is sought to be affected and taken under the execution, and under a judgment to which they were not a party and of which they had no legal notice.

It necessarily follows that when the execution issued there was no judgment that was binding upon these plaintiffs, and the sale of their land on execution under the judgment was without warrant of law and absolutely void. Title, therefore, did not vest in the purchaser, nor could his grantee acquire a good title from him. The plaintiffs are entitled to have the title to the land quieted in them upon the conditions hereinafter stated.

Plaintiffs are also entitled to an accounting for rents and profits, except in so far as such claim may be barred by the statute of limitations, but, if it appears that the rental value has been increased or enhanced by reason of the improvements placed on the premises by defendant, then he should not be held for any part of the increased rental value caused by the improvements. Each plaintiff, who had attained the age of majority more than four years before the action was commenced, is limited to one-sixth of the rents and profits for a period, commencing four years before the action was begun and ending with the date of the decree to be hereinafter entered; and each plaintiff, who has attained majority since a date four years ante-dating the commencement of the action, is entitled to recover one-sixth of the rental value of the premises for the entire period during which defendant has been in actual possession.

Defendant went into possession under a deed claiming as owner, and is in the position of an occupying claimant. During the period of his possession he has improved the premises by the erection of a house, barn, fences, windmill and well, and has paid and he or his predecessors in title have discharged certain liens, namely, a mortgage and a judgment for alimony, the latter being a lien on the land, notwithstanding that it was a homestead. *Best v. Zutavern*, 53 Neb. 604; *Fraaman v. Fraaman*, 64 Neb. 472; *Miller v. Miller*, 101 Neb. 405. Under these circumstances, the defendant is entitled to be reimbursed for the items of taxes and liens discharged in the full amount thereof, together with interest at 7 per cent. upon each item from the date it was paid. Defendant is also entitled to be reimbursed for the improvements placed upon the premises to the amount that such improvements enhance the value of the real estate at the time decree shall be entered. Should the amount for which defendant is entitled to be reimbursed exceed the amount for which he is liable for rents and profits, then title should be quieted in plaintiffs, on condition of their paying to defendant such excess.

The judgment of the district court is reversed and the cause remanded, with directions to permit the taking of additional testimony, if desired; to take into account the rents and profits and the payment and discharge of taxes and liens, together with the enhanced value of the premises by reason of improvements, and to enter a decree in accordance with the views herein expressed.

REVERSED.

Note—See Abatement and Revival, 1 C. J. secs. 489, 491; Executions, 23 C. J. sec. 146; Homesteads, 29 C. J. secs. 346, 359, 492 (1926 Ann.); Improvements, 31 C. J. sec. 51; Judgments, 34 C. J. sec. 1014—Quieting Title, 32 Cyc. p. 1383.

CARL D. QUINTON V. STATE OF NEBRASKA.

FILED NOVEMBER 20, 1924. No. 24009.

1. **Criminal Law:** APPOINTMENT OF PROSECUTOR. The appointment of an attorney to take the place of a disqualified county attorney under section 4917, Comp. St. 1922, rests in the sound discretion of the court, and its action in reference thereto is not error, unless an abuse of discretion is found.

2. ———: PLEA IN ABATEMENT: DENIAL OF JURY TRIAL. A denial of a jury trial upon an issue of fact tendered by a plea in abatement is not reversible error in a case where the record fails to disclose that the prisoner was in some manner prejudiced thereby. *Bolln v. State*, 51 Neb. 581.

3. ———: PLEA IN BAR: WAIVER. Under the facts in this case the plea in bar is a waiver of all matters which might have been or which were raised by the plea in abatement.

4. ———: JUDGMENT: NUNC PRO TUNC ENTRY. A court may on its own motion, when the facts are within the knowledge of the presiding judge, enter of record a *nunc pro tunc* judgment, even at a subsequent term.

5. ———: DENIAL OF JURY TRIAL. When a demurrer is interposed and properly sustained to a plea in bar, and the defendant elects to stand on the record thus made, it is not error to deny a jury trial on such plea.

6. ———: DISCHARGE OF JURY. If, during the trial of a criminal case, the court considers that a juror is unfit by reason of prejudice which was not disclosed on *voir dire* examination, and for that reason discharges the jury without prejudice to the prosecution, defendant is not thereby acquitted.

7. ———: HARMLESS ERROR. The court on its own motion gave an instruction to the jury, in which it quoted a section of the statute not applicable to the issues being tried. But, as it is found that the instruction did not prejudicially affect the substantial rights of defendant, the giving of such instruction was not reversible error.

8. ———: NEW TRIAL. Where in apt words one is charged with a crime, trial had to a jury, and the verdict against the defendant is the only one which was warranted by the evidence of defendant, voluntarily given, as in this case, a new trial should not ordinarily be granted.

9. ———: INSTRUCTIONS: CORRECTIONS. A trial court should not

make any correction in its instructions to the jury after the same have been delivered and the jury have retired for deliberation, unless the jury and interested parties be first called into court for that purpose. But the making of the correction is not ground for reversal, ordinarily, unless found to be prejudicial to the person complaining.

ERROR to the district court for Cass county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

Paul Jessen, D. W. Livingston and *A. L. Tidd,* for plaintiff in error.

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

Heard before MORRISSEY, C. J., DEAN, GOOD and THOMPSON, JJ.

THOMPSON, J.

This is a prosecution by indictment, in the district court for Cass county, against Carl D. Quinton, Sheriff (plaintiff in error), wherein defendant was charged with malfeasance in office, under sections 2381 and 9722, Comp. St. 1922. The first two counts charged him, in substance. with failure to enforce the liquor laws of the state. The third, fourth, fifth, and sixth charged him with failure, as sheriff, to file quarterly reports with the board of county commissioners of Cass county of fees earned and collected by him as sheriff during the year 1923, and failure to make quarterly payments of such fees to the county treasurer of Cass county. The seventh and eighth counts charged him, in addition, with failure to report fees collected for serving processes issued by justice courts, and for serving processes issued by courts outside Cass county on persons within the county, respectively, and the eighth further charges him with failure to keep a record of such foreign fees.

Trial was had to a jury. There was a verdict of acquittal as to the first two counts, and of guilty as to the remaining six. Motion for a new trial was overruled, and judgment of removal from office and a fine of $200 was imposed on

defendant. Grounds upon which reversal is sought may be summarized as follows:

The court erred in refusing the then county attorney, A. G. Cole, permission to appear before the grand jury, and later to prosecute the case, and in appointing, on its own motion, D. O. Dwyer as special county attorney, and afterwards calling to his assistance W. R. Patrick; in refusing defendant a jury trial on his plea in abatement, and in overruling the plea.

The court erred in declaring a mistrial and discharging the jury on December 11, 1923, and afterwards, at a subsequent term, on January 16, 1924, in entering a *nunc pro tunc* order as to the December judgment.

The court erred in not considering evidence on issues raised, and in not granting defendant a jury trial on his plea in bar, after the state had interposed a demurrer to the plea, and while same was pending, and in sustaining the demurrer thereto, resulting in his being twice placed in jeopardy.

The court erred in changing a written instruction to the jury out of the presence of defendant, and in its failure to read said instruction to the jury after it was so changed, without conducting the jury into the courtroom for that purpose; and also in refusing to give instructions Nos. 2 and 3 requested by defendant, and in giving instructions Nos. 6 and 13 on its own motion.

Taking up these alleged errors in their order: We have carefully considered the facts upon which the court determined the incompetency of the then county attorney, A. G. Cole, and appointed D. O. Dwyer as special county attorney to appear before the grand jury, and in appointing him special attorney to prosecute the case, with Mr. Patrick as assistant, and we conclude that the facts warranted the action of the court, under section 4917, Comp. St. 1922, and within our holding in *Spaulding v. State*, 61 Neb. 289.

The record does not show that the defendant was prejudiced by the denial of his request for a jury trial on his plea in abatement, and the court did not err. *Bolln v. State*,

51 Neb. 581. It must be remembered, also, that the plea in abatement was met by an answer, alleging substantial facts tending to refute the alleged disqualification of Dwyer, as alleged in the plea, to which no reply was filed. Therefore, the facts well pleaded in the answer stand admitted. The answer also contained an allegation "that the facts stated in the plea are not sufficient to abate the action." The court determined these two questions by overruling the plea, and its ruling was not error, either as one of fact or one of law.

Then defendant later filed a plea in bar. This was a complete waiver of all errors complained of growing out of or connected with his plea in abatement. *Bush v. State*, 55 Neb. 195; *Sheppard v. Graves*, 14 How. (U. S.) *505; *Robertson v. Lea*, 1 Stew. (Ala.) 141.

It must be remembered also that, in addition to the things ordinarily alleged in a plea in bar, defendant added thereto the following, and positively swore to it: "And this defendant alleges that said indictment was sufficient." A plea of previous acquittal must of necessity contain allegations showing legal jeopardy, which waives all previous attacks as to jurisdiction, indictment, and procedure. As stated in *Sheppard v. Graves, supra:* "If after such matters relied on, a defense be interposed in bar and going to the merits of the controversy, the grounds alleged in abatement become thereby immaterial, and are waived."

As to defendant's second contention: After the case had proceeded for a day or more on its merits, the court's attention was called to the misconduct of one of the jurors, Henry Brockman. An investigation was had by the court, in the presence of counsel for both parties and defendant. Witnesses as well as the juror were examined and cross-examined by the respective attorneys for the parties. At the conclusion of the hearing, December 11, 1923, the court announced as its judgment (as is shown by the *nunc pro tunc* order hereinafter referred to), in substance, as follows: That the court is convinced from the evidence that the juror, Henry Brockman, is incompetent and disquali-

fied on account of his partiality toward the defendant, and his failure to disclose this fact on his *voir dire* examination; that the state was thereby misled in permitting him to remain on the jury, and a fair and impartial trial cannot be had. On motion of the state, the court declared a mistrial and discharged the jury from further consideration of the case, without prejudice to the prosecution.

After this discharge of the jury, and at a subsequent term of court, the plea of not guilty was withdrawn, and a plea in bar on the part of defendant was filed, which alleged, in substance, that the rendering of the judgment of December 11, 1923, was an acquittal of defendant, and to permit the state to proceed under the original indictment would be to place defendant twice in jeopardy. The state demurred to this plea. The court then on its own motion, the same judge presiding who declared the mistrial and discharged the jury, having in mind what took place on December 11, 1923, and also the clerk's entry appearing on the journal, entered a *nunc pro tunc* order, entering of record the judgment rendered December 11, 1923. The entry of this *nunc pro tunc* order on January 16, 1924, made the record show as of December 11, 1923, what in fact was done by the court on that date. Such orders are frequently made in the furtherance of justice and the due administration of the law, and may be made at the term or at a subsequent term. Error was not thus committed. 15 C. J. 972, sec. 386; *State v. Moran*, 24 Neb. 103; *Van Etten v. Test*, 49 Neb. 725; *Central West Investment Co. v. Barker*, 79 Neb. 47; *Sutter v. State*, 105 Neb. 144.

As to the third assignment of error: After this *nunc pro tunc* order had been entered, the case came on to be heard on the demurrer to the plea, which was sustained. It is elementary that a court will take judicial notice of its own records in the case before it. After the *nunc pro tunc* order was entered, the judgment discharging the jury without prejudice, and holding the case for trial, was before the court. The issue then was one of law and not of fact. This being the status of the case, the court did not err in sus-

taining the demurrer and denying a trial by jury on this plea. *George v. State,* 59 Neb. 163.

Defendant cites in support of his contention that he has been twice placed in jeopardy section 10151, Comp. St. 1922, which is as follows: "In case a jury shall be discharged on account of sickness of a juror, or other accident or calamity requiring their discharge, or after they have been kept so long together that there is no probability of agreeing, the court shall, upon directing the discharge, order that the reasons for such discharge shall be entered upon the journal; and such discharge shall be without prejudice to the prosecution." He contends that the judgment did not adjudge that a juror was sick, or that an accident or calamity had occurred, or that there had been a failure of the jury to agree, and that as the cause for the discharge of the jury did not come within the ordinary understanding of either "accident or calamity," or failure to agree, the act of the court at the trial was in law an acquittal, and he is twice placed in jeopardy. From such a contention, reason and justice revolt. While the words "accident" and "calamity" are usually used in a physical sense, we hold that they include as well a case where a biased juror is discovered during the progress of the trial, as in this case. The object of the statute is to insure a fair trial to all litigants. We held in *Davis v. State,* 51 Neb. 301, that the insanity of a juror authorizes the discharge of the jury, being an "accident or calamity." And in *Sutter v. State, supra,* we held that the discharge of the jury because of failure to agree is not an acquittal.

The right, in the absence of statute, to exclude a juror and discharge the jury in a proper case, without prejudice to a future trial of the case on its merits, is and of necessity must be inherent in the court, within its sound discretion. This is necessary to the protection of the state, as well as for the protection of defendant. To deny it to either would be a flagrant abuse of the discretion imposed. *Simmons v. United States,* 142 U. S. 148; *State v. Vaughan,* 23 Nev. 103; *State v. Wiseman,* 68 N. Car. 203; *State v. Washing-*

ton, 89 N. Car. 535; *State v. Diskin*, 34 La. Ann. 919; *King v. Ketteridge*, 1 L. R. K. B. Div. (Eng. 1915) 467.

Thus, we conclude that the court, in considering the juror disqualified, in discharging the jury, and in sustaining the demurrer to the plea in bar, was clearly within the law, and that its acts and doings, as shown by the record, did not place defendant twice in jeopardy. *State v. Hansford*, 76 Kan. 678; *State v. Allen*, 46 Conn. 531; *People v. Sharp*, 163 Mich. 79; *Gardes v. United States*, 87 Fed. 172.

Instruction No. 3, requested by defendant and refused, read in part, as follows: "The law no place requires the sheriff to keep a fee book." Instruction No. 6, given, charged the jury, among other things, that section 2397, Comp. St. 1922, which requires certain county officers, "named in the second preceding section," to keep a fee book includes sheriff. This second preceding section was the first section of an entire act passed by the legislature in 1877 (Laws 1877, p. 215), and it included sheriff. An amendment to this first section was passed in 1907 (Laws 1907, ch. 57) which omitted sheriff, and he has never since been reincluded. However, we do not see how this instruction could have been prejudicial to defendant, and we hold it was not. The statute requiring the making of quarterly reports to the county board is mandatory. *State v. Hazelet*, 41 Neb. 257; *Hazelet v. Holt County*, 51 Neb. 716; *Sheibley v. Dixon County*, 61 Neb. 409; *Douglas County v. Vinsonhaler*, 82 Neb. 810. Defendant's own testimony shows that he failed to make these reports as required by the statute, and to pay over certain fees collected, although possessed of actual knowledge of the requirements of the statute. We quote from his testimony:

"Q. Now, Mr. Quinton, I believe you testified that the only report of fees, or the first report of fees that you filed covering fees earned by you in 1923, was filed on the 21st day of November, 1923? A. Yes, sir. Q. That is true, is it not? A. I think so, along about that time. * * * Q. And you knew the law required you to make a quarterly report on the first Tuesday of January, April, July,

and October of each year, didn't you? A. Yes, sir."

Thus, the admitted facts on the part of defendant warranted the jury in finding him guilty of malfeasance in office as charged, because of a palpable omission of duty, under section 9722, Comp. St. 1922. We conclude, therefore, that no prejudicial error was committed by the court in refusing to give defendant's instruction No. 3, and in giving on its own motion instruction No. 6. There was no other conclusion warranted by the evidence than that arrived at by the jury, and their findings and the judgment of the court rendered thereon should not, and will not, be disturbed. *Kielbeck v. Chicago, B. & Q. R. Co.*, 70 Neb. 571; *Goetz Brewing Co. v. Waln*, 92 Neb. 614.

Taken as an entirety, instruction No. 13 fairly states the law applicable to the charges alleged in the indictment against the defendant, and is not vulnerable to the criticisms interposed.

As to the contention that the court erred in changing the wording of an instruction after the same was read to the jury, and while the jury were deliberating on their verdict, the record shows that the modification was made, and that all was done, in the presence of defendant's attorney, and without objection or exception on his part. This modification consisted merely of changing the words "would be" to "may be found." This was not technically in line with the rules that should be, and ordinarily are, observed. The better practice would have been to have called the jury, defendant, and attorneys interested into the courtroom, and there made the correction, and read the instruction as corrected to the jury. Yet, under the circumstances shown, and taking the same in connection with the other instructions given, reversible error was not committed. At best, the same is a mere technicality, and "no substantial miscarriage of justice has actually occurred." Section 10186, Comp. St. 1922.

We have carefully examined defendant's other assignments of alleged error, but we find that they are not well taken, and that the judgment of the district court is in

all things right, and should be and hereby is affirmed. This makes it unnecessary to discuss the state's motion to dismiss.

The judgment of the district court is

AFFIRMED.

Note—See Courts, 15 C. J. sec. 386; Criminal Law, 16 C. J. secs. 404, 747, 2067, 2558, 2617 (1926 Ann.), 3106; 17 C. J. secs. 3579, 3627, 3637 (1926 Ann.), 3690, 3715; District and Prosecuting Attorneys, 18 C. J. sec. 82; Juries, 35 C. J. sec. 98 (1926 Ann.).

STATE, EX REL. VILLAGE OF DAKOTA CITY ET AL., APPELLEES, V. CHARLES W. BRYAN, GOVERNER, ET AL., APPELLANTS.

FILED NOVEMBER 20, 1924. No. 24367.

Statutes: CONSTRUCTION. That construction of a statute of doubtful meaning given it by those whose duty it is to enforce it, and which construction the legislature has by its continued non-interference for a number of years acquiesced in, will be approved, unless as thus construed it contravenes some provision of the Constitution, or is clearly wrong.

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

O. S. Spillman, Attorney General, and *Hugh La Master,* for appellants.

William P. Warner and *H. E. Kuppinger, contra.*

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

THOMPSON, J.

This is an action in mandamus, brought by the state on relation of the village of Dakota City, and numerous other villages similarly situated, against the state board of equalization and assessment, respondents. The issues raised by the pleadings may be stated as follows:

That respondents are about to proceed under sections 5839-5841, Comp. St. 1922, as they have proceeded for the last 16 years, to apportion the value of the rolling-stock of the railroads passing through relators' corporate limits, which rolling-stock is subject to terminal taxation, upon a basis of mileage value within terminals, arrived at by taking the total value of the rolling-stock of a railroad, and separating it as between main line and branch line according to the value of the main line and branch line respectively, then dividing the main line value of the rolling-stock by the main line mileage, and the branch line value by branch line mileage, and then assigning to each relator its amount, depending upon its location on a branch line or main line, when in law under section 5874, Comp. St. 1922, this apportionment should be made upon a main line mileage valuation alone, and without distinction as to whether relator is located upon a main or branch line.

The prayer of relators' petition is for an injunction, restraining respondents from certifying to the county clerks of the counties in which relators are located upon the main or branch line basis, and for a writ of mandamus compelling respondents to certify according to relators' interpretation of section 5874, *supra*.

A demurrer was filed, alleging that the petition "does not state facts sufficient to constitute a cause of action," which was overruled. Respondents elected to stand on their demurrer. Judgment was entered as prayed for. Respondents bring the case here for reversal, contending that the court erred in overruling the demurrer, and in granting the writs of injunction and mandamus.

In deciding this case, it must be remembered that we have had biennial sessions of the legislature since the board of equalization and assessment has been proceeding under its interpretation of section 5874, which interpretation is complained of. Section 5874 was enacted in 1907 as part of an entire act, and remained without change until 1921, when it was amended by repealing a part thereof. However, this amendment in no manner modified or

changed the section as to matters here under consideration. Thus we conclude that the action of the legislature approved the correctness of the interpretation placed upon these statutes by the board. *Douglas County v. Vinsonhaler,* 82 Neb. 810; *Rohrer v. Hastings Brewing Co.,* 83 Neb. 111; *State v. Sheldon,* 79 Neb. 455. The opinion in the last cited case embodies a discussion of the question herein presented of main line or branch line, as well as that of legislative adoption of construction by usage, which renders a further discussion of these questions unnecessary.

Therefore, it is considered by us that respondents were within their legal rights when under the Constitution and statutes, they assessed and were about to assess the rolling-stock of the railroads for the purpose of terminal taxation, by taking the total value of the rolling-stock, and separating it as between main line and branch line respectively, then dividing the main line value of the rolling-stock by the main line mileage, and the branch line value by the branch line mileage, and then assigning to each relator its amount, depending upon its location on a branch line or main line.

The judgment of the district court should be and hereby is reversed, set aside, and the temporary injunction dissolved, and the cause remanded for further proceedings in harmony with this opinion.

REVERSED.

Note—See Statutes, 36 Cyc. pp. 1140, 1141; Taxation, 37 Cyc. p. 1038.

STATE, EX REL. METROPOLITAN UTILITIES DISTRICT ET AL., APPELLEES, V. CITY OF OMAHA ET AL., APPELLANTS.

FILED NOVEMBER 20, 1924. No. 23745.

Municipal Corporations: CONSTITUTIONAL LAW. The provision of section 16, ch. 33, Laws 1919 (Comp. St. 1922, sec. 3761), imposing upon municipal corporations the obligation to levy a tax to pay

hydrant rentals, is not violative of section 7, art. VIII of the Constitution, providing: "The legislature shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes."

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

W. C. Lambert, for appellants.

John L. Webster, contra.

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

REDICK, District Judge.

This is a mandamus proceeding, instituted by Metropolitan Utilities District, as relator, to compel the respondents, the city of Omaha and the city council of said city, to levy a hydrant rental water tax against the taxable property within the city of Omaha, Nebraska, which relator claims is a statutory obligation resting upon respondents. R. B. Howell intervened as a corelator and demanded the same relief, basing his individual demand upon the additional ground that he was the owner and holder of one of the water-bonds that were issued by said city when it purchased and took over the water-plant. Respondents filed a return, and the cause was submitted to the court upon the pleadings, and a writ issued as prayed by relators. Respondents appeal.

Relator, Metropolitan Utilities District, is a corporation created under the laws of the state and, as such, it has succeeded to the rights, powers and duties of the original water-board and of the Metropolitan Water District, and is now in possession of and engaged in the operation of the water-plant of the respondent city. In 1911 the city of Omaha purchased and took over the water-works plant of the Omaha Water Company, and issued bonds in the amount of $7,500,000 to pay for the same. Each of the bonds so issued, on its face, purports to be an unconditional obliga-

tion of the city, and the faith and credit and the real and personal property of the city are pledged for the payment of the principal and interest of the bonds. Each bond contains the further recital:

"The city of Omaha hereby obligates itself to each and every holder of this bond and of the coupons hereof that the water-board of the city of Omaha and its successors, after the payment of the actual and necessary expenses of operation and such improvements as are necessary to maintain the efficiency of said water-works, shall apply the water fund of said city (*including therein the water tax* and the revenue from water-services and rates to consumers) to the payment of interest on this issue of Omaha water-works bonds of said city, and shall set aside at the end of each year all moneys remaining in said fund, as a sinking fund for the payment of the principal and interest of this bond and of the issue of which this bond forms a part; *and that the said city shall levy such taxes* as may be necessary in addition thereto for the payment of the principal and interest of this bond as the same respectively become payable."

In 1912 the city of Omaha took possession of the water-plant and continued the operation thereof until succeeded by the Metropolitan Water District, which latter-named district retained possession and continued in operation of the system until succeeded by relator, Metropolitan Utilities District, now in possession of and operating the plant. In the original franchise, granted to the Omaha Water Company, and in the contract pursuant thereto by and between the city and the water company, it was provided that the city would pay annually $60 for each hydrant and $10 per annum for each intermediate hydrant, and would levy a tax to meet such payment. In the legislative act, creating the Metropolitan Water District, which was enacted in 1913 (Laws 1913, ch. 143), as amended in 1919 (Laws 1919, ch. 33, sec. 16; Comp. St. 1922, sec. 3761), it is provided that the water fund of the district should consist of all moneys received on account of the water-plant for water-service or

otherwise, together with a water tax to be levied by the municipal authorities, the amount to be certified to the municipal authorities, by the board of directors of the district in time for annual levy of taxes each year, which amount shall not exceed the sum produced by computing each fire hydrant, now or hereafter installed, at the following rates for each hydrant: Regular fire hydrant $60, intermediate $10; the gross amount of the tax not to exceed a three-mill levy; and it is made mandatory upon the municipal authorities to levy such tax. It is further provided that the fund, together with interest received, shall be used for the purpose of paying interest or principal on the bonds issued by the district or city, the cost of operation, maintenance and extension or improvements of the water-plant, salary and expenses, and, after allowing a reasonable amount for depreciation, the remainder in said fund at the end of each year shall be converted into a contingent fund for the payment of water-bonds outstanding, or for extraordinary improvements which may be needed from time to time in the conduct and maintenance of the water-plant.

Respondents admit the creation of the Metropolit- Utilities District, and that it is in control of and operating the water-plant; admits the issuance of the bonds, and that a considerable part of the issue is outstanding; that they contain the recitals above set forth and show that the pledges of the city have been faithfully kept; that nothing is now due and payable on either principal or interest of the bonds; that the amount existing in the sinking fund is $500,000 in excess of the requirements and is and will be sufficient to meet all present needs. The respondents, among other defenses, urge that the legislative act, imposing upon the city the obligation to levy a water tax, violates section 7, art. VIII of the Constitution, and is therefore unenforceable. The section of the Constitution referred to provides:

"Private property shall not be liable to be taken or sold for the payment of the corporate debts of municipal cor-

porations. The legislature shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes."

That the construction, operation or maintenance of a water-plant by a municipal corporation is not an exercise of governmental functions, but is in the nature of a private enterprise for the convenience, advantage or benefit of the municipality, its inhabitants and property owners, and that the phrase "for corporate purposes," as used in section 7, art. VIII of the Constitution, is limited to those municipal activities designed, in the main, for the principal or exclusive convenience or benefit of the municipality, its inhabitants or property owners, was held by this court in *Metropolitan Utilities District v. City of Omaha, ante*, p. 93. It was further held in that case that a statute which imposes upon a municipal corporation the burden of paying the cost of lowering gas and watermains, when operated by another corporation, is in contravention of section 7, art. VIII of the Constitution.

In the instant case, the statute imposes on a municipality the duty of levying an annual tax equal to $60 for each fire hydrant and $10 for each intermediate hydrant, to become a part of the water fund, to be used for the purposes above set forth.

It is contended by the relators that the statute in question merely empowers the municipality to levy hydrant rentals, but we think no discretion is lodged with the city in that respect. The statute is mandatory in terms requiring the levy of the tax, and while the proceedings necessary to the imposition of the tax are instituted and carried on by the municipality, the obligation to pay the hydrant rentals is imposed directly by the legislature, and we held in *Metropolitan Utilities District v. City of Omaha, supra*, that in the construction and application of the constitutional provision in question the imposition of an obligation upon a municipality which can only be discharged by taxation is equally within the prohibition as though the legislature had levied the tax directly. We may assume, therefore,

that the tax in question is levied by the legislature, and the question is squarely presented whether or not it is a tax for corporate purposes within the meaning of those terms as contained in the prohibition of the Constitution.

The dual nature of powers exercised by municipal corporations is too well established, not only in this state but elsewhere, to call for discussion. First, are those which it exercises as the agent of the state, and which are delegated to it by the legislature under the Constitution. Without such delegation those powers would not exist. The exercise of them involves the municipality in pecuniary obligations which can only be satisfied by taxation. Such powers are not exercised for corporate purposes, but for governmental purposes as an agent of the state, and for the general welfare of all the people of the state, notwithstanding the fact that they have no operation beyond the boundaries of the city. But within such boundaries and to the extent that power has been delegated they are of equal force with laws passed by the legislature, and operate alike upon all persons within the city, whether resident thereof or of other states or other countries. Second, are those powers which the municipality exercises solely and strictly for the benefit of its inhabitants, such as the proper care of streets and alleys, parks and other public places, and in the erection and maintenance of public utilities and improvements generally. While the terms "corporate purposes" are quite general and in a popular sense might be considered to include all the ends for the accomplishment of which municipal corporations are created, to give them such interpretation would disregard the well-established distinction above pointed out between the different functions performed by the municipality for the sole benefit of its inhabitants and those performed as an agency of the state in the exercise of police powers. The words themselves imply a limitation upon their application; they would seem to include only such purposes as were to be carried out for the benefit of the corporation and its inhabitants, and not those in the accomplishment of which the people of the

entire state are interested. To give them the broad significance contended for by respondent would in effect deprive the state of all exercise of its police power within the city boundaries. This cannot have been the intention of the framers of the Constitution, because it is elementary that all the police power is vested in the state government, and it may not abdicate such power, although it may delegate the exercise of it to municipal corporations within their borders; but they may not delegate it irrevocably, and the municipality acts only as the agent of the state and its powers may be controlled or revoked by the authority which delegated them. That the terms were used in a restrictive sense seems further evident from the fact that, if total prohibition had been intended, such purpose would have been clearly expressed in the terms: "The legislature shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for any purpose." They have used more restrictive terms, and they readopted the same provision from the Constitution of 1875 after the same had been several times construed by this court as no inhibition upon the exercise of power by the legislature imposing burdens upon municipal corporations connected with the performance of their governmental functions as an agency of the state. But, aside from this consideration, as already suggested, the word "corporate" implies something connected with the interests of the municipality itself as distinguished from those wider interests which it has in common with all inhabitants of the state in the enforcement of laws for the general welfare of the people as a whole—laws which are referable to the police power or the general policy of the state.

The inquiry then recurs, whether or not the tax in question is required to be levied for a corporate purpose, or whether it has relation to the exercise of the governmental power of the state through the agency of the municipal corporation.

We held in *Gillespie v. City of Lincoln*, 35 Neb. 34, and *State v. Love*, 89 Neb. 149, that a municipal corporation in

furnishing and operating a fire department is in the performance of a governmental function as distinguished from a corporate function, and it is said in 28 Cyc. 267, under "Governmental Functions:" "This class of functions (including maintaining and operating a fire department) are not franchises, or privileges, to be exercised or ignored by the municipality at discretion, but rather legal duties imposed by the state upon its creature, which it may not omit with impunity but must perform at its peril." (Citing a number of cases in notes 30 and 31.) The location and maintenance of hydrants in the city streets and supplying them with water are directly connected with the performance of this governmental function. The primary purpose of such hydrants is for fire protection, and secondarily, or perhaps of equal importance, for the flushing of sewers and cleaning of streets. All these operations are carried on for the public welfare and safety, are for the protection of the health and safety of the public, and find their authority in the general police power of the state which has been in part delegated to the municipality.

We think that the principles announced in the case of *State v. Love,* 89 Neb. 149, control the decision of this case. That was an action for a mandamus to compel the officers of the city of Lincoln to place the plaintiff upon the retired list of firemen in said city and pay him a pension of $50 a month, in accordance with a statute (Laws 1895, ch. 39) requiring the payment of such pensions, and the defense was that the statute was unconstitutional as imposing taxes upon a municipal corporation for a corporate purpose. But we held, citing *Gillespie v. City of Lincoln,* 35 Neb. 34: "That firemen should be placed in the same classification as policemen and health officers; that they are public or state officers vested with such powers as the statute confers, and that the duties they perform do not relate to the corporate functions of the municipality." We further said: "*Gillespie v. City of Lincoln, supra,* has not been criticised or in any manner discredited by this court, and must be held to state the correct general principle of law. In sus-

taining the right of the legislature to authorize the governor to select commissioners who shall appoint and control members of the police force and of the fire department in metropolitan cities, the functions of firemen are recognized as governmental rather than proprietary. *Redell v. Moores*, 63 Neb. 219. So, therefore, while the city of Lincoln has the right, and in its charter is given specific authority, to assemble appliances for the extinguishment of fires, to employ firemen, and to levy and collect taxes to pay the expense of the fire department, and while that purpose is a public one, it is not a corporate purpose within the prohibition in section 7, art. IX of the Constitution."

This settles the question that the maintaining of a fire department is not for the accomplishment of a corporate purpose but for a governmental purpose, and is a public duty the performance of which the state may compel although it results in taxation of the inhabitants of the city. The most common method of extinguishing fires is by pouring water upon the flames, and that is one of the public duties of the city to prevent conflagrations. It is incumbent upon it to provide the means for the accomplishment of that purpose, which includes, procuring a supply of water whether by means of wells and pumps in communities not supplied by water-works, or through hydrants where they are so supplied. We have no doubt but that the state may compel the performance of this duty and require the expense connected therewith to be paid by taxation.

Our conclusions are sustained by the decisions of other states. In *City of Chicago v. Manhattan Cement Co.*, 178 Ill. 372, 381, a statute imposing a liability upon a municipal corporation for damages caused by a mob was held not within a similar constitutional provision of the state of Illinois, the court holding that the liability so imposed was not merely and only for corporate purposes, and that the general assembly may compel taxation by a municipal corporation for performance of duties as an agency of the state government and to discharge duties and obligations resting upon it as such.

In *People v. County of Williamson,* 286 Ill. 44, it was held: "The general assembly may compel a municipal corporation to perform any duty which relates to the general welfare and security of the state, although the performance of such duty will result in taxation or create a debt to be paid by taxation."

In *Chicago, M. & St. P. R. Co. v. County of Lake,* 287 Ill. 337, it was held that an act requiring the municipality to make a change of grade and bear the expense thereof at a railway crossing was not for *corporate* governmental purposes and therefore not prohibited by the constitutional provision.

These cases are discussed in *Metropolitan Utilities District v. City of Omaha, ante,* p. 93, and distinguished therefrom on the principle announced herein, that the constitutional provision under discussion has no application to the exercise by the state of the police power.

In *Gooch v. Exeter,* 70 N. H. 413, it was held that an act fixing the salaries of police officers and one delegating such authority to the board of police commissioners, such salaries to be paid out of municipal funds, was not unconstitutional as being an expenditure for municipal purposes.

The case at bar is clearly distinguishable from *Metropolitan Utilities District v. City of Omaha, ante,* p. 93. In that case another provision (section 3760) of the same act we have been discussing was under consideration, whereby it was sought to charge the city with the expense of lowering water-mains and resetting hydrants whenever necessary, and we held that part of the act within the prohibition of section 7, art. VIII of the Constitution, upon the principle, as announced in the second syllabus:

"The construction, operation or maintenance of water and gas plants by municipal corporations is not an exercise of governmental functions, but is rather in the nature of a private enterprise for the convenience, advantage or benefit of the municipality, its inhabitants and property owners."

It seems clear that the lowering of water mains and

resetting of hydrants is a part of the construction, operation and maintenance of a water-works system, and that, if the providing of such system was a private enterprise merely for the benefit of the municipality and its inhabitants, a tax levied for the maintenance of such system would be for a corporate purpose and clearly within the prohibition of the Constitution. We also held in that case:

"The phrase 'for corporate purposes' as used in section 7, art. VIII of the Constitution, is limited to those municipal activities designed, in the main, for the principal or exclusive convenience or benefit of the municipality, its inhabitants or property owners."

On the other hand, in the instant case, while the fund raised by taxes imposed for hydrant rentals goes into the general treasury of the Utilities District and subject to its control, and may be used in payment of the expenses of construction and maintenance of the water-works, yet that is not the purpose underlying the imposition of the tax, but it is rather to require and enable the city to perform a governmental function as an agent of the state in the exercise of the police power. In no sense can the payment of hydrant rentals be construed as a contribution to the construction and maintenance of the water-works, any more than the payment of a rental for a building may be looked upon as a contribution to the support of the owner; in both cases the payment is made for a consideration beneficial to the party paying who has no interest in the disposition of the fund.

The statute in question recognizes the injustice of requiring water consumers, through the imposition of rates, to bear the public expense consequent upon the furnishing of water for extinguishing fires, and places the burden upon all taxable property in the city, thus requiring all to contribute for the public welfare; this is not only logical, but in consonance with principles of justice.

We conclude that the provision of the statute requiring the levy of a tax to pay hydrant rentals is not violative of section 7, art. VIII of the Constitution, and that the judg-

ment of the district court is right and should be affirmed.

AFFIRMED.

GOOD, J., dissenting.

I am unable to concur in the majority opinion in so far as it holds that the water tax, mentioned in the statute, is imposed for a governmental rather than for a corporate purpose. The statute requires the tax to be placed in and become a part of the water fund, and further provides the purposes for which the water fund may be expended, viz., for the payment of interest or principal of any water bonds issued for the cost of the plant; cost of operation, maintenance and extension or improvement of the water plant; salaries and expenses of the officers and employees of the Metropolitan Water District; for the payment of bonds that have been previously issued or to be hereafter issued, or for extraordinary improvements. It seems plain that the tax is imposed for the purpose of paying for, maintaining and operating a water plant, and that such an enterprise is, in its nature, a private business for the convenience, advantage or benefit of the municipality, its inhabitants and property owners.

The construction, operation or maintenance of water plants by a municipal corporation has been held by this court not to be an exercise of a governmental function, but in the nature of a private enterprise, and to be for a corporate purpose, within the meaning of section 7, art. VIII of the Constitution. *Metropolitan Utilities District v. City of Omaha, ante,* p. 93. Authorities are therein cited sustaining the proposition, and I think are in conformity with the overwhelming weight of authority. It may be observed that counsel for both relator and respondents in this case concede that the construction, operation and maintenance of water plants by a municipality is a private enterprise and is not the exercise of a governmental function. Relator, however, insists and argues in this case, as was done in the case of *Metropolitan Utilities District v. City of Omaha, supra,* that the phrase "for corporate purposes,"

as used in section 7, art. VIII, of the Constitution, had reference to municipal or governmental activities and functions and did not relate to those that were in the nature of a private business enterprise. This contention of relator was disapproved in the case heretofore cited. The majority opinion seems to be based largely on the rulings of this court in *Gillespie v. City of Lincoln*, 35 Neb. 34; *Redell v. Moores*, 63 Neb. 219; and *State v. Love*, 89 Neb. 149. The *Gillespie* case goes no further than to hold that the maintaining of a fire department by a city is an exercise of the police power and, in effect, is governmental in its nature. The *Redell* case does not seem to be in point. The *Love* case, in substance and effect, holds that the maintaining of a fire department by a municipality is the exercise of a governmental function, rather than a private or corporate purpose. I have no quarrel with the rulings in these cases, but it seems to me that it is a *non sequitur* to hold that, because the maintaining of a fire department is a governmental function, the construction, maintenance and operation of a water plant is of like character. It is true that water is one of the chief factors in the extinguishment of fires, but so are proper fire apparatus, hose, nozzles, ladders, trucks, etc. Suppose a municipality should be authorized to and did establish and maintain a plant for the manufacture of such fire apparatus as it should need, could it, with reason, be said that in so doing it was exercising a governmental function? It seems to me that the question suggests the answer. A municipality may purchase its fire apparatus in the open market. It may also engage a private person or corporation to furnish a supply of water for fire protection, or may authorize a private person or corporation to construct and operate a water plant. It seems to the writer that the statute in question imposes a tax for corporate purposes, within the meaning of section 7, art. VIII of the Constitution, and is therefore invalid.

I think that the statement in the syllabus of the majority opinion is misleading in that it assumes that the tax is levied to pay hydrant rentals. An examination of the

statute shows that the tax is not levied for the payment of hydrant rentals but to pay for and maintain a water plant. It is true that the amount of the tax is measured by the number of hydrants and is also limited to a three-mill levy, but this is simply a measure or limitation of the amount of the tax. The purpose for which the tax is levied must be determined by the use which the statute directs shall be made of the fund arising from its levy and collection.

I think the writ should have been denied and the action dismissed.

ELIZABETH TIERNAN, APPELLANT, V. CHRISTOPHER TIERNAN, APPELLEE.

FILED DECEMBER 4, 1924. No. 22925.

1. **Judgment: BAR.** Since a decree for separate maintenance does not sever the bonds of matrimony, the fact that a plaintiff has obtained such decree does not constitute a bar to the maintenance thereafter of a suit by her for an absolute divorce.
2. **Divorce: ALIMONY.** In such an action for an absolute divorce and alimony, the court is entitled to take into consideration any allowance for the support of plaintiff theretofore made in the decree for separate maintenance, and has power to modify and set aside such allowance upon rendering a decree for permanent alimony.

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

C. J. Campbell and *Harry R. Ankeny*, for appellant.

Stewart, Perry & Stewart and *Robert Van Pelt, contra.*

Heard before MORRISSEY, C. J., LETTON, DEAN, GOOD and THOMPSON, JJ.

PER CURIAM.

In 1920 plaintiff began an action against her husband, the defendant, upon three causes of action; one for separate maintenance on the ground of extreme cruelty, the others to construe the provisions of an antenuptial contract and for

an accounting for rents and profits by him collected from the property mentioned in the contract, the income from which she contended belonged to her. The defendant denied the alleged cruelty, charged her with the same offense, and prayed for an absolute divorce. The court found that plaintiff was entitled to recover the sum of $125 a month as separate maintenance; that defendant was not entitled to a divorce, and that, under the antenuptial contract, plaintiff was not entitled to the possession or income from said real estate until after the death of defendant. It also found that the provision of the antenuptial contract, "which attempts to deprive plaintiff of the right of maintenance and support, and alimony, from the defendant, tends to facilitate separation and divorce and is against public policy, illegal and void, and that the same has never been held by decree of court to be a binding and valid provision of said contract." Defendant took no appeal. The judgment of the district court was affirmed on January 26, 1922. *Tiernan v. Tiernan,* 107 Neb. 563.

In 1922 plaintiff filed a petition asking for an absolute divorce from defendant on the ground of extreme cruelty. Plaintiff also tendered to defendant a quitclaim deed to the real estate described in the antenuptial contract, alleging that her interest therein was valueless. The charges of cruelty were denied, the decree in *Tiernan v. Tiernan, supra,* was pleaded in bar of the claim for alimony, and the validity of the antenuptial contract was said to be *res judicata.* The district court found that plaintiff was entitled to an absolute divorce; that no increase in the amount of award for separate support was required or necessary; that the contract barred her from any interest in the property except as provided therein, and that she is not entitled to any alimony.

It was decided in *Tiernan v. Tiernan, supra,* that the antenuptial contract, in so far as it attempts to deprive plaintiff of the right to maintenance, support and alimony from the defendant in case of his misconduct, is against public policy, illegal and void. This being the case, the

only question here is whether the court erred in refusing to award plaintiff any alimony in addition to the $125 a month formerly adjudged to be paid to her under the decree for separate maintenance. The evidence shows that the property mentioned in the antenuptial contract consists of a business lot in the city of Lincoln, upon which a frail and unsubstantial building has been erected. Under the contract the plaintiff has the right to the possession of the real estate and the rents and profits arising therefrom only in the event she survives her husband, and this right continues only so long as she remains unmarried. Defendant retains entire control over his property during his life. If the rental value of the property should be impaired by the destruction of the building by fire or other means, there is no provision in the contract whereby it must be restored at the cost of the defendant or his estate. The value of plaintiff's interest is so remote, contingent and unsubstantial we think it is of little avail as a credit for defendant upon alimony. The estate of defendant is of the value of from $250,000 to $260,000. The evidence shows that plaintiff did not assist in the accumulation of any of this property. Through the wrongful conduct of the defendant the object and purpose of the marriage was defeated. Plaintiff is entitled to a fair proportion of the property of defendant in order to provide for her support and maintenance in accordance with her station in life and defendant's means.

The court has come to the conclusion to set aside the allowance of $125 a month and to award as alimony the sum of $40,000, to be paid in annual instalments of $8,000 for five years, the first instalment to be paid upon the final determination of this case, and the deferred payments to draw interest at the rate of 6 per cent. per annum, defendant to have the right to pay the whole sum at any time. Plaintiff to have no right, title or interest whatsoever, other than the lien of this decree, in any of the property of the defendant. The decree of divorce is affirmed,

and the decree as to alimony is modified in accordance with this opinion.

AFFIRMED AS MODIFIED.

Note—See Divorce, 19 C. J. sec. 578 (1926 Ann.); Husband and Wife, 30 C. J. secs. 915, 914 (1926 Ann.).

ALVIN JONES V. STATE OF NEBRASKA.

FILED DECEMBER 4, 1924. No. 24099.

1. **Criminal Law**: INSTRUCTIONS. In a prosecution of a police officer for an alleged violation of section 9477. Comp. St. 1922, an instruction that tells the jury that the statute makes it the duty of police officers to "prosecute or file complaints against any person whom they know, or have reasonable grounds to believe, are violators of the law" in regard to the matters denounced in that section of the statute is incorrect, and, under the circumstances of this case, is prejudicially erroneous.
2. **Indictment**: SUFFICIENCY. Where an offense can be committed only in a certain municipal division, which is less than the county wherein the indictment is returned, the name or description of such division, and an allegation that the offense was committed therein, must be set out in the indictment.
3. **Criminal Law**: INSTRUCTIONS. The instructions given by the court covering count three of the indictment are discussed in the opinion and approved.

ERROR to the district court for Cass county: JOHN B. RAPER, JUDGE. *Affirmed in part, and reversed in part.*

A. L. Tidd, for plaintiff in error.

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

Heard before MORRISSEY, C. J., LETTON, DEAN, GOOD and THOMPSON, JJ.

MORRISSEY, C. J.

Defendant prosecutes error from a conviction in the district court for Cass county on an indictment brought under section 9722, Comp. St. 1922, under the terms of which it

is made a misdemeanor for any of the officers enumerated in the section to "be guilty of any palpable omission of duty or who shall wilfully or corruptly be guilty of malfeasance or partiality in the discharge of his official duties." Defendant, at the date mentioned in the indictment, was the chief of police of the city of Plattsmouth and fell within the class of officers mentioned in the statute. The indictment contained three counts: The first count charged that defendant with knowledge "that one Julia Kaufman did unlawfully have in her possession intoxicating liquors in the city of Plattsmouth in the county of Cass, and state of Nebraska, he, the said Alvin Jones as said police officer did, then and there and at divers and sundry times subsequent thereto, unlawfully and in violation of his duty as said officer fail to apprehend, arrest, or bring to justice said Julia Kaufman, and is guilty of malfeasance in office." As to count 1 of the indictment, the court told the jury:

"The statutes of Nebraska make it unlawful for any person to have in his possession for the purpose of sale, or to sell or give away, any intoxicating liquor, and it is the duty of police officers to prosecute or file complaints against any person whom they know, or have reasonable grounds to believe, are violating the law in regard to such intoxicating liquors, and a wilful failure or neglect to so file complaints or to prosecute such offenders constitutes a malfeasance by such police officers."

Counsel for defendant earnestly contend that the quoted instruction is an incorrect statement of the law and seriously prejudiced defendant before the jury. The criticism is directed against that clause of the instruction wherein the court told the jury:

"It is the duty of police officers to prosecute or file complaints against any person whom they know, or have reasonable grounds to believe, are violating the law in regard to such intoxicating liquors."

The statute relied upon by the state (Comp St. 1922, sec. 9477) to support this instruction does not specifically mention the office of chief of police, the office held by defend-

ant, but it seems to be accepted without question that under the ordinances of the city of Plattsmouth, which are in evidence, defendant falls within the class of officers enumerated in that section and the statute should be applied to him the same as if he were a constable within the city. As a foundation for the instruction given, the statute may be considered as including the office of chief of police of the city of Plattsmouth and may be read as follows: It shall be the duty of the chief of police to apprehend, on view or warrant, and bring to justice all felons and disturbers and violators of the criminal law of this state, to suppress all riots, affrays and unlawful assemblies which may come to his knowledge, and, generally, to keep the peace for his proper city.

The statute does not provide that a peace officer shall "prosecute or file complaints," but it does provide that he shall "apprehend, on view or warrant, and bring to justice," etc. The instruction is, to say the least, not a correct quotation from the statute. Being incorrect, we are called upon to determine whether under the circumstances of this case it was prejudicial to defendant. The phrase "to file" has a well-recognized meaning in the law and its meaning is also, we believe, well understood by the average juror. In the sense in which it is employed in the instruction, when considered in connection with the evidence then before the jury, it could be taken only to mean that it was the official duty of defendant to actually make a complaint in writing against the parties violating the law. On the trial it was admitted that defendant had not filed a written complaint with any magistrate, and, therefore, when the jury were instructed that it was his duty so to do, the jury had no alternative other than to bring in a verdict of guilty. Had the jury been correctly informed as to the provisions of the statute, it might have reached the conclusion that, notwithstanding his failure to actually reduce his complaint to writing and to file that complaint with a proper magistrate, he had nevertheless endeavored in good faith to perform his duty and to enforce the law. The giving of

this instruction was prejudicially erroneous and the conviction of defendant under count 1 of the indictment cannot be sustained.

Count 2 of the indictment charged: "That said Alvin Jones, then and there being a police officer, to-wit, the chief of police of the city of Plattsmouth in the county of Cass and state of Nebraska, on the 10th day of July, 1922, did unlawfully become intoxicated and is thereby guilty of malfeasance in office," etc.

Counsel point out that under the language of this count of the indictment it is not alleged that defendant became intoxicated within the city of Plattsmouth or within the county of Cass, and suggests that if defendant's intoxication took place outside the city of Plattsmouth he could not be found guilty of a violation of section 9722, Comp. St. 1922, on which the prosecution is based, and, if the intoxication occurred without the county of Cass, defendant was not guilty of a violation of the statute within the jurisdiction of the court wherein he was tried.

In answer to this assignment, the attorney general suggests that the word "then" refers back to the time stated in the indictment, and the word "there" refers to the venue or place where the indictment is returned as indicated by the caption and other words of the indictment, to wit: "Cass county, Nebraska." It will be noted that the argument of counsel for the state goes only to the extent of indicating a basis for holding that count 2 may be held to charge defendant's intoxication to have been within the county of Cass. It does not indicate any basis on which the court may hold that defendant's alleged intoxication was within the city of Plattsmouth. The rule is well settled in this state that "An information or complaint must charge explicitly all that is essential to constitute the offense. It cannot be aided by intendment, nor by way of recital or inference, but must positively and explicitly state what the accused is called upon to answer." *Gaweka v. State*, 94 Neb. 53. In the authority last cited it is held that a complaint which charged a defendant with the offense

of resisting a municipal officer while he was trying to make an arrest without a warrant, but failed to allege that the offense was committed within the limits of the municipality of the officer, was fatally defective. In the instant case it must be borne in mind that by count 2 it was not intended to charge defendant with the violation of any statute denouncing the offense of intoxication. By this count he was charged with malfeasance in office. His jurisdiction was limited to a subdivision of the county and he was answerable for his official conduct only within that subdivision. "Where the offense is statutory, and can be committed only in a certain municipal division, which is less than the county within the jurisdiction of the court, the name or description of such division, and the fact that the offense was committed therein, must be set forth in the indictment." *Seifried v. Commonwealth,* 101 Pa. St. 200.

By count 3 of the indictment, defendant was charged with having and keeping in his possession in the city of Plattsmouth intoxicating liquors in violation of the statute dealing with possession of liquor. The evidence offered by the state was calculated to prove that the liquors so alleged to be unlawfully kept by defendant were by him kept in the place of business of one B. J. Halstead in the city of Plattsmouth. Halstead testified directly to that effect. By instruction No. 11, the court told the jury: "If the defendant kept or had intoxicating liquor in the place of business of B. J. Halstead, or in any other place in the city of Plattsmouth except the defendant's private dwelling, such keeping of said liquor constituted a violation of law." In instruction No. 14, the court told the jury that if defendant, while he was a policeman and at any time within 18 months prior to the bringing of the indictment, "had or kept intoxicating liquor at the place of business of B. J. Halstead in the city of Plattsmouth, or at other places outside of his private dwelling in said city, then the having or keeping by the defendant of said intoxicating liquors in such places constituted malfeasance in office." The instructions are claimed to be prejudicial as giving undue emphasis to the

testimony of the witness Halstead. Authorities are given to support this assignment. These authorities are all from foreign jurisdictions, and we are constrained to doubt that they are based upon a state of facts such as this record presents; in any event they are not conclusive of the question. The testimony upon which the state sought a conviction related only to the possession of liquor by defendant at the place of business of the witness Halstead. Had the instruction been less specific, counsel probably would complain of its general character. Defendant was not prejudiced because the court narrowed the inquiry to the place which was definitely fixed by the evidence. There is no error in either instruction.

The judgments entered on counts one and two are reversed and the prosecution based in these counts is reversed.

The judgment entered on count three is affirmed.

AFFIRMED IN PART AND REVERSED IN PART.

Note—See Criminal Law, 16 C. J. sec 2480; 17 C. J. sec. 3688; Indictments and Informations, 31 C. J. sec. 203.

WILLIAM GREBE V. STATE OF NEBRASKA.

FILED DECEMBER 4, 1924. No. 24118.

1. **Statutes: CONSTRUCTION.** The word "corruptly" when used in a statute generally imports a wrongful design to acquire some pecuniary or other advantage.
2. **Indictment: SUFFICIENCY: MALFEASANCE IN OFFICE.** In order to sustain a conviction under section 9722, Comp. St. 1922, it is not necessary to charge and prove that the unlawful conduct alleged was done both wilfully and corruptly; if wilfully done it may sustain a conviction.
3. **Rulings of the court on instructions asked by defendant have been examined and found free from error.**

ERROR to the district court for Cass county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

A. L. Tidd, for plaintiff in error.

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

Heard before MORRISSEY, C. J., LETTON, DEAN, GOOD and THOMPSON, JJ.

MORRISSEY, C. J.

Defendant was convicted in the district court for Cass county under an indictment in which he was charged with malfeasance in office for unlawfully assaulting one Hayward.

At the time charged in the indictment, defendant was a constable within Cass county and the prosecution is based upon the provisions of section 9722, Comp. St. 1922.

By instruction No. 3, the court told the jury: "The statute of the state of Nebraska, in so far as it pertains to the offense charged against the defendant herein, provides: 'Any * * * constable * * * or any ministerial officer, who shall be guilty of any palpable omission of duty or who shall wilfully * * * be guilty of malfeasance or partiality in the discharge of his official duties, shall be fined' as provided by law." The first objection of defendant is that in this instruction the court omitted the words "or corruptly" which are found in the statute immediately following the word "wilfully." In instruction No. 5, the court defined the term "malfeasance," and concluded the instruction by saying: "An act of a public officer is considered as done 'wilfully' when the officer consciously acts contrary to a known duty or intentionally omits to do that which he knows it is his duty to do." Because the words of the statute, "or corruptly," are omitted from the instructions mentioned, defendant insists that these instructions are prejudicially erroneous. Counsel say that the words "or corruptly" as used in the statute add to the meaning of the word "wilfully," and that the language used means not

merely that the act is done voluntarily, but that it is done with a bad motive. In support of this contention counsel quote the concluding sentence from paragraph 6 of the syllabus of *State v. Donahue*, 91 Neb 311, which reads: "It must be prompted by some evil intent, or legal malice, or at least be without sufficient grounds to believe that he is performing his duty." It is rare, indeed, that a single sentence when set apart and considered without relation to its context expresses the full meaning of its author. The sentence quoted is not an exception to the rule and should be considered in connection with the entire paragraph in which it is used. It may, too, be worthy of mention that the opinion in the case relied upon was adopted by a divided court, and the authorities cited by the judges who dissented raise a serious question as to the correctness of the majority opinion. However, a disposition of this case does not make necessary a review of the issues there discussed or determined. In the instruction criticised the court merely undertook to give so much of the language of the statute as applied to the case then on trial; neither the charge made in the indictment nor the proof before the jury went so far as to charge defendant with corrupt conduct within the generally accepted meaning of that term. A fair interpretation of the statute leads to the conclusion reached by the trial judge, namely: If the act charged was done voluntarily, that is, of defendant's own volition, it was wilfully done and falls within the inhibition of the statute. The words of the statute omitted from the instruction, "or corruptly," suggest a motive. The word "corruptly" when used in a statute generally imports a wrongful design to acquire some pecuniary or other advantage. It may be noted, too, that the phrase as used in the statute is in the disjunctive. The statute does not provide that before a conviction can be had a jury must find that defendant acted both "wilfully" and "corruptly." The plain import of the language is that, if defendant was either wilful, or corrupt, his act was a violation of the statute.

Certain assignments of error relating to preliminary

pleas are urged in the brief, but these issues have been disposed of in *Quinton v. State, ante,* p. 684, and therefore will not be noted here.

Our attention is called to instructions asked by defendant and refused by the court, but we find no error in the rulings of the court on these instructions. The record as a whole is found free from error, and the judgment is

AFFIRMED.

Note—See Corruptly, 14A C. J. p. 1432 (1926 Ann.); Indictments and Informations, 31 C. J. sec. 245; Officers, 29 Cyc. p. 1450; Statutes, 36 Cyc. p. 1124 (1926 Ann.).

JULIA KAUFMANN V. STATE OF NEBRASKA.

FILED DECEMBER 4, 1924. No. 24119.

1. **Criminal Law: VENIRE: MOTION TO QUASH.** When, on the trial of a criminal case, a motion to quash the venire because of alleged disqualification of its several members is made by defendant and overruled by the court, error cannot be predicated on the ruling, in the absence of a *voir dire* examination showing that the jurors against whom the motion was directed were challenged for cause, and that defendant exercised the peremptory challenges allowed under the statute.

2. ———: INSTRUCTIONS. An instruction will not be held erroneous because of a mere typographical error which cannot reasonably be said to have confused or misled the jury to the prejudice of the party complaining.

3. ———: SUFFICIENCY OF EVIDENCE. The evidence has been examined, and *held* to support the verdict.

4. ———: DUAL COUNTS. Where an indictment under section 3238, Comp. St. 1922, in its first count charges that defendant on a certain day "did unlawfully have in her possession, for the purpose of sale, intoxicating liquors," and in the second count thereof charges that defendant, on the same day as that fixed in the first count, "unlawfully kept for sale intoxicating liquors," the two counts charge one and the same offense, and upon a conviction on both counts a single penalty should be imposed.

5. ———: ———. Where an indictment under section 3238, Comp. St. 1922, in count 3 charges that defendant on a day cer-

tain "did unlawfully sell intoxicating liquors," and in count 4 charges that defendant, on the same day as that fixed in count 3, did "unlawfully give away intoxicating liquors," and does not clearly charge different acts, the two counts charge one and the same offense, and upon a conviction upon both counts, a single penalty should be imposed.

ERROR to the district court for Cass County: JOHN B. RAPER, JUDGE. *Affirmed as modified.*

A. L. Tidd, for plaintiff in error.

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

Heard before MORRISSEY, C. J., LETTON, DEAN, GOOD and THOMPSON, JJ.

MORRISSEY, C. J.

Defendant was placed on trial under an indictment which in four counts charged violations of section 3238, Comp. St. 1922. The jury returned a verdict of guilty on each count. The court imposed a separate sentence on each count in the indictment, and defendant has prosecuted error to this court. The grand jury that returned the indictment under which defendant was tried also returned an indictment against the sheriff of Cass county. The indictment against the sheriff charged that he was guilty of malfeasance in office in failing to apprehend and prosecute defendant for the acts set out in the indictment returned against her. A jury selected from the regular panel was duly impaneled and sworn to try the sheriff on the indictment returned against him, but, because of an incident which arose after the taking of considerable evidence, that jury was discharged. At the same term of court, and subsequent to the mistrial of the sheriff, defendant was arraigned and placed on trial. Her counsel filed objections to the venire and alleged that 12 of the jurors then members of the reguar panel, as sworn jurors, had heard the evidence in the case against the sheriff; that 11 other members of the regular panel were in the courtroom when

the opening statements of the respective counsel were made to the jury in that case; that they had heard the testimony there adduced; and alleged that the testimony adduced in the case of the state against the sheriff was given largely by the same witnesses who would be called as witnesses in the trial of defendant, and that the facts developed on that trial constituted the gist of the state's case against defendant. Defendant's objections were overruled.

It is claimed that the ruling on these objections denied defendant a trial by an impartial jury as guaranteed by section 11, art. I of the Constitution, and that it is in conflict with the opinion of this court in *Seaton v. State*, 106 Neb. 833. After a thorough examination of the record, in so far as it relates to the issue outlined, we find that none of the persons who were impaneled and sworn to try the case against the sheriff served as jurors in the instant case, and that of the 11 other members of the regular panel, who it is alleged were present in the courtroom and as spectators heard the opening statements of counsel and the evidence given in that case, only two served upon the jury in the instant case. The *voir dire* examination of the jury was not preserved, nor does the record in any way inform us as to whether or not any jurors were challenged for cause, or that defendant exercised the peremptory challenges allowed her under the statute. In the case of *Seaton v. State, supra,* relied upon by the defendant, the record affirmatively shows that defendant exercised every means available to avoid the submission of his case to any of the jurors alleged to have been disqualified. The rule is well settled that "A party by failing to exercise his right of peremptory challenge will be held to have waived any objection on account of the disqualification of a juror then known to exist." *Morgan v. State*, 51 Neb. 672.

In one of the instructions given by the court in quoting the clause of the statute which provides that the possession of intoxicating liquor "shall constitute *prima facie* evidence that it was kept by such person with the purpose of unlawful sale, use or disposition in violation of law," the words

"the purpose of" which in the statute stand between the words "with" and "unlawful" are omitted from the instruction. Because of this omission, the giving of the instruction is assigned as error. Any person familiar with the use of the English language, on even a casual reading, would discover that a typographical error had been made, but he would be neither confused nor misled as to the law applicable to the case. The omission of these words did not make the instruction prejudicially erroneous.

There is the further contention that the evidence does not support the verdict. We shall not undertake to set out the evidence. It has been examined and found sufficient to sustain the finding of the jury.

One other matter remains to be considered. It has to do with the number of penalties to be imposed. Count 1 of the indictment charges that on July 1, 1923, defendant "did unlawfully have in her possession, for the purpose of sale, intoxicating liquors." Count 2 charges that on the same day defendant "unlawfully kept for sale intoxicating liquors." In a single sentence in the statute on which the indictment is based it is provided that it shall be unlawful for any person to "keep for sale or barter" intoxicating liquors. It is obvious that both count 1 and count 2 charge a violation of this provision of the statute. The same unlawful act is charged in each of these counts although it is charged in slightly different language, and a conviction on one count or on both counts calls for the imposition of but a single penalty.

Count 3 of the indictment charges that on July 1, 1923, defendant "did unlawfully sell intoxicating liquors." Count 4 charges that defendant did on July 1, 1923 "unlawfully give away intoxicating liquors." Again we turn to the statute and find that, in the same section which we have considered in relation to counts 1 and 2 of the indictment, it is made unlawful for any person to "give away," "or to sell," intoxicating liquors. The language of the statute is so clear as to require no interpretation. It shows upon its face the intention of the legislature to be

to make it unlawful for any person to sell intoxicating liquors or to give away intoxicating liquors. It is easy to see that the legislature desired that prosecuting officers might not be embarrassed in the enforcement of this law, and, because in many instances it might be difficult to prove whether the transaction was a sale or was a gift, so wrote the statute that proof of either is sufficient to sustain a conviction. It therefore follows that counts 3 and 4 in substance charge the same offense and call for a single penalty.

With the exception only of the judgment pronounced, the record is found free from error. The judgment entered is modified as follows: The penalty imposed under count 1 shall stand as the penalty under both count 1 and count 2; and the penalty imposed under count 3 shall stand as the penalty imposed under both count 3 and count 4; and, as thus modified, the judgment of the district court is

AFFIRMED.

STATE, EX REL. MARGARET L. TUNISON, APPELLEE, V. JOSEPH R. MILLSAP, APPELLANT.

FILED DECEMBER 4, 1924. No. 22897.

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

J. L. Cleary, for appellant.

Hainer, Craft, Edgerton & Fraizer, contra.

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

LETTON, J.

This was an action to compel the moderator of school district No. 53 of Hamilton county to sign a school warrant, in favor of the relator, in payment of wages due the

relator under a contract with the school board of that district. A motion was submitted at the hearing praying that the appeal be dismissed for the reasons that the amount due upon the warrant has, since the appeal was taken, been paid by the school board under authorization by the voters at the annual meeting in 1924, and for the further reason that Millsap, against whom the action proceeds, resigned his office on August 1, 1922, and his resignation was accepted August 8, 1922, and one Talich appointed moderator in his place. No denial was made of these facts. It is said this is a moot case for both of these reasons.

The basic controversy in this case is whether school district No. 53 should pay a sum of money claimed to be due to the relator for services as a teacher in said district. The parties, after the appeal was taken, having compromised and settled this question by payment, there is no further necessity for litigation. *Harte v. Castetter*, 38 Neb. 571. The appeal is therefore dismissed at the cost of the appellant.

APPEAL DISMISSED.

STATE, EX REL., JOHN J. REINHARDT, COUNTY ATTORNEY, APPELLANT, V. GEORGE TALICH, APPELLEE.

FILED DECEMBER 4, 1924. No. 23652.

1. Schools and School Districts: ANNUAL MEETINGS: ADJOURNMENT. "The annual school meeting of each school district for the election of officers is required to be held on the first Monday of April of each year, and there is no authority to adjourn the election to another day." *State v. Cones*, 15 Neb. 444.
2. ———: APPOINTMENT OF MODERATOR. After the expiration of the date provided by law for the election of school officers, the power to accept the resignation of a moderator and to appoint his successor vests in the board of trustees.

APPEAL from the district court for Hamilton county: LOVEL S. HASTINGS, JUDGE. *Affirmed.*

John J. Reinhardt and *Horth, Ryan, Cleary & Suhr*, for appellant.

Hainer, Craft, Edgerton & Fraizer, contra.

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

LETTON, J.

The county attorney of Hamilton county filed an information in the nature of a *quo warranto* against George Talich, alleging that he unlawfully holds and exercises the public office of moderator of the board of trustees of school district No. 53, Hamilton county; that at the annual school district meeting in district No. 53, held on June 12, 1922, Joseph R. Millsap was elected moderator, and that on that date the meeting was adjourned to meet on August 1, 1922; that at the adjourned session, held on August 1, 1922, Millsap, the moderator, resigned, his resignation was accepted, and one F. G. Wright was elected as his successor, who immediately assumed the duties of the office; that following the annual meeting Wright was recognized as the moderator by the directors; that on August 8 the board of trustees of the district met at the home of the director, accepted the resignation of Millsap as moderator, and pretended to appoint Talich to fill the vacancy; that Talich pretended to accept the appointment and thereafter took his place as a member of the board; that the appointment was without authority of law, for the reason that the meeting of August 1 filled the vacancy by the appointment of Wright, and that Wright was, before the attempted appointment of Talich, the duly elected moderator of the district.

A motion to quash was filed, which was in practical effect a general demurrer. The court found that the meeting of August 1 had no power to accept the resignation of Millsap and to elect Wright as moderator in his place. The information was quashed and the action dismissed.

By section 6332, Comp. St. 1922: "The board shall have power to fill by appointment any vacancy that may occur in their number, and it shall be their duty to fill such vacancy after its occurrence: Provided, in case the board shall, from

any cause, fail to fill such vacancy, the same may be filled by election at a special school district meeting called for that purpose by the qualified voters present, which meeting shall be called in the same manner and be subject to the same regulations as other special school district meetings."

There was no special meeting called for the filling of a vacancy. In section 6268, Comp. St. 1922, it is provided that the annual school district meeting shall be held on the second Monday of June of each year, and that the officers elected shall take possession of the office to which they have been elected upon the second Monday of July, and the school year shall commence with that date. In section 6275, Comp. St. 1922, it is provided:

"The qualified voters in the school district, when lawfully assembled, shall have the power to adjourn from time to time, as may be necessary, to designate a site for a schoolhouse by a vote of two-thirds of those present, and to change the same by a similar vote at any annual meeting," etc.

State v. Cones, 15 Neb. 444, was an action in *quo warranto* to oust the defendant from the office of school treasurer. Defendant was elected treasurer at the annual school district meeting held on the first Monday in April, 1881. On the first Monday of April, 1883, the annual school district meeting was held. The meeting was adjourned, after transaction of a part of the business, until May 4, 1883. At that meeting the electors adopted a resolution to change the board of trustees from three to six, and proceeded to elect six trustees. On May 7 the board of trustees elected the relator, Crosby, as treasurer, but Cones refused to vacate the office, claiming he was still the lawful treasurer of the district. The statute provided that the change from three to six trustees should be made at the annual meeting, and that the voters at the annual meeting should proceed to elect the six trustees. In the opinion, by Maxwell, J., it is said:

"Section 8 provides for an adjournment from time to time for the purpose of locating a site, but we find

no authority to adjourn the election of officers. The fact that the school year dates from the day of the election tends to show the intention of the legislature to have the election take place at the time indicated, and we are not aware of any authority to postpone the same. We are of the opinion, therefore, that the election held on the fourth of May was a nullity, and that the defendant is the lawful treasurer of said school district."

Where there is no definite provision in a statute directing to whom the resignation of a public officer may properly be given, it is the general rule that such public officer should tender his resignation to the power authorized to fill the vacancy or to call an election for that purpose. Mechem, Public Officers, sec. 413; *State v. Popejoy*, 165 Ind. 177; *State v. Augustine*, 113 Mo. 21. In the case at bar the voters of the district attempted at the adjourned annual meeting to do that which they had no right to do at any other time than that fixed by statute. The adjourned meeting had no authority to elect officers or to accept the resignation of Millsap. These powers, after the expiration of the date provided by law for the election of officers, became vested in the district board, and the pretended acceptance of Millsap's resignation and election of Wright were *ultra vires* of the voters assembled in the adiourned meeting. On August 8 the board accepted the resignation of Millsap and appointed the respondent to fill the vacancy. It is the general rule that, unless specifically limited by law, a regular meeting may adjourn to a future fixed date. *Ex parte Wolf*, 14 Neb. 24; *Maher v. State*, 32 Neb. 354. The *Cones* case merely holds that the election of officers must be had upon the date fixed for the regular annual meeting.

Since the election cannot be postponed, the adjourned meeting in August could not accept the resignation of Millsap and elect his successor. Some stress is laid upon a statutory provision that the state superintendent of public instruction is given power as follows: "He shall decide disputed points in school law and all such decisions shall be held to have the force of law until reversed by the

court." Comp. St. 1922, sec. 6477. It is said that he has held that—"At the time of the annual meeting the resignation of a district officer should be presented to the meeting; at any other time to the district board." This, however, must be taken as meaning that it should be presented to the voters at the annual meeting when assembled for the election of officers, and not at an adjourned meeting after the power of election has been exercised.

AFFIRMED.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY V. STATE OF NEBRASKA ET AL.

FILED DECEMBER 4, 1924. No. 24088.

1. **Taxation:** ASSESSMENT: PRESUMPTION. The presumption is that when the state board of equalization and assessment values railroad property for assessment purposes it acts fairly and impartially in fixing such valuation.
2. ———: ———: BURDEN OF PROOF. The burden of proof is upon a railway company, seeking to set aside an assessment of its property made by the state board of equalization and assessment. to establish its contention that the value of its property has been fixed by the board at an amount greater than its actual value, or that its assessed valuation has not been fairly and properly equalized when considered in connection with the assessment of all other property.
3. ———: ———: FAILURE OF PROOF. The evidence in the case at bar does not substantiate the contention of the complainant that its property has been "systematically, intentionally, and uniformly" assessed at its full actual value, while other property has been assessed "systematically, intentionally, and uniformly" at less than its full actual value, and does not warrant a finding by the court that the assessment made is so excessive and unjust that it should be set aside.

ERROR to the State Board of Equalization and Assessment. *Proceedings dismissed.*

E. P. Holmes, Guy C. Chambers, W. F. Peter and *W. F. Dickinson*, for plaintiff in error.

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

Byron Clark and *Reavis & Beghtol, amici curiæ.*

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

LETTON, J.

The property of plaintiff in error, hereinafter termed the railroad company, was valued for taxation in 1923 by the state board of equalization and assessment at the sum of $10,694,409. Proceedings in error were prosecuted from this valuation to this court, which found "that the valuation of the property of complainant lacks reasonable uniformity with the assessment of lands and improvements; that, as the record recites, the railroad property has been assessed at full, actual value and that the other class mentioned has been assessed at a much lower percentage." The assessment was set aside and the proceedings remanded to the state board of equalization and assessment for further proceedings in accordance with law. 111 Neb. 362. Pursuant to this decision, another hearing for the purpose of ascertaining the value of the property of the railroad company was held by the board on March 25, 1924, which resulted in a finding that the property of the company at the date of the assessment in 1923 was worth $9,571,496, being $1,122,913 less than it had been found to be worth at the previous assessment. From this finding the railroad company again prosecutes error.

The petition in error charges that the board valued the petitioner's property for assessment purposes for the year 1923 at its full actual value; that its property was valued at $9,571,496, while its actual value is only $5,186,920; that the board erred in assessing the petition-

er's property at its full value, while all other property was valued at less than its full value, and erred in refusing to equalize the assessment in accordance with the evidence, by either increasing the valuation of all other property or by reducing the valuation of petitioner's property in accordance with and in the same ratio as other property assessed.

At this second hearing before the board, additional evidence was produced by the company with respect to the actual value of the railroad property. The proper limits of this opinion will not permit a minute and detailed statement of the tables and classifications introduced in evidence. Many of the applicable principles of law are set forth in the former opinion and will not be restated. The evidence of the company has been considered at length. The total owned mileage of the system is 5,363.75. The owned mileage in Nebraska is 245.56. In complainant's exhibit 6, in which the company compares the Nebraska mileage with the sum of all the mileage both owned and leased, it is stated that the percentage of line in Nebraska to that of lines in other states is 3.41 per cent. There is no leased mileage in Nebraska, so as a basis of comparison the figures are fallacious. Comparing owned lines in Nebraska with owned lines in other states we find that 4.57 per cent of the owned mileage lies within the state of Nebraska. Using this figure in the computation, and considering the market value of the stocks and bonds which are based upon the mileage actually owned by the company, a value considerably higher than the amount found by the board is reached as the value of the Nebraska property. It was admitted by the accountant testifying for the company that one of the bases of valuation used by him was incorrect in that it does not assign to Nebraska as large a proportion of the stock and bonds issued, taken as representing value, as ought to be assigned to it, if the miles of road where the bonds are an actual lien are considered; that in dividing the stocks and bonds upon the basis of miles of track operated the same thing would be true, and also this would be true if

based upon transportation train miles. The evidence shows that the Rock Island system consists of 5,363.75 miles of line owned by the company, and also of many miles of leased lines, and of trackage rights over many miles; that the tentative valuation of the entire line made by the interstate commerce commission in 1915, exclusive of the Chicago, Rock Island & Gulf Railroad, and of equipment, amounted to $275, 363, 390, and it is shown that additions and betterments since July 1, 1915, to December, 1922, amounted to $22, 526, 737. The value of equipment on April 1, 1923, is not in evidence. There is evidence in this record, not produced before the board at the first assessment, as to the density of traffic in Nebraska as compared with that in other states. This evidence establishes that the density of freight traffic on the lines in Nebraska is less than half that of the average density per mile on the system, and that the density of passenger traffic is much less than the average density on the system. No doubt the board considered these factors. But it must be considered that the density of freight traffic and consequent enhanced value of the line at the convergence near Chicago—the neck of the bottle—is produced by the traffic arising on all the feeder lines, including the lines in Nebraska. There is also testimony by the complainant showing that at the former hearing errors were made in the computations introduced in evidence by it. If the accountants were in error then, may they not be equally in error now? The questions presented as to proper allocation of values are difficult to solve, and it is not to be wondered at that accountants, valuation boards and courts reach different conclusions in respect of this point.

That the actual value of the property was not properly equalized with the value of other property in the state is another complaint made. To disprove or qualify the evidence presented by the company as to the value of farm lands, the state introduced 44 affidavits respecting the market value of farm lands in Lancaster county, Nebraska. The evidence shows that the peak average value of farm

lands occurred about January 1, 1922, and that there has been a rapid decline since; that the ratio of assessed value to sale value is about 74.4 per cent., and not 68 per cent., as the evidence at the former hearing indicated. The sale prices in the testimony offered by the complainant were taken from the public records, excluding certain classes of conveyances, but it is shown that in some of them the actual consideration was lower than the price named in the conveyance.

Another consideration is worthy of mention. The value of railroad property, under the statute, is not to be equalized with the value of farm real estate alone. The intention of the legislature was that all property in the state should be valued and assessed upon practically the same basis. The board has power "to increase or decrease the assessed valuation of any class, classes or kinds of property in any county or tax district, whenever in their judgment it shall be necessary to make such assessment conform to law." Comp. St. 1922, sec. 5901. The burden of proof is upon the company to establish its contention that the value of its property has been fixed by the board at an amount greater than its actual value, or that its assessed value has not been fairly and properly equalized when considered in connection with the assessment of all other property, so that this disparity and lack of uniformity result in an unjust and unfair assessment. While some members of the court think the result reached is inaccurate, and the value as equalized is too high, it is a practical impossibility from the evidence before us to fix the precise equivalent of the actual value of the property. Approximation both as to value and uniformity is all that can be reached. We cannot say the company has sustained the burden of proof that the assessment is so unjust and arbitrary that it ought to be set aside. The proceedings in error are therefore

DISMISSED.

Note—See Taxation, 37 Cyc. pp. 990, 1119.

RAY GRAGG V. STATE OF NEBRASKA.

FILED DECEMBER 4, 1924. No. 24105.

1. **Criminal Law**: ASSISTANT PROSECUTOR. Where a county attorney, under the direction of the district court, procures an attorney to assist in the trial of a person charged with a felony, such assistant is not required to qualify and give a bond nor to take an oath as deputy county attorney.

2. ———: COUNTY ATTORNEY: DE FACTO OFFICER. Where a person is employed to act in the capacity of county attorney and thereafter performs the duties which regularly pertain to this office, and holds himself out to the public as such official but has not given the required statutory bond nor taken the required statutory oath, such person is county attorney *de facto*. *Baker v. State, ante,* p. 654.

3. ———: ———: RIGHT TO OFFICE. The right of a duly appointed incumbent to retain the office of county attorney is not triable under a plea in abatement.

4. ———: ASSISTANT PROSECUTOR: APPOINTMENT: OBJECTION. When, under section 4916, Comp. St. 1922, a county attorney, under the court's direction, procures counsel to assist in the prosecution of a person charged with a felony, it is not error for the court to overrule defendant's objection to such appointment, unless it is shown that the appointment was made under a mistake of fact or under such circumstances as would reasonably tend to preclude the accused from having a fair and impartial trial and thereby prejudicially affect his substantial rights.

5. ———: FORMER JEOPARDY. A jury retired to deliberate upon its verdict in a felony case, when it was discovered that the accused had not been arraigned. The jury were recalled and resworn. Thereupon the accused was lawfully arraigned and pleaded "not guilty." On defendant's request a continuance was granted, over the state's objection, until the next regular term of court, and, on defendant's motion, the jury were dismissed, but without prejudice to the state. When the case was regularly called for trial, at the term to which it was continued, defendant was given leave to withdraw his plea of "not guilty" and interpose a plea in bar of the prosecution on the alleged ground of former jeopardy. *Held,* that, in view of the proved facts, the court did not err in overruling the plea in bar.

6. **Larceny**: DESCRIPTION OF ANIMALS. The use of the generic

designation "cattle" is a sufficient description in a verdict under the statute providing punishment for stealing a "cow, steer, bull, heifer, or calf." Comp. St. 1922, sec. 9603.

7. ———: VERDICT: VALUE. Where a person is convicted of stealing an animal under section 9603, Comp. St. 1922, it is not incumbent upon the jury to fix the value of such animal in its verdict.

8. Criminal Law: SENTENCE. Where a person is found guilty of stealing an animal under section 9603, Comp. St. 1922, it is error for the court to fix the minimum sentence under section 10248, Comp. St. 1922, instead of section 9152, Rev. St. 1913, when it appears that the latter act was in force at the time the crime was committed.

ERROR to the district court for McPherson county: GEORGE C. GILLAN, JUDGE. *Affirmed: Sentence reduced.*

John F. Cordeal, Frank M. Colfer, B. F. Butler and *Walter D. James,* for plaintiff in error.

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

Heard, before MORRISSEY, C. J., ROSE, DEAN, GOOD, and THOMPSON, JJ.

DEAN, J.

Defendant was charged in McPherson county with stealing "one spotted heifer calf, weight about 450 pounds, eight months old," and, upon conviction, was sentenced to serve a term in the penitentiary of not less than two nor more than four years. He prosecutes error.

The assignments of alleged error will be taken up in the order in which they are presented in the briefs.

Mr. R. H. Beatty, an attorney of Lincoln county, was appointed to assist in the prosecution, on the application of Mr. George N. Gibbs, county attorney for McPherson county, under section 4916, Comp. St. 1922, as amended, Laws 1923, ch. 41. The objection is that Beatty "was privately employed by private persons" and was disqualified because he was paid for his services solely by the "Nebraska Stock

Growers' Association." But neither McPherson county nor Mr. Charles Chessmore, the owner of the stolen property, paid any part of this fee, nor is the latter a member of the association.

Defendant cites *McKay v. State,* 90 Neb. 63, and *Flege v. State,* 93 Neb. 610, in support of his contention. In the *McKay* case defendant's counsel made a timely motion to exclude private counsel from participating in the prosecution on the ground (1) that the assistant was not the deputy county attorney; (2) that the county attorney had not requested the appointment; (3) that he had not taken an official oath; and (4) that he was employed and paid "by the brothers and sisters of the deceased" whom it was charged McKay had feloniously slain. Defendant's motion was overruled on the ground that an order had been entered "in the presence of the defendant and his counsel" "at the commencement of the empanelment of the jury that M. F. Harrington is permitted to assist the county attorney in the prosecution." On appeal it was held that the court erred because (1) it was not shown that the county attorney requested the appointment; and (2) the mere fact that the court permitted counsel to assist was not a compliance with the statute; and (3) that mere acquiescence by the court and county attorney is not sufficient.

In the *Flege* case an assistant prosecutor was appointed, on the county attorney's application, who had theretofore been employed and paid by a person who was suspected of having feloniously killed the decedent. And it appears that he assisted in the preliminary examination and also in a former trial of the accused in the district court and, as stated in the opinion, had taken "an active part in both trials for the purpose of protecting his suspected client." On appeal this court held that, under the circumstances attending the appointment, "a fair and impartial trial of the accused person could not be reasonably expected." The judgment of conviction was reversed.

Section 4916, Comp. St. 1922, was enacted for the express purpose of authorizing the county attorney to pro-

cure such assistant counsel as he may deem necessary for a felony trial. *Bush v. State,* 62 Neb. 128; *Blair v. State,* 72 Neb. 501; *Lower v. State,* 109 Neb. 590; 18 C. J. 1336, sec. 79. Its object is that, under the court's direction, assistant counsel may be procured who will not, in his zeal for a verdict, be tempted to prevent the accused from having a fair and impartial trial. It is obvious that the participation of counsel, as an assistant prosecutor, who has been employed by a person having ulterior motives, as against the accused, might seek to bring about the conviction of an innocent person to gratify the animosity of an unprincipled client.

It is unthinkable that the legislature, in the enactment of section 4916, held any other thought than that the state, by the county attorney, should have not only the privilege, but that, for obvious reasons, it should be his bounden duty, in a proper case, to procure the appointment of such assistance as the exigencies of a felony case might require, to the end that the state might be thereby enabled to present the material facts to the jury, unbiased and unprejudiced by improper motives. In the present case the facts are so vastly dissimilar from the facts in the *McKay* and *Flege* cases that defendant's contention finds no support in either. The evidence discloses that reversible error cannot be predicated on this assignment.

When the case was first called for trial in September, 1923, defendant filed a plea in abatement, wherein he alleged that the information was not filed within three years next after the date of the commission of the alleged offense. But in this counsel seem to be mistaken, because it appears that the alleged offense was committed October 12, 1918, and the information was filed October 7, 1921. Comp. St. 1922, sec. 9931; *Boughn v. State,* 44 Neb. 889, reaffirmed in *State v. Robertson,* 65 Neb. 41. It is not argued, however, that the information was not served upon defendant, within the time required by statute, before the trial commenced. Comp. St. 1922, sec. 10104. Besides the foregoing averments, defendant charges that Mr. Gibbs, who

verified and filed the information, was not the duly qualified, elected or appointed county attorney of McPherson county, and that "his pretended acts as such assumed official were and are without authority of law and of no force or effect." But the record shows that his appointment was regular. He did not, however, take the official oath nor file a bond. But he held himself out as county attorney and performed the duties pertaining to this office and was recognized by the public as county attorney, so that he was county attorney *de facto*. *Baker v. State, ante*, p. 654.

However, the title to a public office cannot be collaterally attacked, nor can it be determined under a plea in abatement, but ordinarily by *quo warranto*. 32 Cyc. 691; *State v. Gonzales*, 26 Tex. 197. In view of the evidence the court did not err in overruling defendant's plea in abatement in its entirety.

On the same day that defendant's plea in abatement was overruled, at the September, 1923, term of court, the following proceedings were had, as shown by the record, namely: September 27, 1923, a jury was selected and sworn and the state introduced its evidence and rested. Defendant introduced no evidence and rested. The argument proceeded and the jury, having been instructed, retired in charge of the sheriff. The court's attention was then called to the fact that defendant had not been arraigned, and had not pleaded to the information. Whereupon the jury were recalled and, on motion of the state, defendant was arraigned, the information was read to him and, upon being called upon to plead, he pleaded not guilty. The jury were then resworn to try the case and the state announced its readiness for trial. But defendant, in open court, then announced "that he is not ready for trial, and requests the court to discharge the jury in said action, and continue said action for trial to the next term;" that the court thereupon granted a continuance as requested, over the state's objection, and the jury were discharged "without prejudice to the state." Defendant then entered into a recognizance with sufficient surety for his appearance at the

March, 1924, term of court, when the cause came on regularly for trial.

At the next succeeding term of court, namely, the March, 1924, term, to which on defendant's motion the case was continued, to wit, on March 27, 1924, when the jury were impaneled, defendant obtained leave to withdraw his plea of not guilty and interpose a plea in bar, wherein he alleged, "that the state ought not to further prosecute said information against him" on the ground of former jeopardy. On consideration of the record, and the evidence, the court overruled the plea in bar.

The record clearly discloses that defendant's plea of former jeopardy is utterly groundless. In a criminal case the issues are not joined until defendant has been arraigned and has pleaded to the information. And, until these statutory requirements have been fulfilled, there is nothing to be tried out. The accused has not yet been informed of the nature of the charge against him. There can be no jeopardy in the absence of a plea. Comp. St. 1922, sec. 10117; *Browning v. State*, 54 Neb. 203; *Popel v. State*, 105 Neb. 348; 16 C. J. 243, 244, secs. 381, 382. If when defendant was arraigned he had stood mute and had not requested a discharge of the jury and had not requested a continuance of the action until "the next term," another question might have been presented. But he did not stand mute, which was his right, but pleaded to the information, and over the state's objection and at his own request the jury were discharged, and also at his request the action was continued. The plea of former jeopardy was properly overruled.

The jury found defendant "guilty of stealing cattle in manner and form as he stands charged in the information." Defendant says this is not a sufficient description in a verdict under the statute providing punishment for stealing a cow, steer, bull, heifer, or calf. Comp. St. 1922, sec. 9603; *Clark v. State*, 102 Neb. 728; 25 Cyc. 83.

The jury did not find the value of the property alleged to have been stolen. It is argued this is error. The statute under which defendant was prosecuted does not require

such finding. The act, among other things, merely provides: "Whoever steals any cow, steer, bull, heifer, or calf, of any value, * * * shall be imprisoned in the penitentiary not more than ten years nor less than one year." Comp. St. 1922, sec. 9603. See *Griffith v. State*, 94 Neb. 55.

Defendant cites *Hennig v. State*, 102 Neb. 271, and *Fowler v. State*, 109 Neb. 400, but neither case is in point because both prosecutions were brought under section 9129, Rev. St. 1913, now section 10154, Comp. St. 1922, and in such actions the jury are required, on conviction, to fix the value of the stolen property. This the jury failed to do and both cases were reversed for this reason. This assignment is without merit.

In a supplemental brief filed by defendant he argues that the court erred in imposing a minimum sentence of two years, under section 10248, Comp. St. 1922, instead of one year, under section 9152, Rev. St. 1913, that being the provision of the indeterminate sentence law which was in effect when the crime was committed. In this the court erred. The minimum sentence of one year should have been affixed. *Ingoldsby v. State*, 110 Neb. 495.

The judgment of the district court is therefore affirmed in all respects, except as to the imposition of a minimum sentence of two years, and in this respect only it is modified and the minimum sentence is fixed at one year.

AFFIRMED: SENTENCE REDUCED.

Note—Criminal Law, 16 C. J. secs. 381, 3206; District and Prosecuting Attorneys, 18 C. J. secs. 79, 17 (1926 Ann.), 86; Larceny, 36 C. J. secs. 578, 572.

LYDIA ELIZABETH BAKER, APPELLANT, V. GROVER C. BAKER, APPELLEE.

FILED DECEMBER 4, 1924. No. 22948.

Marriage: ANNULMENT. Where a male and female are above the age required by statute to enter into the marriage relation, and are otherwise competent, and are married under and pursuant

to a marriage license that is wrongfully obtained, and the marriage is fully consummated, the fact that the marriage license was wrongfully obtained affords no ground for annulment of the marriage.

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

Sloan, Sloan & Keenan and *Epperson, Massie & Epperson,* for appellant.

Stiner & Boslaugh, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE, GOOD and THOMPSON, JJ.

GOOD, J.

This action was instituted on behalf of Lydia Elizabeth Rath Baker by her father, John Rath, Jr., as her next friend, to annul her marriage to defendant Grover C. Baker. As grounds for the relief demanded, plaintiff alleged that she was under the age of 18 years when the marriage ceremony was performed; that defendant used artifice and deceit and exercised undue influence over plaintiff and coerced her consent to entering into the marriage; that he practiced fraud in procuring the marriage license, by falsely representing to the county judge that plaintiff was 19 years of age when he knew that she was under 18 years, and that the marriage had not been consummated by cohabitation of the parties. Defendant admitted the marriage, and that plaintiff was under 18 years of age when the license was procured and the marriage ceremony performed, and that he had falsely stated to the county judge that she was over 18 years of age when he procured the marriage license, and denied the other allegations of the petition. A trial of the issues thus presented resulted in a general finding for the defendant and the dismissal of plaintiff's cause of action. Plaintiff appeals.

From the record it appears that at the time of the marriage ceremony plaintiff lacked three weeks of being 18

years of age; that she had for many years resided with her parents on a farm in Clay county; that defendant resided on a farm about two miles distant, where his sister kept house for him; that defendant had "kept company" with the plaintiff for a year and a half, or more, prior to their marriage; that he frequently called upon her at the home of her parents, took her to church and to places of entertainment and amusement; that the father and mother of plaintiff frequently visited the defendant at his home; that the two families were quite intimate; that a marriage between the parties had been contemplated for a long time, and on two or three different occasions defendant had sought the consent of plaintiff's father to the marriage, but on each occasion the father had withheld consent on the ground that his daughter was too young at that time to enter into the marriage relation.

On November 5, 1921, defendant procured the marriage license and that evening met plaintiff in the town of Sutton, and, with his sister took her in his automobile and drove to the village of Saronville, where the marriage ceremony was performed by a minister of the gospel in the presence of the latter's wife and of defendant's sister. Plaintiff insists that, while she knew he had the license and saw it before they left Sutton, she told him she would not marry him without the consent of her parents. However, she did not protest against going to Saronville, nor did she make any protest or remonstrance when the marriage ceremony was performed. After the marriage ceremony, plaintiff, defendant and his sister drove back to Sutton, where the sister was left, and defendant and plaintiff drove on to the city of Aurora, where he and his wife registered at a hotel as man and wife and occupied the same room. The next morning the parties drove to Lincoln, where they remained two days with relatives of the defendant, and then drove back to Clay county and remained one night with a neighbor. The next morning they drove to the home of plaintiff's parents, evidently to seek their forgiveness, but plaintiff's mother ordered defendant

not to come upon the premises. After an hour's parley the parties then returned to the defendant's home. Later in the day word was sent to plaintiff that her mother was ill and desired her to come home. Defendant again took his wife to the home of her parents, stating that he would call for her that evening. When he did call for her that evening she came out and sat in the automobile with him and discussed their affairs for some time, but refused to go with him, and remained with her parents. Very shortly thereafter this action was instituted.

The evidence discloses that the marriage was fully consummated; that no artifice, deceit or coercion was used by defendant; that, while plaintiff desired the consent of her parents to the marriage, nevertheless it appears that she freely and without any duress or any undue influence entered into the marriage relation. We have, then, this situation: Was the marriage void or voidable so that it may be annulled because the plaintiff was under 18 years of age, and because the marriage license was obtained by falsely representing that she was above the age of 18 years?

Section 1489, Comp. St. 1922, declares: "In law, marriage is considered a civil contract, to which the consent of the parties capable of contracting is essential." Section 1490, Comp. St. 1922, provides: "At the time of the marriage the male must be of the age of eighteen years or upwards and the female of the age of sixteen years or upwards." It will thus be observed that the parties to this action were of the age where they could consent to and enter into a marriage contract. It is true that the statute further provides: "Previous to the solemnization of any marriage in this state, a license for that purpose must be obtained from the county judge of the county wherein the marriage is to take place." Comp. St. 1922, sec. 1492. And the next succeeding section (section 1493) provides: "When either party is a minor, no license shall be granted without the verbal consent, if present, or written consent, if absent, of the father, if living, if not, then of the mother, of such minor, or of the guardian or person under whose

care and government such minor may be, which written consent shall be proved by the testimony of at least one competent witness." However, this relates to the obtaining of a license, and does not go to the validity of the marriage.

It has long been the rule in this state, and, we think, in most jurisdictions as well, that, notwithstanding the statute declares a license shall be necessary, yet the want of a license does not affect the validity of the marriage. This court has held in *Haggin v. Haggin,* 35 Neb. 375, that the want of a license does not affect the validity of the marriage, but renders the party performing the ceremony liable. In *Melcher v. Melcher,* 102 Neb. 790, it is held: "If a minor is of the age of consent (Rev. St. 1913, sec. 1541), the fact that there was no license, or that it was wrongfully obtained, does not invalidate his marriage." And in the course of the opinion it is said (p. 792): "We must remember that the age of consent to marry is, by our statute, made 18 years or upwards for the male, and 16 years or upwards for the female (Rev. St. 1913, sec. 1541) and, although by section 1543, Rev. St. 1913, a license must be obtained before the marriage takes place, and by section 1544, Rev. St. 1913, no license can be issued to a minor without the consent of his parents, yet the want of a license does not affect the validity of the marriage. *Haggin v. Haggin,* 35 Neb. 375. These parties were both above the age of consent, and therefore, under these provisions of the statute, they were legally married. The fact that the license was wrongfully procured may destroy its effect and protection, and subject the parties at fault to penalties, but it does not affect the validity of the marriage itself." In that case the husband and wife were aged 19 and 17 years, respectively.

Section 1491, Comp. St. 1922, declares what marriages shall be void, but it is clear that the parties to this action do not fall within any of the provisions mentioned in said section, and no statutory ground appears for declaring this marriage invalid. Plaintiff insists that this court, how-

ever, has general equitable jurisdiction to declare invalid a marriage contract procured by fraud, regardless of the fact that it does not come within any of the provisions of the statute which render a marriage void or voidable. This contention cannot avail the plaintiff because the record is barren of any evidence that would establish fraud in procuring the plaintiff's consent to enter the marriage relation.

The judgment of the district court is supported by well-established principles of law and is sustained by the evidence.

AFFIRMED.

ROSE, J., dissents.

The following opinion on motion for rehearing was filed May 1, 1925. *Former judgment of affirmance adhered to.*

PER CURIAM.

This case has been heretofore submitted and an opinion adopted. *Baker v. Baker*, ante, p. 738.

The case has again been argued on a motion for rehearing. After a careful reexamination of the questions involved, a majority of the court is satisfied with the opinion heretofore adopted, and it is therefore adhered to.

ROSE, J., dissents.

JOHN H. MOORE, EXECUTOR, APPELLEE, V. JOHN H. MARKEL, APPELLANT: EMILY J. MOORE, INTERVENER, APPELLEE. JOHN H. MARKEL, APPELLANT, V. ESTATE OF ROBERT E. MOORE, APPELLEE.

FILED DECEMBER 4, 1924. No. 24202.

1. Contracts: MODIFICATION. A contract containing mutual obligations of the parties thereto by mutual consent may be changed or modified in one or more of its details at any time after its execution, and before a breach has occurred, by a new agreement without any new, independent or distinct consideration.
2. ———: TIME OF PERFORMANCE. Where time and punctuality of performance are essential elements of a contract, and by valid,

mutual agreement of the parties, there is a specific extension of time for performance, the new time becomes of the essence of the contract and has the same effect as though the contract had been originally written as modified.

3. **Descent:** CONTINGENT INTEREST OF WIFE: EXTINGUISHMENT. The contingent interest of a wife, residing in this state, in the real estate of her husband is not extinguished or barred by his deed alone, nor is it affected by a written contract, executed by him alone, and she takes the same interest in his real estate after his death as she would have taken had he not executed such deed or contract.

4. ———: ———. The interest which a widow takes in the real estate of her husband on his death is more than that of an heir at law.

5. **Conversion:** REALTY OF DECEDENT. When a married man contracts to convey real estate and dies before the contract has been performed, it is only the interest that his deed alone would have conveyed which equity will treat as personalty in the hands of his personal representative.

6. **Vendor and Purchaser:** CONTRACT: TERMINATION. Where time for the performance of a contract to convey land is expressly made an essential element of the contract, if the vendor is not able to perform on the day fixed, the purchaser may treat the contract as at an end.

7. **Specific Performance:** ENFORCEMENT. Specific performance of a contract to convey real estate will not be enforced, at the instance of the vendor, for a partial interest, where the contract is for the entire interest.

8. ———: MUTUALITY. If one party to a contract cannot enforce substantial performance, a court of equity will not decree specific performance at the instance of the other party. The right to specific performance must be mutual and reciprocal.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Reversed, with directions.*

Stewart, Perry & Stewart, for appellant.

Jacob Fawcett, Samuel J. Tuttle and *C. C. Flansburg, contra.*

Heard before MORRISSEY, C. J., DEAN, DAY, GOOD and THOMPSON, JJ.

GOOD, J.

John H. Moore, as executor of the will of Robert E. Moore, brought in the district court an action against John H. Markel, to obtain authority to execute a warranty deed for two lots in the city of Lincoln, Nebraska, which in his lifetime his testator had contracted in writing to convey to Markel, and to enforce specific performance of the contract. With this action was consolidated another action, then pending in the district court on appeal from the county court, in which Markel was seeking allowance of a claim against the estate of Robert E. Moore for the advancements he had made on the same contract, basing his right to recover on the theory that he had rescinded the contract because of inability of the executor to perform the contract according to its terms. Emily J. Moore, widow of Robert E. Moore, intervened and joined in the prayer of the executor's petition, and offered to join in executing a deed conveying the lots to Markel. For convenience, John H. Moore, executor, will be referred to as plaintiff and Markel as defendant. The trial of the consolidated actions resulted in the disallowance of defendant's claim and authorizing plaintiff to execute a warranty deed conveying the lots, and decreeing specific performance of the contract. Defendant appeals.

This action comes here as a case stated under rule 14 of this court (94 Neb. XIII). The facts are not in dispute, and, so far as pertinent to the issues to be determined, may be summarized as follows:

On March 16, 1920, Robert E. Moore, without his wife joining, entered into a written contract with defendant, wherein he agreed to convey to the latter two lots in the city of Lincoln, Nebraska, for a consideration of $60,000, of which $10,000 was then paid and the remainder was to be paid on or before January 1, 1922, and was to bear interest at 6 per cent. per annum, payable semi-annually. Robert E. Moore was to furnish abstract, showing merchantable title of record, and to deliver his warranty deed to vendee when the remainder of the purchase price and

interest had been paid. Defendant was given the privilege of paying $1,000, or any multiple thereof, on any interest pay day, and the further right, upon the payment of $3,000 additional of the purchase price, to remove from the lots the buildings thereon. Time and punctuality of performance of the agreement were made an essential element of the contract. Abstract of title was furnished and title approved by defendant, who paid an additional $3,000 of the purchase price, took possession of the lots, and removed the buildings that were thereon when the contract was executed. The instalments of interest that became due September 16, 1920, March 16 and September 16, 1921, were paid when due.

In July, 1921, defendant, in writing, requested Moore to agree to an extension of time for making the deferred payments. Several letters were exchanged between the parties. Correspondence finally resulted in Moore writing a letter to defendant on July 19, 1921, in which he said, in substance, that if defendant would pay $5,000 on the principal, plus interest and taxes, he would give him one year's time at 6 per cent. on the remainder due, and if, at the end of a year's time, $5,000 additional on the principal and the interest and taxes were paid, he would give an additional year's time on the balance of the principal at 6 per cent. interest. On July 23, 1921, defendant, in writing, accepted Moore's offer. On November 16, 1921, defendant, in writing, requested Moore to extend to June 1, 1922, the time for payment of the $5,000 of principal which would have been due January 1, 1922, pursuant to their former correspondence. On the following day Moore wrote a letter to defendant in which he said: "Replying to yours of the 16th would say, I think I will be needing the money about January first, next, very much and would be very glad to have it at that time, but if you cannot possibly raise it, I will give you until June 1, 1922."

It is stipulated that taxes on the real estate described in said contract were paid by defendant as follows: November 19, 1920, city treasurer, Lincoln, Nebraska, $178.34,

for 1920 taxes; March 14, 1921, city treasurer, Lincoln, Nebraska, $57.93, for paving taxes; March 29, 1921, county treasurer, Lincoln, Nebraska, $595.08, for 1920 county taxes. For aught that appears in the record, this is all of the taxes that have been levied upon the lots in question.

On December 6, 1921, Robert E. Moore died testate, without issue, and leaving him surviving his widow, Emily J. Moore. On January 31, 1922, the will of Robert E. Moore was admitted to probate and plaintiff was appointed executor. Emily J. Moore later renounced the provisions made for her in the will of her husband and elected to take under the statute. On March 16, 1922, defendant went to plaintiff and stated that he wanted to pay the balance due on the contract for the purchase of the lots described in the contract and was then able to pay the same, and asked plaintiff if he had the deed to said property executed by Robert E. Moore and was ready to deliver said deed according to the contract. Plaintiff then stated that he had no deed executed by Robert E. Moore, but that he would apply to the court for authority to make a deed. On the same day defendant learned for the first time that Robert E. Moore was married at the time he executed the contract, and that his widow, Emily J. Moore, survived him. He was then advised by his attorneys that Emily J. Moore was the owner of an undivided one-half interest in said lots. Afterwards and on the same day defendant delivered to plaintiff the following writing:

"John H. Moore, Executor of the Estate of R. E. Moore, Deceased.

"Dear Sir: On March 16, 1920, I entered into a contract with R. E. Moore for the purchase of (here follows description of lots). On account of existing conditions I hereby elect to rescind such contract. You are further notified that I hereby surrender possession of lots to you and demand the repayment of all money paid by me on said contract. Yours truly,

"(Signed) J. H. Markel."

On April 28, 1922, plaintiff instituted his action to obtain authority to execute a deed of conveyance and to enforce specific performance of the contract.

The decree is assailed on many grounds. We shall consider only such as seem necessary to a proper determination of this appeal. By express provision "time and punctuality in performance of agreements contained herein" were made an essential element of the contract. While the contract was executory, in part at least, the terms were modified by mutual agreement of the parties as to the time of making the deferred payments. Plaintiff argues that the agreement to extend time is invalid for want of consideration.

The rule of law applicable is that a contract, containing mutual obligations of the parties, may, at any time after it has been made and before a breach has occurred, be changed or modified in one or more of its details by a new agreement, by mutual consent of the parties, without any new, independent, or distinct consideration. *Bowman v. Wright*, 65 Neb. 661; *Easton v. Snyder-Trimble Co.*, 94 Neb. 18; *Teal v. Bilby*, 123 U. S. 572; *Kiler v. Wohletz*, 79 Kan. 716, L. R. A. 1915B, 11, and note (b) appearing on page 17. It is not even suggested that there had been any breach of the terms of the contract at the time of the extension agreement. It follows that the time in which defendant should make his deferred payments was modified by subsequent agreement of the parties, as above indicated.

The modification of the contract did not alter or change the provision making time and punctuality of performance an essential element of the contract, and that provision continued to be a part thereof and applied to the contract as modified. Where, by valid agreement, there is a specific extension of time for performance, the new time becomes of the essence of the contract, just the same as though the contract had been originally written as modified. 13 C. J. 690, sec. 785.

March 16, 1922, was an interest pay day on which defendant, by the terms of the contract, was privileged to

pay $1,000 of the principal, or any multiple thereof. Under this provision he could pay all of the remainder of the consideration and thereby be then entitled to a deed to the lots. On that day defendant, not being himself in default, informed plaintiff that he was able and desired to pay the remainder due on the purchase price, and asked for a warranty deed executed by Robert E. Moore. Plaintiff did not and could not then deliver either a deed executed by Robert E. Moore or one executed by himself as executor; nor did he then have authority, as executor, to execute a deed conveying the interest of Robert E. Moore to defendant. Moreover, the interest of the wife of Moore, contingent on her surviving her husband, could not be affected by the contract, because she was not a party to the contract. When Moore died his widow elected to renounce the provisions of his will for her benefit and to take under the statute, as she had a perfect right to do. She thereby became vested with title to an undivided half-interest in the lots.

Plaintiff invokes the equitable rule that, where a valid contract to convey real estate has been entered into and the vendor dies before performance, equity will treat the contract as personal property, so that the executor is entitled to the money as personal property, and contends that in this case the widow must look to the money in the hands of the executor for any contingent interest she may have had in the real estate. This contention overlooks the fact that Mrs. Moore was not a party to the contract. The interest which a widow takes in the real estate of her husband on his death is more than that of an heir. *In re Estate of Grobe,* 101 Neb. 786. The prospective interest of an heir at law in the real estate of his ancestor may be barred by the deed or contract of the ancestor. In this state the deed of the husband alone will not bar the contingent interest of his wife in the real estate of which he is seised during coverture, unless she is a nonresident of the state. It follows that his contract alone could not affect her contingent interest. When a married man contracts

to convey real estate and dies before the contract has been performed, it is only the interest that his deed alone would have conveyed which equity will treat as personalty.

We then have this situation: On March 16, 1922, plaintiff was unable to perform the contract. A warranty deed conveying merchantable title was due to defendant on that day. Plaintiff could not furnish it then or ever, unless a third party, who was not bound by the contract, would join in a deed. That third party could not be compelled to join. It was a matter of choice with her. Defendant could not have enforced specific performance of the contract except as to an undivided half interest in the lots. It is a well-settled rule that, where time for the performance of a contract to convey land is expressly made an essential element of the contract, if the vendor is not able to perform on the day fixed, the purchaser may treat the contract as ended. *Shonsey v. Clayton,* 107 Neb. 695; *Johnson v. Herbst,* 140 Minn. 147; *Soldate v. McNamara,* 94 Conn. 589. In *Miller v. Ruzicka,* 111 Neb. 815, it is held: "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." Again, it is held by this court that specific performance will not be enforced for a partial interest, where the contract is for the entire interest. *Hoctor-Johnston Co. v. Billings,* 65 Neb. 214; *Boehmer v. Wellensiek,* 107 Neb. 478.

The right to enforce a contract must be mutual. If one party to a contract cannot enforce substantial performance, a court of equity will not decree specific performance at the instance of the other party. The right to specific performance must be mutual and reciprocal.

Applying these rules of equity to the facts disclosed by the record, it clearly appears that plaintiff was not entitled to specific performance of the contract, and that defendant was justified in declaring the contract rescinded.

This brings us to the question of the amount defendant

should recover. He demands reimbursement for all payments of principal, interest, and taxes, less the amount that should be deducted for the removal of the buildings and the value of his possession of the lots from the execution of the contract until it was rescinded. The record is barren of any evidence as to the value of his possession. Only a nominal amount can be allowed therefor. The value of the buildings removed is stipulated to be $1,000. We are of the opinion that it would not be equitable for defendant to recover for the general taxes paid during the time he occupied the lots. Plaintiff and his testator were liable for and presumably paid taxes on the money and contract obligations of defendant, which represented the full purchase price of the lots. It would seem unjust that they should pay taxes on the lots and also on the full contract price while defendant occupied the lots and was certainly relieved from the taxes on the money that he had used to make the payments. As to the paving tax, that was a lien for benefit accruing on the lots, and defendant should be reimbursed therefor.

The payments made by defendant on principal aggregated $13,000; interest payments $4,230; paving tax $57.93; total $17,287.93; less the value of removed buildings, $1,000, leaves the net amount defendant should recover at $16,287.93, together with interest thereon at 7 per cent. per annum from March 16, 1922.

The judgment of the district court is reversed, and judgment will be entered in accordance with this opinion.

REVERSED.

Note—See Conversion, 13 C. J. sec. 9 (1926 Ann.); Contracts, 13 C. J. secs. 604, 607, 784; Dower, 19 C. J. secs. 201 (1926 Ann.), 164; Specific Performance, 36 Cyc. pp. 739, 622; Vendor and Purchaser, 39 Cyc. p. 1412.

WILLIAM N. EDGAR, APPELLEE, V. SKINNER PACKING COMPANY ET AL., APPELLANTS.

FILED DECEMBER 4, 1924. No. 22902.

1. **Corporations: SALE OF STOCK: SUIT TO RESCIND: VENUE.** When a sale of stock in a foreign corporation is procured through fraudulent representations and statements of its agent in a county, the contract for the sale executed, dated, signed, and consideration paid, and the contract transmitted to the corporation office in another county, an action in equity to rescind the contract based on such fraud may be brought in the former county. Comp. St. 1922, sec. 634.
2. **Contracts: "DATE."** "The word 'date' is the 'designation or indication in an instrument of writing of the time and place when and where it was made.' " *Hammond v. Ocean Shore Development Co.*, 22 Cal. App. 167.
3. ———: **RESCISSION.** When one party to a contract has been induced to enter into it through fraudulent representations of the other party, he has a reasonable time after discovery thereof to rescind.
4. ———: ———. *Held*, that, under the facts proved and the law applicable, the trial court did not err in entering decree rescinding contract of purchase.

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

Ritchie, Canaday & Swenson and *C. D. Ritchie*, for appellants.

Butler & James and *Stewart, Perry & Stewart, contra.*

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

THOMPSON, J.

This is a suit in equity, instituted by plaintiff, Edgar, against the defendants, Skinner Packing Company, American State Bank, and D. W. Geiselman, seeking to rescind a contract of subscription for stock in defendant packing company, cancel a note given by plaintiff in part payment thereof, and to recover $3,125, the amount paid by him on the

subscription. The pleadings are too voluminous to be here set out, but the material issues before us are: (1) Whether the district court for Red Willow county had jurisdiction of defendants? The Skinner Packing Company is a foreign corporation, with its principal place of business in Nebraska in Douglas county. Service was had on it by serving summons on the auditor of public accounts in Lancaster county, under section 634, Comp. St. 1922. The other defendants are residents of Douglas county, and were served therein. Neither defendant was served in Red Willow county. (2) Was the plaintiff induced to purchase 50 shares of stock in defendant packing company by false and fraudulent representations made to him by it through its agent, to his detriment? (3) Did plaintiff waive his right to rescission by delay after having knowledge of the facts?

The trial court overruled objections filed by defendants to the jurisdiction, and defendants then answered over, carrying into each answer as a part thereof this question of jurisdiction. At the close of the evidence, the court found for the plaintiff, and granted him the relief prayed for as to defendant packing company, and dismissed as to the other defendants. From this judgment, defendants appeal.

The court having found in favor of defendants Geiselman and American State Bank, and as no cross-appeal was had, we need consider the appeal as to the other defendant only.

Taking up the issues in their order, we find that the subscription for the stock was secured, the money paid, and the note executed and delivered to the authorized agent of defendant packing company, all in Red Willow county, and at the same time and place the false and fraudulent representations relied on were made. Also, the contract was dated and signed in Red Willow county. *Held*, that "the cause of action, or some part thereof, arose" in Red Willow county, under section 634, Comp. St. 1922, and the court did not err in overruling objections raised to the

jurisdiction. *Buckley v. Advance Rumely Thresher Co.*, 106 Neb. 214.

Further, the petition discloses that the cause of action, or some part thereof, arose in Red Willow county, and issuance of summons and return thereof show that service was had on defendant packing company in Lancaster county by serving summons on the auditor of public accounts, and on defendants Geiselman and the bank in Douglas county. Thus, objections to the jurisdiction which were carried into the respective answers were those and those only disclosed by the record. Therefore, each defendant, by reason thereof, entered a general appearance. *Brooks v. Flora*, 111 Neb. 9.

As against this conclusion, defendants cite *Hammond v. Ocean Shore Development Co.*, 22 Cal. App. 167, in which suit was brought in Mono county. It was not alleged that the contract was either made or to be performed in that county, and this failure is stressed in the opinion. On the contrary, it appeared from the complaint that the contract was dated in San Francisco county, and the presumption is that a writing is truly dated, and the place at which a contract is dated is held to be "the place where the contract was made." The opinion then concludes that the contract was made and was to be performed in San Francisco county. It is further held therein that "a cause of action in deceit accrues immediately upon the successful consummation of the fraud," citing 20 Cyc. 90, and that rescission was had in San Francisco county, and the Mono county court was without jurisdiction.

Let us apply this reasoning to the instant case. The plaintiff lived in Red Willow county, the parties were there when the contract was made. It was dated at Bartley, in that county. The money was paid and the note given there. There was no other place named in the contract for its completion. The letter seeking rescission was written and posted there. Then it must be further noticed that the language of the California statute construed by that court did not contain the words, "or some part thereof," found

in section 634, *supra*. Then, the California case was one at law, based on a rescission had, while this is one in equity, seeking rescission. In the former, the cause of action arose where the rescission took place; in the latter where the fraud, or some part thereof, was committed. It is contended by defendants that legal notice of rescission was not had. This contention is not applicable to an equitable action for rescission. *Geise v. Yarter, ante*, p. 44; *Union Central Life Ins. Co. v. Schidler*, 130 Ind. 214; *Briggs v. Brushaber*, 43 Mich. 330; 20 Cyc. 90. But the rule is otherwise in a law action.

As to the second issue, the case comes to us for trial *de novo*, under section 9150, Comp. St. 1922. We have carefully examined every question presented by the pleadings and the evidence, from which it is considered by us that the petition states a cause of action, impelling the granting of the relief prayed for, if supported by sufficient evidence; that the evidence conclusively proves that defendant Skinner Packing Company, through its duly and legally authorized agent, falsely and with intent to defraud plaintiff, made the representations set forth in the petition; that plaintiff believed same to be true, and relying thereon was induced to, and did, pay the defendant packing company, at the time and place stated, $3,125 in money, and at the same time and place executed and delivered to it his promissiory note in the usual commercial form for $3,125, due and payable as alleged in plaintiff's petition; that defendant retains, and has at all times retained, the certificate of stock and control thereof, as well as the note. Further, as a part of the fraud, the agent executed a collateral contract to repurchase the stock. The evidence shows that this agent at the time was also a stockholder and promoter of defendant packing company. Thus, this case comes within the law as announced in *Stroman v. Atlas Refining Corporation, ante*, p. 187; *Brown v. Stroud & Co., ante*, p. 210; *Franey v. Warner*, 96 Wis. 222.

As to the third issue, we find that, although plaintiff did not bring this action for more than a year after the fraud

was committed, he did bring it within a reasonable time after he discovered such fraud. Things such as the laudatory letters written him by defendant company served to lull his suspicion, investigation, and discovery. However, timely after such discovery, plaintiff demanded of defendant company a rescission of the contract, asked surrender of the note, and payment to him of $3,125, offering to return as far as possible under his limited control all that he had received by virtue of the transaction. We conclude that plaintiff did not waive his right to rescind by laches. In this conclusion we are supported by *Rhines v. Skinner Packing Co.*, 108 Neb. 105. "The true doctrine is that, after discovering the facts justifying rescission, the party is entitled to a reasonable time in which to decide upon the course he will take." 2 Black, Rescission, sec. 536.

Therefore, having examined every question of law and fact presented it is considered and determined by us that the findings, judgment and decree of the district court in favor of plaintiff and against defendant Skinner Packing Company is in all things right, and should be, and hereby is,

AFFIRMED.

Note—See Contracts, 13 C. J. sec. 671; Corporations, 14 C. J. sec. 874; 14A C. J. sec. 4121; Date, 17 C. J. sec. 2; Fraud, sec. 133.

ROBERT J. TATE, APPELLEE, V. R. L. BARB, APPELLANT.

FILED DECEMBER 4, 1924. No. 22913.

Evidence examined, and *held* insufficient to sustain the judgment.

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

Abbott, Rohn & Dunlap and *Courtright, Sidner, Lee & Gunderson*, for appellant.

J. C. Cook, contra.

Heard before MORRISSEY, C. J., LETTON, DEAN, GOOD and THOMPSON, JJ.

THOMPSON, J.

This is a suit brought for specific performance of a contract for the sale of real estate. The petition is in the usual form, with a copy of the contract in plaintiff's possession, as it now is, attached, which describes the land as located in Kit Carson county, Colorado.

The answer alleges, in substance, that plaintiff, being desirous of having defendant's aid in selling land, suggested that he pay plaintiff $500, and the latter would prepare duplicate memoranda to be signed by each, plaintiff to retain one and defendant the other, and that plaintiff could use this in making sales of land to other parties; that, if defendant concluded he did not want to purchase land, he could let plaintiff know and the $500 would be returned to him, and all matters dropped (thus raising a similar issue to that in *Coffman v. Malone*, 98 Neb. 819); that defendant notified plaintiff that he did not want to purchase land, and demanded the return of his $500, but plaintiff refused to pay same.

The evidence as to this part of the answer shows that defendant consented to the suggestion of plaintiff, and the latter sat down at defendant's table, they being at the time at defendant's home on the farm, and prepared the papers in the presence of defendant's wife; that each signed the respective duplicates, plaintiff retaining one and defendant the other; that the property was described as "Nw. quarter of Sec. seventeen, Township eight, Range forty-eight."

Another defense relied on is that the description of the land purported to be sold being, as follows from that set out above, without state, county, or meridian named, is wholly insufficient to comply with the requirements of the statute of frauds as pertaining to the conveyance of land. Comp. St. 1922, sec. 2453; *Barton v. Patrick*, 20 Neb. 654; *Frahm v. Metcalf*, 75 Neb. 241; *McCarn v. London*, 83 Neb. 201.

The answer further alleges that a copy of the instrument purporting to have been signed by plaintiff and defendant attached to plaintiff's petition shows that the orig-

inal now contains the words " Kit Carson " and " Col.," which have been written in as part of the description since same was executed, and the word " Nebraska " erased from the original; that at the time of the execution of these duplicates the space where the words " Kit Carson " now appear was left blank, and where the word " Col." now appears was the word " Nebraska," and the duplicate left with defendants did not and does not contain the words " Kit Carson " and " Col;" that the original in plaintiff's possession, wherein it now differs from the duplicate in defendant's possession, has been fraudulently altered since its execution, without defendant's knowledge or consent. The answer also prays, by way of cross-petition, for judgment for $500, the sum paid plaintiff at the time of execution of duplicate.

The reply is in substance a general denial. Trial had to the court, resulting in a finding and judgment for plaintiff as prayed for. Motion for a new trial overruled, and case appealed here for trial *de novo*.

For reversal, defendant contends, *inter alia*, that the decree of the court is contrary to law and the evidence. In support of this contention he states in his brief and upon oral argument that a microscopic examination of the original contract as found in plaintiff's possession reveals as follows:

" When Tate wrote out the two contract forms they were resting on a surface which had small, regular and pronounced corrugations or raised places over the entire part whereon the forms were resting when written. Both of the exhibits are exactly alike in that respect. Every letter of the written part of both exhibits except the words ' Kit Carson ' and ' Col.' in plaintiff's exhibit A displays these same regular and pronounced corrugations in the impression made by the indelible pencil which Tate used. The impression of the pencil used in writing the words ' Kit Carson ' and ' Col.' in exhibit A is perfectly uniform. When these words were written the paper was resting on a perfectly smooth and regular surface.

"At the trial plaintiff's exhibit A was introduced and seen for the first time since almost twelve months before by the defendant and Mrs. Barb, and for the first time by counsel for defendant. The light in the courtroom was insufficient and dim. An examination of exhibit A by the court under these conditions did not disclose the difference in writing.

"The evidence adduced by both parties is entirely in harmony on one of the issues. It is conclusively established that when the parties were at the house of the defendant in September, 1919, the plaintiff filled out both of the contract forms, filling in the blank spaces in his own handwriting. It is not disputed that the plaintiff at the request of the defendant filled out and delivered an original copy of the contract to the defendant."

Defendant's contention above set out is not without merit. As this microscopic examination was not had at the trial, and neither was the attention of counsel for plaintiff nor the trial court called to facts disclosed thereby, it is considered by us that, in justice to the parties concerned, the judgment should be, and it hereby is, set aside, and the cause remanded for trial.

REVERSED.

Note—See Alteration of Instruments, 2 C. J. sec. 210.

WILLIAM GREBE V. STATE OF NEBRASKA.

FILED DECEMBER 4, 1924. No. 24100.

1. **Former Case Controlling.** As to the objection to the displacement of the county attorney and the appointment of substitute attorneys to prosecute the case, errors complained of as to trial and ruling on plea in abatement, the law as announced in *Quinton v. State ante*, p. 684, with which this case was argued and submitted, is controlling.
2. **Assault.** Mere words will not justify an assault.

ERROR to the district court for Cass county: JAMES T. BEGLEY, *Judge*. *Affirmed.*

A. L. Tidd, for plaintiff in error.

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

Heard before MORRISSEY, C. J., LETTON, DEAN, GOOD and THOMPSON, JJ.

THOMPSON, J.

This is a prosecution by indictment in the district court for Cass county, wherein William Grebe, plaintiff in error, is charged with unlawful assault upon one Elmer Gaines. Trial had to a jury, verdict of guilty, and sentence of a fine of $100, plaintiff in error to stand committed until fine and costs paid. Motion for a new trial was overruled. To reverse the judgment, error is prosecuted to this court.

This case was argued and submitted with the case of *Quinton v. State, ante*, p. 684, the records being the same up to and including the overruling of the plea in abatement. The parties in their briefs and upon oral argument refer to Grebe as defendant, and for convenience we shall do the same.

The errors complained of may be summarized as follows: (1) The court erred in refusing to permit the then county attorney to conduct the prosecution of the case, and in appointing for that purpose another attorney of the county and an assistant attorney, and in overruling defendant's objection to such procedure. (2) The court erred in dismissing defendant's plea in abatement, and in refusing him a jury trial on it. (3) The court erred in giving instruction No. 9 on its own motion, and in refusing to give instruction No. 3 requested by defendant.

The errors complained of in assignments numbered 1 and 2 were carefully considered by us in *Quinton v. State, supra*, and we hold that the law as therein announced is applicable to the facts in this case. Therefore, it is considered by us that the court did not commit reversible error in appointing an attorney to conduct the prosecution of the case in place of the then county attorney, and in

appointing an assistant for him, and in overruling defendant's objection to such procedure, or in refusing defendant a jury trial on his plea in abatement, or in dismissing his plea.

As to the assignment of error numbered 3, it is considered by us, after a careful consideration of the evidence, that instruction No. 9 given was applicable to it, while instruction No. 3 refused was not.

The judgment of the district court is in all things right, and should be, and hereby is,

AFFIRMED.

Note—See Assault and Battery, 5 C. J. sec. 253; Criminal Law, 16 C. J. sec. 747; 17 C. J. secs. 3627, 3579; District and Prosecuting Attorneys, 18 C. J. sec. 82.

AMERICAN STATE BANK, APPELLEE, V. JOHN KELLER: WILLIAM LAMM ET AL., APPELLANTS.

FILED DECEMBER 4, 1924. No. 23602.

1. **Chattel Mortgages: FILING: UNPLANTED CROPS.** An agreement in writing to execute a mortgage upon crops not yet planted is not entitled to be filed as a chattel mortgage.
2. ———: ———: ———. The filing of a chattel mortgage upon specifically described property will not operate as constructive notice of an agreement therein contained to give a chattel mortgage upon unplanted crops.
3. ———: ———: ———: NOTICE. While a chattel mortgage, or an agreement for one, upon unplanted crops will be enforced in equity against the mortgagor and all persons with notice thereof, the filing of either one of such instruments as a chattel mortgage will not operate as constructive notice of the equitable rights of the mortgagee.

APPEAL from the district court for Scotts Bluff county: P. J. BARRON, JUDGE. *Reversed, with directions.*

Morrow & Morrow, for appellants.

Robert G. Simmons and *J. M. Fitzgerald, contra.*

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

REDICK, District Judge.

This is an action to determine the priority of liens between a chattel mortgage held by the plaintiff and two chattel mortgages held by the defendants Lamm and Westervelt, respectively, and executed by the defendant John Keller. On March 7, 1922, John Keller, being indebted to the plaintiff for balance due upon a promissory note and money advanced at the time, executed to plaintiff a chattel mortgage upon some personal property, about which there is no issue, to secure his note, for $825, due July 10, 1922. After describing the particular chattels, the mortgage contained this provision: "I further agree to give above bank a first mtg. on my share of crops that I will plant during 1922 both to secure this mtg. and also one of $5,775 (which had been thereinbefore mentioned) on which a balance is yet due of $3,395, said crop mtg. to be given when crop is planted." Subsequently, in accordance with said agreement, and on May 27, 1922, Keller executed a chattel mortgage upon his interest in the then growing crops upon his farm, including 75 acres of sugar beets and 30 acres of oats, as security for his note of $825 and a balance of $3,395, which mortgage was filed for record the same day. On May 17, 1922, Keller executed a mortgage to defendant Westervelt upon the same crops for $2,700 as security for a note of that date, representing money owed, and the sum of about $1,183 thereafter advanced during the season to enable him to harvest his crop. This mortgage was filed for record May 17. On April 25, 1922, he executed a mortgage upon the same crops to defendant Lamm for $400, which mortgage was filed for record May 19, 1922. By consent of the parties the sugar beet crop was sold and the proceeds, $4,445.23, paid into court, of which amount $1,482.90 was paid out by consent of the parties, and the contest is over the distribution of the remainder.

The lower court entered a decree finding the above facts, and finding also that Westervelt and Lamm had no actual notice of the mortgage of the plaintiff and agreement therein contained, but held as a matter of law that said defendants took their mortgages with constructive notice of the agreement contained in plaintiff's mortgage, and ordered the payment by the clerk to the plaintiff of the balance remaining in the custody of the court. Defendants Lamm and Westervelt appeal.

The sole question for determination is whether or not the due and proper filing of the chattel mortgage of plaintiff on March 7, 1922, afforded constructive notice to the defendants of the agreement therein contained to give the plaintiff a first mortgage upon the crops in question when the same had been planted. The plaintiff contends that the finding of the court that the defendants did not have actual notice of plaintiff's mortgage is erroneous, but has filed no cross-appeal, and in any event a careful examination of the evidence has convinced us that the finding should not be disturbed. Eliminating the question of actual notice, parties agree that the only question is the one above stated.

The briefs contain an interesting discussion, with a citation of authorities, upon the question of the validity of the chattel mortgage upon crops to be thereafter planted, and the power of the court to decree specific performance of agreements of the kind contained in plaintiff's mortgage, but we need not enter upon a discussion of these matters beyond the observation that in the cases of *Skala v. Michael,* 109 Neb. 305, and *Weigand v. Hyde,* 109 Neb. 678, substantially identical contracts contained in farm leases were held valid and specifically enforced in the *Skala* case, and the money in the hands of a subsequent purchaser with notice adjudged to the landlord in the *Weigand* case; but in both those cases the subsequent purchasers had actual notice of the agreement.

The claim of appellants is that the agreement contained in plaintiff's chattel mortgage, if contained in a separate

instrument, would not be entitled to record, and, though recorded, would not afford constructive notice of its contents. From these premises it is argued that such agreement, though contained in an instrument which was entitled to record, was no more efficacious in giving notice. It is true that the recording of an instrument not entitled to be recorded will not give constructive notice. *Benedict v. T. L. V. Land & Cattle Co.*, 66 Neb. 236, it is equally true that where an instrument is properly recorded it gives notice, not only of its general character and main purpose, but also of all facts recited therein properly connected with the transaction recorded, and within these limits it is generally held that the record gives notice of such facts as persons would have learned if they had examined the same. 23 R. C. L. 216, sec. 79. But the record does not give constructive notice of facts recited therein having no connection with the transaction from which the authority to record is derived. *Mueller v. Engeln*, 75 Ky. 441. In that case it was held that a provision for a lien upon personal property contained in a deed of real estate constituting a conveyance in the chain of title through which the vendee claimed was not constructive notice of such lien to the vendee, for the reason that the fact exhibited in the deed was wholly foreign to the subject of the reference.

Let us then consider the situation as exhibited by the record in this case. Plaintiff's mortgage was given upon certain chattels therein described as horses, mules, etc.; the agreement to give a mortgage upon future crops was not connected in any manner with the particular chattels described in that mortgage nor with the lien thereon, but was a mere executory agreement to execute a mortgage upon other property not then *in esse;* the agreement was not necessary to the validity of the lien upon the chattels nor connected with it in any manner; it was neither a mortgage nor a conveyance intended to operate as a mortgage of goods and chattels within the purview of the registry acts of this state; it was a separate and distinct

personal contract not within their purview so far as we have been able to ascertain, and if contained in a separate document, even though recorded, would not give constructive notice of its contents. The fact that it was a part of an instrument entitled to record does not give it any vitality or efficacy as notice, for the obvious reason that it was wholly foreign to the subject of the properly recorded instrument.

It is further contended by appellee that a chattel mortgage upon property not *in esse*, though void at law, is an equitable mortgage and constitutes a valid lien. But we have held to the contrary in the case of *State Bank v. Grover*, 110 Neb. 421, in which it was said that such a mortgage was ineffectual to create a lien, either legal or equitable, and the recording of it constituted no notice of a claim of lien; this is upon the principle that the instrument was void. Appellee argues, however, that an agreement for a lien upon property not *in esse* is not void either at law or in equity and is capable of enforcement as an executory contract, and, therefore, that equity will look upon the contract and give it effect the same as a mortgage, on the principle that equity considers that done which ought to have been done. But we are unable to perceive how this aids the appellee. Considered as a mortgage it is void under the principles announced in the *Grover* case; considered as an executory contract it certainly cannot be given any greater effect as to notice than the mortgage itself, had one been executed. Appellee cites *Grand Forks Nat. Bank v. Minneapolis & Northern Elevator Co.*, 6 Dak. 357; but in that state there is a statute expressly declaring valid mortgages upon future crops. Also *Ludlum v. Rothschild*, 41 Minn. 218, holding that such a mortgage is valid in equity and may be enforced against subsequent purchasers with notice. There is no difficulty here. We think one who purchases chattel property with notice of the existence of a mortgage thereon, or with notice of an agreement to execute a mortgage thereon, though such instrument were executed before the property came into being, could

not be considered an innocent purchaser, but would take title subject to the equitable rights of the mortgagee of which he had notice. This was the holding of this court in *Skala v. Michael*, 109 Neb. 305, and *Weigand v. Hyde*, 109 Neb. 678. While in the *Skala* case reference was made to the fact that the lease had been recorded, it also appeared that the equitable mortgagee had taken possession of the chattels and the claimants had actual notice of his equitable rights before the issuance of the attachment. And while in the case of *State Bank v. Grover, supra*, it was said: "Since * * * the lease from Grover to Marlow was not recorded and plaintiff had no actual knowledge of the provisions thereof, it follows that it was not charged with any notice of any right of Grover to a lien on the beets." This must not be considered as authority for the proposition that, if the lease had been recorded and there had been no actual notice, it would have afforded constructive notice, because such holding was not necessary to the disposition of the case.

Kelley v. Goodwin, 95 Me. 538, is cited to the effect that an equitable mortgage may be filed for record the same as a legal mortgage. In that case the court construed an agreement in the lease, whereby the lessor retained title to all the crops thereafter planted until the rent was paid in full, as an equitable mortgage, and that inasmuch as it was not filed as a mortgage subsequent purchasers would be protected. The distinction here is that no attempt to create a lien can be found in the language of the contract, but a mere executory agreement to give the lien at a future time. The case is in line with the holdings in those states where the filing of a mortgage upon property not *in esse* is said to give constructive notice of the equitable rights of the mortgagee, but, as above indicated, the rule in this state is different. What would have been the holding of the Maine court if the contract had been a mere executory agreement to give a mortgage in the future, is not intimated.

While we have no doubt as to the validity of appellee's

agreement and the power of a court of equity to enforce its specific performance against all persons having notice thereof, we are constrained to hold that recording the same as a part of the chattel mortgage did not impart constructive notice, and as appellants had no actual notice thereof, their rights under their mortgages are superior thereto.

We have examined the other points made by appellee, and authorities cited, but do not deem it necessary to discuss them.

The judgment of the district court is reversed, with instructions to enter a decree in conformity with the views herein expressed.

REVERSED.

Note—See Chattel Mortgages, 11 C. J. secs. 51, 71, 95, 229.

CARL J. FRICKE V. STATE OF NEBRASKA.

FILED DECEMBER 29, 1924. No. 23956.

1. Criminal Law: BUILDING AND LOAN ASSOCIATIONS: "FALSE ENTRY." A "false entry" in the ledger of a building and loan association, punishable under section 8100, Comp. St. 1922. is one that is intentionally and knowingly false when made, and was made with the intent to deceive any person authorized to examine into the affairs of such association.

2. ———: ———: ———. In such a case, an entry, even though incorrect, if made to correct a mistake in bookkeeping and to make the account speak, or more nearly speak the truth, is not the character of false entry made criminal by the statute.

3. ———: ———: ———: INSTRUCTIONS. Where the evidence on the part of defendant tends to prove that the entries charged to be false were made merely in order to correct mistakes in bookkeeping and to make the "fully paid stock" account on the ledger more nearly state the true facts as to the liability of the association on said account, an instruction which states: "And if you find from the evidence of this case that the defendant wilfully made or caused to be made the false entries charged in the indictment or any one of them, knowing them to be false,

he cannot be heard to say that he made them innocently. Such an entry is calculated to deceive and the defendant who made it knowingly cannot avoid the presumption that such entry would have the effect of deceiving," is prejudicially erroneous.

4. ———: EVIDENCE OF OTHER CRIMES. As a general rule, evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution.

ERROR to the district court for Cass county: ALEXANDER C. TROUP, JUDGE. *Reversed.*

Halleck F. Rose, Arthur C. Pancoast and *William A. Robertson,* for plaintiff in error.

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

Heard before MORRISSEY, C. J., LETTON, DEAN, GOOD and THOMPSON, JJ.

PER CURIAM.

Carl J. Fricke, hereinafter named defendant, was convicted on seven distinct counts of the offense of making false entries on the books of account of the Livingston Loan & Building Association. From this conviction he prosecutes error.

The assignments of error are that each of the counts is not sustained by sufficient evidence and is contrary to law: error in the reception of evidence; error in the instuctions. and in the rulings of the court in regard to a plea in abatement. The assignments of error concerned with the rulings of the court upon a plea in abatement have already been decided adversely to the defendant's contention in *Quinton v. State, ante,* p. 684, and will not be further considered.

The first count of the information charges a false entry at page 338 of ledger No. 2 of the corporation, purporting to show that on June 16, 1921, the corporation paid A. Rys, a stockholder, $300 in payment of stock which Rys held in the corporation, which entry was false and made with in-

tent to deceive the officers and stockholders of the corporation and the officers and employees of the department of trade and commerce. The second count charged a like false entry to Rys of $900 on May 19, 1921. The third count, a similar entry purporting to show that the corporation paid to D. Sampson, a stockholder, $2,100; the fourth count, a false entry at page 338 of ledger No. 2, purporting to show that the corporation had paid out $9,850 "with like intent to stockholders in said corporation." Count five charges falsity of a like entry on the same page, on October 20, 1921, purporting to show that the corporation paid $3,370 to stockholders in the corporation. The sixth count charges that on November 17, 1921, on the same book and page, a false entry was made purporting to show that the corporation paid to stockholders in payment of shares of stock held by them, $5,250. The seventh count makes a like charge with respect to the payment of $394.07.

Section 8100, Comp. St. 1922, so far as material here, is as follows: "Every person who shall wilfully or knowingly subscribe, or make, or cause to be made, any false statement or any false entries in any book of any association organized for the purpose set forth in section 8084 of this article or exhibit any false paper with the intent to deceive any person authorized to examine into the affairs of such association, * * * shall be deemed guilty of a felony," etc.

The entries charged to have been falsely made with the intent to deceive were all made on page 338 of ledger No. 2, which is the " paid-up stock account." This is a general account kept to show the liability of the association upon outstanding fully paid stock. Fully paid stock represents money loaned to or deposited with the association. On the credit side of the ledger is shown the amount of money received by the association, and on the debit side the amount paid out to the holders of such stock on withdrawals. It is clearly shown by his method of keeping this account that defendant was incompetent and did not understand the principle upon which such account should be

kept. For instance, if $1,000 was deposited with the association, a fully paid stock certificate would be issued for that amount, and an entry made on the credit side showing that the holder of the certificate was entitled to credit in that amount. If the owner afterwards drew $400, an entry would be made debiting him to that extent. It was not the custom of defendant to indorse this as a credit upon the certificate already issued, but to take up this certificate and issue a new one for $600 as of the date of the original certificate. Defendant would then enter $600 on the credit side of the ledger. The actual liability of the association on the stock would be only $600, but the entries as made upon the books would show that the association owed both the $1,000 and the $600, less the $400 entered on the debit side, thus overstating the liability of the association $600. Apparently in the endeavor to correct such errors defendant would at various times make entries on the debit side of the ledger in order to balance the account. Most of such entries were made in the ledger without corresponding explanatory entries in the journal. In some the names of the certificate holders are stated, but not always correctly, and the amounts do not always correspond with the debits which should have been made.

There is little conflict in the evidence of the expert accountants who testified. Some of those testifying for the state denominate these entries "false entries," while Mr. Greenfield, the accountant who was called by and gave evidence for both the prosecution and the defense, testified that some are incorrect but not false; that is, that they were made to correct previous errors in the books which overstated the liability of the association, and were not calculated to deceive any one authorized to examine the affairs of the association. He also testified that he made an exhaustive examination of the fully paid stock account, especially in connection with the entries charged to have been falsely made; that in this ledger account he found that a renewal was charged as if the stockholder had received that much additional cash, when as a matter of

fact he did not receive any. If the entries had been properly made in the first place, there would have been an entry on both sides of the ledger, which would maintain the account in its correct balance. On discovery of the error, it would have been perfectly proper for defendant to make the entries to correct the account, and there was no other way of correcting it except to make the missing debits. He also testified that the entries "to balance" (without mentioning names) set forth in the latter counts of the indictment were made as correction entries because a number of entries had been made upon the books giving credit for fully paid-up stock which was never paid for, and which certificates were canceled. The witness did not clearly identify these particular certificates in connection with any particular correction, but he does testify that corrections aggregating the amount of these entries were necessary; that the credits and debits of the accounts he had examined indicated a liability on the fully paid stock account of $42,060.75, while the actual liability was only $13,350, the excess liability being due to the failure to make the proper debit entries; that these entries would not operate as a cover for an abstraction of money and could not have covered any money going to Fricke personally. He further testified, on cross-examination, that there was scarcely an account in the books that was correct, and that there were numerous mistakes, many of them made against defendant's interests.

Coming now to the assignments of error: Early in the trial objection was made to the introduction of testimony as to the facts that the assets had been transferred to a like association in Omaha, as to the present financial condition of the association, and as to the basis upon which its assets had been transferred, but the court permitted evidence as to the transfer and as to the amount realized for stock, on the statement of counsel for the state that the purpose was to show a motive for the alleged false entries. On cross-examination the same witness testified that she received $82.30 per $100 for her shares of stock,

and that the local association owned some mortgages that were being foreclosed, in which the stockholders had an interest. One of the accountants for the state testified that he, with another accountant, made an audit of the books at the request of the board of directors. This audit went back to 1913. The court admitted the result of this audit, over objection, as going to show a reason or motive for false entries. The witness also testified that he could not identify any shortage on account of paid-up stock. The witness was questioned as to what he observed as to keeping the record of loans on mortgaged property. This was objected to as not involving the items here in controversy, but the objection was overruled, and he was permitted to testify that mortgages were carried as assets of the association after they had been paid off, and that defendant kept two sets of books, a private set and the set belonging to the association, the private books consisting of small books of the nature of pass-books. On cross-examination he testified that they found numerous mistakes that defendant had made against himself, and that he charged himself with money that should not have been charged to him.

Defendant was charged with knowingly making certain specific false entries in a ledger "kept for the purpose of showing the financial condition of said corporation," with the intent to deceive the officers of the association and of the state. If these entries upon the ledger had the effect to cover up any shortage in the money received upon the paid-up stock account, and defendant's motive in making them was to conceal from the officers of the company or the examining officers of the state a deficiency in the paid-up stock account, then he would be guilty of the offense charged, provided the entries were sufficiently identified. But there is direct proof, not disputed, that there is no shortage in the paid-up stock account. The evidence which was received, implying that defendant had concealed, or abstracted, or embezzled money derived from collections upon mortgages, tends to prove another crime which it

was not shown had any relation to the crime with which he was charged, and should not have been admitted. *Berghoff v. State,* 25 Neb. 213; *In re McVey,* 50 Neb. 481; *Davis v. State,* 54 Neb. 177; 16 C. J. 586, sec. 1132.

The court gave the following among other instructions: "The court instructs the jury that the intent to deceive in the making of a false entry is an essential element of the offense or offenses charged, but the intent and motives which actuate men can be ascertained only by a consideration of their acts. And if you find from the evidence of this case that the defendant wilfully made or caused to be made the false entries charged in the indictment or any one of them, knowing them to be false, *he cannot be heard to say that he made* them innocently. Such an entry *is calculated to deceive* and the defendant who made it knowingly *cannot avoid the presumption* that such entry would have the effect of deceiving. Nor would the fact that the entry was not made in a skilful manner and could be easily detected constitute any defense." This instruction told the jury as a matter of law that, if defendant wilfully made the entries charged, he cannot be heard to say he made them innocently, that such an entry was "calculated to deceive," and that defendant "cannot avoid the presumption that such entry would have the effect of deceiving." The charge in the indictment is that the entry purports to show that the various sums paid to the stockholders named in the indictment were paid by the corporation to them respectively in payment and satisfaction of stock which the stockholders held. But the explanation is made that these entries were not made to show a payment by the corporation, but were made as correction entries to rectify an apparent overstatement of liabilities of the corporation to the stockholders. The main defect with respect to these entries is that their purpose was not fully explained on the journal or even on the ledger itself.

Even though correct as a legal proposition, an instruction not based upon the evidence may constitute reversible error. *Esterly Harvesting Machine Co. v. Frolkey,* 34 Neb.

110; *Boesen v. Omaha Street R. Co.*, 79 Neb. 381. Considering the nature of the testimony in this case, the giving of this instruction was erroneous. We are satisfied that the errors committed at the trial were prejudicial to defendant. We note also that no instruction was given upon the presumption of innocence.

REVERSED.

Note—See Building and Loan Associations, 9 C. J. sec. 19 (1926 Ann.); Criminal Law, 16 C. J. secs. 1132, 1133, 2486; 17 C. J. sec. 3690.

ROBERT WHITE, APPELLEE, V. GUS E. LEYDEN ET AL., APPELLANTS.

FILED DECEMBER 29, 1924. No. 22924.

1. **Contracts**: CONSTRUCTION. In construing a written contract, the words employed will be given their ordinary significance unless it appears that the parties used them in a different sense.
2. **Vendor and Purchaser**: CONTRACT: CONSTRUCTION. The contract between the seller and the purchaser is construed, and the words "fall due" as used therein are *held* to have the same meaning as the word "delinquent."
3. **Mortgages**: FORECLOSURE: DEFENSES. In a suit to foreclose a purchase money mortgage, an answer which alleges that the contract of sale between the vendor and the vendee bound the vendor to furnish to the vendee a complete abstract of title to the premises involved, that the vendor furnished an abstract, but it was incomplete in that it failed to show certain special assessments levied against the premises, and that the vendee performed his part of the contract in reliance upon the abstract furnished, states a defense *pro tanto*, and it is error to sustain a general demurrer thereto.

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

C. C. Flansburg, for appellants.

Nolan & Woodland, contra.

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

MORRISSEY, C. J.

This is a suit to foreclose a purchase money mortgage. In defendant's amended answer it was alleged that the agreement between the parties had been reduced to writing, and that this writing, among other things, provided that the sale was "subject also to all taxes and assessments levied after the year 1918, and to any unpaid special taxes or special assessments levied for improvements not yet completed, and to unpaid instalments of special assessments which fall due after date hereof levied for improvements not yet completed, and to unpaid instalments of special assessments which fall due after date hereof levied for improvements completed," and that the vendor would furnish the vendee " a complete merchantable abstract of title brought down to date hereof * * * within a reasonable time. The purchaser or his attorney, if an abstract or copy be furnished, shall, within ten days after receiving such abstract, deliver to the vendor or his agent, together with the abstract, a note or memorandum in writing, signed by him or his attorney, specifying in detail the objections he makes to the title, if any; or if none, then stating in substance that the same is satisfactory." A copy of the contract was attached to and made a part of the answer. The answer also contained the allegation that the vendor caused to be delivered to the vendee's attorney an abstract of title to the premises, and that no special assessments of any kind appeared upon the abstract against the property; that county and state taxes of $121.26 were shown as then due and delinquent, which vendor subsequently paid; that the attorney attached a written statement of the condition of the title to the abstract and returned it to the party from whom it had been received.

The answer contained a statement of certain payments made, and alleged that these payments were " made in reliance upon said abstract and the taxes shown thereon,"

notwithstanding that, "prior to the execution of said contract and the deed thereunder, special assessments had been levied for paving tax, but such assessments were all due long prior to the date of the deed and contract and became delinquent in equal annual instalments thereafter." It alleged that two instalments of the special assessment levied for paving tax subsequently became delinquent; that the premises were advertised for sale for special assessments; that defendant paid these delinquent instalments of special assessments; and when the interest on the mortgage in suit fell due, tendered the amount of the interest, less the sum paid to discharge the special assessments, to the holder of the interest coupon.

The copy of the answer set out in the transcript does not specifically state that this tender was refused. However, it was refused, and such refusal forms the basis for this action.

There was a prayer that the liability of the respective parties for the payment of the special assessments be determined, and for general equitable relief. To this answer plaintiff interposed a general demurrer. The demurrer was sustained. Defendant refused to plead further, and the court entered a decree in favor of plaintiff for the amount set out in the petition, and defendant has appealed.

Two questions are presented. Only one of these questions, we learn from the presentation in this court, was pressed upon the attention of the trial judge, namely, the language of the contract wherein it was provided that the purchaser took title "subject also to all taxes and assessments levied after the year 1918, and to any unpaid special taxes or special assessments levied for improvements not yet completed, and to unpaid instalments of special assessments which fall due after date hereof, levied for improvements completed." The controversy, it will be noted, arises over the "unpaid instalments of special assessments," and the meaning of the words "fall due," as used in the contract, becomes material.

This point was so tersely stated and the rule so correct-

ly announced by the trial judge that we adopt his language and conclusion as our own, to wit: "We are construing a contract between individuals, and the words must be given their ordinary significance unless it appears that the parties used them in a technical sense. If I say to my purchaser, 'Here are eight instalments of special taxes levied on this property, I will pay everything up to date and you are to pay all instalments which fall due hereafter,' there could be no question as to the intention of the parties that the purchaser was bound to pay all instalments which were not then required to be paid under the terms of the levy. It seems to me that it was in this sense the parties used the term 'due' in their contract, and that the word shall be given the same meaning as 'delinquent.'"

The contract bound the purchaser to furnish a complete abstract of title. The demurrer admits that the abstract furnished was not complete, in that it did not show the special assessments then made against the property, and it admits that all payments made subsequent to the delivery of the abstract were made in reliance upon the abstract. In this state of the record, it was error to sustain the demurrer.

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

REVERSED.

Note—See Contracts, 13 C. J. sec. 489—Mortgages, 27 Cyc. p. 1602; Vendor and Purchaser, 39 Cyc. p. 1633.

HERMAN FEIS, APPELLEE, v. UNITED STATES INSURANCE COMPANY, APPELLANT.

FILED DECEMBER 29, 1924. No. 22928.

1. Insurance: PROOF OF LOSS: NOTICE: WAIVER. Before an action is begun to recover upon a policy of accident insurance, refusal of payment made on the ground that the policy was not in force at the time the injury was sustained constitutes a waiver of notice and proof of loss.

2. ———: POLICY: CONSTRUCTION. An accident insurance policy made the insurer liable only "where there are some external and visible marks of an injury." In such a policy these provisions should be liberally construed as regards the insured.
3. ———: ———: ———. It is not required that such marks shall be either immediately visible or enduring in their nature, and where the evidence shows that the insured received a violent blow upon the stomach sufficient to knock him down, to affect his breathing, and to cause a slight pallor in his face at the time of the accident, and there is also medical testimony that such a blow would probably cause a reddening of the skin which would soon disappear, the requirements of the policy as to "external and visible marks" are sufficiently met.
4. ———: QUESTIONS PROPERLY SUBMITTED. Evidence examined, and *held* sufficient to justify the submission of the questions as to whether the death of the deceased was the result of an accident such as is covered by the provisions of the policy, and whether there were some "external and visible marks of an injury."

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

C. L. Clark and *R. F. Ireland,* for appellant.

J. C. McReynolds, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE, GOOD and THOMPSON, JJ.

LETTON, J.

Plaintiff's son held an accident insurance policy in the defendant company. The policy provided that, in case of the death of the insured from accident, $1,000 should be paid to the beneficiary, who is the plaintiff in this case. The son died from what is claimed by the plaintiff to be the result of an accident. Defendant denied liability, pleading that the policy was void at the time the insured sustained the injury; that no notice was given of the injury within 20 days, as the policy requires; that the policy only insured " against loss resulting directly, independently, and exclusively of all other causes from bodily injuries effected during the life of this policy, solely through external, vio-

lent, and accidental means, and where there are some external and visible marks of an injury;" that the injury and death were not so caused, but were " caused primarily and directly from gastric hemorrhage due to an ulcer or ulcers of the stomach," and that there were no external and visible marks of the injury alleged in plaintiff's petition. The reply denies the allegations in the answer, and pleads that the defendant, before the filing of the action, denied any liability on the policy and waived proofs of loss and notice of the accident and death.

Defendant absolutely denied any liability before suit was brought, alleging that the policy was not in force at the time of the injury. This is a waiver of the defense based upon the provision of the policy requiring notice of the accident and proof of death. Where it is denied that the policy is in force at the time the injury is received, a defense based upon a provision of the policy is inconsistent with it, and proofs of loss are dispensed with. *Omaha Fire Ins. Co. v. Hildebrand,* 54 Neb. 306; *Ætna Ins. Co. v. Indiana Nat. Life Ins. Co.,* 191 Ind. 554, 22 A. L. R. 402, and cases in note, p. 408.

A fair interpretation of the petition is that it charges that the insured received an accidental blow upon the stomach, and also an injury from two heavy lifts in the course of his employment. The evidence is to the effect that on September 26, the day of the first accident and injury alleged, the deceased, a young man about 20 years of age, who was working for a farmer named Macklin, with Macklin and his son, a young man of about the same age as the insured, were loading an implement, commonly known as a " hay-buck," upon a wagon, and that the wind caught it and blew it over. A projecting beam or sweep upon it struck the insured across the stomach and " knocked the breath out of him," a witness says, and he was a little pale. He was knocked into a sitting position. He said he was not hurt much. Afterwards he worked as usual. There was apparently no difference in his appetite, but he was restless at night and did not sleep well, while before he

was a sound sleeper. On that night he rubbed his hands across his stomach several times and did so more or less all the week. On September 28 the insured and young Mr. Macklin were about to remove a water-tank partly filled with water. They had to lift one side high enough to empty it before they could load it. It was heavy and hard to lift. After it had been lifted, young Mr. Macklin says he noticed the insured stooped over, that he was trembling, and sweat broke out on his forehead. He worked on September 29 and 30, and on the evening of October 1 he vomited blood. A physician was called, who gave him a hypodermic, but he vomited blood again twice before morning. His father arrived at the farm in the morning. Upon consultation with the doctor it was decided to take the young man to a hospital in Lincoln. This was done. He was able to walk into the hospital; but, while there, had recurrent hemorrhages, which he vomited. He had lost so much blood that an attempt was made a few days afterwards to save his life by transfusion of blood from his brother's arm, but he died during this operation.

Among the defenses pleaded are that insured died from hemorrhages caused by gastric ulcer, and not from the result of an accident; that, if it should be found that he died from an accident, defendant was not liable under the policy, because the injury did not occur "solely through external, violent, and accidental means," and there were "no external and visible marks of an injury."

There is no direct proof that the blow upon the stomach caused any external and visible mark upon the body. Apparently the insured was not examined by any one until the night of October 1, when the physician was called. There is no proof that there was then any visible mark of the blow upon his body. Two attending physicians at the hospital testified that, when examined at that time, there were no visible external marks upon the body, and that in their opinion the hemorrhages were the result of gastric ulcers. Another physician testified, in answer to a hypothetical question, that a blow such as was described would

be apt to show a reddening of the skin, that if there had been a reddened spot it might disappear in a day, and that it would be unusual for such evidence to be in existence six or seven days after the blow. Another doctor testified that a blow such as described might possibly, but not very probably, cause a rupture of a small blood vessel in the stomach. Much medical testimony was adduced upon the question, whether if a mark had been made upon the body at the time of such a blow it would have disappeared before the time that the examination was made, and upon the question as to the probable existence of gastric ulcer.

The court gave the following instruction, the latter clause of which is vigorously urged to be reversible error: " If the death of the insured was not the proximate result of his alleged accidental injuries, independent and exclusive of all other causes, the plaintiff cannot recover. Moreover, if you find from the evidence that the injury of the deceased, if any, did not cause any external visible mark upon him, you should find for the defendant; but you are further instructed in this connection that if he received a violent blow upon the abdomen sufficient to knock him down, and if you so find from the evidence, you are at liberty to find and believe that the injury did produce an external mark upon him, though the same did not long remain."

Considering the undisputed facts in evidence, we are inclined to think, taking the instruction as a whole, that it was not prejudicial. There is no denial that at the time the insured was struck he appeared to have " the breath knocked out of him," and was pale, and that afterwards, when he lifted the heavy tank filled with water, his face became pale, he trembled, perspiration broke out upon his brow, and he stood for several minutes attempting to recover. Three nights after he vomited blood and had recurring hemorrhages until he died. Up until that day he had apparently been a strong, healthy young man, working every day, with a good appetite and apparently sound digestion. He had never complained of any trouble with his stomach. While there was a conflict in the evidence

of the doctors as to whether the injury resulted "directly, independently, and exclusively of all other causes from bodily injuries," there was sufficient evidence to warrant the jury in so finding.

Were there any "external and visible marks?" The words must not be strictly, but liberally, construed as regards the insured. It is not required that such marks shall be either immediate or enduring in their nature. What is essential is that there is some manifestation abnormal in its nature and affecting the physical man, the existence of which may be ascertained by observation or examination. *Pennington v. Pacific Mutual Life Ins. Co.*, 85 Ia. 468. The question of what constitutes an external and visible mark has been before the courts in a number of cases. A case very similar to this is *Horsfall v. Pacific Mutual Life Ins. Co.*, 32 Wash. 132, 63 L. R. A. 425. The insured in that case had overtaxed his strength by a heavy lift. Immediately thereafter he showed pallor, he trembled, and perspiration stood out upon his forehead. Such indications were held by the court proper to be submitted to the jury to determine whether they were visible and external marks within the meaning of the words in the policy. See also, *Modern Woodman Accident Ass'n v. Shryock*, 54 Neb. 250; *Barry v. United States Mutual Accident Ass'n*, 23 Fed. 712; *Peterson v. Locomotive Engineers Mutual Life & Accident Ins. Ass'n*, 123 Minn. 505, 49 L. R. A. n. s. 1022, and note; *Lewis v. Brotherhood Accident Co.*, 194 Mass. 1; *Root v. London Guarantee & Accident Co.*, 92 App. Div. (N. Y.) 578; 4 Joyce, Insurance (2d ed.) sec. 2617; Fuller, Accident and Employers' Liability Insurance, 121. Under the authorities cited, there were some "external and visible marks of an injury."

Considering all the facts in the case, we are of the opinion that no prejudicial error occurred, and the judgment is, therefore,

AFFIRMED.

Note—See Accident Insurance, 1 C. J. secs. 37, 79, 80, 206, 337.

JACOB MADURA, APPELLEE, V. PATRICK E. MCKILLIP, APPELLANT.

FILED DECEMBER 29, 1924. NO. 22932.

1. Evidence: WRITING: VALIDITY: BURDEN OF PROOF. One who attacks the validity of a written instrument to which his name has been signed, either in his own handwriting or in the presence of witness by his mark, has the laboring oar and must overcome by competent evidence the presumption of its validity afforded by its proper execution and acknowledgment.
2. Trial: INSTRUCTIONS: BURDEN OF PROOF. In such a case, instructions which place the burden of proof of establishing the validity of the instrument upon the defendant relying upon the same, and which fail to instruct the jury that in case the evidence is equally balanced the plaintiff cannot recover, are erroneous.

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

Albert & Wagner and *W. J. Hammond,* for appellant.

J. J. Harrington, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE, GOOD and THOMPSON, JJ.

LETTON, J.

This is an action to recover a balance alleged to be due plaintiff on an oral contract for the sale of real estate. Plaintiff, who was the owner of 320 acres of land in Greeley county, alleges in substance that on September 20, 1919, he sold the same to defendant McKillip for $29,000, subject to a mortgage of $19,000; that $1,000 was to be cash in hand, $12,000 on or before March 1, 1920, and $16,000 by the conveyance to the plaintiff of 160 acres of land in Holt county, free and clear of incumbrance, which price was agreed upon by the parties. This agreement was to be reduced to writing by the defendant, who caused a writing to be prepared, falsely representing that it contained the terms of sale agreed upon. Plaintiff was unable to read or write English, was illiterate, and, relying upon the representa-

tions of McKillip that the written contract contained the terms of the oral agreement, he signed it by his mark. The written contract, which is set out in full, provides that the north half of section 6, township 29, range 10, in Holt county, should be conveyed in part payment of the Greeley county land, the northeast quarter to be conveyed to plaintiff and the northwest quarter to the plaintiff's son, Albin Madura, the latter quarter subject to a mortgage of $4,000. It is alleged that plaintiff has performed the contract on his part, but that defendant has refused to pay $12,000 which became due March 1, 1920.

The defendant denies the making of any other than the written contract; alleges that pursuant thereto the deeds to both the Greeley county land of plaintiff and the Holt county land of defendant were deposited in a bank at Spalding, Nebraska; that plaintiff received and accepted two separate deeds, one running to himself as grantee and the other to his son Albin as grantee; that defendant purchased under and by virtue of the written contract, and has fully performed all his obligations thereunder; that plaintiff, at the time the deeds were delivered, paid defendant the sum of $172.80 in accordance with the written contract. It is also pleaded that plaintiff, having caused defendant to convey one quarter to his son for the agreed consideration of $12,000 above the $4,000 mortgage, is now estopped to deny the validity of the contract or of the conveyance.

The evidence on behalf of plaintiff is to the effect that he is 55 years old and was born in Poland. He cannot read nor write, and makes his mark when he signs papers. When he went to look at the Holt county land his son was with him. McKillip's agent, Fellers, then told him that his son was going to buy the other quarter. After looking at the land they went to McKillip's office. McKillip read the contract to him and he believed it was according to the agreement. He did not know the half section was included or he would have stopped the transaction. McKillip deposited $1,000 in the bank for him, but it was taken

to pay interest and taxes on the Greeley county farm he sold defendant. He also paid for taxes, interest, etc., $172.80. He furnished an abstract of title to his land, but McKillip, though he promised to do so, did not furnish an abstract to the Holt county land. There was a mortgage on the quarter he bought in Holt county, but he was not aware of the same until he was notified to pay the interest. This was not released until after this action was begun. The first he knew of the fraud, a neighbor to whom he showed the deed said there was $13,000 coming to him, and when plaintiff told him about the $1,000 left at the bank he said there was $12,000 still coming. On cross-examination he testified that McKillip, Fellers, John Kutlas, who was an agent for McKillip and a Polander, and his son Albin, went out to see the land, and that he told them he wanted only one quarter. Albin and Fellers were at the bank in Spalding afterwards at the time the deal was closed. The banker did not have two deeds and hand one to plaintiff and one to Albin. Albin went to Holt county with him for a ride and he was more with the agent than with him.

For the defendant, Albin Madura testified that he heard the conversation at the time the contract was made; that his father understood English pretty well; that McKillip read the contract first, and then Kutlas explained it to his father in Polish. The agreement was that his father was to have the improved quarter clear, and his father said he wanted the other quarter conveyed to the witness. On their return to Greeley county he heard his father say he was getting a quarter clear and that the witness was getting another quarter with a mortgage on it. Mr. Fellers corroborates him as to the transaction with McKillip, and also says that he was present when the settlement was made with plaintiff at the Spalding bank; that he had with him a complete statement of the matter, taxes, mortgage, and equity, and that he went over the statement with the banker and plaintiff, checking over all the items, and that Albin Madura was there. Madura asked the

banker if everything was all right, and he said it was, so Madura signed the deed. Madura paid the difference according to the statement. Madura then gave witness two deeds, and asked him to send them up to O'Neill to be recorded. The original statement was sent to McKillip and a copy was given to plaintiff. McKillip and Kutlas testified practically to the same effect. Howarth, the scrivener, said that he heard plaintiff say he would like to get a quarter of land for his boy. McKillip dictated the contract to the witness, who wrote it on the machine. Plaintiff and Albin Madura were in the room and could hear the dictation as well as the witness. The banker at Spalding testifies that plaintiff told him he had exchanged his place for a half section of land in Holt county; that he was getting a quarter with improvements, and that the other quarter with an incumbrance on it he was giving to his son, Albin, so that he would stay at home.

Considering the direct conflict between the testimony of plaintiff and that of the other witnesses, it was essential that the law with respect to the burden of proof be clearly and correctly stated to the jury. Instruction No. 4, after stating the plaintiff's contention as to the facts, concludes as follows: "If the plaintiff has, by a preponderance of the evidence, proved his contention as herein set forth, then your verdict will be for the plaintiff for $12,000, to which you will add and include interest at 7 per cent. from March 1, 1920, to November 14, 1921." Instruction No. 6, after stating the claim of defendant, that the written contract was the only one entered into, and that it had been fully performed, told the jury: "If you shall find that the defendant has proved the truth of his contentions by the evidence, then you will find for the defendant." Instruction No. 6, therefore, placed upon defendant the burden of proving the truth of his contention. Neither in instruction No. 4, nor in any other instruction, is the jury told that, in case the evidence is evenly balanced, the plaintiff cannot recover. Such an instruction is peculiarly necessary when plaintiff is seeking to set aside

an instrument in writing on the ground of fraud, for, as has been said by this court: "What would be sufficient to constitute a preponderance of the evidence and to sustain a judgment in an ordinary case might not suffice in another, where, in addition to the burden resting upon the plaintiff in any case, particular presumptions are to be overcome. This is especially true where a plaintiff seeks by parol evidence to overcome the presumptions arising from the express terms of a conveyance, or from the relations of the parties concerned therein. It is obvious that what would ordinarily suffice may fall far short of the requisite *quantum* of proof in such a case, without in any degree infringing the general rule that only a preponderance of the evidence is demanded." *Doane v. Dunham,* 64 Neb. 135. See *Bingaman v. Bingaman*, 85 Neb. 248. Instructions No. 7 and No. 8 are subject to the same infirmity. One who attacks the validity of a written instrument to which his name has been signed, either in his own handwriting or in the presence of witnesses by his mark, has the laboring oar and must overcome by competent evidence the presumption of its validity afforded by its proper execution and acknowledgment, and he is not entitled to recover unless he has done so.

This case has been tried twice, the jury disagreeing the first time, and rendering a verdict in favor of the defendant the second time. While we are reluctant to reverse a judgment under such circumstances, we are of the opinion that it was prejudicial error to fail to state that the plaintiff could not recover if the evidence was equally balanced, and also to place the burden of proof as to the validity of the written contract upon the defendant.

REVERSED.

Note—See Evidence, 22 C. J. secs. 22, 83—Trial, 38 Cyc. pp. 1749, 1751.

STATE, EX REL. CLARENCE A. DAVIS, ATTORNEY GENERAL, APPELLEE, V. FARMERS STATE BANK OF WINSIDE, APPELLEE: FRANK H. CARPENTER, APPELLANT.

FILED DECEMBER 29, 1924. No. 23271.

1. **Banks and Banking:** RECEIVERS. "Ordinarily a receiver takes charge of banking affairs where the bank left them, and cannot generally, in absence of fraud, mistake, or violation of law, open closed transactions which would conclude the bank, if solvent." *State v. South Fork State Bank*, *ante*, p. 623; *State v. American Exchange Bank*, p. 834, *post*.
2. ———: GUARANTY FUND: LIABILITY. A person leaving money in a solvent state bank and accepting therefor a time certificate of deposit bearing on its face interest at the rate of 5 per cent., is not entitled to the protection of the bank guaranty law during the existence of a secret oral agreement for additional interest.
3. ———: ———: ———. Where a bank's time certificate of deposit, bearing interest at the rate of 5 per cent., represents actual money left with the bank, a secret oral agreement for additional interest may be abandoned by an arrangement to that effect, if made in good faith upon the surrender of the certificate and, in lieu thereof, the issuance of a new one for the amount actually deposited with interest at the rate of 5 per cent. from the new date, and under such circumstances the new certificate may be within the protection of the bank guaranty law.

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

A. R. Davis and *H. E. Siman*, for appellant.

Fred S. Berry and *C. M. Skiles*, *contra*.

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

ROSE, J.

This is a controversy between the receiver of the Farmers State Bank of Winside, an insolvent corporation, and Frank H. Carpenter, claimant, who pleads that he is an unpaid depositor entitled to the protection of the bank guaranty law. The department of trade and commerce took charge of the bank in a failing condition November

7, 1921, when it was indebted to claimant in the sum of $15,000, evidenced by two certificates of deposit which had been issued by the bank to claimant September 1, 1921, one for $10,000 and the other for $5,000, each bearing on its face interest at the rate of 5 per cent. per annum and maturing March 1, 1922. In a proceeding by the state to wind up the affairs of the bank, Carpenter filed with the receiver a claim for $15,000 and interest, based on the two certificates of deposit mentioned, praying for payment out of the bank guaranty fund. On the ground that claimant and executive officers of the bank had a secret oral agreement for interest in excess of 5 per cent. per annum, the receiver pleaded that claiman was not a depositor within the meaning of the bank guaranty law. Upon a trial of the issues raised by the pleadings, the district court allowed the claim as a general one against the assets of the bank in the hands of the receiver, but decreed that claimant, on account of the oral agreement pleaded by the receiver, was not entitled to the protection of the bank guaranty law. Claimant has appealed.

On undisputed evidence the district court found that claimant was a general creditor of the bank to the extent of $15,000 and interest, but there seems to be error in the ruling that the agreement for interest in excess of 5 per cent. prevents a resort to the bank guaranty fund. Comp. St. 1922, sec. 8008.

On former certificates issued by the bank to claimant, the latter had received interest in excess of the maximum authorized by the bank guaranty law, and whether that infirmity extends to or inheres in the later certificates of deposit on which the present claim is founded is the question for determination.

Claimant had been a depositor in the bank for a number of years before it failed. He was a farmer and had deposited in the bank proceeds of the sale of a farm. As early as October 20, 1919, he held three time certificates of deposit aggregating $13,500. These represented actual deposits of money and bore 5 per cent. interest only. Noth-

ing in excess of that rate was contemplated or paid in any form during the original transactions. Claimant was at first a depositor in strict conformity to the bank guaranty law and left his time deposits in the bank after they matured. They were soon increased to $15,000. The original certificates were surrendered and, in lieu thereof, new ones in different denominations aggregating $15,000 were issued, bearing on their face 5 per cent. interest and reciting that the deposits were protected by the bank guaranty fund of the state. There were other transactions of a similar nature from time to time upon maturity of certificates. In the meantime claimant and officers of the bank entered into an oral agreement for additional interest, but not involving usury. Pursuant to this arrangement, the bank on two occasions paid, and claimant accepted, the increase. While receiving additional interest under the oral contract, claimant, of course, was not entitled to the protection of the bank guaranty law.

The agreement for additional interest, however, did not necessarily affect the two certificates in controversy. They were issued September 1, 1921, and represented a sum of money previously deposited by claimant and never returned. They recited that they bore 5 per cent. interest. That rate was authorized by the bank guaranty law. When older certificates were surrendered September 1, 1921, and claimant received in lieu thereof the certificates under consideration, the former transactions, unless involved in fraud, mistake, or violation of law, bound claimant and the bank as well as the receiver. A principle of law applicable to the facts was recently stated in this form:

" Ordinarily a receiver takes charge of banking affairs where the bank left them, and cannot generally, in absence of fraud, mistake, or violation of law, open closed transactions which would conclude the bank, if solvent." *State v. South Fork State Bank, ante,* p. 623; *State v. American Exchange Bank,* p. 834, *post.*

As between claimant and the bank, the oral arrangement for additional interest was a legitimate transaction in

which both parties were competent to join. It did not release the bank from its obligation to pay plaintiff the amount of the certificates with additional interest. The allowance of the claim as a general one was equivalent to a finding that it was not tainted by fraud. The effect of the transaction was to prevent a resort to the bank guaranty fund while the oral agreement was in force. *State v. American Exchange Bank*, p. 834, *post*. The surrender of former certificates on which additional interest was paid closed the transactions to the receiver, unless the oral understanding extended to the two certificates in controversy. On their face, they were strictly within the protection of the bank guaranty law. They so recited and bore interest at the rate of 5 per cent. only. These two certificates, aggregating $15,000, did not include any sum for excessive interest. While surrendering the old certificates for the new ones in the same amount, claimant complained that 5 per cent. was not enough, but the cashier told him at the time that he could not pay more. It required the consent of both parties to change the terms of the written instruments. Such consent was never given. Claimant accepted the final certificates at their face without any agreement for additional interest and none was ever paid. The proper inferences from the undisputed facts are that the agreement for more than 5 per cent. interest on former certificates was finally abandoned and that the bank retained claimant's $15,000 as a deposit within the meaning of the bank guaranty law.

That part of the judgment to the contrary is reversed and the cause remanded for the purpose of requiring payment of Carpenter's claim from the bank guaranty fund.

REVERSED.

STATE, EX REL. CLARENCE A. DAVIS, ATTORNEY GENERAL, APPELLEE, V. WAYNE COUNTY BANK, APPELLEE: GOTTLIEB STORZ, CLAIMANT, APPELLANT.

FILED DECEMBER 29, 1924. No. 23657.

1. **Banks and Banking**: GUARANTY LAW: DEPOSIT. A state bank by soliciting renewals of time certificates of deposit and by appealing to the depositor for additional deposits does not thereby necessarily, within the meaning of the bank guaranty law, change the character of the transactions from deposits to loans.

2. ———: ———: ———. A bank's solicitation, receipt and retention of funds belonging to others are not of themselves conclusive tests of "loans" as distinguished from "deposits" within the meaning of the bank guaranty law.

3. ———: ———: ———. In a controversy between the receiver of an insolvent state bank and a creditor claiming the protection of the bank guaranty law, the question as to whether the claim is based on a deposit as distinguished from a loan should be determined by the facts and circumstances surrounding each particular case.

4. ———: ———: EVASION. Any scheme or subterfuge to procure any part of the bank guaranty fund by evading or cheating the law in the making and receiving of deposits is ineffectual for that purpose.

5. ———: ———: ———. In good faith a person entrusting money to a state bank may enter into a valid agreement to accept therefor time certificates of deposit bearing interest at the rate of 5 per cent. only, and at the same time bind an officer of the bank to pay personally additional interest, without extending the transactions beyond the protection of the bank guaranty law.

6. ———: ———: ———. The misconduct of an officer of a bank in charging to it interest which he agreed to pay with his own money to a depositor is not imputable to the latter, if he had no knowledge of or part in the wrongdoing.

7. ———: ———: LIABILITY. "Where a bank's time certificate of deposit, bearing interest at the rate of 5 per cent., represents actual money left with the bank, a secret oral agreement for additional interest may be abandoned by an arrangement to that effect, if made in good faith upon the surrender of the certificate and, in lieu thereof, the issuance of a new one for the amount actually deposited with interest at the rate of 5 per cent. from

the new date, and under such circumstances the new certificate may be within the protection of the bank guaranty law." *State v. Farmers State Bank, ante,* p. 788.

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

Smith, Schall, Howell & Sheehan, for appellant.

Fred S. Berry and *C. M. Skiles, contra.*

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

ROSE, J.

This is a controversy between the receiver of the Wayne County Bank of Sholes, an insolvent corporation, and Gottlieb Storz, claimant, who pleads that he is an unpaid depositor entitled to the protection of the bank guaranty law. The department of trade and commerce took charge of the bank in a failing condition August 25, 1922, when it was indebted to claimant in the sum of $18,000, evidenced by four certificates of deposit which had been issued by the bank to claimant May 16, 1922, three for $5,000 each, bearing interest at the rate of 5 per cent. per annum and maturing respectively November 2, 1922, November 15, 1922, and December 1, 1922, and one for $3,000, bearing interest at the same rate and maturing June 6, 1922. In a proceeding by the state to wind up the affairs of the bank, Storz filed with the receiver a claim for $18,000 and interest, based on the four certificates of deposit mentioned, praying for payment out of the bank guaranty fund. The receiver objected to such payment, and urged as defenses that the certificates were mere renewals of former certificates; that the bank for its own benefit at its own solicitation was a borrower; that claimant and the bank entered into and carried out a secret agreement for the payment of excessive interest; that the original transactions and the renewals resulted in loans instead of deposits; that claimant was a lender and not a depositor

within the meaning of the bank guaranty law. This is a summary only of the defenses. Upon a trial of the issues raised by formal pleadings, the district court sustained the position taken by the receiver and held that claimant was not entitled to the protection of the bank guaranty law, but entered judgment in his favor for $18,000 and interest as a general creditor of the bank. Claimant has appealed.

Was claimant a lender as distinguished from a depositor within the meaning of the bank guaranty law, providing that—"No banking corporation transacting a banking business under this article shall pay interest on deposits, directly or indirectly, at a greater rate than five per cent. per annum?" Comp. St. 1922, sec. 8008.

When the bank failed it was legally indebted to claimant in the sum of $18,000. In money or its equivalent it had received that sum from assignors of claimant. This amount does not include any interest. None of the principal was ever returned. All transactions having any connection with the claim of Storz were evidenced by time certificates of deposit bearing on their face interest at the rate of 5 per cent. only. Some of them were issued as early as 1914, and for several years neither the bank nor any one for it paid any additional interest. The former payees named in the certificates were E. A. Higgins, the Storz Brewing Company, and its successor, the Storz Beverage & Ice Company. The companies named were corporations controlled by claimant, the principal stockholder and the present owner of the four certificates in controversy. At one time the bank had funds of claimant's assignors to the extent of $25,000. Later this was reduced by payments to $15,000, and afterward increased to $18,000, the amount of the claim under consideration. It was the practice of the bank to pay interest and issue new certificates upon maturity of the old.

At times when the bank could not pay certificates at maturity its cashier applied to claimant for renewals and for more money. The granting of such favors, however,

did not necessarily change the character of actual deposits to loans. Entrusting funds to a bank for future repayment, whatever the nature of the transaction, implies the anticipation of mutual benefits. Without the hope of protection or profit in some form there would be no inducement to entrust money to a bank. Regarded either as loans or deposits, funds are solicited and accepted by banks with a view to promoting banking interests. A bank's solicitation, receipt and retention of funds belonging to others are not of themselves conclusive tests of loans. The question should be determined by the facts and circumstances surrounding each individual case.

Were the transactions involved in this proceeding converted from deposits into loans by the payment of interest in excess of 5 per cent.—the rate specified in all certificates of deposit? The reserve of the bank became impaired. It was unable to pay the time certificates as they matured. Interest rates generally increased. The cashier solicited a retention of the funds and applied for more money. He was told by claimant, while in control of corporations which owned unpaid certificates aggregating $15,000, that the rate of interest was too low and that he wanted his money. He did not demand usury. The cashier offered additional interest at a rate satisfactory to claimant. Definite terms of the new arrangement do not appear in any writing nor are they stated by any witness. Afterward maturing certificates were surrendered and new ones issued, each bearing on its face interest at the rate of 5 per cent., which was regularly paid by the bank, the cashier paying in addition by his individual check a bonus varying at different times from 1 to 3 per cent. Claimant testified that the arrangement for additional interest was the individual obligation of the cashier. The payment of the bonus by individual check, while the bank paid 5 per cent. only, tends to confirm the testimony of claimant. The receiver calls attention to evidence that payments of additional interest by private check were afterward charged to the bank and credited to the personal account of the cashier. The result

was ultimate payment of excessive interest out of funds of the bank. This latter fact was first brought to the attention of claimant at the trial, if he told the truth on the witness-stand. His testimony is consistent with the documentary evidence of the transactions. From evidence that claimant had cautioned the bank to keep entries of the additional interest off its books, the cashier in testifying inferred that claimant knew the excess was being charged to the bank. Under all the circumstances it is more logical to infer that claimant, as the controlling officer of his corporations, meant to make legal deposits without exposing the transactions to unnecessary suspicion. His conduct was consistent with the theory that there were two contracts, one limiting the obligations of the bank to the precise terms of certificates of deposit bearing interest at the rate of 5 per cent. only and the other requiring an interested officer of the bank to pay additional interest on his individual account. Of course, any scheme or subterfuge to procure any part of the bank guaranty fund by evading or cheating the law is ineffectual for that purpose, but there are circumstances under which a bank may pay on a deposit the maximum rate of interest allowed by statute and an officer may, at the same time, in good faith, enter into an agreement to pay additional interest from his personal funds. Misconduct of a bank officer in subsequently taking the excess from the bank is not necessarily imputable to an innocent depositor who had no knowledge of the wrongdoing. *State v. Farmers State Bank, ante,* p. 474. What is forbidden by the bank guaranty law is payment by the bank on deposits, directly or indirectly, of interest at a greater rate than 5 per cent. per annum. The prohibition does not in specific terms prevent an officer of a bank, while acting in good faith, from paying additional interest on his personal account. Comp. St. 1922, sec. 8008. There might be instances in which such payments would save a bank ir a financial crisis or stop an unreasonable run on a solvent institution, thus protecting the guaranty fund

itself. The decision seems to be controlled by the recent opinion in *State v. Farmers State Bank, ante,* p. 474.

Moreover, the secret agreement pleaded by the receiver seems to have been abandoned when the bank issued the certificates upon which the claim of Storz is founded. When he was the individual owner of four unmatured certificates representing the funds in controversy, bearing interest at the rate of 5 per cent. per annum, aggregating $18,000, and payable to the Storz Beverage & Ice Company, he surrendered them to the bank May 16, 1922, without any agreement or purpose to exact additional interest, and received in lieu thereof the certificates on which the present claim is based. On these latter certificates no excess was ever paid by any one. Excessive interest on surrendered certificates under the circumstances disclosed by the record does not necessarily affect new ones issued and accepted in compliance with statutory terms. *State v. American Exchange Bank,* p. 834, *post.* The better view of the evidence and the law applicable thereto leads to the conclusion that claimant is protected by the bank guaranty law. That part of the judgment to the contrary is reversed and the cause remanded for the purpose of allowing his claim as a deposit.

REVERSED.

PETER W. SHERLOCK, JR., APPELLEE, V. PETER W. SHERLOCK, SR.: RICHARDSON DRUG COMPANY, APPELLANT.

FILED DECEMBER 29, 1924. No. 24193.

1. **Master and Servant:** WORKMEN'S COMPENSATION LAW. The terms "any scheme, artifice or device," as used in the workmen's compensation law in connection with the creation of a liability to injured workmen for compensation, do not necessarily imply active fraud or evil design.
2. ———: ———: LIABILITY. A corporation amenable to the workmen's compensation law may create a liability for the compensation of an injured workman employed by an independent contractor whose agreement obligates him to protect the corpora-

tion from liability for injuries to workmen, where such contractor is not required to procure insurance for the protection of his employees.

3. ———: ———: "EMPLOYEE." In the workmen's compensation law the provision that the word "employee" shall not be construed to include "any person whose employment is casual, and which is not in the usual course of the trade, business, profession or occupation of his employer," means conjunctively both casual employment and usual course of trade.

4. ———: ———: USUAL COURSE OF BUSINESS. Painting the outside of a five-story brick building owned and used by a corporation in conducting therein a wholesale drug business may be work performed "in the usual course of the trade, business, profession or occupation" of such corporation, within the meaning of the workmen's compensation law.

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

Kennedy, Holland, De Lacy & McLaughlin, for appellant.

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

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

ROSE, J.

This is a proceeding under the workmen's compensation law. The name of plaintiff, an injured employee seeking compensation, is Peter W. Sherlock, Junior. There are two defendants. The name of one of them is Peter W. Sherlock, Senior, the father of the plaintiff. The other defendant is the Richardson Drug Company, a corporation engaged in the wholesale drug business. In conducting that enterprise it owns, occupies and uses a five-story brick building at Ninth and Jackson streets, Omaha. Defendant Sherlock, as an independent contractor, June 29, 1923, agreed with the corporation to paint exterior parts of its building for $135 and to hold it harmless in the event of an accident to himself or to any of his employees. In contemplation of the painting the corporation in letting the con-

tract did not obtain insurance for the protection of injured workmen nor require defendant Sherlock to do so. He did not procure insurance for that purpose but employed plaintiff as a painter at $29.70 a week. While the latter was at work in that capacity on the exterior of the building, the staging under him gave way. In the resulting fall he was severely injured. In a proceeding before the compensation commissioner both defendants were held liable to plaintiff for $15 a week. From the award therefor the corporation alone appealed. In the district court the defenses may be summarized as follows: The corporation was not the employer of plaintiff. He was employed by defendant Sherlock, an independent contractor. The painting on the outside of the building was not done in the usual course of the corporation's business. Plaintiff was not an employee of the corporation within the meaning of the compensation law. Upon a trial of the issues in the district court judgment was rendered against both defendants in favor of plaintiff for compensation of $15 a week, and an attorney's fee of $250. The corporation again appealed.

There is no conflict in the evidence. On the facts outlined, is plaintiff entitled to compensation from the corporation? The solution is not free from difficulties and in some respects judicial opinion is not harmonious. The decision depends on the meaning of the workmen's compensation law when applied to the undisputed facts.

While defendant Sherlock was an independent contractor and the corporation did not directly employ plaintiff, the statute seems to create a liability for compensation for a failure to procure insurance for the protection of workmen. Among the provisions of the workmen's compensation act are the following:

"Any person, firm or corporation creating or carrying into operation any scheme, artifice or device to enable him, them or it to execute work without being responsible to the workmen for the provisions of this article, shall be included in the term 'employer' and with the immediate employer shall be jointly and severally liable to pay the compensation

herein provided for and be subject to all the provisions of this article. This section, however, shall not be so construed as to cover or mean an owner who lets a contract to a contractor in good faith, or a contractor who, in good faith, lets to a subcontractor a portion of his contract, if the owner or principal contractor, as the case may be, requires the contractor or sub-contractor, respectively, to procure a policy or policies of insurance from an insurance company licensed to make such insurance in this state, which policy or policies of insurance shall guarantee payment of compensation according to this article to injured workmen." Comp. St. 1922, sec. 3039.

The terms, "any scheme, artifice or device," as they are thus used, do not necessarily imply active fraud or evil design. Any one resorting to such means under the circumstances described in the legislation on this subject may be included within the term "employer." Defendant Sherlock and the corporation meant to release the latter from liability for compensation of a painter, if injured while at work on the exterior of the building. The independent contract imposed upon defendant Sherlock the following obligation:

"I agree to hold the Richardson Drug Co. harmless in case of any accident to myself or employees."

This may fairly be considered a "device" within the meaning of the workmen's compensation law, if the corporation disregarded a statutory duty to require its independent contractor to procure compensation insurance.

In its regular trade or business as a wholesale druggist the corporation is an employer and as such is amenable to the workmen's compensation law. Comp. St. 1922, secs. 3029, 3037, 3038. The act, however, in defining the word "employee" for the purposes of the legislation, declares:

"It shall not be construed to include any person whose employment is casual, and which is not in the usual course of the trade, business, profession or occupation of his employer." Comp. St. 1922, sec. 3038.

The disjunctive "or" formerly separated the two condi-

tions, "casual" and "not in the usual course," but by amendment they are now united by the conjunction "and." Either condition was a defense before the statute was changed. *Kaplan v. Gaskill,* 108 Neb. 455; *Petrow & Giannou v. Shewan,* 108 Neb. 466. Since the adoption of the amendment both must be shown. *Nebraska National Guard v. Morgan, ante,* p. 432.

To escape liability under the statutory definition of "employee," therefore, it is now incumbent on the corporation to show both conditions—casual employment and not in the usual course of trade or business. Nor is it enough to prove the letting of the independent contract, if plaintiff performed his services as workman "in the usual course of the trade, business, profession or occupation" of the corporation. In that contingency the duty to require defendant Sherlock to procure compensation insurance still remained. In this connection the corporation asserts that the requirement for insurance is inapplicable, because, as it is argued, the outside painting was not done in the usual course of the wholesale drug business. The contrary seems to be the better view, though the question is debatable. The building is property of the corporation and is used for corporate purposes. Capital of the corporation is invested in the building and the expense of repairing it is payable from the corporate funds. The building is used for offices, storage and other general purposes of the wholesale drug business. It is property used legitimately in conducting the enterprise in which the corporation is engaged. The workmen's compensation law does not separate it from the stock of drugs for the purpose of determining what is done in the usual course of trade. Plaintiff, when injured while painting, had he been employed directly by the corporation, would have been a person whose employment was "in the usual course of the trade, business, profession or occupation of his employer." Casual employment or employment by an independent contractor, outside of such "trade, business, profession or occupation," would present a different question. Under a liberal construction of the

workmen's compensation law, the work in which plaintiff was engaged when injured was performed "in the usual course of the trade, business, profession or occupation" of the corporation. In that situation it failed to require defendant Sherlock to procure insurance for plaintiff's protection, and joined the independent contractor in a device to escape liability for compensation to the injured workman. Within the meaning of the law both defendants are liable to plaintiff for compensation. It follows that there is no error in the record. Counsel for plaintiff are allowed a fee of $250 for their services in the supreme court.

AFFIRMED.

LETTON, J., dissents.

JOHN A. CREIGHTON REAL ESTATE COMPANY, APPELLANT, V. CITY OF OMAHA ET AL., APPELLEES.

FILED DECEMBER 29, 1924. No. 22772.

1. **Municipal Corporations: WATER-WORKS: TRANSFER.** A water company owned a franchise to operate a system of water-works in the city of O. and was thereby authorized to lay and extend its water mains in any part of the city, and the city had power to compel the company to extend its mains, providing the city ordered fire hydrants placed thereon at intervals of not more than 400 feet, and would contract to pay a stipulated annual rental. A private corporation, owning an addition to the city that was not accessible to the water mains, entered into a contract with the water company, whereby the latter extended its water mains into and through the corporation's addition to the city, on condition that the private corporation would advance the cost of extending the mains, such cost to be refunded by the water company to the corporation when the city of O. ordered the extension of the mains and the placing of fire hydrants and entered into a contract to pay stipulated rental. *Held*, that the title to the water mains, laid pursuant to this contract, immediately vested in the water company, and that, on a subsequent sale of its water plant to the city of O., title to such water mains became vested in said city.
2. ———: ———: ———. The provisions in a deed of conveyance, set out in the opinion, and under the circumstances

therein pointed out, *held* sufficient to indicate that the grantee had therein assumed a certain obligation of the grantor.

3. **Parol Evidence.** Where a provision of a written instrument is fairly susceptible of two constructions, or where the language employed is vague, uncertain or obscure, resort may be had to parol or extrinsic evidence to ascertain its true meaning.

4. **Contracts: PAYMENTS: CONDITIONS.** Where a contract provides for the payment of a sum of money upon the happening of certain contingencies, ordinarily a cause of action will not arise thereon until the conditions have actually happened.

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

John P. Breen and *William H. Herdman,* for appellant.

John L. Webster and *W. C. Lambert, contra.*

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

GOOD, J.

Action by John A. Creighton Real Estate Company against the city of Omaha and the Metropolitan Water District of said city, to recover the amount alleged to be due on three written contracts, entered into between plaintiff and the Omaha Water Company, and which, it is alleged, the defendants have assumed. General demurrers to the petition were sustained and the action dismissed. Plaintiff appeals.

We are required to determine whether the petition states a cause of action. The petition is too lengthy to be set out in this opinion, and we shall attempt to summarize only the material parts thereof.

From the petition it appears that the Omaha Water Company owned a franchise to operate a system of waterworks in the city of Omaha. Under its franchise its was authorized to lay and extend its mains in the streets of the city, and the city had power to require the company to lay and extend its water mains, providing the city ordered fire

hydrants to be placed, at intervals of not more than 400 feet, along such mains, and for which the city would pay a stipulated annual hydrant rental.

In 1903 the city elected to take over the water plant at a price to be ascertained by appraisement. Upon completion of the appraisement in 1905, the city refused to take over the plant, and protracted litigation ensued between the water company and the city in the federal court over the question as to whether the city should be required to take over and pay for the plant at the appraised value. In 1912 a decree was entered requiring the city to take over the plant at the appraised value, and also to pay the further sum of $129,424 for extensions and improvements made to the water plant after the appraisement and pending litigation. This sum did not include the cost of the mains, constructed pursuant to the contracts on which this action is based. During the time of the litigation between the Omaha Water Company and the city of Omaha, the plaintiff in this action laid out Creighton's First and Second additions to the city of Omaha, and which were incorporated in and became a part of the city. Plaintiff desired a water supply for these additions to the city, but the water company refused to extend its water mains through the additions unless ordered by the city, or unless the cost thereof was advanced to it. The city did not order the extensions. Thereupon, plaintiff entered into three contracts, of like tenor, with the water company, whereby it agreed to advance to the water company the cost of laying and extending the mains through its additions to the city. Each contract contained the following provision: "Said The Omaha Water Company hereby agrees that when the city of Omaha shall by competent authority order the extensions herein provided for and shall order hydrants placed thereon at intervals of not more than 400 feet under an agreement with said The Omaha Water Company to pay rental for such hydrants, said water company will thereupon refund the cost of the construction of said mains to the said John A. Creighton Real

Estate & Trust Company, and shall then become owner of said mains and their appurtenances." These contracts are the ones on which plaintiff seeks to recover, on the theory that the city has assumed the obligations of the Omaha Water Company.

Pursuant to these contracts, the plaintiff paid to the Omaha Water Company the cost of the mains which were laid and extended through the additions, and the actual use and operation thereof passed to the defendants, with the plant, on July 1, 1912, when the Omaha Water Company, pursuant to the decree of the federal court, executed its deed conveying the plant to the city of Omaha. The Metropolitan Water District succeeded to the rights of the city in the management and operation of the water plant, under the provisions of chapter 143, Laws 1913. No fire hydrants had been placed on the mains in question, or order placed, by the city of Omaha, or its successor in interest.

The defendants urge that the petition does not state a cause of action for various reasons, among them: (1) That no cause of action has accrued because the conditions on which the refund was to be made by the Omaha Water Company have never occurred, viz., the ordering and placing by the city of fire hydrants upon the extended mains; (2) that plaintiff's cause of action, if any, accrued on the 1st day of July, 1912, and is barred by the statute of limitations, since the action was not begun until more than four years thereafter; and (3) that the city never assumed the contract obligations of the Omaha Water Company. In this connection it is proper to observe that, although the case was determined on demurrers to the petition, the petition did not set out a copy of the deed from the Omaha Water Company to the city, but it did allege that the city assumed the obligations of the Omaha Water Company. By stipulation of the parties, parts of the contract or deed were read into the record, and considered by the district court in passing upon the demurrers, and are before this court for consideration, the same as though they had been incorporated in the petition.

We will first determine the question as to whether or not the petition shows that the city of Omaha became the owner of the mains which were laid, pursuant to the contracts between the plaintiff and the Omaha Water Company. It is apparent that the plaintiff had no right to enter upon the streets and lay water mains; nor did it do so; but he Omaha Water Company, possessing the right, did enter upon the streets and lay the mains, and they became a part of its water plant. The only thing that the plaintiff did was to advance to the Omaha Water Company the cost thereof, under an agreement for a refund upon the conditions stated. We think it very clear that the title to these mains, when laid, was in the Omaha Water Company.

From excerpts from the deed of the Omaha Water Company to the city, it appears that the descriptive part covers all water mains, hydrants, and appurtenances thereto, of the Omaha Water Company in the cities of Omaha, South Omaha, Florence, the village of Dundee, and places adjacent to the city of Omaha, in the county of Douglas, and all the property, rights and interest of the Omaha Water Company in and to connections between the pipes and mains and the various buildings, structures and enterprises in said cities, and then follows this clause: "It being the purpose and intent of said The Omaha Water Company to convey, assign and transfer thereby to said city of Omaha, pursuant to the purchase elected to be made by said city of Omaha, as aforesaid, the entire system of waterworks operated by the said The Omaha Water Company, wherever located, together with the appurtenances, and all its property and rights in and in respect thereto, except as herein excluded, including the right of said The Omaha Water Company to maintain and operate the same and every part thereof, and to receive the income from the further operation thereof."

From this clause it appears beyond question that each and every part of the system of water mains, owned or operated by the Omaha Water Company, except such as were excluded, were conveyed to the city of Omaha, and

there is nothing in the deed, so far as set out, which shows that the mains in question were excluded. It sufficiently appears that the city of Omaha became the owner of the mains that were laid pursuant to the contracts between plaintiff and the Omaha Water Company; that it and its successor in interest are using and operating them as part of the water system acquired from the Omaha Water Company, and that it has never paid a cent for these mains.

Defendants argue that there is nothing in the deed from the Omaha Water Company to indicate an assumption by its grantee, the city of Omaha, of the grantor's obligation to refund to plaintiff the cost of the mains that were laid pursuant to the contracts between plaintiff and the Omaha Water Company. The following is an excerpt from the deed: "Subject nevertheless to the obligations entered into by said The Omaha Water Company with private consumers in said city of Omaha, * * * all of which obligations are to be assumed by said city of Omaha." Just what obligations the defendant city assumed under this provision of the deed is not quite clear. Defendants argue that it was intended to apply to the individual users of water and had no relation to the contracts under which the mains in question were laid. In determining what effect should be given to this clause, it is proper to consider, not only the language used, but the circumstances and condition of the parties and the subject-matter, so far as disclosed.

When plaintiff entered into the contracts with the Omaha Water Company, it was, in fact, contracting for the purpose of obtaining a supply of water, to be available for use on property owned by it. It was a private corporation, owning a large amount of real estate, and was entering into the contracts so that it might be supplied with water and thereby become a private water consumer, and, in fact, it did become such as soon as the mains were laid and water turned into them. It should also be borne in mind that, by the decree of the federal court, the city of Omaha was liable to the water company for all extensions

of the mains of the water company made after the appraisement, and that by its deed the water company was surrendering and turning over to the city all of its mains, including those in question, and was receiving no compensation for these particular mains. It would seem unreasonable that the water company, when it was entitled to collect from the city the cost of these mains, should surrender them to the city without a cent of consideration, unless it was to be relieved from the obligation of refunding to the plaintiff the cost thereof, and it seems unreasonable that the city should expect to receive and appropriate these mains to its use, amounting in value to many thousands of dollars, without paying anything therefor. Under these circumstances, it appears more reasonable that the parties intended, by the general clause referred to, that the city should assume the obligations of the Omaha Water Company to make refund to the plaintiff, when the condition arose calling for such refund. In any event, we think resort may be had to parol testimony, to ascertain whether the parties so intended the clause to operate as an assumption of the contract obligations under consideration.

That a written instrument is open to explanation by parol or extrinsic evidence, when its meaning is fairly susceptible of two constructions, or where the language employed is vague, uncertain, obscure or ambiguous, is a well-settled principle of law. If any doubt exists as to the meaning of this clause, it may be settled by resort to parol testimony upon the trial of the issues. We entertain the view that sufficient is alleged to indicate that the city did assume the obligations of the Omaha Water Company to make refund to plaintiff upon the happening of the condition which would make such refund due and payable.

Defendants contend that, by the terms of the written contracts, on which this action is based, the conditions have not arisen by which the plaintiff could assert a right against the Omaha Water Company to recover from it the amount advanced as the cost of laying the mains, because (1) the

city has not ordered the water mains extended: (2) the city has not ordered hydrants placed on said water mains; and (3) the city has not agreed to pay rental for said hydrants, as provided for in said contracts. On the other hand, the plaintiff contends that the obligation to pay and the power and ability to mature the obligation having come together in the defendant city, the law matures the debt.

Plaintiff cites, as supporting its contention, *Bleecker v. Bond*, 3 Wash. C. C. (U. S.) 529. In that case the following rule is announced (p. 539): "If one person is bound to pay a sum of money, upon the happening of a particular event, which is prevented by the obligor, it is the same thing as if the event had actually taken place; and the right of the obligee to claim the stipulated sum immediately arises." We have no criticism to make of the rule there announced, but think it inapplicable to the situation existing in the instant case. It is not alleged in this case that the defendants have prevented the happening of the conditions on which a refund would be made to plaintiff. Whether the city would have ordered the extension of the mains and the placing of hydrants, and would have contracted for the payment of hydrant rental, had the water plant remained in the possession of and the property of the Omaha Water Company, is not, and perhaps could not, be shown with certainty.

We are of opinion that until the hydrants have been placed on the mains, or until the city or its successors have wrongfully refused to place the hydrants thereon, no cause of action can accrue. It is not alleged that the city or its successors have been requested to place hydrants on the mains, much less that they have arbitrarily and unjustly refused to so place them. We are of opinion that no cause of action has arisen, and that the action was prematurely brought.

In sustaining the demurrers to the petition, the district court was clearly right. Judgment

AFFIRMED.

Note—See Contracts, 13 C. J. sec. 532; Evidence, 22 C. J. sec. 1570—Waters, 40 Cyc. pp. 774, 782.

The following opinion on motion for rehearing was filed May 23, 1925. *Former opinion vacated, and judgment of district court reversed.*

Municipal Corporations: ASSUMPTION OF CONTRACT: CONDITION: MATURITY OF CONTRACT. Where, for a valid consideration, a municipality has assumed the contract of another person to pay a certain sum upon certain conditions, and where, afterwards, the sole power to perform the conditions is vested in the municipality, and the duty is by law imposed upon it to perform the conditions, then the law will mature the contract to pay, notwithstanding the condition, in fact, has not been fulfilled.

GOOD, J.

An opinion heretofore adopted in this case is reported, *ante*, p. 802, reference to which is made for a general statement of the issues. A rehearing has been allowed and the cause again submitted for further consideration upon a single question, viz.: Had plaintiff's cause of action accrued when the action was brought?

Plaintiff and the Omaha Water Company entered into three written contracts of like tenor, by the terms of which the plaintiff agreed to, and did, advance to the water company the cost of extending its water-mains into and through Creighton's First and Second additions to the city of Omaha which had been platted by plaintiff. Each of the contracts contained the following provision:

"Said The Omaha Water Company hereby agrees that when the city of Omaha shall by competent authority order the extensions herein provided for and shall order hydrants placed thereon at intervals of not more than 400 feet under an agreement with said The Omaha Water Company to pay rental for such hydrants, said water company will there-

upon refund the cost of the construction of said mains to the said John A. Creighton Real Estate & Trust Company."

The mains were extended according to the agreement, and thereafter the city of Omaha purchased the system of water-works theretofore owned by the water company and, as heretofore held, assumed the obligation of these contracts. No hydrants were ever placed upon the mains, and, since the city had purchased the plant, of course no contracts were made with the water company to pay rentals. In the former opinion the view was taken that, until the hydrants were actually placed, or the city had wrongfully refused to install hydrants, no cause of action would accrue.

One of plaintiff's contentions is that the contract obligation was matured by the provisions of section 3760, Comp. St. 1922. This statute was enacted in 1913, which was after the making of the contracts involved in this action and after the city of Omaha had, by purchase, acquired the water plant previously owned by the Omaha Water Company. The part of said section 3760, pertinent to the present inquiry, is as follows:

"Said metropolitan water districts shall maintain free of charge the number of hydrants heretofore established for fire protection in the streets of municipalities constituting said district, and in addition thereto shall maintain 'regular' fire hydrants approximately four hundred feet apart on service mains in the streets of said municipalities not now equipped therewith."

The Metropolitan Water District, mentioned in the statute quoted above, is a municipal corporation created by statute to control and operate the water plant owned by the city of Omaha. In our former opinion no attention was given to this statute, because, while mandatory in terms, it was believed to be directory only, and did not impose the obligation to install or maintain fire hydrants except when and where there was a real need of such hydrants for fire protection. We are still inclined to that view. But it is alleged in the petition that—

"Creighton's First addition comprises 11 blocks, subdivided into 210 lots; that since the platting of same and prior to the filing of the petition more than 150 residence houses have been erected on said lots and more than 150 families now reside in the houses in said addition; that the houses so erected are located generally throughout said addition; that said houses and contents are of a value amounting to several hundred thousands of dollars, and the same and the families occupying said houses, by reason of the failure and neglect of the defendants to locate and establish water or fire hydrants on the water-mains laid and extended in and through said addition pursuant to the said contracts between this plaintiff and said water company, are wholly without adequate protection from fire. * * * Creighton's Second addition comprises 6 blocks, subdivided into 88 lots; that, since the platting of same and prior to the filing of this petition, more than 50 residence houses have been erected on said lots and more than 50 families now reside in the houses in said addition; that the houses so erected are located generally throughout said addition; that said houses and contents are of a value amounting to several hundred thousands of dollars."

This is followed by allegations similar to those quoted relating to Creighton's First addition.

A majority of the court are of the opinion that the facts alleged are sufficient to clearly show an actual and real need for the installation and maintenance of hydrants for fire protection in Creighton's First and Second additions to the city of Omaha, and that, under the circumstances, the above quoted statute imposes on defendants the duty of installing fire hydrants on the water-mains laid pursuant to the contracts between plaintiff and the Omaha Water Company, and that the facts alleged show that defendants are wrongfully neglecting to perform the duty imposed by statute. If the conclusions arrived at are correct, then it follows that the power and the duty are in defendants to mature the obligation to refund the cost of the mains to plaintiff. To hold that the obligation to refund has not ma-

tured would be to permit the defendants to take advantage of their own wrong, and thereby defeat a just obligation. Neither good morals nor law will sanction such a course.

The court is of the opinion that the petition states a cause of action, and that the demurrer should be overruled. Our former opinion, in so far as it conflicts with the views herein expressed, is vacated.

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

REVERSED.

VERA A. RIDDICK, APPELLEE, V. JULIAN W. RIDDICK, APPELLANT.

FILED DECEMBER 29, 1924. No. 22929.

Divorce: CONDONATION. "Condonation of acts of cruelty by the husband against the wife is conditional upon subsequent good conduct, and cannot constitute a defense in an action for divorce if the husband is guilty of cruelty after the alleged condonation." *McNamara v. McNamara*, 93 Neb. 190.

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

Wilmer B. Comstock, for appellant.

Jacob Fawcett, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE, GOOD and THOMPSON, JJ.

GOOD, J.

Plaintiff sued her husband for a divorce and, among other grounds for relief, alleged that the defendant had been guilty of extreme cruelty, particularly in that he had falsely charged her with infidelity to the marriage vows. She also asked the custody of the minor child of the parties, a little girl two years of age. The defendant denied all of the charges against him, save and except those re-

lating to the charges of infidelity, and alleged that the only charges made by him were based upon plaintiff's admissions of intimate relations with other men. The trial resulted in a decree for plaintiff, and she was awarded the custody of the minor child. Defendant appeals.

The parties were married March 6, 1918, and shortly after the marriage he reenlisted in the United States Marine Corps, and in due time was sent to France, where he was wounded and "gassed" while in the service of his country. While he was overseas plaintiff remained with her parents at Lyons, Nebraska. Upon his return to America in the spring of 1919, he came to Nebraska, to the home of his wife's parents. She was then visiting at the home of a girl friend, in Randolph, Nebraska. Upon information that her husband had returned, she immediately rejoined him at her father's home in Lyons. Very shortly thereafter he accused her of undue intimacy with the father of the girl whom plaintiff had been visiting, and also with another gentleman, who was the family physician of plaintiff's parents. Both of these men were from 50 to 60 years of age, while plaintiff was but 19 years old. The parties, however, continued to live together for some time, and in the fall of 1919 moved to Lincoln, where defendant entered the state university, taking vocational training provided by the United States government. At the end of the school year, about June 1, 1920, the parties returned to the home of plaintiff's parents, where they remained until the latter part of August, when defendant again went to Lincoln to resume his school work. Plaintiff refused at that time to return with him. Since then they have not lived together.

Defendant in his testimony said that very soon after his wife rejoined him at the home of her parents, after his return from France, she received a number of long-distance telephone calls; that he overheard a part of the telephone conversations; that she received a number of letters from the father of the friend whom she had been visiting; that he obtained possession of some of the letters and

read them; that they contained recitals of the meretricious conduct and relations existing between the writer and plaintiff; that he then read the letters to her and charged her with infidelity; that she admitted the truth of the charges and promised, if he would forgive her, not to be again guilty of misconduct. Plaintiff, however, upon the witness-stand denied any misconduct upon her part; denied that she ever received any such telephone calls or letters, and denied the existence of any such letters as testified to by defendant.

There is no evidence in the record, except the testimony of defendant, that plaintiff has been other than a chaste and pure woman. There is evidence which tends to show that plaintiff has always borne a good reputation in the community in which she lives and has lived from the time of her birth, and also that the men, with whom she was charged with being intimate, are of respectable character and standing in their communities. It may also be observed that the testimony of defendant is conflicting in many respects. It is but charitable to say that defendant, suffering from his wounds and disease resulting therefrom, has become morbid and unduly suspicious and jealous. The evidence justifies the finding that charges of infidelity against the wife are untrue and were made without probable cause.

Defendant argues that the charges, even if false, have been condoned by the subsequent cohabitation of the parties, and therefore do not at this time constitute a cause for divorce. The record discloses, however, that the charges have been repeated and reiterated by defendant in his letters since the parties separated. In *McNamara v. McNamara*, 93 Neb. 190, it is held: "Condonation of acts of cruelty by the husband against the wife is conditional upon subsequent good conduct, and cannot constitute a defense in an action for divorce if the husband is guilty of cruelty after the alleged condonation."

Counsel for defendant urges us to follow the holding of this court in *Votaw v. Votaw*, 90 Neb. 699. In that case

the husband had made false charges against his wife. There was some slight provocation for the charges; they were made while he was angry, and very shortly thereafter he retracted his charges and did everything in his power to make amends for his cruel conduct. Under the circumstances in that case, this court approved the finding of the district court denying a divorce. The situation in the instant case is very unlike that in the *Votaw* case. Here the false charges have not been withdrawn, nor has the defendant sought to make amends for them, but, on the contrary, he has reiterated them, and did so even upon the trial.

The evidence indicates that the plaintiff is a proper and fit person to have the custody of the little daughter, and, by the aid of her parents, she can provide for it a suitable home where it will have proper care and training.

We find nothing that would justify disturbing the judgment of the district court. It is therefore

AFFIRMED.

Note—See Divorce, 19 C. J. sec. 204.

JOHN E. COOPER ET AL., APPELLEES, V. JOSEPHINE KOSTICK, APPELLANT.

FILED DECEMBER 29, 1924. No. 22943.

1. **Contracts.** "That a binding contract may result from an offer and acceptance, it is essential that the minds of the parties meet at every point, and that nothing be left open for future arrangement." *Krum v. Chamberlain*, 57 Neb. 220.
2. ———. "To establish an express contract there must be shown what amounts to a definite proposal and an unconditional and absolute acceptance thereof." *Melick v. Kelley*, 53 Neb. 509.

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

Halligan, Beatty & Halligan, for appellant.

Hoagland & Carr, contra.

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

GOOD, J.

This is an action by a vendor against a vendee for specific performance of an alleged contract for the conveyance of real estate. There was a decree for plaintiffs, and defendant appeals.

The action hinges upon the question as to whether there was a valid contract between plaintiffs and defendant for the conveyance of real estate. John E. Cooper, one of the plaintiffs, was the owner of 400 acres of land in Lincoln county, Nebraska. On the 1st of October, 1920, he signed a written instrument, purporting to authorize Mrs. Myrtle Stewart, a real estate broker, to sell his land. It is very doubtful if this written instrument conferred any authority on Mrs. Stewart, because it was not signed by the broker; nor did it describe the land, as required by section 2456, Comp. St. 1922. However, we need not decide that question at this time. If any authority whatever was given to Mrs. Stewart, it was to sell the land at $40 an acre, on the basis of one-half cash and the balance on time.

On the 10th day of February, 1921, Mrs. Stewart showed the land to the defendant, Mrs. Kostick, and her husband, as prospective purchasers. It appears that Mrs. Kostick would be unable to purchase the land except with the acquiescence and assistance of her husband. Mrs. Kostick was willing to purchase the land at the price of $40 an acre, but was not willing to pay one-half cash. There is some conflict in the testimony as to the terms on which she was willing to purchase, but the weight of the testimony is to the effect that she was willing to purchase by paying $1,000 cash and $3,000 on the 1st of March following, when deed should be executed, and that she would give back a mortgage on the land for the remainder of the purchase price, due March 1, 1926, but with the privilege to her of paying any amount of the purchase price on any interest day. Mrs. Stewart had no authority, in any event,

to enter into a contract embodying these terms, but an alleged contract was prepared on that evening, in the words and figures following:

"This agreement made and entered into this the 10th day of February, 1921 by and between Mr. (Mrs.) M. Stewart as agent for John E. Cooper as party of the first part and Josephine Kostick of Wellfleet as party of the second part, witnesseth:

"Said party of the first part is this day agreeing to sell and the said second party is agreeing to purchase the following described real estate, to wit: (Here follows description of land.)

"As a consideration price the said parties of the second part agree to pay sixteen thousand and no/100 dollars payable as follows: one thousand and no/100 dollars cash the receipt of which is hereby acknowledged and the Bal. to be paid per any agreement made with Mr. J. E. Cooper the present owner which said terms the said J. E. Cooper has agreed to make agreeable to the said second parties.

"Both parties have read the above and do agree to stand by the terms and stipulations as set forth above.

"Signed this the 10th day of Febr. 1921, at Maywood, Nebr.

"(Signed) John E. Cooper, by Mrs. Stewart, Agent, First Party.

"'osephine Kostick, Second Party.

"Harry Hall, Witness."

This instrument was executed at a bank in Maywood. At the time, Mrs. Kostick executed and delivered, either to Mrs. Stewart or the banker, a check for $1,000, as earnest money in the event that a valid contract was made between the parties. On the following morning Mrs. Stewart took this instrument to the plaintiff Cooper at North Platte and gave him her version of the terms upon which Mrs. Kostick would purchase the land. Thereupon, Mr. Cooper had a contract prepared which fixed the terms of payment as follows: $1,000 in cash; that the vendee should assume a mortgage of $2,000; the further payment of

$3,000 on March 1, 1921; a payment of $3,000 on March 1, 1924; and the balance of $7,000 to be paid on March 1, 1926; the two latter payments to be secured by a second mortgage upon the land. Cooper signed this contract and Mrs. Stewart then took it to Mrs. Kostick for her signature. Upon examination, Mrs. Kostick announced that it did not contain the terms on which she was willing to buy, and she refused to sign it and stopped payment on the check. There were some further negotiations between Mrs. Kostick and Mrs. Stewart relative to the terms of the proposed contract, and they were changed so as to provide for the payment of $1,000 on March 1, 1924, and $9,000 on March 1, 1926. There is evidence that Mrs. Kostick was then willing to accede to these terms if her husband would consent, but he was not willing and would not join in signing any contract. On the 1st of the following March the plaintiff tendered a deed and demanded performance by Mrs. Kostick, according to the terms of the proposed contract as altered, and, on Mrs. Kostick's refusal, this action ensued.

Plaintiff argues that the written instrument is sufficient to comply with the statute of frauds, and that, since Mr. Cooper evinced a willingness to execute a contract on terms that were satisfactory to Mrs. Kostick, there was a valid contract enforceable in a court of equity. Defendant, on the other hand, contends that there never was a valid contract and, therefore, nothing which could be enforced. We think a careful analysis will clarify the situation.

The written instrument signed by defendant and Mrs. Stewart was not intended by either party to be the final contract. Mrs. Stewart had no authority to enter into, and bind her principal by, a contract, the terms of which would be satisfactory to the defendant. The instrument, on its face, shows that part of the terms, relative to the time and manner of payment, was to be thereafter submitted to Cooper and approved by the parties before there could be a binding contract. This so-called contract, when signed, did not and could not bind the plaintiff to sell, nor the de-

fendant to purchase, the premises, because some of the material provisions had not yet been agreed upon.

We think it clear that this written instrument can be construed as nothing more than an offer by defendant to purchase the land at an agreed price, when the terms as to payment were made satisfactory to her. When Mrs. Stewart communicated to plaintiff the terms, as she understood them, on which defendant was willing to purchase, he then had another contract prepared which was not in accord with either the terms demanded by the defendant or those communicated by Mrs. Stewart. The proposed contract, which was signed by the plaintiff, in effect rejected the offer of the defendant and was a counter-offer to the defendant to enter into a new contract upon different terms.

This court has held: "That a binding contract may result from an offer and acceptance, it is essential that the minds of the parties meet at every point, and that nothing be left open for future arrangement." *Krum v. Chamberlain*, 57 Neb. 220. "To establish an express contract there must be shown what amounts to a definite proposal and an unconditional and absolute acceptance thereof." *Melick v. Kelley*, 53 Neb. 509; *Roberts v. Cox*, 91 Neb. 553. See also *Frahm v. Metcalf*, 75 Neb. 241. Plaintiff did not unconditionally accept the offer of defendant; nor did defendant unconditionally accept the counter-offer of the plaintiff. There never was a meeting of the minds of both parties as to all of the terms of the contract.

Plaintiff, however, argues that, since Mrs. Kostick later evinced a willingness to sign the prepared contract if Cooper would change the terms, so that she would be required to pay only $1,000 on March 1, 1924, and the balance of $9,000 on March 1, 1926, and, Cooper having consented to make this change, a contract resulted. The record shows that defendant did not make an unconditional offer to sign the new contract as changed, but only that she would be willing to do so if her husband would consent and assist her in making the payments. He did not consent. The condition on which she was willing to sign

never occurred. Her conditional offer to sign the contract never became effective, and it is significant that she never signed it.

Under the facts disclosed, it seems quite clear that there never was a valid contract of sale and purchase between the parties. The judgment of the district court is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

Note—See Contracts, 13 C. J. secs. 48, 59, 86.

CATHRYN SAWYER, APPELLEE, V. SOVEREIGN CAMP, WOODMEN OF THE WORLD, APPELLANT.

FILED DECEMBER 29, 1924. No. 24230.

1. **Appeal:** LAW OF THE CASE. "The decision of questions presented to this court in reviewing the proceedings of the district court becomes the law of the case and, for the purposes of the litigation, settles conclusively the points adjudicated." *Smith v. Neufeld*, 61 Neb. 699.
2. **Courts:** RES JUDICATA. "The determination of a matter which is involved in the litigation and discussion at the bar is not to be regarded as mere dictum, even though it is only indirectly involved in the decision of the question upon which the case turns." *Lancaster County v. McDonald*, 73 Neb. 453.

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

Gaines, Van Orsdel & Gaines and *De E. Bradshaw*, for appellant.

Will H. Thompson & Son and *Byron G. Burbank, contra.*

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

GOOD, J.

Action on fraternal beneficiary certificate. The defense alleged is a forfeiture because the member, without no-

tice to the society, changed his occupation from one that was nonhazardous to one that was listed by the society as hazardous and in violation of the constitution and laws of the society. There was a directed verdict for the plaintiff, and defendant society appeals.

This is the third appearance of this case in this court. The first opinion is reported under the title of *Sawyer v. Sovereign Camp, W. O. W.*, 105 Neb. 395; and the second appeal is reported under the title of *Donnelly v. Sovereign Camp, W. O. W.*, 111 Neb. 499.

On the second appeal to this court, the by-laws and constitution of the association, relating to the question of forfeiture, were presented, and how they should be interpreted was argued to this court and were by this court construed. The provisions of the by-laws in question are set forth in that decision and will not be here repeated. It was there held: "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. * * * 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."

It is the settled rule in this state that: "The decision of questions presented to this court in reviewing the proceedings of the district court becomes the law of the case and, for the purposes of the litigation, settles conclusively the points adjudicated." *Smith v. Neufeld*, 61 Neb. 699.

To the same effect is the holding in *Lowe v. Prospect Hill Cemetery Ass'n*, 75 Neb. 85.

Defendant, however, insists that the rule is not applicable to the instant case because, as it claims, that part of the opinion in the former appeal which construed and interpreted section 56 of the constitution and by-laws of the association is mere dictum. To this view we cannot assent. In *Lancaster County v. McDonald*, 73 Neb. 453, it is held: "The determination of a matter which is involved in the litigation and discussed at the bar is not to be regarded as mere dictum, even though it is only indirectly involved in the decision of the question upon which the case turns." It is true that on the second hearing of this case by this court the decision might have been grounded upon the question alone that the by-law providing for forfeiture never became effective because of failure to comply with section 7903, Comp. St. 1922. Nevertheless, both questions were involved in the litigation; both were argued, and both were determined. The same question now presented was presented upon the former appeal and was determined adversely to the defendant. The decision upon the former hearing became the law of the case and was binding upon the district court, and in directing a verdict the trial court only followed the law of the case as previously laid down by this court.

We find no error. Judgment

AFFIRMED.

HERMAN B. ANDERSON, APPELLANT, V. EAST STOCKING THRESHING MACHINE COMPANY ET AL., APPELLEES.

FILED DECEMBER 29, 1924. No. 22940.

1. Negligence: QUESTION FOR JURY. Ordinarily one operating a steam threshing engine liable to emit sparks should first equip such engine with a proper spark arrester, when its use is practicable. Whether such use is practicable is a question of fact for the jury.
2. Appeal: AFFIRMANCE. Findings of a jury on disputed ques-

tions of fact, under proper instructions, will not be disturbed unless clearly wrong.

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

E. S. Schiefelbein, H. Emerson Kokjer and *B. E. Hendricks,* for appellant.

J. H. Barry, contra.

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

THOMPSON, J.

This action is one to recover damages alleged to have been caused by the destruction of wheat in the stack by fire set by sparks from defendants' engine, owing to their negligence. Plaintiff alleges, in substance, that he entered into a contract with defendants to thresh his wheat, pursuant to which defendants came upon his premises and began threshing, and negligently operated their engine, in that they failed to provide it with a proper spark arrester; that defendants used a 16-horse-power engine to run a 36-inch separator, which engine was too small to furnish sufficient power tc run such separator at proper speed without crowding, thus causing the former to emit sparks; that defendants set their engine so that sparks would be carried from it by the wind to the stacks, where the same ignited plaintiff's wheat, which was destroyed through no fault of plaintiff.

Defendants deny any negligence on their part, alleging that the engine and separator were equipped and operated properly; that the engine was of sufficient capacity for use in connection with the separator; that the damage, if any, was caused by plaintiff's negligence in directing the change made in setting the engine, and that plaintiff assumed the risk. Defendants, by not denying plaintiff's allegation that sparks from their engine caused the fire, thereby admit it.

The reply is a general denial. Case tried to a jury, verdict for defendants. Motion for a new trial overruled, judgment entered on the verdict. Plaintiff appeals.

The undisputed evidence necessary to a determination of the questions relied on for reversal is that defendants are an association of farmers formed for the purpose of owning and operating a threshing machine for their own use and benefit, and not for hire. Plaintiff is a farmer living in the same community, who has had experience in operating threshing machines. He had assisted a neighbor in threshing with this machine just before it was moved to his place. Desiring to employ defendants to thresh for him, he entered into a contract with the three defendants now remaining in the case, pursuant to which they came upon his premises with their machine. Plaintiff, as a part of the agreement, was to, and did, select and deliver the coal used to do this threshing. The grain to be threshed was in two rows of stacks, eight or nine feet apart. The wind was in the south, or a little west of south. Defendants' engine was without a spark arrester. They first set the machine, without direction of plaintiff, in such a manner as to cause sparks from the engine to be blown away from the stacks. About 270 bushels were threshed while the machine was so set. There is a direct conflict in the evidence as to why the position of the machine was at this time changed. Defendants testified that plaintiff said the help were compelled to work in the dust as the machine was then set, and that he requested them to change its position to where it sat at time of fire. Plaintiff denies this. However, the undisputed evidence further shows that the change was made, thus placing the engine so that sparks emitted from it would be blown directly toward the stacks. Shortly thereafter, one of the stacks caught fire, and all remaining were consumed.

Considerable expert testimony was adduced by both sides as to the practicability of using a spark arrester on this make of engine when burning the coal which plaintiff had

provided for its use, and as to whether spark arresters were in common use save when threshing with fuel more combustible than coal. This evidence is conflicting, as is that upon the question of whether a 16-horse-power engine operating a 36-inch separator would of itself cause an increase in sparks emitted from the former.

The jury, by finding generally in favor of defendants and against plaintiff, found the disputed questions of fact in favor of the former. There is sufficient evidence to support the verdict, and it precludes us from further consideration of these disputed questions of fact.

Plaintiff offered the following instruction to the jury, which was refused: "You are instructed that the engine operated by the defendants was not equipped with a spark arrester, from which the law presumes the defendants guilty of negligence, and if you find from the evidence that the fire which consumed the plaintiff's wheat was caused by a spark from the defendants' engine, then your verdict should be for the plaintiff, unless you find that the plaintiff was also guilty of negligence which contributed to the fire."

He assigns the refusal as error, citing *Friederich v. Klise*, 95 Neb. 244. A casual consideration of the syllabus in that case paragraph by paragraph, each independent of the other, might cause one to reach the conclusion that for a person to operate a steam threshing engine without a proper spark arrester raises a presumption of negligence in all cases. This, however, is not the correct way to test an opinion, or the conclusion deducible therefrom. It should be taken in its entirety. Considering that case thus, the law announced is that it raises a presumption of negligence to fail to equip such engine with a proper spark arrester when it is *practicable to use one.*

In the instant case, as above stated, the evidence shows that it would have been impracticable, if not impossible, to use a spark arrester while threshing plaintiff's wheat, and we hold that, under the facts disclosed, failure to have

their engine so equipped did not raise a presumption of negligence on the part of defendants.

This instruction refused was faulty in that it took from the jury the question as to whether it was practicable to use a spark arrester on defendant's engine under the evidence introduced, and it was properly refused.

Plaintiff contends that the trial court erred in giving certain instructions on its own motion. Upon examinations we are convinced that this contention is not well taken. The instructions as a whole correctly state the law applicable to the facts, and in a manner not prejudicial to plaintiff.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

Note—See Appeal and Error, 4 C. J. sec. 2836—Negligence, 29 Cyc. pp. 462, 636.

CHARLES F. STUTZMAN ET AL., APPELLEES, V. AMANDA GEARHART ET AL., APPELLANTS.

FILED DECEMBER 29, 1924. No. 22941.

1. **Trusts: BREACH: LACHES.** A., B., and C., partners, bought land with partnership funds. Title was taken in A.'s name with the express understanding and intent that each was to have an equal interest therein. Later A. declared himself absolute owner, and, less than a year after, B. brought suit praying a decree finding A. trustee for the benefit of A., B., and C.'s heirs, C. having died. A. pleaded laches. *Held*, B. is not estopped thereby.
2. **Evidence** examined, and *held* sufficient to sustain the judgment.

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

Halligan, Beatty & Halligan, for appellants.

N. M. York and *Cook & Cook, contra.*

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

THOMPSON, J.

Plaintiffs Charles F. Stutzman, Jonathan Stutzman, and Louise Schmeekle, children of John J. Stutzman, hereinafter named, brought this suit in the district court for Dawson county against defendants Amanda Gearhart and Herbert Stutzman, also children of John J. Stutzman, Lena Stutzman, wife of Charles F. Stutzman, Alma Stutzman, wife of Jonathan Stutzman, Blanche Stutzman, wife of Herbert, and Carl Gearhart, husband of Amanda, for partition of 160 acres of land in such county. In the petition it is stated, in substance, that plaintiff Jonathan Stutzman, defendant Herbert Stutzman, and their father, John J. Stutzman, were at one time equal partners, doing business under the firm name of "Stutzman Bros;" that on or about the 11th day of March, 1905, such partnership purchased 160 acres of land in Dawson county, describing it, and paid for same out of partnership funds; that for their convenience the title thereto was taken in the name of defendant Herbert Stutzman, to be by him held in trust for their use and benefit as equal partners therein and thereto; that John J. Stutzman died intestate on April 28, 1921, a resident of Dawson county, leaving as his sole and only heirs Jonathan Stutzman, who became and was the owner of an undivided 6-15 interest in such 160 acres of land; Herbert Stutzman, 6-15; Charles F. Stutzman, 1-15; Louise Schmeekle, 1-15; Amanda Gearhart, 1-15; that Lena Stutzman is the wife of Charles F. Stutzman; Alma Stutzman is the wife of Jonathan Stutzman; and Blanche Stutzman is the wife of Herbert Stutzman; that the estate of John J. Stutzman had been administered upon, and all claims, debts and expenses paid. Prayer is for decree considering and determining the above interests, and for partition of such land.

Defendants Lena and Alma Stutzman, in their answer, admit the allegations in the petition. Defendants Herbert and Blanche Stutzman, in their amended answer, deny that plaintiff Jonathan Stutzman or John J. Stutzman ever had any interest in the land, and allege that Herbert is the sole

owner thereof; that plaintiff Jonathan Stutzman is guilty of laches by failing to timely assert his pretended claim. The reply is in substance a general denial.

Case tried to the court. Decree for plaintiffs as prayed for, and partition ordered. Defendants Herbert and Blanche Stutzman appeal.

The evidence shows that John J. Stutzman, looking to the best interests of himself and sons, Jonathan and Herbert, suggested to them the propriety of forming a partnership, he contributing property, and the sons their attention and ability, to the promotion of the enterprise. Acting upon this suggestion, the partnership was formed, to be known as "Stutzman Bros." The business of the father and these two sons was thereafter conducted under the partnership name. Funds were deposited in the bank to the credit of "Stutzman Bros.," and checks drawn thereon by either of the three.

The land in question is located near the land which the father and sons farmed under this partnership agreement, and they conceived the idea of purchasing it in furtherance of the partnership enterprise. Pursuant to the contract of purchase, the three built a barn thereon, and the first payment of $1,500 was made with partnership funds. As the father had a judgment then existing against him, he did not want to take title in his name. It was then suggested that title be taken in the name of Herbert, with the understanding and intent that he would hold same for the benefit of the three. A mortgage given to secure the remainder of the purchase price was signed by Herbert. Nothing was paid on this mortgage, and it has been renewed from time to time by other mortgages.

A dissolution of the partnership took place later, following which the personal property was divided. Jonathan moved away, and Herbert and the father continued farming the land. Sometime after, the latter died intestate. Herbert continued to farm the land in question, suggesting to Jonathan, both by letter and personal conversation, that they should settle the matter of dividing the land be-

tween themselves, and ignore the rights of the other children to the interest held by the father at the time of his death. Such settlement was not made, and it appears that later Herbert asserted sole ownership in this land.

The evidence is without conflict as to the organization of the partnership, but there is a direct conflict as to the circumstances surrounding the taking of title by Herbert. However, we find that the evidence strongly preponderates in favor of plaintiff's contention.

As to the defense of laches pleaded by defendants, we find that plaintiff began this action less than a year after he learned that Herbert had asserted sole ownership in such land. The evidence fails to show that defendant was damaged, or his position changed, by reason of delay. The plea of laches is without support, and cannot avail in this case.

Therefore, it is found and considered by us that the facts alleged in the petition are sustained by the weight of evidence; that Jonathan Stutzman is owner of an undivided 6-15 interest, Herbert Stutzman 6-15 interest, Charles F. Stutzman 1-15 interest, Louise Schmeekle 1-15 interest, and Amanda Gearhart 1-15 interest, in and to the southwest quarter of section 34, township 11 north, range 23 west of the sixth principal meridian, in Dawson county; that defendant Blanche Stutzman is without interest therein, save such as she may have by reason of being the wife of Herbert Stutzman; that partition of the land above described should be had.

It is considered by us that the judgment of the trial court is in all things right, and should be, and hereby is,

AFFIRMED.

Note—See Evidence, 39 Cyc. p. 160; Trusts, 39 Cyc. p. 606.

CHARLES C. PARMELE v. STATE OF NEBRASKA.

FILED DECEMBER 29, 1924. No. 23945.

Evidence examined, and *held* insufficient to support the judgment.

ERROR to the district court for Cass county: ALEXANDER C. TROUP, JUDGE. *Reversed and dismissed.*

W. A. Robertson, H. E. Kuppinger and *Sullivan, Wright & Thummel,* for plaintiff in error.

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

A. L. Tidd, D. W. Livingston and *Paul Jessen, amici curiæ.*

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

THOMPSON, J.

This is a prosecution by indictment brought in the district court for Cass county against Charles C. Parmele, plaintiff in error hereinafter referred to as defendant. The indictment, in substance, charges that on or about the 8th day of December, 1920, Luke L. Wiles made and delivered his promissory note for $1,500 to defendant or his order by virtue of the relation of principal and agent then existing between Wiles and defendant; that defendant was to negotiate the note and pay the proceeds to one Daisy Douglas for the benefit of Wiles, Daisy Douglas then owning a note for $5,000 signed and delivered to her by Wiles; that defendant unlawfully, fraudulently and feloniously converted and embezzled the note without the assent of Wiles.

Defendant filed a plea in abatement, to which the state answered. Plea was overruled. Defendant then pleaded not guilty; trial was had, and verdict of guilty returned. Motion for a new trial overruled, judgment entered sentencing defendant to the penitentiary for from one to three years. Defendant prosecutes error to this court.

Defendant's brief contains 23 assignments of alleged error, but we find it necessary to consider only one, namely: "The verdict is not sustained by sufficient evidence." The evidence discloses that Mrs. Douglas held a promissory note of Wiles for $5,000. After she received this note she became possessed of $3,500 in cash that she desired to place at interest. Seeing defendant Parmele, she so informed him, and asked if he could not procure such a note for her. Either at the time, or shortly after, defendant told her he could procure a note signed by a Mr. Latham for $5,000, and if Wiles would pay her $1,500 on the note she held of his, that would enable her to purchase the Latham note. In pursuance of this conversation Mrs. Douglas gave defendant a check for something over $3,500, which he used to procure a certificate of deposit for $3,500. Defendant then informed Wiles of Mrs. Douglas' desire to buy the Latham note. Wiles replied that he could not pay $1,500 in cash at the time, but would give a note for $1,500 which could be used as cash. Wiles then executed and delivered the note for $1,500 to defendant. It appears that the Latham note to be purchased was held by an Omaha bank as collateral to an $8,000 note signed by Latham. Defendant went to this Omaha bank, taking Latham with him, and turned over to it the $1,500 note and the $3,500 certificate of deposit. Latham executed a note for $3,000. His $8,000 note was then surrendered to him, and the $5,000 note and mortgage securing it were placed with defendant, who delivered the latter note and mortgage to Mrs. Douglas, requesting her to indorse $1,500 on the $5,000 note of Wiles held by her, as credit for the $1,500 note. She stated that this $5,000 note was in her safety deposit box at the bank, but the first time she went to the bank she would make the indorsement.

It was afterwards found that Mrs. Douglas had not made the indorsement for $1,500 on the Wiles note. Wiles took the matter up with defendant, who again saw Mrs. Douglas. She said she had not made the indorsement, but would do so. It appears that such indorsement was not had at

the time of filing the indictment in the case. It was contended at the trial on the part of the state, by way of the testimony of Wiles, that at the time he delivered the $1,500 note to defendant the latter agreed to see that the indorsement was had, and the case was tried on the theory that, as defendant had received the $1,500 note by reason of the agreement on his part to see that this indorsement was had, which indorsement was not had prior to defendant's use of the note, he then and there became guilty of embezzling such note, which was property of value, as charged in the indictment.

It is obvious that such indorsement would not ordinarily be made by Mrs. Douglas until the $5,000 Latham note and mortgage had been delivered to her, and delivery could not ordinarily be made until the purchase had been had. And purchase could not be had without using the $1,500 note. This was known and so understood by Wiles and defendant at the time. Hence, it is considered by us that the evidence fails to support the state's contention. Failure to secure the indorsement under the facts disclosed by the evidence did not constitute an embezzlement of the note.

It is elementary that a conviction for embezzlement cannot be had unless the evidence discloses a felonious intent. *State v. Culver*, 5 Neb. (Unof.) 238; *Hamilton v. State*, 46 Neb. 284. We cannot perceive from what angle the evidence could be viewed to warrant the conclusion that defendant "unlawfully, fraudulently and feloniously" converted the note as charged. At the time Wiles executed this note it was understood between him and defendant what the latter was to do with it. Defendant used the note pursuant to this understanding and in no other way. Defendant got none of the proceeds of the note. They were applied as defendant promised they would be when he asked Wiles to execute same.

The evidence does not support the contention of the state that defendant was Wiles' agent, but even if it did, as above stated, evidence of a felonious intent is entirely lacking.

Therefore, it is considered by us that the judgment of the district court should be, and hereby is, reversed, and the action dismissed.

REVERSED AND DISMISSED.

Note—See Embezzlement, 20 C. J. sec. 82.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. AMERICAN EXCHANGE BANK OF BRISTOW: ANNA ERICKSON, INTERVENER, APPELLANT: LUCIAN L. COOK, RECEIVER, APPELLEE.

FILED DECEMBER 29, 1924. No. 24060.

1. **Banks and Banking**: GUARANTY LAW: DEPOSIT. A deposit in a bank to come within the protection of section 8024, Comp. St. 1922, need not necessarily be money; it may be money or the equivalent of money.
2. ———: RECEIVER. "Ordinarily a receiver takes charge of banking affairs where the bank left them, and cannot generally, in absence of fraud, mistake, or violation of law, open closed transactions which would conclude the bank, if solvent." *State v south Fork State Bank*, *ante*, p. 623.
3. ———: GUARANTY FUND: LIABILITY. When money is deposited in a state bank and certificate of deposit issued therefor drawing 6 per cent., and afterwards, while the bank is a going concern, in ordinary course of business, such certificate is surrendered and new certificate issued in lieu thereof drawing 5 per cent., *held*, that, on subsequent failure of the bank, ordinarily the latter is entitled to be paid out of the depositors' guaranty fund.
4. **Evidence** examined, and *held* sufficient to sustain a decree recommending the payment of claims allowed out of the depositor's guaranty fund.

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

J. P. Palmer, for appellant.

Fred S. Berry, *W. T. Wills* and *C. M. Skiles*, *contra.*

Heard before MORRISSEY, C. J., ROSE, DEAN, GOOD and THOMPSON, JJ.

THOMPSON, J.

The American Exchange Bank of Bristow, Boyd county, failed January 11, 1923, and was placed in the hands of a receiver. Anna Erickson, intervener and appellant herein, filed claims on three certificates of deposit, one for $5,000, No. 2633, one for $3,461.41, No. 2634, and one for $621.13, No. 2636, each of which was dated October 21, 1922. These claims were recommended for disallowance by the receiver, and pleadings were ordered filed. In compliance therewith intervener, Erickson, filed a petition, praying for allowance of such claims, and that payment be had out of the guaranty fund.

The receiver filed an answer, setting forth copies of each and all certificates of deposit which had been issued by the bank to Mrs. Erickson. The first of these certificates was issued November 30, 1918, and the last October 21, 1922. The last three are the above, which were renewals of two dated October 21, 1921, in the amounts of $621.13 and $4,461.41, and one dated April 21, 1922, in the amount of $5,000. $1,000 had been paid on the $4,461.41 certificate before it was taken up by certificate number 2634. He further alleged: "That said certificates are not protected by the depositors' guaranty fund of the state of Nebraska for the reason that there was a fraudulent agreement between the parties that the bank should pay the said Anna Erickson, and did pay the said Anna Erickson, a bonus of 1 per cent. in addition to the 5 per cent. named in said certificates, thus creating an excessive rate of interest, and said certificates did not represent a deposit but represented a loan"

Anna Erickson, for reply, admitted all of her transactions with this bank as set forth in the receiver's answer, but denied the paragraph thereof which alleged that there was a fraudulent agreement for the payment of an excessive rate of interest and that interest was paid in excess of 5 per cent.

Trial had, judgment for Anna Erickson as a general creditor, but denied payment out of the guaranty fund. She appeals.

We find from the evidence that Mrs. Erickson, a woman of Swedish descent and with limited education, began depositing cash in appellee bank in 1918, receiving therefor certificates of deposit drawing 5 per cent. interest. As time went by her deposits increased and new certificates were issued, some as renewals and some for added deposits, up to April 12, 1920, at which time she wrote to Frostrum, president of the bank, also of Swedish descent, inclosing two certificates, one for $800, dated May 27, 1919, and one for $2,152.50, dated June 9, 1919, and demanded cash for same. The bank computed the interest on these at 5 per cent., merging them in one certificate of the amount of $3,079.86, being certificate No. 2016 dated April 12, 1920, and sent it to her. She returned it and asked Frostrum to forward cash for the amount represented by the certificate. He returned it, at the same time stating by letter that he would give her 6 per cent., and that her money would be secure under the guaranty law of the state and safe.

The evidence further shows that she was in fact without actual knowledge of the law denying such deposit protection under our guaranty statutes. She first learned of the nonprotected nature of a deposit drawing in excess of 5 per cent. interest in October, 1921, and immediately went to Bristow and, as she testified, "I did go to the bank and ask them if that I found out it should be against the law, and I asked them to renew my certificates and take everything away, everything that was against the law so I should be protected." On cross-examination her answers were in substance the same. At the time of her visit the bank was a going concern.

Acting upon her suggestion, and, as she believed, in accordance therewith, new certificates, of which the ones sued on are renewals, were issued to her, each of which on its face drew 5 per cent. Whether or not 6 per cent. was computed and merged in the $4,461.41 certificate, hereinbefore mentioned, is not clear, but whether it was or not the transaction formed a legal obligation running from the bank

to her, and was cash or the equivalent thereof deposited on that day. *State v. Banking House of A. Castetter,* 110 Neb. 564; *State v. South Fork State Bank, ante,* p. 623. This closed her business with the bank and brought all certificates within our guaranty of deposits statutes, and they so continued, thus bringing the case clearly within the rule of the law announced in *State v. South Fork State Bank, supra:* " Ordinarily a receiver takes charge of banking affairs where the bank left them, and cannot generally, in absence of fraud, mistake, or violation of law, open closed transactions which would conclude the bank, if solvent." See *United States v. State of Oklahoma,* 261 U. S. 253.

Appellee relies on *Iams v. Farmers State Bank,* 101 Neb. 778. In that case both parties intended to contravene the statute, and it was so held. The extra interest had been regularly paid when due. The original transaction, with no attempt to purge it, continued up to the bank's insolvency and charge taken of it by the district court looking to its closing and dissolution, and suit brought on such certificate. In this case no one can seriously contend that claimant knew other than the law presumes she knew, that by taking 6 per cent. she was placing the transaction outside our statutes' beneficent provisions as to the guaranty of deposits. As soon as she learned that, by contracting for 6 per cent. she was not within the guaranty statute, she did everything possible to remedy the evil. She requested that all excess interest be taken out of the money due her and new certificates issued. This was done, as she believed.

A contract for 6 per cent. is not illegal in the sense of being unenforceable as against the bank. It is simply one not within the guaranty statutes. A depositor may take his choice, receive 5 per cent. and be within the statutes as a depositor, or 6 per cent. and be without, as one holding a loan. If he concludes to change a loan not so secured to a deposit secured, ordinarily he may do so. *State v. Banking House of A. Castetter, supra; State v. Grills,* 35 R. I.

70; *Patterson v. First Nat. Bank*, 73 Neb. 384. The fifth paragraph of syllabus of the last cited case is as follows: "Where the hand to pay is also the hand to receive, payment may be made by a transfer of credits upon the books of a bank."

It is therefore considered by the court that judgment of the trial court, in so far as it holds Anna Erickson's claims general ones, should be, and hereby is, set aside, and the amounts found due her by such judgment are ordered paid out of the depositors' guaranty fund.

AFFIRMED AS MODIFIED.

PETE NELSON V. STATE OF NEBRASKA.

FILED DECEMBER 29, 1924. No. 24096.

Evidence examined, and *held* sufficient to sustain the judgment.

ERROR to the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Affirmed.*

J. R. Lones and *Charles P. Rapp*, for plaintiff in error.

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

Heard before MORRISSEY, C. J., ROSE, DEAN, GOOD and THOMPSON, JJ.

THOMPSON, J.

Plaintiff in error, hereinafter called defendant, was convicted in the district court for Douglas county upon an information charging him with robbery from the person, to which he pleaded not guilty. He prosecutes error to this court, relying upon three grounds, which may be condensed into one, namely, that the verdict is not sustained by the evidence.

The evidence discloses that J. K. Bittenger was robbed of money and valuables in Omaha, Douglas county, on the night of April 12, 1923, at about 8:50 o'clock, by three

men driving a gray Cadillac roadster automobile. It being dark at the time, Bittenger was unable to identify his assailants by sight afterwards; but, as each talked in a loud manner while robbing him, he identified defendant by his voice from among several.

Arthur Stout and Roy Smith were also arrested in connection with this robbery. Stout pleaded guilty, and at this trial testified that defendant was one of the three who committed the crime, and Smith was the other. Smith was arrested at defendant's home, and confessed his part in the affair, surrendering Bittenger's watch and chain. At the trial he testified that he was one of the guilty parties, but that defendant had no part in the robbery. He implicated one Anderson.

Mrs. Iverson, a disinterested witness, testified that defendant was at her home in Omaha the night of the robbery in company with two men; that the three left in a gray Cadillac roadster automobile, sometime between 8:30 and 9:00 o'clock. In this she is corroborated by her husband's testimony.

Defendant denies any part in the robbery, testifying that he went to Neola, Iowa, on the day it was committed, and in the evening was a visitor at Hans Schuman's home west of Millard, in company with two men, residents of Neola; that they drove a Buick automobile; that he saw Stout on the day of the robbery driving a Cadillac roadster. His wife testified that he was not home on the day of the robbery nor the day following.

Witness Lipp testified that he was employed at a garage in Millard on the day of the robbery; that defendant came there in a Buick automobile about 8:30 o'clock in the evening and purchased gasoline, later going into a barber shop near by. In this he is corroborated by the proprietor of the shop.

The rebuttal on the part of the state tends to corroborate evidence previously given.

It will be observed that the defense rests largely on the alleged alibi. We find, however, from a careful review and

analysis of the evidence, that the alleged alibi is without support, and the evidence warranted the verdict and judgment of the district court. It is therefore considered that the judgment is in all things right, and should be, and is,

AFFIRMED.

Note—See Criminal Law, 16 C. J. sec. 1588—Robbery, 34 Cyc. pp. 1808, 1809.

STATE EX REL. CLARENCE A. DAVIS, ATTORNEY GENERAL, v. FARMERS & MERCHANTS BANK OF WALTON, APPELLEE: UNITED STATES FIDELITY & GUARANTY COMPANY, APPELLANT.

FILED DECEMBER 29, 1924. No. 23175.

1. **Banks and Banking: TRUST FUNDS: LIABILITY.** Where money is deposited in a bank to the credit of an administrator of an estate, the bank is charged with notice of the trust character of the fund, but is not required to see that the same is properly applied or accounted for, in the absence of notice, or knowledge of facts putting it upon inquiry, that the money is being misapplied.
2. ———: ———: ———. In such case, where the fund is withdrawn upon checks of the trustee, signed in his official character, the responsibility of the bank with regard thereto is ended.
3. **Appeal: ISSUES.** Where defendant, having denied generally, had leave to file more specific objections to the allowance of the claim, which was not done, but evidence was received without objection and case tried in the court below as though certain issues were presented, the plaintiff will not be heard upon an objection raised for the first time upon appeal, that such issues must be specially pleaded.

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

Reavis & Beghtol, for appellant.

C. M. Skiles and *Richard F. Stout, contra.*

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

REDICK, District Judge.

This case involves a claim of the United States Fidelity & Guaranty Company against the receiver of the Farmers & Merchants Bank of Walton, Nebraska, for an allowance against the bank guaranty fund of the state of Nebraska, and arises out of the following facts which are practically undisputed, though the inferences to be drawn therefrom and the law applicable thereto are in controversy.

Before the bank was taken over as an insolvent by the state of Nebraska and a receiver appointed to wind up its affairs, one Louis A. Berge was the cashier and managing officer thereof. On March 14, 1921, Berge was appointed administrator of the estate of Wilhelm Schultz, deceased, and gave bond for the faithful performance of his duties, with the claimant as surety thereon. Berge, having failed to account for the funds in controversy to the estate, was removed and one Koop appointed administrator, who brought the suit and recovered judgment against the claimant for a sum in excess of the deposits hereinafter referred to. Claimant paid the judgment and now seeks to be subrogated to the rights of the estate with regard to said deposits. On March 16, 1921, there came into the hands of Berge, administrator, three amounts in cash, to-wit, $1,274.18, $2,042.09, and $2,578.32, aggregating $5,894.59, and he deposited the same in said bank to the credit of "L. A. Berge, Administrator." On the same day Berge drew two checks, one for $894.59 and the other for $5,000, which equaled precisely the sum of the deposits above mentioned. The checks could not be found, and there is some contention on the part of the claimant that no such checks were issued. The evidence on this point are entries in the check register as follows: "L. A. B. $894.59" and "L. A. B. $5,000.00," and the clerk who made those entries testified that it might have been a check or a debit slip, but we do not deem it material which form, check or slip, the order took; the important question is whether it was a personal order of Berge or one given in his capacity as ad-

ministrator. Separate ledger sheets were kept of the personal account of L. A. Berge and L. A. Berge, administrator, but the latter could not be found and is not in evidence. The ledger sheet of Berge's personal account covering the period in question is in evidence and shows no deposits on March 16 or any other material date of the three items of receipts above referred to, which were credited to the account of Berge, administrator; neither are the two items represented by the checks or slips in controversy charged to the personal account of L. A. Berge. The bookkeeper who made the entries testified that the amount of those checks would have to be charged either to the personal account of Berge or his account as administrator, and that, inasmuch as they were not charged to the former, they must have been charged to the latter, though she does not have any distinct or independent recollection of the transaction. She further testified in this connection that the entries on the ledger sheets were not taken from the check register, but from the checks or slips themselves, and that she would not have charged the check to the administrator account unless it had been signed as administrator.

What are the proper inferences to be deduced from the evidence as above detailed? The claimant insists that, inasmuch as the two checks in question were listed "L. A. B." without the addition of " Admr." or other sign characterizing them as administrator checks, and therefore not distinguishable upon the record from personal checks of Berge similarly listed, they must be taken to have been personal checks which could not operate to withdraw funds held by Berge as administrator, and that in law those funds are still in the bank. On the other hand, the receiver contends that the fact that the checks were not charged to the personal account of Berge, supported by the testimony of the bookkeeper, requires the inference that the checks or slips were orders by Berge as administrator, charged to his account as such officer, and the fund thereby was drawn from the bank. We think the better rea-

soning is with the receiver, and this conclusion is in accordance with ordinary business custom.

Having reached the conclusion that the money was regularly withdrawn from the bank by Berge as administrator, what are the legal relations and responsibilities of the parties? The deposit of the money to the credit of Berge, administrator, charged the bank with notice of the trust nature thereof; but the bank was charged with no duty as to the proper application of the fund, unless it had notice of a threatened misapplication, or of facts sufficient to put it upon inquiry. In the absence of such notice or facts, if the fund was withdrawn upon checks or orders of Berge as administrator, the bank was not required to follow the money and see that it was properly applied. There is no evidence of any actual notice to the bank, but it is contended that the knowledge of Berge of his intentions in withdrawing the funds is imputed to the bank by virtue of his official connection with it as cashier and manager. "The rule whereby an agent's knowledge is imputed to his principal is subject to an exception in the case of an agent who is engaged in an independent fraudulent scheme without the scope of his agency." *Houghton & Co. v. Todd*, 58 Neb. 360. Berge was the agent of the bank; he was also agent of the estate. While acting for either principal his knowledge would be imputed to that principal; but, when he acted as administrator, his knowledge gained in that capacity could not be imputed to the bank. Claimant contends that Berge, cashier, knew everything that Berge, administrator, knew, which is, of course, self-evident considering the titles as mere *descriptio personæ* applicable to one individual; but viewed together with the admitted fact that the *alter ego* of the cashier is one and that of the administrator a different person, then in legal contemplation Berge becomes two persons and the quality and effect of his acts depend upon the capacity in which he performs them; and notice of facts coming to the knowledge of the agent will be imputed only to that principal for whom or in whose interest the

agent acted at the time. To paraphrase the language of Rose, J., in *State v. American State Bank*, 108 Neb. 129, 132;

"The test of the bank's knowledge is not what Berge, its cashier and manager, did as administrator of the Schultz estate, but what he did with the estate's money while performing banking functions as the bank's officer."

That the bank was charged with notice of the trust character of the fund at the time of the deposit is conceded, but the act with which we are concerned is the withdrawal of the fund from the bank. For whom or in whose interest was Berge acting in that transaction? Was he acting in the capacity of cashier or administrator, or neither? If he had attempted to apply the fund in payment of an overdraft at the bank or in any other way for the bank's benefit the bank would be charged. There is absolutely no evidence tending to show that he was acting for or in the interest of the bank, but if our inferences are correct, he was acting in the capacity of administrator. The fact that the two capacities are united in one person presents no difficulty. The fact that a man is the husband of one woman and brother of another does not make him the husband or brother of both. The question is not what Berge knew as an individual, but what he knew in his capacity as agent of the bank, and that alone will be imputed.

In *State v. American State Bank*, 108 Neb. 111, cited by claimant, the manager of the bank, acting for the owner, had taken a note payable to himself, instead of to the owner of the debt, turned it over to the bank and caused the amount to be credited to the account of a corporation of which he was the sole owner, and it was held that in accepting the note for the bank he was acting for it, and his knowledge of the true ownership thereof would be imputed to the bank, which therefore, could not become an innocent purchaser thereof. The argument seems to be that in paying the money out in this case he was acting for the bank to the same extent that he did in receiving the note in the case cited, but the distinction is plain; in receiving

the note the bank was benefited, it was the ordinary method of investing its funds; in paying it out the bank received no benefit, and had no interest except to see that it was paid upon the order of the depositor. There is no evidence, unless imputed, that the bank had any notice of an intended misappropriation of the fund; the fact alone that the fund was withdrawn the same day or that following the deposit was not sufficient to put the bank upon inquiry.

In *State v. American State Bank,* 108 Neb. 98, also cited by claimant, a check payable to Springer was indorsed by Wentz, the managing officer, " Credited to account of Benj. W. Springer," but the deposit slip was made in favor of the Wentz Company of which he was manager, and the money was paid out on checks of that company; the act of Wentz in crediting the check to the wrong person was the act of the bank.

And, in *State v. American State Bank,* 108 Neb. 92, the manager of the bank was held to be acting as its agent in procuring cash and securities upon the order of the debtor to pay his debt to the bank. In each of the three cases just cited the bank was claiming an interest in the fund, while in the instant case its position is that the fund has been paid out in the ordinary course, the bank receiving no benefit therefrom.

Claimant also cites cases from other states—where a trustee was knowingly permitted to deposit trust funds to his personal account and check against the same, *United States Fidelity & Guaranty Co. v. People's Bank,* 127 Tenn. 720, and *Bank of Hickory v. McPherson,* 102 Miss. 852; where money was paid out on checks not properly countersigned, *American Nat. Bank v. Fidelity & Deposit Co.,* 129 Ga. 126; where a trustee drew checks upon the trust fund to pay his private debt to the bank, *Allen v. Puritan Trust Co.,* 211 Mass. 409; and *Fidelity & Deposit Co. v. Rankin,* 33 Okla. 7; and some others of a similar nature, but they do not aid him, as in all of them the bank knowingly permitted or aided in the misappropriation of

the fund. As was said in *United States Fidelity & Guaranty Co. v. People's Bank, supra:*

"We do not wish to be understood as holding that a bank is in general liable for the acts of trustees who deposit money with them. If the money is deposited to the trustee's credit as such, and his checks are drawn on this fund in his character of trustee, or guardian, as the case may be, the bank need look no further. It is not responsible for his administration of the fund, unless it knows, or in some special transaction has good reason to believe, that he is misappropriating the fund. It would be out of all reason to impose such responsibility upon banks."

This is but a special application of the general rule announced in *Koehler v. Dodge,* 31 Neb. 329, and approved in *Buffalo County Bank v. Sharpe,* 40 Neb. 123, that —

"A corporation is not chargeable with the knowledge nor bound by the acts of one of its officers in a matter in which he acts in behalf of his own interests, and deals with the corporation as a private individual, and in no way represents it in the transaction"—citing numerous cases.

We have reached the conclusion that the fund in question was withdrawn by Berge in his character as administrator, without any complicity on the part of the bank, and that knowledge of his fraudulent intentions cannot be imputed to the bank, and that neither the estate nor claimant by subrogation has any claim against the state guaranty fund.

It is a further contention of claimant that the receiver is in no position to make the defense that the money had been lawfully paid out, for the reason that such matter must be specially pleaded, the answer being a general denial. The rule as contended for is well established in this state, but the point is made for the first time in this court. The record discloses that upon his request counsel for the receiver was given leave to file more specific objections to the allowance of the claim, which was not done; but the evidence was taken without any objection to its relevancy and trial seems to have been had upon the assumption that

such issue was in the case. Under these circumstances, we think the objection cannot be urged for the first time in this court.

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

AFFIRMED.

CARL THOMAS, GUARDIAN, APPELLANT, V. FIRST NATIONAL BANK OF BAYARD ET AL., APPELLEES.

FILED DECEMBER 29, 1924. No. 23606.

Insane Persons: JUDGMENT: ENFORCEMENT. A judgment against an incompetent rendered after inquisition and appointment and qualification of a guardian of his person and estate cannot be enforced by the ordinary process of execution, but must be collected through the administration of the estate by the county court, or sale of the real estate, if necessary, under license of the district court.

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

George C. Porter and *Mothersead & York*, for appellant.

Morrow & Morrow, contra.

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

REDICK, District Judge.

Action to enjoin sale under execution of lands of an incompetent under guardianship. A preliminary injunction was allowed by the district court, but subsequently a demurrer to the petition was sustained and action dismissed, and the plaintiff, as guardian of the incompetent appeals.

Appellee, March 1, 1923, while the incompetent was under guardianship, recovered a judgment against him for $930, and the only question for determination is whether such judgment may be collected by ordinary execution or must be presented to the county court and collected through

the administration of the guardianship proceedings. The question is a new one in this jurisdiction, and depends very largely upon the construction of the statutes of this state concerning the appointment of guardians for incompetents. They provide generally for such appointment over the person and estate of the incompetent, require the giving of a bond, provide that the guardian shall manage the estate and pay the just debts of the ward out of his personal estate, and, if insufficient, by sale of his real estate upon procuring license therefor. He is required to apply the estate to the suitable maintenance and support of the ward and his family, and to file an inventory of all the property of the ward, and account for and dispose of the estate of his ward in like manner as is directed with respect to executors and administrators, as nearly as may be. No license to sell real estate may be granted without the approval in writing of the county board of the county. No provision is made for filing claims against the ward, and by other provisions in the statute an insane person may be sued on any claim, and it is the duty of his guardian to appear and defend, which was done in this case, resulting in the judgment above mentioned. Such judgment, therefore, is valid in every particular, and the question is how it shall be collected.

The underlying purpose of guardianship statutes is to preserve the estate for the support and benefit of the ward by protecting it from the improvident contracts of persons incompetent to manage their own affairs, and to place the estate within the control of the court acting through its properly appointed agents. The theory of the plaintiff is that upon appointment of the guardian the estate of the ward is *in custodia legis*, and is not subject to attachment or execution, as such processes are inconsistent with the purposes of the act and the authority of the court over the estate. It was so held in *Nolan v. Garrison*, 156 Mich. 397, and in *Sturgis v. Sturgis*, 51 Or. 10. Under statutes substantially the same as ours the latter court held:

"The personal or real estate of the ward can be con-

verted into cash only by proper proceedings under the direction of the county court. * * * This is the policy of the whole probate law with reference to estates of deceased persons, as well as to those under guardianship. Therefore, the enforcement of a judgment against the ward can be accomplished only through the county court, and not by process against either the ward's estate or the guardian."

We think these cases announce the correct principle, and there is nothing in conflict with this decision in *Spence v. Miner*, 90 Neb. 108, or *McAlister v. Lancaster County Bank*, 15 Neb. 295, cited by defendants. See, also, *McNees v. Thompson*, 5 Bush (Ky.) 686, holding that after inquisition the incompetent is civilly dead, and that statutes conferring power upon the court of chancery to license the sale of the incompetent's real estate supersede the ordinary process of execution; also *Wesley v. Wood*, 72 Misc. Rep. (N. Y.) 258, *Grant v. Humbert*, 114 App. Div. (N. Y.) 462, and *Saunders v. Mitchell*, 61 Miss. 321. That the real and personal estate of the ward is under the control of the court has been frequently held in this state, *Gentry v. Bearss*, 82 Neb. 787; *Hendrix v. Richards*, 57 Neb. 794; and *McCoy v. Lane*, 66 Neb. 847, in which the power of the court to allow claims was recognized.

Defendants cite *Pollock v. Horn*, 13 Wash. 626, but the statutes of that state specially provide, " in all judgments against such ward the execution shall be against the property of the ward only," thus impliedly recognizing the propriety of such procedure. The same distinction exists in *Peters v. Townsend*, 93 Ark. 103, also cited. The other cases cited by the defendants are not in point.

We conclude that the judgment of the district court is erroneous, and the same is reversed, with instructions to recall the execution and grant the injunction as prayed.

REVERSED

SAMUEL WHITE, APPELLANT, V. DELLA WHITE, APPELLEE.

FILED DECEMBER 29, 1924. No. 22904.

1. Divorce: ALIMONY. Upon a divorce of the wife for extreme cruelty, the court may decree her such alimony out of the estate of her husband as it shall deem just and reasonable, having regard to the ability of the husband, the character and situation of the parties, and all other circumstances of the case.
2. ———: ———: ANTENUPTIAL CONTRACT. Even a valid antenuptial contract, not being made in contemplation of divorce, cannot absolutely limit the amount of an award of alimony to the wife upon divorce obtained by the husband for the wife's fault, though it should be considered by the court with other evidence on that point.
3. ———: ———. Evidence examined, and the decree of the district court awarding the appellee and cross-petitioner, though at fault and divorced, $17,000 of alimony out of her husband's estate valued at $110,000, approved.

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

Thomas, Vail & Stoner, and *Norval Bros., Colman, Landis & Mastin,* for appellant.

C. E. Sandall, Arthur G. Wray, O. S. Gilmore, John Riddell and *McKillip & Barth, contra.*

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

SHEPHERD, District Judge.

Mr. White sued Mrs. White for a divorce, alleging extreme cruelty in three counts or causes of action. She had falsely accused him of having a loathsome venereal disease; upon occasion she had attacked him, called him a liar, and shaken him; at divers other times she had flown into fits of rage against him, in one of which she menaced him with a stool and threatened she would knock his brains out. He declared that this cruelty had brought him great grief and humiliation, resulting in ill health. Mrs. White filed

an answer and cross-petition denying these charges, and alleging a long course of ill treatment on her husband's part, including kicks and blows, verbal abuse and vile names, intoxication, threats, undue sexual demands, meanness in money matters, and so forth in great detail. She averred that such ill treatment had caused her great mental suffering and had destroyed her bodily health. She also alleged an antenuptial contract, but says that it was procured through misunderstanding and fraud. All of this Mr. White denied. Upon trial more than 75 witnesses were sworn and 3,000 pages of record were made.

On the issue of divorce the court found that both parties were at fault, found that there was more corroboration of the plaintiff's case on cruelty than there was of the defendant's, and found generally in favor of the former and against the latter. The court gave the plaintiff a divorce and awarded the defendant $17,000 of alimony. Appealing, the plaintiff assigns as error the finding and decree allowing the defendant permanent alimony in the sum mentioned.

The pair were married June 15, 1915. White was 60, Mrs. White about 40. The former's first wife, by whom he had nine sons and daughters, was then three years deceased. The latter's husband had been dead a year. White, who was worth in the neighborhood of $110,000 had grown tired of keeping house for his girls (two of them were still in school) and greatly desired a home and a wife. Mrs. White, then the widow Potter, had little of this world's goods, but was comparatively young, somewhat accomplished, attractive, not averse to a good home, and willing to marry the right man. In a very natural way the two met and became interested in each other, and the male seems to have prosecuted his suit with all of the ardor so frequently observed in a vigorous old man of 60, bereft of the mate of his youth and seeking a companion for his declining years.

Such marriages are not infrequently unhappy after a year is gone. And it was so in the instant case. The pair

were ill-assorted. Their ways were different; the man was set in his, and the woman in her's; and neither of them appears to have had the rare temper of mind and heart to take them over their rough places. When youth weds youth nature gives bond to the union, but age must fill the place of that bond with forbearance and patience and philosophy, not forgetting a soothing and a saving humor. These parties did not measure up to the requirements of a successful second marriage experience.

Considering that the plaintiff was the possessor of property worth $110,000, the court's decree for alimony in the sum of $17,000 would not ordinarily be questioned. Since the case of *Edholm v. Edholm*, 99 Neb. 331, such an award to the unsuccessful wife, even though she were at fault and even though she contributed nothing to her husband's estate, would be within the sound discretion of the court.

The point of this appeal lies largely in the fact that there was an antenuptial agreement in the case which provided that Mrs. White was to receive $10,000 and that sum only, at the plaintiff's death, and her heirs only $5,000 in the event of her death theretofore. The agreement also contained a provision that White was to have the power of disposal of any or all of his property at any time during his life, with or without his wife's consent. It was a hard contract, because it provided a means whereby the plaintiff could make himself penniless and leave his wife without a dollar. And it should be said in passing that it was entered into without much time for study or deliberation on her part and with no opportunity whatever for consultation with her friends, being handed to her almost literally with her marriage ring. Nevertheless appellant maintains that it was a valid contract and bases his complaint mostly upon it, it being his contention that she should not be permitted to recover more than the $10,000 provided for in said agreement, and that the court had no discretion to award a greater sum.

Arguing upon the court's finding that the defendant was guilty of cruelty, the appellant strongly urges that it is

repugnant to equity to say that a woman who has entered into an antenuptial contract may by her own fault terminate the ensuing marriage relation, and then secure a greater sum by way of permanent alimony than she would have received had she been a good wife and had she survived her husband. This may immediately be answered by the observation that, if the fault be one that is wickedly planned and practiced, the court will take notice of the fact and deal with the party accordingly; while, if it be without premeditation or malice, it may chance under some circumstances that the woman, though at fault, is in good conscience entitled to better treatment than the contract provides. But the ultimate answer, conceding that the contract was fairly obtained, is that the matter of divorce was not contemplated by the parties and not anticipated in the contract; and the law provides that in every divorce for any cause excepting that of adultery committed by the wife the court may "decree to her such part of the personal estate of the husband and such alimony out of his estate as it shall deem just and reasonable, having regard to the ability of the husband, the character and situation of the parties, and all other circumstances of the case." Comp. St. 1922, sec. 1533. The statute has made no exceptions in the case of an antenuptial contract, and the power is vested in the trial court to make fair and fitting award not limited by the provisions of such contract. The contract may be in evidence, among other evidence, as to the amount to be awarded, but no more.

The course of judicial decision in Nebraska indicates a tendency on the part of the courts to deal generously with the unsuccessful wife in those cases where the fault is not intentionally planned and maliciously practiced. Nor does this tendency depend alone upon consideration of mercy or upon the obligation of the husband to support, but rather upon the theory of protecting the marriage relation and safeguarding society. In other words, the court deals with the guilty wife, in cases where the husband has ample means and is himself also at fault, so that if she is suffer-

ing from sickness or specific disability she may have relief, and so that in any case she shall not be led by financial distress into dissolute or abandoned ways. This is the true rule, at once honoring the marriage relation, safeguarding the state which has an interest in it, and doing justice and equity between the parties. It goes without saying that in applying the rule the trial court must be reasonable and not abuse its discretion.

We think that the trial court was entirely within the limits of reason and sound discretion here. White was not a dullard deceived. He was not a feeble old man beguiled. He was a hale and vigorous individual of 60, successful in business and of means and opportunity to look about him in his choosing. No one can read the voluminous record without conviction that he led the way into this marriage. He was guilty of cruelty only less than that of the appellee. The record shows it; the trial court decided it. When his wife was urging a reconciliation, he repulsed her, shifted his residence to Seward and began this suit. The record shows her at the trial sick and emaciated, suffering from a toxic goiter, affected with a pelvic ailment, in the turmoil of a lawsuit which promised to exhaust her strength and take her means. As a matter of fact, the trial ran through a dozen days, not to speak of months of preparation. There were clouds of witnesses and well-nigh clouds of attorneys. The costs, including fees, must have been very great. The record is one of the largest every brought to this court. We are satisfied that in the decree rendered the judge followed the statute, considering the ability of the husband, the character and situation of the parties, and all other circumstances of the case. 1 R. C. L. 77, sec. 77; *Wyrick v. Wyrick,* 88 Neb. 9; and, certainly by inference, in *In re Estate of Enyart,* 100 Neb. 337. It is stated in 1 R. C. L., *supra,* as follows: "The determination of the amount of permanent alimony is controlled by no fixed standard, but rests, rather, in the sound discretion of the court, which, being judicial in character, is not liable to be reviewed by an appellate court except where it is evi-

dent that there has been a clear abuse thereof." And in *Wyrick v. Wyrick*, 88 Neb. 9, the court said: "It thus appears that in awarding alimony, in an action for divorce, the district court is clothed with a fair measure of discretion. Indeed, it was frankly conceded upon the argument, by counsel for the appellant, that it was incumbent upon them to show that the trial court in this case had abused its discretion in fixing the amount of alimony in order to entitle the plaintiff to a decree of this court increasing the same."

Counsel on both sides devote pages of their briefs to a consideration of whether or not the antenuptial contract in question was valid. Appellant states in substance that the trial court concurred with counsel for the appellee in the view that upon the authority of the *Enyart* case it was void and unenforceable. We are of that opinion. The language of the opinion in that case may well apply to the situation in this: "While it appears that Katherine Richardson desired to marry for a home for herself and daughter, and it is very probable that, even if fully informed as to Enyart's estate, she still would have signed it, the contract, construed as Enyart intended it to mean, is unconscionable, not in accordance with the duties which the law imposes upon a husband in the marital relation, and its terms are such that it ought not to be enforced. *Isaacs v. Isaacs*, 71 Neb. 537."

The amount given the wife was too small, and, as we have seen, under the terms of the contract even that was not assured. She was too much hurried into it. *Warner's Estate*, 207 Pa. St. 580, cited in the *Enyart* case. And she cannot be said to have had the complete information as to a wife's rights necessary to justify a contract by which she was to receive so little.

On either phase of the controversy, the court was vested with the right, the discretion, and the duty to award according to the statute so often quoted. Considering all, it dealt liberally with the appellee, yet not so liberally as

to lead the court to decide that it abused its discretion, or acted in any wise unreasonably.

We hold that the decree of the district court should be affirmed, and it is so ordered.

AFFIRMED.

Note—See Divorce, 19 C. J. secs. 578, 582, 588, 614.

STATE, EX REL. CLARENCE A. DAVIS, ATTORNEY GENERAL, V. KILGORE STATE BANK: FRED A. CUMBOW, RECEIVER, APPELLEE: UNITED STATES FIDELITY & GUARANTY COMPANY, APPELLANT.

FILED DECEMBER 29, 1924. No. 23391.

1. **Banks and Banking**: DEPOSITS: PRIORITY. A deposit by the United States, through its proper agents, of individual Indian money in a state bank is entitled, upon failure of said bank, both to priority against the assets of the bank and the protection of the state bank guaranty fund; and this is so notwithstanding a bond in accordance with federal law be first given by the bank to secure the deposit.

2. ———: GUARANTY FUND: SUBROGATION. The surety on a bond given by a state bank to secure a deposit of Indian money, such as is required by federal law, will ordinarily be subrogated to the rights of the depositor of such money—the United States by its proper agents—when no equity intervenes to bar such subrogation and when the surety has paid the depositor the amount due on such deposit. *Held*, in this case, that the appellant is entitled to such subrogation, and consequently to a first lien upon the assets of the bank and to payment from the state bank guaranty fund.

APPEAL from the district court for Cherry County: WILLIAM H. WESTOVER, JUDGE. *Reversed, with directions.*

Reavis & Beghtol, O. M. Walcott and *C. E. Sanden*, for appellant.

C. M. Skiles, James C. Quigley and *J. J. Harrington, contra.*

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

SHEPHERD, District Judge.

The Kilgore State Bank of Kilgore, Nebraska, was insolvent, and through petition filed by the attorney general in district court of the sixteenth district its insolvency was duly declared by the court, and Fred A. Cumbow was appointed receiver. The receiver classified the claim of the United States Fidelity & Guaranty Company for $22,000, the same being the claim here in question, as a "general claim not having priority." Thereupon, by leave of court, the surety company intervened and, alleging that the claim was both a claim of first priority against all the assets of the bank and a claim entitled to payment from the guaranty fund along with other deposits, prayed decree to that effect.

By an amended answer the receiver admitted many of the allegations of the petition, but averred in defense that the claim was not filed with the receiver as required by law; that it was based upon a void bond and upon an unauthorized deposit; that it is in reality a claim of the United States against the state of Nebraska; that the intervener bases its claim upon an asserted but nonexistent right to subrogation to the right of the United States against the bank guaranty fund; that the deposit made was a deposit of public money of the United States, and that therefore no right exists against the guaranty fund; that the intervener was a depositor and can maintain no claim except against the bank; that the bank paid more than 5 per cent. upon the deposit and that accordingly no valid claim can arise against the guaranty fund.

To this answer, which also contained a traverse to the petition generally, the intervener filed a general denial by way of reply.

In the decree of the court the claim was rejected, and the intervening claimant duly appealed, assigning that the court erred (1) in refusing to allow the appellant reim-

bursement from the guaranty fund, and (2) in refusing the claim priority over all others against the bank's assets.

There is scarcely any dispute as to the facts, none at all as to the following: Claude C. Covey and his successor, J. A. Buntin, who were superintendents of the Rosebud agency, deposited a large amount of individual Indian money upon checking account in the Kilgore State Bank, the bank having theretofore given bond to secure the repayment of the same to the United States as required by federal law. The intervener signed this bond as surety. The account had been checked down to $22,000 when the bank was taken over by the department. The commissioner of Indian affairs called upon the surety company and it paid the amount due in the total sum, including interest, of $22,516.39. The bond was in appropriate form, running to the United States and requiring such action on the part of the surety company. A statement in writing, made by the assistant commissioner upon payment by the surety, recites the payment and sets forth in substance that the surety company is accordingly entitled to assert the rights of the United States in recovering from those bound. The bank paid interest at 5 per cent. on the deposit so long as it was a going concern. It also paid the surety company, the intervener, $125 for the bond, charging it with rent, clerk hire, etc., as an expense of bank operation. The total value of the bank's assets was $50,000, which was much less than its liabilities.

The significant provision of law applicable to the case at bar is to be found in section 8033, Comp. St. 1922. It is as follows:

"The claims of depositors, for deposits, and claims of holders of exchange, shall have priority over all other claims, except federal, state, county and municipal taxes, and subject to such taxes, shall at the time of the closing of a bank be a first lien on all the assets of the banking corporation from which they are due and thus under receivership, including the liability of stockholders, and, upon proof thereof, they shall be paid immediately out of the

available cash in the hands of the receiver. If the cash in the hands of the receiver, available for such purpose, be insufficient to pay the claims of depositors, the court in which the receivership is pending, or a judge thereof, shall determine the amount required to supply the deficiency and cause the same to be certified to the department of trade and commerce, which shall thereupon draw against the depositors' guaranty fund in the amount required to supply such deficiency and shall forthwith transmit the same to the receiver, to be applied on the said claims of depositors."

By this provision it would seem that in the first instance the United States, acting for its ward, the Indian, and depositing the latter's money, would stand in the place of any other depositor of the bank and have recourse to the guaranty fund.

It is patent that the objection that the claim was not filed with the receiver is captious. The receiver testified that it was filed. It was stated and classified in the latter's official report. No defense can be made upon this ground.

The defense that the claim is a claim of the United States made against the state is equally untenable. The claim is made by the United States for and on behalf of its wards. It is not a claim of, or belonging to, the United States.

The fact that the bank paid a premium of $125 for the surety bond does not constitute a defense as making the interest rate paid exceed the maximum 5 per cent. It was a current expense of the bank, so charged, and properly so charged.

We pass the contentions that the deposit was made without authority and that the bond was void, as having been answered by what has been heretofore said in this opinion. All of these enumerated contentions are without merit.

Whether the surety company was subrogated to the rights of the United States, and thereby given access to the bank guaranty fund, is a question much argued in the briefs. The referred to written statement made by the assistant commissioner somewhat indicates conventional subrogation. But passing to the matter of legal subroga-

tion, or subrogation by operation of law, we find the rule stated very favorably to the appellant in *Nelson v. Webster*, 72 Neb. 332: "Under the civil law not only is the surety entitled where he pays the whole debt to the benefit of all the collateral securities taken by the creditor, but he is also entitled to be substituted, and to the very debt itself, to the creditor by way of cession or assignment. And upon such cession or assignment * * * the debt is, in favor of the surety, treated not so much as paid, as sold; not as extinguished, but as transferred with all its original obligatory force against the principal.'" On the strength of this authority, which cites *Wilson v. Burney*, 8 Neb. 39, and is followed and approved in *Kramer v. Bankers Surety Co.*, 90 Neb. 301, an ordinary surety would seem to be entitled to subrogation.

But appellees insist that the intervener does not come within the category of the ordinary surety, because it was a surety for hire, was paid for the risk which it assumed, became an insurer in effect, and cannot be permitted, now that it has had to answer according to the condition of the bond, to itself resort to the guaranty fund for recoupment.

The question, upon analysis, falls naturally into two parts. First, is there anything in the bank guaranty law which in terms proscribes such a transaction as this, or is there anything in a deposit made under such circumstances that in equity removes such a deposit from the protection of the guaranty fund? Second, what is there in the situation here presented, outside of the fact that the surety was a surety for hire, that bars the intervener from subrogation? Considering the first, there is nothing in the text of the law, or in its contemplation, so far as we can discover, to ban the transaction or to cast suspicion upon it. The deposit can be nothing else than a deposit. Its character was not changed by the additional safeguard of the bond. The protection of the guaranty fund attached to it immediately it left the hands of the agency superintendent and became a deposit of the bank. No harm is

done to the bank by maintained or increased deposits and no injury results to the guaranty fund thereby, wherefore the deposit in question injects the situation with no countervailing equity to relieve the fund from its duty to protect it. This depositor of this money had recourse to the guaranty fund.

This brings us to the second inquiry. The contract was in suretyship. It was so denominated in the bond. The intervener signed as a surety. The requirement of the United States was a suretyship. The contract was not a policy of insurance whereby the company was to pay the United States without recourse. Appellees concede in their brief that the surety company has recourse upon the bank, having paid for the bank. How? Through subrogation to the right of the United States is the only possible way. And since the United States had in that very connection, as we have seen, a right of recourse to the guaranty fund, why should the right of subrogation be abridged in regard to that? Manifestly there is no reason why that should be, since no condition interposes to check the operation of the equitable doctrine of subrogation. The fact that the surety is paid will not do it. That fact does not destroy the inherent nature of suretyship, nor deprive it of its peculiar remedy, which is subrogation. Subrogation follows equity, and it is only where it will be inequitable to permit it to function where it ordinarily does function that its automatic operation is denied. The paid surety is as much entitled to subrogation as the unpaid surety unless some equity intervenes.

It must be clear that the guaranty fund protection of the deposit which was to be made was in the contemplation of the parties when the surety company entered upon its suretyship. It was paid for that suretyship, but the terms, as to amount, were made upon the theory that the deposit carried the protection of the fund and that it, the surety, would stand in the shoes of the depositor.

If it were alleged and proved, or if it in any wise appeared, that there was collusion between the bank and the

surety, whereby the money, when deposited, was to be made way with, or whereby the bank was to receive the money on deposit when by law it could not receive deposits because it was in a failing condition, or whereby the guaranty fund was to be injured or endangered, then there would be reason for denying appellant the subrogation upon which it depends. Nothing of the kind is in the record. We are satisfied that the United States was entitled to resort to the guaranty fund for the repayment of its deposit, and that when the appellant paid the United States it became subrogated to the latter's right in that regard. The appellant was entitled to have its claim satisfied from the guaranty fund. The trial court was in error in adjudging otherwise. The decree should be reversed.

The many cases cited by the appellees in their brief have been examined with care, so far as possible. One of them is not to be found from the citation. One of them is a damage case not touching, even remotely, any question involved in this case. One or more decide that an ambiguous contract of suretyship must be construed against the party drawing it. Others are authority for the familiar rule that the paid surety is less a favorite of the law than a surety not paid. One holds that the bond must be strictly construed where an employer sues a surety company on its bond given to indemnify against embezzlement by an employee. In at least three of them the surety company fails of getting relief when suing as subrogated to the county's right, because the bank, which had bought spurious certificates issued by a crooked county auditor and cashed them at the county's treasury, was an innocent purchaser of said certificates. The surety company had gone the auditor's bond, and had so far put him in a position to work the fraud, hence it, and not the bank, must suffer.

For instance, in the case of *American Bonding Co. v. State Savings Bank*, 47 Mont. 332, a deputy clerk of the district court furnished a surety bond for his faithful performance and account. He issued jury certificates to persons that did not exist. The bank bought them and afterwards cashed

them at the county treasurer's office. The treasurer, upon discovery of the fraud, sued the surety company and recovered. The surety company thereupon sued the bank, alleging a right of subrogation. But the court held that the bank was innocent in its purchase of the certificates, and said that as between the surety and the bank it did not appear that in equity and good conscience the bank ought to suffer the loss. It is obvious that in such cases a fraud and a resulting equity intervene to prevent the effective operation of subrogation. Nothing of the kind can be found in this record.

In another case much relied upon, *Hormel & Co. v. American Bonding Co.*, 112 Minn. 288, there was a building bond issued by the bonding company. The contractor failed to pay certain liens, whereby the owner was compelled to make payment. The owner brought suit against the bonding company, and the court held that as between the owner and the bonding company the relation was that of insurance, and the construction most favorable to the owner would be adopted. We cannot see where the case is of any particular value on the question of subrogation.

In the first case cited upon the point, *Columbia Bank & Trust Co. v. United States Fidelity & Guaranty Co.*, 33 Okla. 535, recoupment to the surety company from the bank guaranty fund was not permitted because the surety company's bond had been for the securing of a deposit of permanent school fund moneys of the state of Oklahoma, and the statute expressly provided with respect to deposits of such school moneys that such deposits should be secured only by surety bonds and by other particular named securities which did not include the guaranty fund, and only by them. In that case, statute intervened to prevent resort to the guaranty fund through the doctrine of subrogation, and hence the case is not of value in resolving the question presented in the case at bar.

To go over all of the cases cited in appellees' brief would consume too much space and would serve no useful purpose. Suffice to say, the authorities so presented do not

militate against the views above expressed.

There can be no dispute as to what a deposit is, and what funds deposited in a state bank are entitled to the protection of the guaranty fund. Our court has passed upon these propositions, holding that public funds in a state bank are secured in the same manner as private funds are secured. This was the holding in *State v. Peoples State Bank*, 111 Neb. 136. A deposit which is protected under the state bank guaranty fund law is a deposit of money placed in the hands of and under the command of the bank. *State v. Farmers State Bank*, 111 Neb. 117; also *State v. Farmers State Bank, ante*, p. 380. A depositor is one who leaves money with a bank on time deposit or subject to check. *Farrens v. Farmers State Bank*, 101 Neb. 285. In *Central State Bank v. Farmers State Bank*, 101 Neb. 210, it is held that the party who in good faith and in the usual course of business places money in a state bank subject to check and not drawing interest at a rate exceeding that fixed by statute, 5 per cent. per annum, has a deposit there under the provisions of the guaranty law, and in case the bank fails his deposit may be made a charge against the guaranty fund. And in connection with this it is to be noted that *Kessler v. Armstrong*, 158 Fed. 744, has defined what the ordinary course of business is by saying that deposits made at the bank on a business day in banking hours are deposits in the ordinary course of business.

In the brief, attention is called to the fact that the bond runs to the United States, instead of to the disbursing officer. But a later provision of federal statute declares only that the bond must be an acceptable bond. We think that the mere fact that, through misunderstanding or inadvertence or lack of knowledge, the bond is to a wrong obligee does not vitiate the bond, and that the bond ought to be upheld notwithstanding it should more properly have been to the disbursing agent. Particularly is this true since there is no ambiguity in intent and substance, and since the bank received the money and both the bank and the guaranty fund had the benefit of the same. *Huffman v.*

Koppelkom, 8 Neb. 344; *Thomas v. Hinkley*, 19 Neb. 324; *United States Wind Engine & Pump Co. v. Drexel*, 53 Neb. 771; *Gannon v. Phelan*, 64 Neb. 220.

It remains to consider the contention of the appellant that this deposit is a claim of first priority against all the assets of the bank. We think that it is, despite the argument of the appellees based upon the holding in *Cook County Nat. Bank v. United States*, 107 U. S. 445. The following provisions of the federal statute seem to provide a basis for the claim:

"Whenever the principal in any bond given to the United States is insolvent, or whenever, such principal being deceased, his estate and effects which come to the hands of his executor, administrator, or assignee, are insufficient for the payment of his debts, and, in either of such cases, any surety on the bond, or the executor, administrator, or assignee of such surety pays to the United States the money due upon such bond, such surety, his executor, administrator, or assignee, shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured to the United States; and may bring and maintain a suit upon the bond, in law or equity, in his own name, for the recovery of all moneys paid thereon." U. S. Rev. St. (1875) sec. 3468.

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed." U. S. Rev. St. (1875) sec. 3466.

Even this language might leave us in doubt, since the

deposit in this case was of individual money belonging to the Indians, and not public money of the United States. But the money was in fact deposited by the United States as a guardian of its wards, through its Indian agent or representative, and it would seem that the law is broad enough in its purpose to cover a case of this kind. This view finds support in the case of *United States Fidelity & Guaranty Co. v. Bramwell*, 295 Fed. 331, which involved the deposit of a large amount of Indian funds in the Bank of Klamath Falls. The surety, the fidelity and guaranty company, paid the amount of the deposit to the United States, and then claimed priority over other creditors of the bank. The court said: "The position of the defendant is that the statute giving the United States priority was designed to protect the public revenues, so that the government could sustain its burdens and pay its obligations, and since the debt here in question was for money held by the United States for the use and benefit of the Indians residing on the Klamath Indian Reservation the statute has no application. But it seems to me this is an unwarranted construction of the statute. The language is general and without qualification. It applies to all persons indebted to the United States. The form of the indebtedness is immaterial. *Lewis v. United States*, 92 U. S. 618.

"The debt here in question was due from the bank to the United States, both by the terms of the deposit and the condition of the bond given for its security. The United States was the only party to which the obligation ran, and which could enforce it. It is true the money was held in trust for the use and benefit of the Indians, but that does not make the indebtedness of the bank any the less an indebtedness to the United States. The United States, under the treaty with the Klamath Indians, * * * is the guardian of the Indians on the reservation, and as such supervises and manages their affairs, collects and disburses funds intended for their benefit, and may sue to enforce and protect their rights and obligations; * * * and when it causes money received by it through

its officers for the use and benefit of the Indians to be deposited to its credit in a bank, it is, in my opinion, entitled to priority on account thereof to the same extent as in the case of any other debt due it, and such was conceded to be the law in the recent case of *United States v. Oklahoma*, 261 U. S. 253."

The objection of appellees upon the authority of the *Cook County Nat. Bank* case, *supra*, is well answered by the appellant in its reply brief. The holding in that case was because congress had repealed the statutes as applicable to national banks. But because of that it does not follow that the statutes have been repealed as to state banks.

We are convinced that the debt for which the appellant was surety was one which was due the United States, and that by subrogation, as provided for in section 3468, above quoted, the appellant succeeds to the right of the government, and is entitled to be paid from the bank's assets in advance of any other claim.

Because of the views expressed, the decree of the district court is reversed and the cause is remanded for decree in accordance with the holding of this opinion.

REVERSED.

THOMPSON, J., dissents.

SCHOOL DISTRICT D, APPELLANT, V. SCHOOL DISTRICT NO. 80 ET AL., APPELLEES: SCHOOL DISTRICT I OF DAWES COUNTY, APPELLANT.

FILED DECEMBER 29, 1924. No. 24128.

1. **Judgment:** CONCLUSIVENESS. A party to a lawsuit in the district court, where such court has jurisdiction over the person and subject-matter, will be bound by the judgment rendered in such case when collaterally attacking it, even though such judgment was irregularly or erroneously entered.

2. ———: ———. If the trial court properly acquires jurisdiction, "it has the right to decide every question which arises in the case, and its orders and judgments, however erroneous, cannot be collaterally assailed. Such errors can only be taken

advantage of by proceedings in error or appeal to this court." *Fraaman v. Fraaman*, 64 Neb. 472.

3. ———: RES JUDICATA. A judgment acts as an absolute bar to a subsequent action based upon the same contentions, not only as to every matter offered to sustain or defeat said contentions, but also as to any other admissible matter which might have been offered for that purpose.

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

G. T. H. Babcock, F. S. Baird, E. D. Crites and *F. A. Crites*, for appellants.

Allen G. Fisher and *Samuel L. O'Brien, contra.*

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

SHEPHERD, District Judge.

This case arsises from a redistricting in Dawes county under chapter 243, Laws 1919, involving school districts called No. 80, D, and I. The following appears from the record and from agreement of counsel upon argument:

In the fall of 1919 the survey committee, composed of the county superintendent and two others, began redistricting in Dawes county, and proceeded to detach certain land and other property from old No. 80 and to divide the same between D and I, which were apparently being formed or restablished. Whether it had completed its work in this behalf by the 24th day of May, 1921, the record does not fully disclose. It seems doubtful. On the day last mentioned district No. 80 brought an injunction suit, No. 4749, against the committee, Edna E. Rincker, Fred A. Hood, and A. C. McLain, to enjoin them from disposing of its schoolhouse and from depleting its revenues by transferring said lands to the other districts. In its petition it alleged in detail that the committee had destroyed its boundaries, and would, if not restrained, strip it of its revenues, sell its property, and deprive its children of school

privileges. It alleged also that the committee had not proceeded according to law, and that what it was doing was not only illegal, but calculated to work irreparable injury to the district. It averred also in fitting terms that it was without adequate remedy at law. The suit was prosecuted to final determination, and on the 22d day of August, 1921, the court duly entered an order against the defendants permanently enjoining them —

" From the further doing of any of the acts affecting the scope or territorial limits of the plaintiff, school district No. 80, as it stood during the years of 1919 and 1920, theretofore, from in any manner interfering with the levying of taxes for school purposes in said school district during the years above mentioned, and from in any manner interfering with the disposition or sale of any of the personal property belonging to the plaintiff during the said years theretofore that plaintiff so existed as school district No. 80, or from any other act or the exercise of pretended authority that in any wise tends to diminish the territorial limits of said school district No. 80, as it existed during the years 1919, 1920, and the years theretofore or any other act that tends to impair or destroy the original school tax resources of plaintiff, and until the further order of this court."

In apparent disregard of the court's order, however, the county superintendent, county clerk, and county treasurer went ahead and were about to turn the tax money derived from said disputed lands over to districts D and I, when they were stopped by a contempt proceeding, in the course of which they seem to have promised obedience to the injunction and to have escaped punishment. This latter happened about the 4th day of May, 1922. At that time said officials, and possibly districts D and I by their proper officers, presented a motion and answer in said cause to set aside said order of injunction and to be allowed to litigate the subject-matter of the suit. This motion the court denied by written decree of the date last mentioned. The decree is as follows:

"This cause came on for hearing pursuant to notice of such hearing upon the application for conviction of the defendants for contempt of court by violation of decree and injunction given herein on August 22, 1921, Allen G. Fisher, Esq., appearing for said application, and Fred A. Crites, Esq., county attorney, for the defendants; and immediately before hearing the defendants presented their motion filed on this date with an answer tendered to vacate the decree and for leave to file said answer, and the court having heard the said motion and tendered answer, and showing in support thereof read, and counsel for plaintiff, doth overrule said motion and refuse to vacate said decree, to which defendants are allowed an exception."

Thereafter on the 18th day of September, 1922, school district D began an action against district No. 80 for the disputed lands and for the taxes to be derived therefrom, asking that No. 80 be enjoined from claiming said lands or said taxes and from interfering with its rights thereto, and asking also general equitable relief. The petition refers to the injunction granted in No. 4749, and states as follows in regard to the same: "During the year 1921, school district No. 80 was given a judgment against Edna E. Rincker, Fred A. Hood, and A. C. McLain, permanently enjoining them from interfering with the territory of said school district No. 80." But in connection with this it declares that school district D was not made a party to the suit in which such judgment was entered. It also alleges the steps taken to form district D, and avers that said district was a duly-organized school district in regular operation. District I intervened with a similar petition in its own behalf.

The defendant answered that all the matter pleaded in said petitions was pleaded in case No. 4749 and was therefore *res judicata;* that the action of the survey committee was not effective, because certain jurisdictional steps were not taken; and that subsequent to the entering of the permanent injunction the plaintiff and the intervener appeared in the case by application to set aside said injunction; also,

that their remedy, if any, was by *quo warranto*. The following is from the answer:

"And this defendant says further that afterward, on May 4, 1922, in the said cause and court, the plaintiff school district D by its moderator and other officers, and the intervening school District I by its moderator and officers appeared by the said Edna E. Rincker, Fred A. Hood, and A. C. McLain, the district survey committee of said county, and tendered in said cause and court their verified answer to the petition for injunction and offered proof, the county attorney appearing for the defendants in said action and school district D and school district I, and the said Frederick S. Baird, as moderator and attorney, also appeared and argued, and the facts pleaded in their tendered answer, whereof proof was offered to the said court, are the identical same facts and acts and allegations and language which are set out in the petition and intervening petition herein; nevertheless this court, having heard all the facts and all the allegations which are now tendered in this cause in behalf of school district D and school district I, refused to vacate the said decree, and by its judgment then duly given continued the same in full force, and this defendant says that by reason of the premises there was an absolute, full and entire adjudication against the plaintiff herein and against the intervener herein which is yet in full force and effect in favor of this defendant."

The defendant also alleged failure on the part of the county superintendent to correct her records as she had promised to do in the contempt proceeding, and consequent misdistribution of the disputed taxes on the books of the county clerk and treasurer; that the judgment in No. 4749 ought to be extended against Oscar Johnson and Belle Quinn, present county clerk and county treasurer, respectively, on the ground that districts D and I were privy to the order made therein, etc. It concludes its answer with a prayer for the latter, for the dismissal of the plaintiff's petition, for an accounting of tax moneys, and for general equitable relief.

To this answer no reply was filed or made.

The case came on for trial February 18, 1924, and on the same day the court rendered decree as follows, to-wit:

"No. 4977. In the district court of Dawes county, Nebraska.

"School District D, Plaintiff, v. School District Number 80, Oscar Johnson, County Clerk, substituted as defendant for Roll G. Smith; Belle Quinn as County Treasurer substituted as defendant for Fred Neeland, Defendants. School District I, Intervener.

"On this 18th day of February, A. D., 1924, comes the plaintiff and intervener by G. T. H. Babcock, Esq., and F. S. Baird, Esq., its attorneys, and comes the defendant school district No. 80 by Allen G. Fisher, Esq., and S. L. O'Brien, Esq., its attorneys, and the cause is brought on for hearing upon the petition of plaintiff and the petition of intervention and the answer under which pleadings each party tenders evidence, but upon due consideration of the said pleadings and the statements of counsel for each party the court finds that the former adjudication set out in the petition and answer may not be interfered with nor set aside in this action, and that a court of equity has not power by injunction to vacate its former injunction in cause No. 4749 in this court, and that the parties have the right to have the present incumbents, county clerk and county treasurer, substituted as defendants, they having appeared herein.

"It is therefore considered, adjudged and decreed that the petition of plaintiff and the petition of intervention be and each is hereby dismissed, and the defendant school district No. 80 go hence without day as to said petitions, and upon the cross-petition of the defendant it is again ordered that the injunction against the county treasurer and county clerk given on August 22, 1921, be and continue in full force and be obeyed. To the judgment of dismissal herein, the plaintiff and intervener each excepts.

"By the Court: W. H. Westover, Judge.

"Filed Feby. 18, 1924."

It is this decree from which the appeal is taken. A bill of exceptions was settled and filed. It is a part of the record. It contains only the petition and affidavit for injunction in said first injunction case, No. 4749, together with the restraining order and permanent injunction granted therein.

Apellants present 16 assignments of error in their brief. They may be reduced in number and summarized as follows: The court erred (1) in receiving in evidence the pleadings and decree in No. 4749; (2) in holding that the matter of this case is *res judicata* by the decree of No. 4749; (3) in holding that the petition in No. 4749 states a cause of action and in granting an injunction therein, the fact being that such an order would be void for want of jurisdiction; (4) in failing to take testimony and to decide the case thereon; (5) in holding that the court had no power to vacate a former injunction by injunction; (6) in ordering the injunction in No. 4749 applied to the county clerk and treasurer when they were not parties to the suit; (7) in allowing the injunction in No. 4749 when it appeared from the petition that districts D and I were at least *de facto* organizations, and that *quo warranto* was alone the form of action by which their legality could be tested.

Of course, if the court was without jurisdiction in the first case, the decree entered therein was void and could not operate as an adjudication of the issue raised in the second case. It would seem from *Dappen v. Weber*, 106 Neb. 812, that *quo warranto* is the proper action whereby to test the legal entity of a school district and the status of its officers. But, conceding this, it is to be observed that in the instant case the court may have properly found and concluded that the bodies in question, D and I, were only districts in the making, merely school districts in contemplation, as distinguished from school districts in being. The petition in No. 4749 so indicated, referring to them as pretended school districts, or as bodies which the survey committee was attempting to establish and was pleased to

call school districts. There is a difference—and one which perhaps calls for another application of the rule—between an established district and one which is incomplete, when question is raised as to the district's entity, officials, and powers. There may be exceptions in a proper case.

Nor are we prepared to say that one school district may not employ injunction against another, or against a survey committee, to prevent an injury which is manifestly irreparable, such as the deprivation of school privileges to its children. In other words, the absence of an adequate remedy in *quo warranto* ought to open the door to equity. In the case at bar such a situation was presented. A *prima facie* case was alleged, but the defendant, though duly summoned, failed to attend, omitted to appear. The case is governed, we are inclined to think, by *Hilton v. Bachman*, 24 Neb. 490, and kindred cases, such as *Hough v. Stover*, 46 Neb. 588, and *Fraaman v. Fraaman*, 64 Neb. 472, in which it is held that a party to a proceeding in the district court, where such court has jurisdiction over the person and subject-matter, will be bound by the judgment in the case when collaterally attacking it, even though the judgment was irregularly or erroneously entered. A pleading of a case cognizable only in equity as a case at law, or a pleading of a case cognizable only at law as a case in equity, may be vulnerable to timely attack, but if it is unassailed the judgment rendered thereon will not be held void.

But, aside from this, it is clear that the first injunction suit which we are considering contained an averment respecting the sale of the plaintiff's schoolhouse, which could not come within the purview of the *Dappen* case, *supra*, and which entitled plaintiff to the interposition of equity. Now, if equity takes jurisdiction for one purpose, it will take it for all purposes. At least, it may do so in the discretion of the court. It commonly seeks to avoid multiplicity of suits. In *Fraaman v. Fraaman*, above cited, the court said: "Where a district court has acquired jurisdiction, it has the right to decide every question which

arises in the case, and its orders and judgments, however erroneous, cannot be collaterally assailed. Such errors can only be taken advantage of by proceedings in error or appeal to this court." The district court seems to have acted on this well-recognized principle, and to have adjudged the territorial limits of school district No. 80, as well as the other questions involved.

Coming now to the second suit, the case in which this appeal has been perfected, a careful consideration of the matter of it convinces us that it is the same old matter litigated in No. 4749. It will be remembered that in its answer the defendant district No. 80 alleged that districts D and I got into No. 4749 on motion and answer as to the merits, and were heard, with the result that the court refused to vacate the decree therein rendered, and that neither the plaintiff nor the intervener replied thereto. If, according to the recognized rule of pleading, these undenied allegations of the answer are to be taken as true—and it would seem that they should be, for appellant's statement that both parties treated them as denied finds no support in the record—the matter was *res judicata* as the trial court adjudged it. We so hold. A judgment acts as an absolute bar to a subsequent action based upon the same contentions, not only as to every matter offered to sustain or defeat said contentions, but also as to any other admissible matter which might have been offered for that purpose. *Slater v. Skirving*, 51 Neb. 108; *Orcutt v. McGinley*, 96 Neb. 619.

It would also seem, though we do not decide, that, although school districts D and I were not made party defendants in the first case, they should be held to be in privity with the defendant, the survey committee, and concluded by the terms of the decree in that case. This conclusion has additional weight because of the fact that their territorial limits, at least, depended upon the work of the survey committee which was interfered with and directed by the terms of said judgment.

It also appears from the facts hereinbefore recited that

the decree of the district court was right, for the reason that the remedy of school districts D and I, if any, was clearly by *quo warranto*. It was so held in the case of *Dappen v. Weber*, 106 Neb. 812, and in *Mosiman v. Weber*, 107 Neb. 737. The action for injunction chosen by the plaintiff and intervener was challenged in the pleadings. It was suggested by counsel upon argument that the trial judge stated that in his opinion the remedy of the plaintiff, supposing that *res judicata* were not in the case, would be by *quo warranto*. We have no doubt that this is true.

At first blush it might seem that the same doctrine which we here apply ought to have been applied by the court in the first injunction case; that the trial judge should have taken notice of the character of the complaint and of the proper action to be employed, and should, accordingly, have held that the action of injunction would not lie. But in that case the defendants, though in court, failed to make objection. In this one, as before stated, objection was seasonably made.

It is asserted by appellants that the trial court refused to receive any evidence in the case, but the record does not disclose that this is a justifiable contention. The decree of the court seems to indicate that each party tendered evidence, but it goes on to say that upon a due consideration of the pleadings and the statements of counsel for each party the court finds, etc. But the real showing of what evidence was offered and received must be found in the bill of exceptions and in the order of the court settling he same. From said order it appears that the defendant only offered evidence, and that evidence, being the pleadings and the orders of the court in the first injunction suit, appears in the bill. The court particularly states in his order that this was the only evidence received and the only evidence offered. If appellants failed to offer evidence, or if they did offer evidence, but failed to make a record thereof, they are without ground upon which to avail themselves of this contention.

It seems possible that upon a more extended and complete record than that which is filed in this cause, the case

might present a different aspect. It is quite evident that there was no well-presented defense to the contentions of school district No. 80. It is likely that a defense might have been urged. If it was meritorious and not urged, it is unfortunate. If school districts D and I or the survey committee had a defense, the failure of their representatives to appear in the first injunction case must be held responsible for their resulting dissatisfaction and possible loss. Parties who are served with summons in a lawsuit duly begun in the trial court can rarely disregard the proceedings therein without consequences both unpleasant and costly.

We have examined all of the authorities cited, and believe that there is nothing in the same which upon careful consideration is opposed to the views herein expressed. The judgment of the district court is

AFFIRMED.

Note—See Appeal and Error, 4 C. J. sec. 1661; Equity, 21 C. J. secs. 48, 117; Judgments, 34 C. J. secs. 810, 815, 831, 856, 1322—Quo Warranto, 32 Cyc. p. 1424.

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26. Harmless error in an instruction is not ground for reversal. *Johnson v. State* 530
27. Venue may appear from the record as a whole. *Farrin v. State* 608
28. Counter affidavits on motion for change of venue may be withdrawn for reverification. *Baker v. State* 654
29. A change of venue is discretionary with the court, and where existence of prejudice has subsided before trial, it is not error to refuse a change. *Baker v. State* 654
30. It is not error to appoint an assistant to the county attorney when he requests it. *Baker v. State* 654
31. The credibility of witnesses is for the jury. *Baker v. State* 654
32. The appointment of a prosecuting attorney in place of a disqualified county attorney is discretionary. *Quinton v. State* 684
33. A denial of a jury trial on an issue of fact tendered by a plea in abatement is not reversible error, unless prejudicial. *Quinton v. State* 684
34. Plea in bar *held* a waiver of all matters raised by plea in abatement. *Quinton v. State* 684
35. Discharge of jury for prejudice of juror not disclosed on *voir dire* examination *held* not an acquittal. *Quinton v. State* 684
36. The quoting of a statute not applicable to the issues is not reversible error, unless prejudicial. *Quinton v. State* 684
37. Where a conviction is warranted by the evidence of defendant voluntarily given, a new trial will not ordinarily be granted. *Quinton v. State* 684
38. Instructions to jury should not be corrected after being delivered and jury have retired, unless the jury and inter-

ested parties be first called into court: but the making of a correction is not ground for reversal, unless prejudicial.. *Quinton v. State* 684
39. A court having knowledge of the facts may enter a *nunc pro tunc* judgment, even at a subsequent term. *Quinton v. State* 684
40. Where accused elects to stand on a plea in bar after demurrer sustained, it is not error to deny a jury trial thereon. *Quinton v. State* 684
41. An instruction *held* not to give undue emphasis to certain testimony. *Jones v. State* 710
42. In a prosecution of a police officer, an instruction which placed an erroneous construction on a statute *held* prejudicially erroneous. *Jones v. State* 710
43. Overruling motion to quash the venire *held* not error, in absence of a *voir dire* examination showing challenges for cause and exercise of peremptory challenges. *Kaufmann v. State* 718
44. Instruction held not erroneous because of typographical error. *Kaufmann v. State* 718
45. Two counts *held* to charge one offense, and to permit but one penalty. *Kaufmann v. State* 718
46. Two counts *held* to charge but one offense of unlawful sale of liquor. *Kaufmann v. State* 718
47. An attorney appointed to assist in a trial for felony is not required to qualify as deputy county attorney. *Gragg v. State* 732
48. Overruling of objection to appointment of assistant prosecutor *held* not error. *Gragg v. State* 732
49. Overruling of plea in bar on the ground of former jeopardy *held* not error. *Gragg v. State* 732
50. The sentence imposed must conform to the law in force at time crime was committed. *Gragg v. State* 732
51. A "false entry" within the building and loan association act, defined. *Fricke v. State* 767
52. An incorrect entry made to correct a mistake in bookkeeping *held* not a "false entry." *Fricke v. State* 767
53. Instruction as to "false entry" *held* prejudicially erroneous. *Fricke v. State* 767
54. As a rule, evidence of other crimes is not admissible. *Fricke v. State* 767
55. Evidence *held* to sustain conviction of robbery from the person. *Nelson v. State* 838

Damages.

1. "Damage" defined. *Wood v. Security Mutual Life Ins.*

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2. Submission of questions of continuance and permanence of injuries *held* not error. *Garrison v. Everett* 230
3. Measure of contractee's damages for breach of a construction contract stated. *Horse Shoe Lake Drainage District v. Crane Co.* 323
4. A party recovering for breach of construction contract is entitled to interest from date of breach. *Horse Shoe Lake Drainage District v. Crane Co.* 323
5. Damages that naturally flow from a breach of contract need not be specially pleaded. *Forburger Stone Co. v. Young* 345
6. A party injured by default of abstractor must prevent increase of damages. *Marcell v. Midland Title Guarantee & Abstract Co.* 420
7. Where opinions of medical experts as to the cause of a lesion conflict, it is a question for the jury. *Culver v. Union P. R. Co.* 441
8. Rule for computing future earnings under the federal employers' liability act, stated. *Culver v. Union P. R. Co.* 441
9. Damages for pain and suffering are awarded as a gross sum payable presently. *Culver v. Union P. R. Co.* 441
10. In absence of statutory authority, it is error to include an attorney's fee in an instructed verdict. *Farmers State Bank v. Aksamit* 465
11. In an action for damages, the presumption obtains that the jury did not consider any element of damages that was unsupported by evidence. *Stocker v. Stocker* 565

Deeds.

1. Evidence *held* insufficient to set aside a conveyance for fraud. *Johnson v. Kelley* 60
2. Whether erasures and alterations in a deed are material is a question for the court. *King v. DeTar* 535
3. In an action for damages for breach of warranty, plaintiff must show surrender to a paramount title outstanding at date of covenant. *Funke v. Fraas* 541

Descent and Distribution.

1. The contingent interest of a wife in lands of her husband is not extinguished by his deed. *Moore v. Markel* 743
2. A widow's interest in her husband's lands is more than that of an heir at law. *Moore v. Markel* 743

Divorce.

1. Where the evidence of the husband is insufficient, he cannot insist that his wife be granted an absolute divorce

instead of separate maintenance on her cross-complaint. *Stocker v. Stocker* 201
2. Decree *held* to be one for separate maintenance, and not for divorce from bed and board. *Stocker v. Stocker* 201
3. In awarding custody of a child of tender years, the law looks to the welfare of the child. *Feather v. Feather* 315
4. Evidence *held* to require that custody of minor child be committed to its mother. *Feather v. Feather* 315
5. The district court may set aside a decree of divorce within six months of its rendition as in ordinary actions during term time. *Carmony v. Carmony* 651
6. After a decree of divorce has been set aside, the cause stands for trial as other actions. *Carmony v. Carmony* 651
7. An order setting aside a decree of divorce can be set aside or modified only in the manner and on notice as in other cases. *Carmony v. Carmony* 651
8. An order setting aside an order made at a previous term, if made without notice to, or appearance by, the adverse party, is void for want of jurisdiction. *Carmony v. Carmony* 651
9. A court in fixing permanent alimony may take into consideration an allowance theretofore made in a decree for separate maintenance. *Tiernan v. Tiernan* 707
10. Condonation of acts of cruelty is conditional upon subsequent good conduct. *Riddick v. Riddick* 813
11. Where a wife is divorced for extreme cruelty, the court may decree her just and reasonable alimony. *White v. White* 850
12. A valid antenuptial contract, not made in contemplation of divorce, cannot absolutely limit award of alimony. *White v. White* 850
13. Award of $17,000 alimony out of an estate of $110,000, approved, though the wife was divorced. *White v. White* 850

Drains.

1. Injunction will lie to prevent construction of a drainage ditch flooding lands of riparian owners, until a time has been fixed for a hearing on damages and notice given. *Costello v. Colfax County* 40
2. A drainage district is liable for damages caused by negligence in construction or maintenance of its works. *Miller v. Drainage District* 206
3. A purchaser of land in a drainage district is entitled to rights of his vendor as to damages subsequent to the purchase. *Miller v. Drainage District* 206

Election of Remedies.

Petition seeking damages for deceit may be amended by plea for rescission. *Huffman v. Bankers Automobile Ins. Co.* 277

Embezzlement.

1. One holding himself out as a deputy county treasurer *held* to be a *de facto* official and liable for embezzlement of public money. *Baker v. State* 654
2. Evidence *held* to sustain conviction. *Parmele v. State* 831

Eminent Domain.

1. Condemnation is maintainable for rights of way for irrigation or waterpower purposes. *Blue River Power Co. v. Hronik* 500
2. Petition for condemnation must be specific. *Blue River Power Co. v. Hronik* 500

Equity.

Equity does not favor forfeiture. *State v. Farmers State Bank* 597

Evidence.

1. Provision in order for stock *held* not to estop purchaser from establishing fraud. *Stroman v. Altas Refining Corporation* 187
2. The owner of personal property may testify as to its value. *Miller v. Drainage District* 206
3. On the question of the cost of a building, evidence as to the value of certain materials *held* competent. *Nittler-Rhump Co. v. Jones* 238
4. A party to a written lease may show that he was induced to execute it by deceit. *Nittler-Rhump Co. v. Jones* 238
5. Permitting witnesses to state their opinion as to the total period of delay in furnishing cut stone *held* error. *Forburger Stone Co. v. Young* 345
6. In an action against a tort-feasor, oral evidence is competent to show the scope of a written settlement with another tort-feasor. *Menking v. Larson* 479
7. The terms of a note cannot be varied by oral evidence. *Farmers Nat. Bank v. Ohman* 491
8. The rule that one must produce a document when called for, or never, is not inflexible. *Sallander v. Prairie Life Ins. Co.* 629
9. An application to set aside an order for production of books and papers should ordinarily be granted when the latter are tendered to the opposite party. *Sallander v.*

Prairie Life Ins. Co. 629
10. One who attacks the validity of a written instrument he has signed has the burden of proof. *Madura v. McKillip* 783
11. Rule stated as to use of oral evidence to construe a written instrument. *Creighton Real Estate Co. v. City of Omaha* 802

Execution.

An execution cannot be lawfully levied on real estate of which a judgment debtor died seised until the judgment has been revived against the persons taking title. *Dougherty v. White* 675

Executors and Administrators.

1. Evidence *held* to sustain judgment for a daughter against the father's estate for services. *Phifer v. Estate of Phifer* 327
2. An administrator is not entitled to recover property of the estate as against the equitable owner, in absence of creditors. *Tyrrell v. Judson* 393
3. Will *held* to give executors authority to sell and convey lands when necessary to carry out its provisions. *Draper v. Eager* 611
4. Decision of executors as to necessity of sale of lands under authority vested in them by will *held* conclusive. *Draper v. Eager* 611

False Pretenses.

1. Intent to cheat and defraud must be proved. *Thompson v. State* 389
2. Gist of offense stated. *Thompson v. State* 389
3. Evidence *held* to negative intent to cheat and defraud. *Thompson v. State* 389

Fraud.

1. Whether an injured party was justified in relying on false representations is a question for the jury. *Farmers Cooperative Grain Co. v. Startzer* 19
2. Representation of a fact in the future, if false, is actionable. *Farmers Cooperative Grain Co. v. Startzer* 19
3. A cause of action based on deceit and misrepresentation survives and is assignable. *Stroman v. Atlas Refining Corporation* 187
4. Evidence *held* insufficient to sustain judgment. *Eliason v. Burnham* 549

Gaming.

A deal in wheat, where actual delivery of grain is not contemplated, is illegal, and no cause of action arises for advances to pay losses. *Bruce v. Ford* 227

Gifts.

A gift of property may be made directly to the donee, or to a third person for delivery after the donor's death. *Tyrrell v. Judson* 393

Guaranty.

1. The term "till maturity," in a contract of guaranty, construed to mean "at maturity." *Lancaster Farmers State Bank v. Buckner* 126
2. Defenses of lack of diligence and want of notice of default *held* not proved. *Lancaster Farmers State Bank v. Buckner* 126

Holidays.

When a legal holiday falls on Sunday, the succeeding day is not a legal holiday. *Reid v. Keys* 242

Homestead.

1. Contract for sale of homestead *held* ratified. *Johnson v. Kelley* 60
2. A homestead may be composed of contiguous parts of governmental subdivisions divided by a public highway. *Davis v. Davis* 178
3. As to the homestead, a probate court can make no order other than to determine the status of a widow. *Davis v. Davis* 178
4. A mortgagee of a valid mortgage of a homestead may ordinarily assert the invalidity of a prior mortgage because not properly acknowledged. *Trevett, Mattis & Baker Co. v. Reagor* 470
5. Conveyance of a homestead must be executed and acknowledged by both husband and wife. *Trevett, Mattis & Baker Co. v. Reagor* 470
6. The homestead character of the family home is not divested by reason of the wife and children removing after divorce. *Dougherty v. White* 675
7. Removal of divorced husband from the former family home for care and attention during illness *held* not an abandonment of the homestead. *Dougherty v. White* 675
8. A homestead vests in heirs or devisees free from debts except such as are created under the homestead law. *Dougherty v. White* 675

Homicide.

1. Instruction as to presumption of malice from the homicidal act and use of a deadly weapon *held* erroneous. *Egbert v. State* 129
2. The time elapsing between the making of a dying declara-

tion and dissolution is not necessarily a factor in determining its admissibility. *Johnson v. State* 530
3. The admissibility of a statement by the victim that he was shot by accused is a question for the court. *Johnson v. State* 530
4. A statement by the victim that he was shot by accused is admissible, if made under a sense of impending death; and the foundation for its admission may be shown by circumstances. *Johnson v. State* 530
5. Statement *held* admissible as a dying declaration. *Johnson v. State* 530

Husband and Wife.

1. In an action for alienation of affections, communications between husband and wife, *held* admissible to show the state of his feelings. *Stocker v. Stocker* 565
2. A married woman may bind her separate estate as surety for her husband, and extension of time of payment of husband's past-due indebtedness is sufficient consideration to support wife's contract as surety. *Biltwell Tire & Battery Co. v. Book* 647
3. A married woman who joins her husband in execution of a note binding her separate estate is bound as if she were single. *Biltwell Tire & Battery Co. v. Book* 647

Indictment and Information.

1. It is not essential that an information show the term of court at which filed, or that it was filed during term time. *Mares v. State* 619
2. Where an offense can be committed only in a certain municipal division, the name of such division and an allegation that the offense was committed therein must be set out in the indictment. *Jones v. State* 710
3. To sustain a conviction for malfeasance in office, it is necessary only to charge and prove that the unlawful conduct was "wilfully" done. *Grebe v. State* 715

Infants.

Child *held* not "employed" or permitted "to work" in a theatre in violation of sec. 7669, Comp. St. 1922. *Taylor v. State* 112

Insane Persons.

1. Appointment of a guardian for the father *held* not to terminate an existing contract with his daughter for his care. *Phifer v. Estate of Phifer* 327
2. Mode of collecting judgment rendered against an incom-

petent after inquisition and appointment and qualification of a guardian, stated. *Thomas v. First Nat. Bank* 847

Inspection.

1. Increase in price of petroleum products to cover excess inspection fees *held* not to justify the state in retaining the fees as belonging to the consumer. *Century Oil Co. v. Department of Agriculture* 73
2. Collection of fees for inspection of petroleum products will be enjoined only as to excess of reasonable cost of inspection. *Century Oil Co. v. Department of Agriculture* 73
3. Complainants *held* entitled to a return only of so much of inspection fees as were excessive. *Century Oil Co. v. Department of Agriculture* 73
4. Method of distribution of inspection fees, stated. *Century Oil Co. v. Department of Agriculture* 73

Insurance.

1. Evidence *held* not to show change of beneficiaries in benefit certificate. *Hubler v. Modern Woodmen of America* 1
2. Facts *held* to establish an equitable substitution of beneficiaries. *Smiley v. Modern Woodmen of America* 10
3. One who solicits insurance, or who, with authority, receives premiums, *held* an agent of the insurer. *Robinson v. Union Automobile Ins. Co* 32
4. A policy of insurance may be reformed so as to express the real agreement. *Robinson v. Union Automobile Ins. Co.* 32
5. Failure to examine policy will not defeat reformation after loss. *Robinson v. Union Automobile Ins. Co* 32
6. Contract of mutual insurance company *held ultra vires*. *Durland v. Elkhorn Life & Accident Ins. Co* 105
7. Insurer *held* liable for damage to automobile by collision while being operated by unauthorized person. *Pred v. Employers Indemnity Corporation* 161
8. An embankment *held* to be an "object" under an automobile insurance policy insuring against loss by "collision with another object." *Pred v. Employers Indemnity Corporation* 161
9. Attorney's fees *held* not properly taxable as costs. *Gipson v. Metropolitan Life Ins. Co* 302
10. Provision in policy making insurer liable only in case of external and visible marks of injury will be liberally construed. *Feis v. United States Ins. Co* 777
11. Requirements of policy as to "external and visible marks" *held* met by evidence. *Feis v. United States Ins. Co* 777
12. Evidence *held* to justify submission of questions of lia-

bility and whether there were "external and visible marks of an injury." *Feis v. United States Ins. Co.* 777
13. Refusal of payment on the ground that the policy was not in force at the time of injury constitutes a waiver of notice and proof of loss. *Feis v. United States Ins. Co.* 777

Interest.

An agent is chargeable with interest on money wrongfully withheld. *Pearlman v. Snitzer* 135

Intoxicating Liquors.

1. Sec. 3238, Comp. St. 1922, *held* not to prohibit the *bona fide* manufacture and sale of vinegar, although alcohol is developed in the manufacture. *Sommers v. State* 311
2. "Mash" defined. *Sommers v. State* 311
3. Certain mixture *held* not mash. *Sommers v. State* 311
4. Evidence *held* to sustain conviction. *Bush v. State* 384
5. An instruction that unexplained possession of a still and mash may be presumed to be for an unlawful purpose *held* proper. *Hoppe v. State* 593
6. Evidence *held* to show that substance exhibited to jury was "mash." *Hoppe v. State* 593

Judgment. SEE CRIMINAL LAW, 39.

1. Judgment against a paving contractor *held* not *res judicata* in an action against the city. *Randall v. City of Chadron* 120
2. The duly authenticated judgment of a state court having jurisdiction is a conclusive adjudication of the subject-matter of the suit. *Harris v. McPherson* 410
3. Admission of *ex parte* affidavit as to authority of an attorney *held* error. *Harris v. McPherson* 410
4. Summons in an action for a money judgment begun in a county where the defendant does not reside cannot be lawfully served on him in the county of his residence, and default judgment on such service is void. *Braun v. Quinn* 485
5. Petition in suit to enjoin enforcement of a judgment must allege a meritorious defense to the first cause of action. *Braun v. Quinn* 485
6. A petition that does not state a cause of action will not support a judgment. *Sallander v. Prairie Life Ins. Co.* 629
7. All persons whose rights might be affected should be made parties to a suit to enjoin enforcement of a void judgment; and where the suit is directed solely against the judge relief should be denied. *Howard v. Spragns* 641
8. A judgment should be revived against the personal representative where personal property is affected, and against

heirs or devisees where real property is affected. *Dougherty v. White* 675
9. A decree for separate maintenance is not a bar to a suit for absolute divorce. *Tiernan v. Tiernan* 707
10. A judgment cannot be collaterally attacked for irregularity. *School District D v. School District No. 80* 867
11. Errors inherent in a judgment can only be corrected by proceedings in error or appeal. *School District D. v. School District No. 80* 867
12. A judgment is a bar to a subsequent action as to questions raised or which might have been raised in the first action. *School District D v. School District No. 80* 867

Judicial Sales.

1. A defect of title to warrant release of a purchaser at a judicial sale must be substantial, and, where the defect may be removed within a reasonable time, equity may require the purchaser to comply with his bid. *Kummer v. Kummer* 220
2. A charge of "by-bidding" is not sustained, where it appears that bids were made in good faith. *Kummer v. Kummer* 220
3. Equity may relieve a purchaser from his bid, when delay in confirmation has changed the situation of the parties or the property. *Kummer v. Kummer* 220

Landlord and Tenant.

Contract of tenant to hold landlord harmless from all liability for damage during reconstruction *held* enforceable. *Wood v. Security Mutual Life Ins. Co* 66

Larceny.

1. Evidence *held* insufficient to sustain conviction. *McCue v. State* 9
2. Evidence *held* to sustain conviction. *Farrin v. State* 608
3. Designation "cattle" *held* sufficient description in a verdict under the statute prohibiting stealing a "cow, steer, bull, heifer or calf." *Gragg v. State* 732
4. The jury are not required to fix the value of a stolen animal. *Gragg v. State* 732

Limitation of Actions.

1. The statute may run in favor of one in possession of lands so as to bar claims for rents and profits. *Davis v. Davis* 178
2. Limitations do not run on a continuing contract until its termination. *Phifer v. Estate of Phifer* 327

Marriage.

That the license was wrongfully obtained is not ground for annulment of the marriage. *Baker v. Baker* 738

Master and Servant.

1. A verdict in favor of an employee and against the employer *held* not inconsistent, where evidence of negligence of other employees is sufficient to sustain the verdict. *Garrison v. Everett* 230
2. Contractor for construction of highway *held* an independent contractor within the compensation law. *Potter v. Scotts Bluff County* 318
3. Compensation to employee permanently partially injured in both legs, stated. *Schlesselman v. Travelers Ins. Co.* 332
4. Farmers using a threshing machine to thresh their own grain are not within the employers' liability law. *Keefover v. Vasey* 424
5. Farmers owning a threshing machine for their own use, who occasionally thresh grain for others, are not within the compensation law. *Keefover v. Vasey* 424
6. Employees threshing grain by a machine are "farm laborers." *Keefover v. Vasey* 424
7. Inquiry as to the occupation of the employer is immaterial, where it is determined that an injured employee is a farm laborer. *Keefover v. Vasey* 424
8. An employee of the National Guard is entitled to compensation under the employers' liability law. *Nebraska National Guard v. Morgan* 432
9. Employment is not "casual," within the employers' liability law, when the term is indefinite and the work is in the regular business of the employer. *Nebraska National Guard v. Morgan* 432
10. An employee preparing ground for an encampment of the National Guard is within the compensation law. *Nebraska National Guard v. Morgan* 432
11. Evidence *held* to sustain finding of total disability. *Nebraska National Guard v. Morgan* 432
12. An employee assumes the risk of injury from lifting. *Culver v. Union P. R. Co* 441
13. Assumption of risk from lifting *held* a question for the jury. *Culver v. Union P. R. Co* 441
14. Accident *held* to occur in course of employment. *Boyce v. Burleigh* 509
15. Injury to an employee by accidental discharge of a gun in the hands of a fellow servant *held* to arise out of the employment. *Boyce v. Burleigh* 509

16. A parent's right of action for injuries to a minor son is not barred by the workmen's compensation act. *Allen v. Trester* 515
17. Amendment to the workmen's compensation act restricting a parent's right of recovery for injuries to a minor *held* not germane to the section amended. *Allen v. Trester* 515
18. A negligent foreman of a corporation is liable as a joint tort-feasor. *Allen v. Trester* 515
19. The terms "any scheme, artifice or device," in the compensation law, do not necessarily imply active fraud. *Sherlock v. Sherlock* 797
20. A corporation amenable to the compensation law *held* liable for injury to a workman employed by an independent contractor. *Sherlock v. Sherlock* 797
21. To avoid liability under the compensation law, it must be shown that the employment was both casual and not in the usual course of trade. *Sherlock v. Sherlock* 797
22. Painting a building used by a wholesale drug corporation *held* work performed "in the usual course of the trade" of the corporation. *Sherlock v. Sherlock* 797

Mechanics' Liens.

A subcontractor cannot acquire a lien for material not used nor delivered. *Farley & Loetscher Mfg. Co. v. Methodist Episcopal Church* 140

Mortgages.

Answer in suit to foreclose a purchase money mortgage *held* to state a defense *pro tanto*. *White v. Leyden* 774

Municipal Corporations.

1. Collection of assessments for improvements will not be enjoined for technical irregularities. *Biggerstaff v. City of Broken Bow* 4
2. "Corporate purposes," as used in sec. 7, art. VIII, Const., defined. *Metropolitan Utilities District v. City of Omaha* 93
3. Law requiring municipal corporations to pay for lowering gas and water mains *held* unconstitutional. *Metropolitan Utilities District v. City of Omaha* 93
4. An act which creates a liability that can be discharged only by taxation imposes a "tax" within the Constitution. *Metropolitan Utilities District v. City of Omaha* 93
5. The operation and maintenance of water and gas plants are not an exercise of governmental functions. *Metropolitan Utilities District v. City of Omaha* 93
6. The statutes requiring notice of claims "arising from defective streets" *held* not to apply to claims for damages to

abutting property sounding in tort. *Randall v. City of Chadron* 120
7. A city is liable for damage to goods caused by negligence of an agent in obstructing a gutter. *Randall v. City of Chadron* 120
8. City *held* liable for negligence. *Randall v. City of Chadron* 120
9. Collection of void assessments may be enjoined. *Sioux City Bridge Co. v. City of South Sioux City* 271
10. The statute imposing on municipal corporations the obligations to levy a tax to pay hydrant rentals *held* constitutional. *State v. City of Omaha* 694

Negligence.

1. Instruction on comparative negligence *held* erroneous. *McMullen v. Nash Sales Co* 371
Gibson v. Kelkenny 524
2. A threshing engine should be equipped with a spark arrester if practicable, and whether its use is practicable is a question for the jury. *Anderson v. East Stocking Threshing Machine Co* 823

New Trial.

1. A verdict should not be set aside because a witness converses with a juror on matters disconnected with the case. *Wood v. Security Mutual Life Ins. Co* 66
2. Charges of misconduct of jurors *held* not substantiated. *Aten v. Quantock* 288
3. A joint motion for a new trial, where the verdict is in favor of several defendants on different defenses, should be overruled if the verdict is good as to one defendant. *Koehler v. Farmers State Bank* 590

Officers.

1. Where an office exists, the method of appointment of the incumbent is not material as to the validity of his acts. *Baker v. State* 654
2. A person performing the duties of county attorney, though not qualifying, *held* county attorney *de facto*. *Gragg v. State* 732
3. The right of a duly appointed incumbent to the office of county attorney is not triable under a plea in abatement. *Gragg v. State* 732

Paupers.

An indigent person has no cause of action against an employer for injuries to one who is liable for the support of such person. *Allen v. Trester* 515

Perjury.

Evidence *held* to sustain conviction. *Iden v. State* 454

Pleading. SEE ANIMALS.

1. Where lack of jurisdiction does not appear in the record, it is proper to plead it in the answer. *Smith v. Atlas Refining Corporation* 6
2. A contract incorporated into a pleading controls allegations which it contradicts. *Carey v. Zabel* 16
3. A petition jointly charging several defendants with wrongful acts must set forth concert of action. *Wolcott v. Merritt Drug Stores* 134
4. Defenses are not inconsistent, unless the proving of one necessarily disproves another. *Schellpeper v. Sporn* 192
5. Nondelivery of note and lack of consideration are not necessarily inconsistent with defense that the note is void. *Schellpeper v. Sporn* 192
6. An answer avering that plaintiff's damage, if any, was beyond defendant's control, admits damages, though defendant interposed a general denial. *Miller v. Drainage District* 206
7. Plea of waiver *held* sufficient. *Jorgensen v. Robinson Seed Co* 573
8. Failure to demur or filing an answer does not waive the right to object to a petition as not stating a cause of action. *Sallander v. Prairie Life Ins. Co* 629

Principal and Agent.

1. A written contract to sell land by an agent without written authority may be ratified by the owner. *Chermak v. Smolik* 54
2. An agent must disclose to his principal every known fact which is the subject of the agency. *Pearlman v. Snitzer* 135
3. Principal *held* not estopped by retaining benefits to deny liability for fraudulent conduct of agent. *Berkovitz v. Morton-Gregson Co* 154
4. Presentation by agent of fraudulently altered statements of account *held* within apparent scope of his authority. *Berkovitz v. Morton-Gregson Co* 154
5. A vendor's agent is liable to the vendee for fraudulent misrepresentations, notwithstanding a clause in the contract that the vendee was buying it solely on his own investigation. *Menking v. Larson* 479

Process.

To authorize summons to another county in a personal action for money, the right to join the resident and non-

resident defendants must exist. *Smith v. Atlas Refining Corporation* 6

Property.

"Property" defined. *Wood v. Security Mutual Life Ins. Co.* 66

Quieting Title.

1. An occupying claimant *held* entitled to reimbursement for liens and taxes paid, with interest. *Dougherty v. White* 675
2. An occupying claimant *held* entitled to reimbursement for improvments. *Dougherty v. White* 675

Rape.

1. In a prosecution for rape, it is not essential to conviction that prosecutrix be corroborated as to the particular act; corroboration as to material facts and circumstances tending to support her testimony being sufficient. *Miller v. State* 243
2. Evidence *held* to sustain verdict. *Miller v. State* 243
3. Evidence *held* to sustain finding of previous chastity of prosecutrix. *Miller v. State* 243
4. Instruction as to proof of previous chastity of prosecutrix approved. *Miller v. State* 243
5. Instruction as to date of offense *held* not erroneous. *Miller v. State* 243
6. In a prosecution for rape, an instruction that, if the jury found that defendant made the assault with intent to commit rape, but did not complete the act, they might find him guilty of an assault with intent to commit rape, *held* not erroneous. *Phillips v. State* 605
7. Motion for a new trial *held* properly overruled. *Phillips v. State* 605
8. In a civil action it is proper for plaintiff to testify that she told others of the wrong soon after its occurrence. *Bishop v. Liston* 559
9. Damages recoverable. *Bishop v. Liston* 559
10. Loss of social standing is a proper element of damages. *Bishop v. Liston* 559

Railroads.

1. The state railway commission has power to make an order requiring permission to discontinue train service. *State v. Chicago & N. W. R. Co.* 176
2. Evidence *held* not to sustain verdict for injuries at crossing. *Varnum v. Union P. R. Co.* 340
3. Question of necessity for an unfenced station ground is for the jury. *Briegel v. Union P. R. Co.* 398
4. Submission of question of negligence and contributory

negligence *held* proper. *Briegel v. Union P. R. Co.* 398
5. Instruction as to duty of engineer when cattle were seen on right of way *held* not erroneous. *Briegel v. Union P. R. Co.* 398

Receiving Stolen Goods.

Under sec. 9616, Comp. St. 1922, it is neither necessary to allege in the information nor to find in the verdict the value of the property received. *Mares v. State* 619

Replevin.

Though interest is the ordinary measure of damages in replevin, where the value of the use exceeds the interest defendant may recover without return of the property. *Warrick v. Rasmussen* 299

Sales.

1. Evidence of increase of wage that does not increase expense is immaterial. *Forburger Stone Co. v. Young* 345
2. Contract for sale of seed corn construed. *Jorgensen v. Robinson Seed Co* 573

Schools and School Districts.

1. There is no authority to adjourn an annual school district election. *State v. Talich* 723
2. The power to accept resignation of a school board officer and to appoint his successor vests in the board of trustees after date of election. *State v. Talich* 723

Specific Performance.

1. Specific performance is discretionary and will not be granted where its enforcement would be inequitable. *Wilson v. Bergmann* 145
2. Decree denying specific performance sustained. *Wilson v. Bergmann* 145
3. Specific performance denied. *Francis v. Garlow* 355
4. Specific performance will not be enforced for a partial interest in land, where the contract is for the entire interest. *Moore v. Markel* 743
5. The right to specific performance must be reciprocal. *Moore v. Markel* 743
6. Evidence as to alteration of instrument *held* sufficient to call for reversal of decree. *Tate v. Barb* 756

Statutes.

1. In construing a statute, the court may examine proceedings attending its passage and amendments thereto. *Chicago, B. & Q. R. Co. v. Amack* 437

2. Employees of railroad engaged in interstate commerce are not within the compensation law. *Chicago, B. & Q. R. Co. v. Amack* 437
3. Construction of a statute by officers, acquiesced in by non-interference for a number of years, will be approved, unless unconstitutional or clearly wrong. *State v. Bryan* 692
4. The word "corruptly," when used in a statute, defined. *Grebe v. State* 715

Taxation.

1. Unlaid sewer pipe *held* not city property, exempt from taxation. *Dunnegan v. Jensen* 266
2. Unlaid sewer pipe *held* subject to taxation as property of sewer contractor. *Dunnegan v. Jensen* 266
3. Loose paving materials *held* assessable as property of paving contractor. *Chapin-Colglazier Construction Co. v. Hamilton County* 269
4. A county board of equalization cannot raise an asessment without notice. *Crane Co. v. Douglas County* 365
5. An injunction lies to restrain collection of a tax assessed by officers without jurisdiction. *Crane Co. v. Douglas County* 365
6. The state board of equalization and assessment is presumed to act impartially. *Chicago, R. I. & P. R. Co. v. State* 727
7. A railway company seeking to set aside an assessment of its property by the state board of equalization and assessment has the burden of proof. *Chicago, R. I. & P. R. Co. v. State* 727
8. Evidence *held* insufficient to show assessment excessive. *Chicago, R. I. & P. R. Co. v. State* 727

Torts.

Settlement with one of several joint tort-feasors is not a defense to an action against another, unless it was agreed that the settlement was in full of all damages. *Menking v. Larson* 479

Trial. SEE APPEAL AND ERROR. CRIMINAL LAW.

1. All persons connected with or interested in a case on trial should carefully avoid communication with jurors. *Wood v. Security Mutual Life Ins. Co* 66
2. A defendant who admits plaintiff's cause of action, but sets up new matter requiring proof, is entitled to open and close. *Farmers State Bank v. Cavanaugh* 142
Thompson v. Wall 196
3. Denial of right to open and close *held* not prejudicial.

Thompson v. Wall 196
4. A verdict for plaintiff on three counts, and in separate paragraph totaling the three, *held* not erroneous. *Miller v. Drainage District* 206
5. Objection to question should be explicit. *Miller v. Drainage District* 206
6. Verdict must show affirmatively amount of findings for plaintiff, and for defendant on counterclaim. *Horse Shoe Lake Drainage District v. Crane Co.* 323
7. Issues not sustained by sufficient evidence may properly be withdrawn from the jury. *Farmers State Bank v. Lydick* 586
8. Special findings, unless manifestly wrong, control a general verdict. *Karr v. Brown* 626
9. A request by both parties for a directed verdict constitutes a submission of the case, both as to fact and law, to the court. *Pearlman v. Snitzer* 135
10. Denial of motion by defendant for a directed verdict *held* proper, where plaintiff has made a *prima facie* case.. *Nittler-Rhump Co. v. Jones* 238
11. Where the evidence is conflicting, it is proper to deny a motion for a directed verdict. *Nittler-Rhump Co. v. Jones* 238
12. Where both parties move for a directed verdict, the finding of the court takes the place of a verdict. *Funke v. Fraas* 541
13. An instruction may prevent prejudice from misconduct of counsel. *Aten v. Quantock* 288
14. Refusal of an instruction embodied in substance in the court's instructions is not error. *Bishop v. Liston* 559
15. Refusal of an instruction covered by the court's instructions is not error. *Jorgensen v. Robinson Seed Co.* 573
16. The court should instruct that the presumption that a document shows what a party by affidavit states is rebuttable. *Sallander v. Prairie Life Ins. Co.* 629
17. An instruction placing the burden of proof on defendant relying on the validity of a written instrument *held* erroneous. *Madura v. McKillip* 783

Trusts.

1. The theory of a resulting trust is based on the intent imputed to the parties, and the proof must be clear and convincing. *Davis v. Davis* 178
2. Suit to establish a trust brought within a year after claim of ownership of land *held* not barred by latches. *Stutzman v. Gearhart* 827
3. Evidence *held* to establish a trust. *Stutzman v. Gearhart* 827

Vendor and Purchaser.

1. Where the vendee renounces an executory contract, the vendor is relieved from tendering performance at maturity. *Chermak v. Smolik* 54
2. When vendor bound to disclose facts. *O'Shea v. Morris* 102
3. Where a transaction is evidenced by several instruments, they should be considered together to determine the rights and liabilities of the parties. *McCaw v. Swallow* 458
4. The trading price of land is not necessarily the measure of relief in an action to recover back payments on rescission. *McCaw v. Swallow* 458
5. Title to land is not necessarily unmarketable, because incumbered by a lien which may be discharged with purchase money at time fixed for delivery of the deed. *Olson v. Woodhouse* 527
6. A vendee who demands cancelation of contract for nonperformance must show compliance with its terms or tender of performance. *Olson v. Woodhouse* 527
7. The unauthorized substitution of a grantee in a deed is a material alteration which will avoid the deed. *King v. DeTar* 535
8. A purchaser from a grantee whose name was substituted after delivery of a deed acquires no title, though without notice. *King v. DeTar* 535
9. Where time is of the essence of a contract to convey land, the purchaser may treat the contract at an end if the vendor is not able to perform on the day fixed. *Moore v. Markel* 743
10. The words "fall due" as used in connection with taxes *held* as meaning "delinquent." *White v. Leyden* 774

Venue.

1. An action against a resident for a money judgment must be brought in the county where he resides or may be served. *Braun v. Quinn* 485
2. Suit to rescind contract for sale of stock *held* properly brought in county where contract was made. *Edgar v. Skinner Packing Co* 752

Waters.

1. Title to water mains laid by the owner of an addition to a city under a contract with a water company *held* to vest in the water company. *Creighton Real Estate Co. v. City of Omaha* 802
2. A water company's deed to a city construed to require the city to reimburse a landowner for costs of water mains. *Creighton Real Estate Co. v. City of Omaha* 802

Wills. SEE EXECUTORS AND ADMINISTRATORS, 3, 4.
Notice of application by executors for construction of a will and directions as to their duties is not necessary to jurisdiction. *Draper v. Eager* 611

Witnesses.
1. In an action against the representative of a deceased person and a surviving partner, evidence of interested witness as to conversations with deceased *held* competent, where not adverse to decedent's interest. *Geise v. Yarter* 44
2. A foundation must be laid in order to impeach a witness for contradictory statements... *Meyers v. State* 149
3. A professional nurse assisting a physician cannot testify to confidential communications between a patient and the physician. *Culver v. Union P. R. Co* 441
4. A sergeant of the army medical corps may testify as to an application made to him for treatment for venereal diseases. *Culver v. Union P. R. Co* 441
5. Purpose of statute making husband and wife incompetent to testify concerning communications made by one to the other during marriage, stated. *Stocker v. Stocker* 565