HAROLD T. ANDERSEN, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED FEBRUARY 29, 1928. No. 25433.

1. **Street Railways:** RATE OF SPEED. The distance traveled by a street car after a collision and before it is stopped may be considered by the jury in determining whether it was going at an excessive speed, under the circumstances and conditions. *Moran v. Omaha & C. B. Street R. Co.*, 108 Neb. 788
2. **Imputed Negligence.** "Except with respect to the relation of partnership, or of principal and agent, or of master and servant, or the like, the doctrine of imputed negligence is not in vogue in this state." *Hajsek v. Chicago, B. & Q. R. Co.*, 68 Neb. 539.
3. **Trial:** INSTRUCTIONS. "Where contributory negligence is pleaded as a defense, but there is no evidence to support such defense, it is error to submit such issue to the jury." *Koehn v. City of Hastings*, 114 Neb. 106.
4. ———: ———. Where there is evidence of defendant's negligence, but no evidence of plaintiff's contributory negligence, no instruction on comparative negligence should be given to the jury.

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

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

Rosewater, Mecham & Burton, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

GOSS, C. J.

This is an action for damages by reason of a collision between an automobile and a street car. From a verdict and judgment thereon against it, the defendant appeals.

The collision occurred at the intersection of Binney and North Twenty-fourth street in Omaha, at 6:30 or 7 o'clock on the evening of May 10, 1927. Plaintiff and Knud H. Nissen, with two young women, were on their way from Blair to attend the movies at Omaha. Nissen owned the Ford

touring car in which they were driving. Nissen was driving and one of the young women was in the front seat with him. Plaintiff and the other young woman were in the back seat. The car was in good condition and the side curtains were all on. None of the occupants of the car were familiar with the streets. They approached Twenty-fourth street from the west on Binney street, which has no street car tracks. Twenty-fourth street has double tracks and is the main north and south street car artery in the north part of the city. There are business houses on the northeast, northwest and southwest corners and a residence on the southeast corner of the intersection. There is evidence that a truck was standing near Binney street at the curb on the west side of Twenty-fourth street when the collision occurred. The south-bound street car struck the rear left side of the Ford car, which whirled around and went or was carried south until it struck the east curb of Twenty-fourth street, scraped along the curb for 20 feet or so and stopped, headed northwest, with the right rear wheel broken and against the curb, three or four feet north of an iron car-stop pole approximately 72 feet south of the south curb line of Binney street. A few feet south of the iron pole is a wooden pole. Plaintiff was thrown out of the car and to a point a few feet further south and his leg was broken. As a result of the injury he was in the hospital two months. Between curbs, Binney street is 29 feet 9 inches wide and Twenty-fourth street 43 feet 1 inch wide; and from the center of the south-bound track to the east curb of Twenty-fourth street is 26 feet 2 inches. The foregoing facts are shown by the evidence, and are either undisputed or are indisputable in view of the finding of the jury. Other facts will be discussed as the questions arise.

Plaintiff alleged, and the court submitted to the jury, three charges of negligence, viz.: (1) Excessive speed of the street car, (2) lack of adequate warning, and (3) lack of proper lookout. Defendant denied all negligence, and pleaded that the plaintiff and the driver of the automobile were negligent, and that plaintiff's injuries were the result

of the carelessness of plaintiff and of the driver. The jury returned a verdict for $4,000 in favor of plaintiff.

In its brief the appellant presents nine assignments of error. The first assignment is that the court erred in permitting Nissen, the driver of the automobile, to testify that, when he first observed the street car, it was running "about 30 to 35 miles an hour." Nissen testified that, when he first saw the street car, his automobile was in the intersection and the front end of it was within four to six feet of the west car rail and the front end of the street car was about 30 feet north of the north curb line of Binney street. He had qualified generally by showing his experience as a driver and his ability to estimate the approximate speed of a moving car. We have held that "a witness who sees a moving car, and possesses a knowledge of time and distance, is competent to express an opinion as to the rate of speed at which the car is moving." *Omaha Street Car Co. v. Larson*, 70 Neb. 591; *Pierce v. Lincoln Traction Co.*, 92 Neb. 797; *Oakes v. Omaha & C. B. Street R. Co.*, 104 Neb. 788. While the writer concedes that it is a close question but thinks this testimony was admissible and that its weight was for the jury to determine, others of our number think the driver had so little time at best to observe the street car and was so busy handling the automobile that his opportunities to judge of the speed of the car were too slight to form the basis of an opinion as to its speed in miles per hour. However, the majority agree that the admission of this testimony ought not to be considered so prejudicial to the defendant as to constitute reversible error in view of the other testimony as to excessive speed. There was testimony from which the jury could have found that, from the time Nissen first observed the street car and from the time the motorman first saw Nissen's automobile until the street car actually stopped, it traveled from a point 30 feet north of the north curb line of Binney street to a point about 75 feet south of the south curb of Binney street, a distance of about 135 feet. It might also be found as true that during all this time

the motorman was using such available means to stop the car as suggested themselves in the emergency. The distance traveled by a street car after a collision and before it is stopped may be considered by the jury in determining whether it was going at an excessive speed, under the circumstances and conditions. *Moran v. Omaha & C. B. Street R. Co.*, 108 Neb. 788.

The second assignment of error is to the effect that the court erred in not sustaining defendant's motions for a directed verdict. The argument proceeds on the erroneous theory that the testimony as to the speed of the street car is eliminated, and that the plaintiff has failed to prove any negligent operation of the street car. This assignment is without merit, as it is already evident that there was evidence competent for the jury to consider in the matter of the charge of negligence based on the alleged speed of the street car.

The court did not submit to the jury any instruction on the doctrine of the comparative negligence of plaintiff and defendant. In its opening statement of facts in the beginning of its brief, the appellant says that the doctrine of comparative negligence does not apply to the case; but several of the assignments of error and much of the brief are on that subject. These arise in the arguments concerning the instructions given by the court and concerning instructions tendered by the defendant and refused. It may well be said here that the instructions of the court were such as are founded on rules well established in this court and such as are conventionally given in cases where there is no negligence of both plaintiff and defendant to be compared and determined by the jury. The appellee argues that there was no such negligence shown in the evidence as between the two parties to the action and that it would have been erroneous if the court had given the jury an instruction as to comparative negligence. In this respect it is true that the answer of the defendant joins the driver and the plaintiff in charges of contributory negligence in approaching the intersection

at high speed, in failing to see and note the approach of the street car, in failing to stop and the like. But it is equally true that the evidence given before the jury failed to show any negligence whatever on the part of the plaintiff. As between the plaintiff and the company, the only question was as to whether the act of the street car company or the act of Nissen, who drove the automobile, was the proximate cause of throwing plaintiff out of the Ford car and breaking his leg. If Nissen, then the company was to be exonerated by the jury; if the company, then it was to be held for damages. Even if Nissen, who controlled the movement of the car, was negligent, his negligence will not be imputed to the plaintiff, unless the plaintiff was in a position at the time of the occurrence to have some control over him, or unless the relations between them were of such a nature as to raise an implied liability for the driver's acts. The rule in force in this state and in most of the states is this: "Except with respect to the relation of partnership, or of principal and agent, or of master and servant, or the like, the doctrine of imputed negligence is not in vogue in this state." *Hajsek v. Chicago, B. & Q. R. Co.*, 68 Neb. 539; *Craig v. Chicago, St. P., M. & O. R. Co.*, 97 Neb. 586; *Stevens v. Luther*, 105 Neb. 184. There was no evidence that these parties sustained any such close relation as listed above. Nissen and plaintiff were, it is true, going from Milwaukee to Dannebrog together, but on no joint enterprise, when they stopped at Blair. The trip to Omaha was purely a side trip which Nissen took to accommodate plaintiff and the girls, who were attending college at Blair. The evidence shows that plaintiff was, as the court told the jury, a passenger in the car. Moreover, the evidence shows that plaintiff believed, and had reason to believe, that Nissen was a careful driver, that he drove up to Twenty-fourth street in a prudent manner, that plaintiff was in the back seat with the curtains on and had no opportunity to act as lookout, that the truck would have obscured his view toward the street car longer than Nissen's, even if he had been in a position to see,

and that generally he not only did not control the movements of the automobile but would have been unable in the circumstances to do so at the time in order to avert the collision, had he been so disposed. There was no occasion for him to seek to drive the car from the back seat before the imminence of the impact and no opportunity thereafter. This court has recently held: "Where contributory negligence is pleaded as a defense, but there is no evidence to support such defense, it is error to submit such issue to the jury." *Koehn v. City of Hastings*, 114 Neb. 106. It follows that, where there is evidence of defendant's negligence but no evidence of plaintiff's contributory negligence, no instruction on comparative negligence should be given to the jury.

Appellant argues that it was the "rapid speed at which the automobile was being driven, not by any force from the street car," that produced the jar or shock when the right rear wheel of the automobile struck the curb on the east side of Twenty-fourth street. When we read the evidence and learn that the automobile was headed a little north of east when the collision occurred and that the right rear wheel struck the curb about 75 feet southeast of the point of impact, and that when the wheel struck the curb the automobile was facing west of north, we wonder if the writer of the brief wants us to conclude that the driver of the automobile reversed his gears at or after the collision, and negligently drove backward at "a rapid speed" until the rear wheel struck the curb? Inasmuch as plaintiff was not thrown from the automobile until after it struck the curb in the fashion stated, we find ourselves unable to assent to the appellant's proposition that the speed of the automobile was the proximate cause of plaintiff being thrown from the car and injured.

While numerous assignments have been set up in the brief, some of them are so interwoven with what we have said that they need not be discussed separately. We think what we have said covers all of them either directly or by implication. The questions of fact were submitted to

the jury under proper instructions. It was the province of the jury to determine the facts. We find no prejudicial error in the record and therefore are of the opinion that the judgment should be, and it is,

AFFIRMED.

REDICK, District Judge, dissents.

Note—See Trover and Conversion, 38 Cyc. 2009 n. 16, 2012 n. 37, 2024 n. 32, 2079 n. 85.

JOHN WEHENKEL V. STATE OF NEBRASKA.

FILED FEBRUARY 29, 1928. No. 26059.

1. Homicide: DEFENSE: "UNWRITTEN LAW." The so-called "unwritten law," by which is meant the private right to avenge a criminal wrong done to a female members of one's family, or, if sought to be applied here, to avenge a wrong done a spouse in violation of the marital rights of the other spouse, does not exist at common law, nor does any statute of this state recognize it in any way whatever; it is not a defense available to one accused of homicide.
2. Criminal Law: EVIDENCE. The testimony of a physician as to the sanity of the accused, based upon an examination of the accused, made without an order of court, and without the knowledge or consent of his attorneys, but without objection by the defendant at the time of the examination, is not subject to the objection that the defendant was compelled to give evidence against himself.
3. ———: ———: OTHER ACTS. "To make evidence of other acts available in a criminal prosecution, some use for it must be found as evidencing a conspiracy, knowledge, design, disposition, plan, or scheme, or other quality, which is of itself evidence bearing upon the particular act charged." *Clark v. State*, 102 Neb. 728.

ERROR to the district court for Madison county: DE WITT C. CHASE, JUDGE. *Reversed.*

H. F. Barnhart and *Moyer & Moyer*, for plaintiff in error.

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

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

GOSS, C. J.

The defendant was charged with the murder of Arthur Carrico with a revolver on June 30, 1926, in Madison county. On December 7, 1926, the jury found him guilty of murder in the first degree and fixed the punishment at life imprisonment. On December 15, 1926, he was sentenced to be imprisoned for life in the state penitentiary. He brought proceedings in error here.

The evidence given at the trial shows beyond dispute that the defendant did the killing at the time and place and in the manner charged. Witnesses who were present at the time of the killing testified that Carrico was shot by the defendant in a garage in Tilden and that three shots were fired by him.

The defendant was a witness in his own behalf and told his grievances of years against Carrico and of the exasperating attitude of the latter toward defendant and in respect of Carrico's debauching of defendant's wife. He testified that, on the day of the shooting, he took a revolver from the cushions of his car and walked into the garage. He detailed a conversation with deceased in which deceased called defendant's wife an opprobrious name and then testified that he could recall nothing more after that. This conversation between the two immediately preceded the fatal shooting.

Self-defense, which is an adequate defense in proper cases, is not indicated by the evidence in this case. So far as any defense was interposed, it was the defense of insanity or amnesia or loss of memory because the deceased had violated the sanctity of his home by the seduction of defendant's wife and had thereby caused the defendant to brood over his marital wrongs and to become so mentally unbalanced as not to be criminally responsible for his act

at the time the killing was done. The so-called "unwritten law," by which is meant the private right to avenge a criminal wrong done to a female member of one's family, or, if sought to be applied here, to avenge a wrong done a spouse in violation of the marital rights of the other spouse, does not exist at common law, nor does any statute of this state recognize it in any way whatever; it is not a defense available to one accused of homicide. 30 C. J. 36, secs. 187, 188. The defendant did not expressly and directly rely on it save only as it was in a large way made use of in his claim of loss of memory or as the cause of his failure to know what he was doing and the moral quality of his act; though with a jury it would probably have all the psychological effect of a legal defense.

The first assignment of error argued in the brief is that the court erred in admitting in evidence, over objection, exhibit 15, which is a letter written by defendant to the wife of a third party, whose name may well be omitted, because we find nothing in the evidence to show that she invited the contents of the letter. The letter was inadmissible and ought not to have been produced. But the record shows that, when this exhibit was offered in evidence, one of counsel for defendant who was in active charge of the trial at the time remarked, "It is all right," and the reporter indicated that the exhibit was received. This waived any right to predicate error upon the admission of the letter in evidence.

Another error assigned and argued is that the prosecutor was guilty of prejudicial misconduct with relation to certain letters probably written by defendant and his own wife. None of these were admitted in evidence, nor are we advised how they came into the possession of the state. No inkling of their actual contents is given us in the briefs, nor do we find any such references in the record. Only one is pointed out as offered in evidence. It is exhibit 14 (and its envelope, exhibit 9, which latter the defendant, without objection, had admitted he wrote). The defendant objected that this was a privileged communica-

tion between husband and wife and the court sustained the objection. In a general objection, counsel for defendant objected to the prosecutor "reciting to this witness the contents of letters before that letter is allowed to be put in evidence, for the reason that it is improper conduct on the part of counsel and it is a violation of the rights of this defendant. It is proper to ask if he wrote this letter." As that was all that was done, except that it was disclosed that it was a letter from defendant to his wife, and the court excluded it, we are of the opinion the defendant was not thereby prejudiced in the minds of the jury. These letters between husband and wife, being privileged, likewise ought not to have been produced.

The next assignment of error is that the court erred in admitting the testimony of Dr. G. E. Charleton, superintendent of the state hospital for the insane at Norfolk, who made a physical and mental examination of the accused, and, in rebuttal, expressed at the trial an opinion therefrom that the defendant was sane. The testimony was objected to because the examination was not made under an order of the court and because accused's counsel was not present and because the examination was *ex parte*. The objection may be treated as referring back to that part of section 12 of the bill of rights of our state Constitution which says: "No person shall be compelled, in any criminal case, to give evidence against himself." The testimony shows that the witness informed the accused that he had been requested by the county attorney to make the examination, that the doctor told him he did not have to answer any question, and that the defendant submitted without objection to the physical and mental tests. We find no case in our court where this question has been decided; none is cited in the briefs. There are numerous authorities to the effect that, where an order of court has first been obtained for an examination of the defendant by physicians, their testimony as to what they discovered, and their opinion as to the sanity of the prisoner, is admissible and does not contravene a similar constitu-

tional provision to the effect that one accused shall not be compelled in a criminal case to give evidence against himself. *People v. Furlong,* 187 N. Y. 198; *State v. Petty,* 32 Nev. 384, and cases cited; 16 C. J. 568. That the evidence is admissible when the defendant submits to an examination without any threats, duress, deception or objection, seems equally well settled; and we may, as applied to this case, deduce the rule that the testimony of a physician as to the sanity of the accused, based upon an examination of the accused, made without an order of court, and without the knowledge or consent of his attorneys, but without objection by the defendant at the time of the examination, is not subject to the objection that the defendant was compelled to give evidence against himself. 16 C. J. 568; *State v. Spangler,* 92 Wash. 636; *State v. Church,* 199 Mo. 605.

While defendant was under cross-examination by the prosecutor, he was subjected to questions, and required to answer them, relating to his own violations of the conventions of the marriage relations. He was required to answer that, before he was married, he had sexual intercourse with a woman and begat a son while the son's mother was the wife of another, that he was sued by the man whose wife and home he had thus violated and was charged with breaking up this man's home and alienating the affections of the man's wife, whom witness married later. The only purpose of this line of questions, as stated by the prosecution during the examination, was that it was "a question of the effect of these things on his mind." We are aware that, when a defendant takes the stand as a witness in his own behalf, considerable discretion is committed to the trial court as to the latitude to be allowed in cross-examination of such a witness. But it should be the disposition of the prosecutor, as it is the office of the judge presiding over such a trial, to see that the witness is so protected that, as a defendant in the case, his rights to a fair trial are not invaded by the introduction of prejudicial evidence. There was only the remotest connection be-

tween defendant's violation of law in committing adultery and the homicide for which he was on trial; and yet the effect of these questions was to try him for both offenses. If the man whose home he despoiled was one favorably regarded by any of the jury, the further effect of the questions and answers was to convict the defendant of murder to redress the irreparable social wrong perhaps also thus far unrequited by any money judgment collected in the case referred to in the questions asked him. "The accused must not be tried for one offense and convicted of another. To make evidence of other acts available in a criminal prosecution, some use for it must be found as evidencing a conspiracy, knowledge, design, disposition, plan, or scheme, or other quality, which is of itself evidence bearing upon the particular act charged." *Clark v. State,* 102 Neb. 728. If the trial of a lawsuit be considered as a game, as so many dominant counsel seem to regard it, with the judge as the referee or umpire, he must hold the players to the rules and guide them with a hand of steel in a glove of velvet. Hitting below the belt or getting out of bounds and an erroneous decision thereon may be lost sight of in a real game, but in a legal controversy they show up when the picture is developed and the proofs are submitted for inspection and review. We derive no satisfaction from the reversal of cases, least of all a criminal case. But we have no choice here; in the last assignment discussed, we think the record shows prejudicial error and that the defendant is entitled to a new trial by reason thereof.

The judgment of the district court is reversed and the cause is remanded for a new trial.

REVERSED.

Note—See Criminal Law, 16 C. J. 568 n. 11, 588 n. 6; 62 L. R. A. 194; 8 R. C. L. 201: 2 R. C. L. Supp. 574; 4 R. C. L. Supp. 455; 6 R. C. L. Supp. 493.

DELMER D. NORTON, APPELLEE, V. BANKERS FIRE INSURANCE COMPANY OF LINCOLN, APPELLANT.

FILED FEBRUARY 29, 1928. No. 26163.

1. **Conversion:** NOTES. The purchaser of a note from strangers to it is not a purchaser in good faith, if he participated in fraud through which they procured it from payee, and such participation may be shown by circumstances surrounding the purchase.
2. ———: ———: NEGOTIABLE INSTRUMENTS ACT. In an action to recover damages for conversion of a note on the ground that plaintiff was cheated out of it by fraud in which defendant participated, the negotiable instruments law is inapplicable to the issues, where the maker is not a party to the action and the pleadings and proofs make no reference to fraud in the inception of the note or to any defense to it.
3. Instructions inapplicable to the case do not require the reversal of a judgment in favor of plaintiff, where defendant was in no wise prejudiced by them.

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

John C. Hartigan, for appellant.

C. C. Flansburg, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

ROSE, J.

This is an action to recover damages for the conversion of a note and mortgage for $10,200. The note was dated March 1, 1918. It bore annual interest from date at 7 per cent. and was secured by a first mortgage on 640 acres of land in Yuma county, Colorado. Both instruments were executed and delivered by Ralph O. Hesp and Earl Hesp, makers and mortgagors, and were payable to Delmer D. Norton, plaintiff, who formerly owned the mortgaged land. The defendant is the Bankers Fire Insurance Company, a corporation claiming to be the *bona fide* holder of the note and mortgage through valid transfers from

plaintiff. The theory of plaintiff is that a trio of conspirators, called "Kline, Ferguson, and McCord," assisted by a fourth conspirator named "Schmutzer," who represented himself to plaintiff as agent for defendant, cheated plaintiff out of his note and mortgage. Plaintiff pleaded, among other things, that the trio falsely stated to him that they had organized the Bankers Trust Company, hereinafter called the "trust company," saying it was a going corporation with authorized capital stock of $1,000,000; that they represented the trust company and had authority to sell its stock; that the trust company owned a building in Lincoln at the southwest corner of Fifteenth and N streets and needed money to apply on the purchase and to complete its title; that for the purpose mentioned it could use plaintiff's note and mortgage the same as money and would accept them at par for trust company stock of the actual value of $140 a share, but of the face value of $100 a share; that plaintiff agreed to purchase 200 shares for $28,000 and in part payment delivered to the trio his unindorsed note and unassigned mortgage; that Ferguson and McCord engaged Schmutzer, who had knowledge of the facts and of the fraudulent purpose of the trio, to negotiate the note and mortgage; that Schmutzer, pursuant to the conspiracy, presented the note and mortgage to Charles Maixner, treasurer and active manager of defendant, who agreed to purchase for the latter the note and mortgage for $8,300 in Liberty bonds, worth less than their face value, and $2,000 in the stock of defendant; that McCord, Ferguson and Schmutzer had no authority to exchange the note and mortgage for anything but money to apply on the trust company building, but after plaintiff indorsed those instruments for that purpose, they were delivered to defendant for the Liberty bonds and the stock; that the trust company had no corporate existence and did not own any building, and plaintiff did not receive any stock issued by the trust company or any of the stock of the Bankers Fire Insurance Company, defendant, or any proceeds of the note and mortgage or anything of value; that defendant,

in exchange for the note and mortgage, with knowledge of the fraud, turned over to Ferguson and McCord Liberty bonds of the face value of $8,300 and stock of defendant in the sum of $2,000; that the representations of the trio were false and plaintiff believed and relied on them; that the note and mortgage were worth their face value; that defendant knowingly participated in the fraud through which plaintiff was cheated. The facts outlined were pleaded in detail. A demurrer to the petition was overruled. Defendant's answer was a general denial.

Upon a trial of the issues the jury rendered a verdict in favor of plaintiff for the full amount of his claim and interest — $15,376.50. From a judgment therefor defendant appealed.

The overruling of the demurrer is challenged as erroneous, but it is fairly shown by the petition that plaintiff was cheated out of his note and mortgage by the four wrongdoers named and that defendant knowingly participated in the fraud.

The principal argument of defendant was directed to the proposition that the evidence was insufficient to sustain the verdict in favor of plaintiff. It was vigorously contended that there was no evidence connecting defendant with the fraud perpetrated by Kline, Ferguson, McCord and Schmutzer. Maixner, who conducted for defendant the negotiations resulting in the transfer and acceptance of plaintiff's paper, testified in effect that he then had no knowledge of the fraud, and that in good faith he purchased and paid for it, and that in his negotiations he dealt alone with the agents of plaintiff who indorsed the paper and intrusted the wrongdoers with it. Testimony by the holder of a note that he purchased it in good faith for value before maturity without knowledge that it was procured from the payee by the fraud of others may be overcome by circumstantial evidence to the contrary. This in effect was the holding on a former appeal; similar proofs being considered sufficient to take the case to the jury. *Norton v. Bankers Fire Ins. Co.*, 115 Neb. 490.

The following facts were established beyond controversy: Plaintiff was originally the owner of the paper. It was worth its face. He never received anything for it. He lost it by means of the fraud pleaded. The representations by which he was deceived into making the transfers were false and he relied on them. Following the fraudulent transactions and the consummation of the swindle Kline left for Florida and Ferguson for Iowa. McCord died within a year.

The fraud of the trio was denounced in argument with equal vehemence by both plaintiff and defendant. Circumstances surrounding the transactions were disclosed by the evidence. Did they show bad faith on the part of defendant? When the trio first got the paper it was not indorsed or assigned. In that form it showed they did not have the title to it and that in attempting to negotiate it they necessarily represented the owner and not themselves. The swindlers who procured the paper and mortgage by false pretenses engaged to make the sale the man named "Schmutzer," a resident of Iowa, who said on the witness-stand that he had been an insurance broker. A purchaser had not yet been found in Lincoln or Omaha. Schmutzer, offering for sale the unindorsed and unassigned note and mortgage of plaintiff, went to Maixner, who, while testifying in this case, volunteered a reference to his service in the penitentiary. At the time the paper was presented to Maixner, he was in the Lincoln office of the Bankers Fire Insurance Company, defendant, acting there as its managing officer. Without inquiring of plaintiff whether Schmutzer or any one else had authority to sell the note for plaintiff or whether plaintiff as owner was willing to exchange it for depreciated Liberty bonds at their face value and stock of the insurance company, Maixner agreed to buy the paper on terms that did not require payment of any money whatever. As conditions of the purchase plaintiff's indorsement of the note and assignment of the mortgage were required in addition to entries bringing the abstract of the mortgaged land down to date. Schmut-

zer did not report to plaintiff but reported to the trio of conspirators the terms offered by Maixner. One of the trio hurried to Colorado and had the abstract brought down to date, returned and afterward plaintiff was induced by the wrongdoers to indorse the note, assign the mortgage and part with his possession. Both papers were promptly delivered to defendant. Plaintiff testified in effect that he never learned the terms of the sale until the facts came out on the trial. While causing a delay of nearly a week and exacting writings and terms from persons who had possession of the paper without authority to transfer it, neither Maixner nor any one else acting for defendant asked plaintiff if he owned it and if so who was authorized to sell it and if the consideration in bonds and stock, without any money, would be satisfactory. The evidence indicates the answer to such inquiries would have been that the sole purpose of the sale was to procure money to apply on the trust company building and that nothing but money would be accepted, plaintiff at the time being in Lincoln, where information was available. The situation was not only sufficient to arouse suspicion but it called for inquiry at the source of knowledge. Schmutzer himself was a witness for defendant and testified that he went to see Maixner, whom he had never before met, and asked if the Bankers Fire Insurance Company did not want to buy a first class mortgage for $10,000. Maixner, knowingly negotiating for "a first class mortgage," presented by a stranger who assumed to represent the owner without any written authority and without power to bind his principal by his own declarations of agency, proceeded to enter into a contract of purchase without putting into the agent's hands anything that could be turned over at its face value to the owner of the mortgage. A thief trying to dispose of stolen property might have taken the course pursued by Schmutzer. In consummation of the purchasing contract Maixner turned over to one or more of the conspirators $8,300 in Liberty bonds below par and corporate stock of the Bankers Fire Insurance Company, defendant, in the sum of

$5,000, upon the sale of which a credit of $2,000 was given. This credit with the $8,300 in bonds aggregated $10,300—the face of the mortgage without interest and $100 in addition. Referring to Ferguson and McCord, Maixner testified:

"They agreed to purchase some stock in the Bankers Fire Insurance Company for mutual benefit, somehow, and that was the result of the transaction."

Maixner testified also that two notes aggregating $5,000 were accepted by defendant for the stock, but that he did not recollect whether they were signed jointly by Ferguson and McCord. He credited on one of the notes "the difference between the amount paid for the mortgage and the face of the mortgage." It thus appears that defendant, knowing he was dealing with Ferguson and McCord in a representative capacity without legal evidence of their agency, entered into a contract to pay to them individually in stock $2,000 in proceeds belonging to plaintiff. After entering into the contract to purchase the note and mortgage Maixner, for the protection of defendant, commissioned Ferguson and McCord to procure from plaintiff a receipt for $10,200, reciting that the payment was in full settlement of the mortgage on the Colorado land, knowing that $2,000 of the stipulated price was payable to them individually. There is a view of the circumstances warranting the inference that defendant participated in the fraud of the conspirators, paying to Ferguson and McCord, personally, a portion of the proceeds of the note and enabling them to defraud plaintiff. In this view of the record defendant was not a purchaser in good faith. The evidence therefor was sufficient to sustain the verdict.

Defendant complains that the trial court in the instructions erred in defining the term "holder in due course" and in otherwise directing the jury in regard to the negotiable instruments law. That law did not apply to the case. The action was one to recover damages for the conversion of a note and a mortgage belonging to plaintiff. The makers and mortgagors were not parties to the action and

there was nothing in the pleadings or proofs to indicate a defense to the note or to the mortgage. Defendant, however, was not prejudiced by the instructions relating to the negotiable instruments law, since the charge as a whole required a verdict against plaintiff, if he failed to prove by a preponderance of the evidence that defendant participated in the fraud.

AFFIRMED.

HOWELL, J., concurring.

My understanding of the principal facts in this case is: That Norton, appellee, owned a note secured by mortgage of the face and actual value of $10,200, plus earned interest at 7 per cent. from its date. Persons denominated in the opinion of Rose, J., as "swindlers" pretended to organize a so-called "trust company" to have $1,000,000 capital stock. One or more of them procured the note from Norton and hawked it about attempting, without success, to sell it, and they got in touch with one Maixner, the representative of appellant, who recognized the value of the note and agreed to buy it. The swindlers ostensibly were acting as agents for Norton. Maixner agreed to take the note, but insisted that it be indorsed by Norton. As between the swindlers and Maixner, the swindlers were selling the note for Norton. However, before paying the swindlers, Maixner required that Norton execute a receipt in which he was to acknowledge he had received $10,200 for the note. Norton understood the note was to be sold for cash, to be used to further the business of the trust company. The receipt did not recite the true consideration paid. Maixner knew that. After the indorsement of the note was procured from Norton and after he signed the receipt for the money to be paid, Maixner gave the swindlers, for the note, bonds of the value of $8,300, and issued directly to, in the name of, one of the swindlers, in payment of the remainder of the purchase price, stock of the Bankers Fire Insurance Company. Maixner then knew that defendant was not paying cash for the note and mortgage, but, instead of making payments to Norton, who was

to sign the receipt for the money, knowingly put a part of the purchase price in the name of one of the swindlers. In that transaction the swindler exceeded his authority as agent and Maixner knew it. He assisted the swindler in swindling Norton and was a party to the conversion of the note in so doing.

The transaction was not governed by the negotiable instruments act, but by the law governing ordinary conversion of personal property. The inevitable deductions to be drawn are that the Bankers Fire Insurance Company aided and abetted the swindlers in the conversion. *Cook v. Monroe,* 45 Neb. 355, lays down this rule:

"Under the usually adopted principle of law that he who intermeddles with personal property which is not his own must see to it that he is protected by the authority of one who is the owner or has authority to act, or that he will be himself liable; and that if he do an unlawful act, even at the command of another acting as principal, and without right, a liability will attach."

That case was cited with approval in *Starr v. Bankers Union of the World,* 81 Neb. 377, 381, where it is said:

"Where several parties unite in an act which constitutes a wrong to another, under circumstances which fairly charge them with intending the consequences which follow, it is a very just and reasonable rule of the law which compels each to assume and bear the responsibility of misconduct of all. 1 Cooley, Torts (3d ed.) 153. Hence, it is held that one who aids and assists in a wrongful taking of chattels is liable for the conversion, though he acted as agent for a third person."

The undisputed evidence charges the Bankers Fire Insurance Company, through Maixner, with knowledge of the wrong that was being done to Norton. In the opinion of Rose, J., it is said:

"Maixner, who conducted for defendant the negotiations resulting in the transfer and acceptance of plaintiff's paper, testified in effect that he then had no knowledge of the fraud, and that in good faith he purchased and paid for it,

and that *in his negotiations he dealt alone with the agents of plaintiff who indorsed the paper and entrusted the wrongdoers with it.* (Italics the writers.) Testimony by the holder of a note that he purchased it in good faith for value before maturity without knowledge that it was procured from the payee by the fraud of others may be overcome by circumstantial evidence to the contrary."

Maixner was dealing with one whom he knew to be the agent of Norton, and was charged with knowledge of the powers ordinarily possessed by an agent authorized to sell his principal's property. Unless otherwise shown, the sale could be made only for cash. The proceeds of such sale belonged to the principal. A sale made on terms beyond the authority of an agent is void (at least voidable) as to the purchaser who took with knowledge of the violation of the duties of the agent. The circumstances surrounding the purchase and the admitted knowledge of Maixner that he was negotiating with persons acting as Norton's agents are sufficient to make the appellant liable in conversion.

It is not necessary to go further back and show that the insurance company had knowledge of any particular fraud which the swindlers had perpetrated upon Norton. The insurance company, through Maixner, aided the swindlers in getting into their names part of the proceeds which should have been paid in cash for the benefit of Norton. That was sufficient knowledge, in law, to compel further investigation by Maixner and the insurance company. There was not a single dollar of money paid for the note by the insurance company. This leads to the conclusion, as one of law, that the insurance company aided in the conversion of the note. It may be said that the trial court erred in giving the instruction defining "holder in due course," and in telling the jury, in effect, that the transaction was controlled by the negotiable instruments act, as to burden of proof. We do not think this instruction was prejudicial error, because there is sufficient in the record to have required of the appellant further and additional explanations as to the part it took. In other words, the

attempted explanations were, in law, no explanations, but rather confirm the belief that Maixner knew that Norton's agents were taking unto themselves property other than money in payment for Norton's note, and that Norton was not going to receive the stock issued to, and in the name of, one of the swindlers. It may be added that the instruction was more favorable to appellant than it was entitled to. The judgment should be affirmed.

GOOD, J., dissenting.

In so far as the opinion holds that defendant is liable for a conversion of the note and mortgage in controversy, I respectfully dissent.

The record shows that while plaintiff was the owner and holder of the note and mortgage he voluntarily surrendered and turned them over to Kline, Ferguson, and McCord, with the understanding and agreement that he was to receive in consideration therefor stock in a trust company which they were then supposed to have organized. Plaintiff testified that he did not expect to receive any part of the consideration that was paid by defendant for the note and mortgage. No doubt exists that Kline, Ferguson, and McCord, through fraud, procured from plaintiff the note and mortgage. Plaintiff knew that they were negotiating for and contemplating a sale thereof and did not protest. When they, through Schmutzer, found a purchaser for the note and mortgage, plaintiff was informed of that fact, and then indorsed the note and assigned the mortgage and placed it in the power of those, to whom he had transferred the note and mortgage, to sell and transfer title to another. They did transfer it to the defendant and received in consideration therefor Liberty bonds to the amount of $8,300 and stock in the Bankers Fire Insurance Company of the face value of $2,000. The total amount paid by defendant for the note and mortgage represented its face value. It is doubtless true that plaintiff did not then realize that he was being victimized by Kline and his associates.

The majority opinion proceeds on the erroneous theory

that Kline, Ferguson, and McCord were agents of the plaintiff and acting for him in the sale of the note and mortgage, and that, being agents, they had authority to sell only for cash. The record does not justify the assumption. Kline and his associates were acting for themselves, or nominally for the mythical trust company. Plaintiff, as he testified, was not to receive any of the proceeds of the sale, because he was to receive stock in the trust company, for which he had subscribed. Had the defendant paid to Kline and his associates the full cash value of the note and mortgage, plaintiff would be in no better position; he would have received no part of the money.

To constitute a conversion there must be a taking of personal property from the owner without his consent. It is a rule, well recognized and almost without exception, that if the owner of personalty expressly or impliedly consents to the taking, use or disposition of his property he cannot recover therefor in an action for conversion. 38 Cyc. 2009. The text announcing this rule cites, in its support, authorities from 17 states, including Nebraska. In *Carlson v. Jordan*, 4 Neb. (Unof.) 359, it is held: "No action for conversion will lie on account of a disposition of property which plaintiff admits authorizing."

In the instant case, plaintiff not only authorized the sale of his note and mortgage to defendant, but participated therein, after he had knowledge that the note and mortgage were being negotiated by Kline and his associates. He indorsed the note and the coupons attached thereto and assigned the mortgage, leaving them in possession of Kline and his associates for delivery.

Justice and equity will not permit plaintiff to recoup from defendant the loss which he sustained through the fraud practiced by Kline, Ferguson, and McCord. To do so would be to compensate plaintiff for a loss sustained through fraud not practiced by defendant. The record clearly shows that the officer of defendant, who acted for it in acquiring the note and mortgage, had no knowledge of Kline, Ferguson, and McCord, or of Schmutzer, until

after plaintiff had subscribed for the stock in the trust company and delivered his note and mortgage to them. There is no direct evidence, nor, as I view the record, are there any facts or circumstances proved, which would justify an inference that any officer of defendant participated in the fraud practiced upon the plaintiff, or had any knowledge thereof, until long after defendant had purchased and paid for the note and mortgage.

In my opinion, the judgment of the district court is not supported by the evidence and should be reversed.

EBERLY, J., concurs in this dissent.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. CLINTON STATE BANK: FAY C. HILL, RECEIVER, APPELLANT: NELS TAUSAN, CLAIMANT, APPELLEE.

FILED MARCH 7, 1928. No. 25545.

Banks and Banking: GUARANTY FUND: DEPOSITS. Where Liberty bonds are placed for safe-keeping in a safety deposit box in a state bank, and without the owner's consent or authority, the officers of the bank abstract such bonds and sell and convert the proceeds, the relation of bank and general depositor is not created. The transaction does not constitute a deposit, within the protection of the depositors' guaranty fund.

APPEAL from the district court for Sheridan county: WILLIAM H. WESTOVER, JUDGE. *Affirmed in part, and reversed in part.*

C. M. Skiles and *R. L. Wilhite,* for appellant.

Irving R. Butler, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and HOWELL, JJ., and REDICK, District Judge.

PER CURIAM.

This action arises out of the failure of the Clinton State Bank of Clinton, Nebraska. In the proceeding to wind up the affairs of the failed bank, Nels Tausan (hereinafter

referred to as claimant) filed a claim, consisting of two items; one for $1,345, based on a deposit in open account; and the other for $1,100, based on the conversion of eleven $100 Liberty bonds, which claimant had placed in a safety deposit box in the bank. The receiver admitted the validity of the claim for $1,345, but asked that payment thereof be withheld to apply on the liability of claimant as a stockholder, and asked that the claim based upon the conversion of the Liberty bonds be not allowed as preferred or payable from the depositors' guaranty fund.

The trial court allowed both items of the claim and decreed them entitled to preference and payable from the depositors' guaranty fund. Payment of the first item, however, was withheld until claimant's statutory liability as a stockholder could be determined, and the court ordered that if claimant should be held liable the first item of the claim should be offset against the stockholder's liability. The receiver has appealed from the part of the decree which allowed claimant a preference for the item based on conversion of the Liberty bonds.

This case is ruled by the decisions of this court in *State v. Clinton State Bank, ante,* p. 482, *State v. Farmers Bank of Page,* 110 Neb. 676, and *State v. Atlas Bank of Neligh,* 114 Neb. 650. In *State v. Clinton State Bank, supra,* it was held: "Where certain Liberty bonds were purchased by a bank for a customer, but were never delivered to the customer, being left with the bank for safekeeping, and were subsequently sold by the bank without the consent of the customer, neither the bonds nor their proceeds constituted a deposit within the protection of the state guaranty fund."

In the instant case, the bonds were placed in claimant's safety deposit box within the bank. Without his knowledge or consent, the officials of the bank abstracted the bonds and sold and converted the proceeds. There never was any intention to make a general deposit in the bank; the transaction does not constitute the owner of the bonds a depositor, within the protection of the depositors' guar-

anty fund. The court erred in holding that claimant was entitled to a preference on that part of his claim, based upon the conversion of the Liberty bonds. That part of the claim should have been allowed only as a general claim.

The judgment of the district court, in so far as it relates to the claim based upon the $1,345 deposit in open account, is affirmed. In so far as it relates to the claim based upon the conversion of Liberty bonds, the judgment is reversed, and the cause remanded, with directions to enter a decree allowing the latter item as a general claim only and not entitled to preference.

AFFIRMED IN PART AND REVERSED IN PART.

HORACE RALPH MCCOLLEY V. STATE OF NEBRASKA.

FILED MARCH 7, 1928. No. 26124.

1. **Criminal Law:** DISQUALIFICATION OF JUROR: BURDEN OF PROOF. On a motion for a new trial on the ground that one of the jurors was not a resident of the county and was not of sound mind and discretion, the burden is on the party alleging the disqualification of the juror, where such disqualification is raised for the first time by such motion.
2. ———: ———. The finding of the trial court as to the qualifications of a juror will not be set aside unless the error is manifest or unless there has been a clear abuse of judicial discretion.
3. **Rape:** SUFFICIENCY OF EVIDENCE. The evidence and record examined, and *held* ample to support the verdict and judgment, and free from error.

ERROR to the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Affirmed.*

John M. Macfarland, for plaintiff in error.

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

Heard before GOSS, C. J., ROSE, GOOD, EBERLY and HOWELL, JJ.

GOSS, C. J.

Plaintiff in error, hereafter called defendant, was convicted of an assault with intent to rape a 17-year-old girl.

The first error assigned and argued in the brief of defendant is that Julius A. Mauss, one of the jurors, was of unsound mind and was a nonresident of the state. No record was preserved in the bill of exceptions showing what answers were given by the juror in his *voir dire* examination. The question was first raised in the motion for new trial and his qualifications as to mind and residence were then presented by oral testimony and by affidavits. Some of these affidavits indicate that on his *voir dire* examination he gave his residence as Omaha. His name could not be put on the jury list unless he had voted in one of the precincts of the county, as the names of jurors are taken from the lists of electors who actually voted at the last election before the names of electors are certified by the election commissioner to the jury commissioner; from this list the jury commissioner selects names of those eligible for jury service. On the evidence and argument of the motion for a new trial, the court held that the juror was a resident of the county. This was a matter within the discretion of the court and to be decided by the court. We find no abuse of that discretion. On a motion for a new trial on the ground that one of the jurors was not a resident of the county, the burden is on the party alleging the disqualification of the juror. Doubtless, if the juror was sane, he had a right to select his actual residence in Douglas county, to register and vote and to serve as a juror there. On the question of the mental competency of the juror, evidence both orally and by affidavits was also taken on the hearing of the motion for new trial. The defendant introduced a certified copy of an order of the district court for Pottawattamie county, Iowa, dated September 4, 1918, appointing Minnie Cowle "permanent guardian of the property" of Julius A. Mauss. There is nothing in the record to show that she was guardian of the person. John L. Chew, an Omaha lawyer, called as

a witness and asked if he was guardian of Mauss, answered: "I am in joint control with his duly appointed guardian, Minnie Cowle." So, assuming that he was duly appointed, he was one of the guardians of the property only. It does not appear that Mauss was ever under guardianship as to his person. Mr. Chew expressed the opinion that Mauss was crazy. The eleven other jurors told by affidavit of their association with Mauss as a juror and each expressed the opinion that he was of sound mind. The affidavit of Dr. Howard L. Updegraff states that he last examined Mauss March 28, 1927 (which was 20 days after the verdict), and that he was of the opinion, from this and previous examinations he had made during the last year, that Mauss was of unsound mind and incompetent. Dr. G. Alexander Young expressed the opinion by affidavit that Mauss had a very fair average of intelligence "for a man of his age and social status," that the guardianship over his property should be lifted, and that he was capable of handling his property. In this state of the evidence, and in this divided counsel of the physicians, after two trials of the cause, we are unwilling to say that the court abused its discretion in deciding that the juror complained of was of sound mind, and in refusing a new trial on account thereof. The burden of showing on a motion for new trial that a juror was not of sound mind and discretion is on the party alleging it. 35 C. J. 244; *People v. Collins,* 166 Mich. 4; *Zimmerman v. Carr,* 59 Ind. App. 245; *Ammons v. State,* 65 Fla. 166. The finding of the trial court as to the qualifications of a juror will not be set aside unless the error is manifest or unless there has been a clear abuse of judicial discretion. 16 R. C. L. 289; *Reynolds v. United States,* 98 U. S. 145; *Hopt v. Utah,* 120 U. S. 430; *Spies v. Illinois,* 123 U. S. 131; *State v. Pearce,* 87 Kan. 457; *People v. Loper,* 159 Cal. 6; *State v. Lauth,* 46 Or. 342, citing many cases.

The defendant seeks to predicate error upon the introduction of the testimony of a nine or ten-year-old girl who was shown by the state to have been picked up by

the defendant on a previous occasion, on the pretext of taking her in his car to school, and by deception to have been taken instead into the men's toilet at Fontenelle Park and solicited to gratify his sexual desires, but another witness caused the defendant to flee before he had accomplished his purpose. The defendant objected to the "girl testifying at this time for the reason that the court refused to let her testify and the court sustained all of the defendant's objections to this girl testifying during the trial of the cause heard on February 7, 1927." (The instant trial was begun March 7, 1927; the transcript showing that in a previous trial the jury was discharged on February 9, 1927, because of inability to agree on a verdict.) The court committed no error in overruling the objections to the testimony of this child on the ground assigned.

Lastly, it is argued that the facts do not show an assault on the prosecutrix but merely a solicitation. There was ample evidence before the jury to indicate that the prosecutrix was a 17-year-old girl, a graduate of the high school, and chaste; on a snowy, slushy day, December 27, 1926, she was waiting for a street car at Thirtieth and Ellison streets to go down town to do some shopping; the defendant stopped his Ford touring car within a few feet of her and asked her if she wanted to go to town; she then thought he was a chum of her brother who roomed with her brother at Lincoln, but as soon as she got in the car she saw she was mistaken; when they got to Thirtieth and Bedford streets, instead of continuing down town, the defendant turned west on the boulevard where there were no houses, and when she asked him why he did not continue toward town he answered that this was a short cut; all the curtains were on the car except the front curtain on the right side where she sat; there was no one one to hear her cry if she called; after going a few blocks he stopped the car, leaving the engine running, and solicited intercourse by its conventionally vile but colloquial name not, however, found in dictionaries; she refused and started to scream, and he said "it will go worse

with you if you yell and scream;" he got over her, lifted her and pulled her bloomers down to her knees and lay on her for some time, accomplishing some penetration; as soon as he had completed ejaculation and finished the assault, he drove toward town against her protest that she wanted to be let off right there so that she could go to the street car; he took her to Seventeenth and Dodge; she took the first street car home and told her parents without delay; they immediately called the police and a well-known doctor of high standing; the doctor responded to the call promptly; he testified she was hysterical and crying; he removed her to a hospital, put her under an anesthetic and examined her; he testified there was a spot of semen on her bloomers, that they were muddy, and that there was a partial perforation of the hymen; her bloomers and hose were found to be soiled with mud similar to that on defendant's overalls and shoes. Here was ample evidence to warrant a charge and conviction of rape. The evidence was quite sufficient to sustain the charge of assault with intent to commit rape, of which he was accused. In order to satisfy ourselves, we have gone deeper into the record than suggested by either brief or argument or than required by the rules governing review of such trials. We are of the opinion that the judgment of the trial court was right and we affirm it.

AFFIRMED.

SARPY COUNTY, APPELLEE, V. OMAHA & SOUTHERN INTERURBAN RAILWAY COMPANY, APPELLANT.

FILED MARCH 7, 1928. No. 25434.

1. **Railroads: OVERHEAD CROSSINGS.** Section 5524, Comp. St. 1922, requires the construction of an overhead crossing over a railway, where it intersects a highway, only when public necessity or convenience would be subserved thereby.

2. ———: ———: **POWERS OF STATE RAILWAY COMMISSION.** The Nebraska state railway commission is without authority to order the construction of an overhead crossing upon a contingency that may never happen.

APPEAL from the Nebraska State Railway Commission. *Reversed and dismissed.*

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

O. S. Spillman, Attorney General, Hugh La Master, H. A. Collins and *William P. Nolan, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

GOOD, J.

Sarpy county began this proceeding by filing a complaint before the Nebraska state railway commission, praying that the railway commission should order the Omaha & Southern Interurban Railway Company, defendant, to construct an overhead crossing over its tracks at a point where they intersect what is known in the record as the "Gregg road." The defendant filed an answer denying that the Gregg road was a highway, alleging that there was no public necessity or convenience to be served by the construction of an overhead crossing or bridge at the point designated, and further alleging its financial inability to comply with any order in that respect. Upon the issues joined a hearing was had before the commission. Elaborate and detailed findings of fact and conclusions of law were made, followed by an order which directed the defendant to construct an overhead crossing at the point in question when, and not before, the county authorities place the highway in a reasonably passable condition. Defendant has appealed.

As grounds for a reversal of the order, defendant avers that the railway commission is without jurisdiction or authority to make such a conditional order as that entered in this case, and that the order is not sustained by the evidence or findings of fact made by the commission.

Neither party raises any question as to the correctness of the findings of fact made by the commission. An independent investigation of the record leads us to the conclusion that each finding of fact is sustained by the evi-

dence. The findings are too lengthy to be set out in this opinion. We shall summarize so much thereof as seems necessary for a proper disposition of the case.

The defendant's line of railway extends in a southerly direction from Omaha to Bellevue and Fort Crook. It runs nearly parallel with the Missouri river and, owing to the hills and bluffs, through numerous deep cuts. There are two main highways running from Omaha in a southerly direction; one to Bellevue along the east side, the other to Fort Crook on the west side, of defendant's track. The distance between these two highways is from 1,900 to 3,000 feet at different points. What is known in the record as the "Gregg road" was regularly opened in 1888. It is 3,000 feet long, connects the two main highways above mentioned, and intersects the defendant's railroad track and right of way. The defendant constructed its railway in 1906, and at the time provided an overhead bridge to carry the Gregg road over its tracks and right of way. This road was never used to any considerable extent. In 1915 the approaches to the bridge had washed away and it had become unsafe for any persons who might attempt to use it. In May of that year the defendant erected barricades on either side of the bridge, to prevent its use. These barricades remained until 1917, when the defendant dismantled and removed the bridge. No complaint was made by any individual or by the authorities of Sarpy county, as to the maintaining of the barricades or removal of the bridge, until in 1925.

It appears from the findings that there are in the vicinity two other highways which connect the two main highways above referred to. One of these roads is 1,200 feet north and the other 1,900 feet north of the Gregg road. The commission found that since 1915 there has been no travel over the Gregg road, going across or over defendant's tracks, and that the portion of the Gregg road lying east of defendant's tracks has been restored to cultivation by adjacent farmers. It found that the two roads to the north of the Gregg road and connecting the two main highways are shorter than the Gregg road, one of them

being 2,000 feet and the other 1,900 feet long. It further found that that part of the Gregg road lying west of the defendant's right of way is still open and is used only, or almost entirely, by one Johnson, who lives a few hundred feet south of the road. The commission found that the failure to use the road when it was first established was due to the condition of the road; that defendant's railroad at that point cuts through the eastern slope of a hill; that the cut on its west side is 20 feet deep and on the east side 12 to 14 feet deep; that there is a 15 per cent. grade leading to the proposed bridge from either the east or the west; that it is so steep it would be difficult for automobiles to negotiate the grade, and that to make an overhead bridge accessible a large amount of grading would be necessary; that the county had not indicated its willingness or intention to do such work; that if the bridge should be constructed it could be used only under most favorable conditions and then under great difficulty and inconvenience; that the other roads connecting the two main highways afford ample facilities for the general public to pass from one highway to the other, and that, with the possible exception of Mr. Johnson, none would have occasion to use the Gregg road in order to reach the paved and graveled highways. Then follows a discussion of the legal phases of the situation, and the commission finally concludes that it is the legal duty of defendant to establish and maintain a crossing at the point in question; concluding its findings as follows:

"We are therefore of the opinion that an overhead crossing should be constructed. Legally this highway is open. As we have shown, however, without grading it will be physically closed, even if an overhead crossing is constructed. Unless the county authorities proceed to properly grade the highway, any order we make 'will be a vain thing.' If the crossing is constructed, the public will not thereby secure any relief, because the road will not be in condition to be traveled. Our order, therefore, will be made contingent upon the county authorities doing the necessary work to make the road passable."

Section 5524, Comp. St. 1922, imposes the duty on every corporation "owning or operating any railroad, crossed by a public road, to make and keep in good repair, good and sufficient crossings for such road over their tracks, including all the grading, bridges, ditches, and culverts that may be necessary within their right of way." Succeeding sections give the state railway commission jurisdiction over all crossings of highways, outside of incorporated villages, towns and cities, over and under all railroads in the state of Nebraska, and authorize the commission to make such regulations for the construction, repair and maintenance thereof as it shall deem adequate and sufficient for the protection and necessity of the public.

While the above quoted statute apparently makes it the duty of the railway company to make and keep in repair good and sufficient crossings wherever its tracks are crossed by a public road, we think a proper interpretation of the statute requires us to consider the purpose and object of such legislation. Clearly, it was intended to provide a safe and adequate means for the public to cross the tracks of a railroad wherever public necessity or convenience would require it. Certainly, it was not the purpose to compel the construction and maintenance of costly bridges or viaducts where they would be of no use to the public, and where they would not serve the public convenience. If any other view were taken, it would require a vain and useless expenditure of large sums of money by railway companies to make and keep in good repair crossings of this character. Railroads are entitled to make such charges for their services, as common carriers, as will bring in an income sufficient to pay the cost of operation, maintenance and a reasonable return upon the investment. These charges must be borne by the patrons of the common carrier. In the last analysis the cost or expense of such crossings must be borne by the public. It certainly is not good policy to require the public to pay for so-called improvements which would be of no benefit to the public. As pointed out by the commission in its findings, if at this time the bridge

or overhead crossing should be constructed, it would be of absolutely no use, nor is there any assurance that it ever would be of any use, to the public. It would require the expenditure of a large sum of money, with no corresponding benefit. Fairly interpreted, the statute was intended to require the construction of crossings over highways when, and only when, public necessity or convenience would be subserved thereby.

It is also a well-settled rule of law that a judgment or order must be based upon a cause of action existing, at least at the time of the hearing. Here, there was no right to the relief prayed at the time of filing the complaint, or at the time of the hearing; nor do we know that there ever would be a right to the relief demanded. We think it was not within the power of the railway commission to make such an order as that promulgated in the instant case.

By this holding we do not mean that the commission may not make an order to take effect at a future specified date, but it may not make such an order to take effect upon a contingency which may never happen.

It follows that the order of the commission should be reversed and the cause dismissed, but without prejudice to the plaintiff to institute another proceeding, praying for the construction of an overhead crossing when the future conditions exist which would warrant the construction of such a crossing.

REVERSED AND DISMISSED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, APPELLEE, V. SECURITY STATE BANK OF EDDYVILLE: F. J. CLEARY, RECEIVER, APPELLEE: T. F. O'MEARA, CLAIMANT, APPELLANT.

FILED MARCH 7, 1928. No. 25458.

1. **Banks and Banking: GUARANTY FUND: DEPOSITS.** A claim against a failed state bank that represents money which a stockholder of said bank has obtained from another and placed in

the bank for the purpose of aiding the bank to replenish its reserve is not within the protection of the depositors' guaranty fund.

2. ———: RECEIVERSHIP: SET-OFF. Where the receiver of a failed state bank comes into possession of a promissory note given to the bank by the maker without consideration and as an accommodation to the bank, he is not entitled to set off such note against a valid claim of the maker against the failed bank.

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

John A. Miller and *E. L. Randall*, for appellant.

Horth, Cleary & Suhr and *C. M. Skiles, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY and HOWELL, JJ., and BROADY, District Judge.

GOOD, J.

This action arises out of the failure of the Security State Bank of Eddyville, Nebraska, hereinafter referred to as the bank. The doors of the bank were closed on the 17th day of September, 1923, and a receiver appointed on the 21st of the same month. T. F. O'Meara, a stockholder of the bank, filed a claim consisting of three items: (1) A certificate of deposit for $4,000; (2) a certificate of deposit for $500; (3) a deposit on open account of $502.65; and prayed that they be allowed as preferred and payable from the depositors' guaranty fund.

The receiver filed objections to the claims, on the ground that they represent money obtained by a stockholder and placed in the bank in lieu of and for the purpose of effecting a loan of funds to the bank. He further pleaded a promissory note for $1,300, executed by the claimant to the bank, and asked that it be set off against the claims. Claimant replied, denying that the deposit represents money placed in the bank for the purpose of effecting a loan of funds to it, and, as a defense to the promissory note, alleged that it was obtained by fraud and without consideration.

Upon a trial of the issues so joined, the court found that the certificate for $500 and the open account represented

deposits in the usual and ordinary course of business, but that the $4,000 certificate represented money that was placed in the bank for the purpose of bolstering up its reserve, was, in effect, a loan for the benefit of the bank, and not entitled to a preference. The court also found for the receiver upon the $1,300 note and set off the amount thereof against the claims, applying the set-off first to the claims which were found entitled to preference, and adjudged that there was due the claimant the sum of $3,602.60, but that it was not entitled to a preference. Claimant appeals.

The appeal requires us to determine whether or not the $4,000 certificate, or any part thereof, represents money placed in the bank for the purpose of effecting a loan to it, and whether claimant was liable to the bank upon the promissory note.

Since the receiver has not appealed, the finding of the trial court, that the certificate of deposit for $500 and the open account of $502.65 represent *bona fide* deposits, must be accepted as correct, as it is judicially determined that these items are entitled to a preference.

In December, 1922, the bank was in financial difficulties and its reserve depleted. The department of trade and commerce was insisting that money should be raised by the officers and stockholders to replenish its reserve. At that time claimant was the owner and holder of a certificate of deposit for $4,000, issued by the bank. For the purpose of aiding the bank, he took this certificate and sold and discounted it to the Federal Trust Company, of Lincoln, Nebraska, for the sum of $3,820, which was placed to his credit in the bank on open account. It remained there until May, 1923, when he took a new certificate of deposit for $4,000, for which his open account in the bank was charged. This latter certificate is the one in controversy.

From the record it is clear that the $3,820, proceeds of the sale of the former certificate, did not represent a deposit made in the usual and ordinary course of business, but was obtained by the claimant and placed in the bank

for the purpose of replenishing its reserve, and was, in effect, a loan by claimant to the bank. Counsel for claimant argue that, when the deposit in the open account was changed into a certificate of deposit, it then ceased to be a loan and became a deposit, protected by the guaranty fund. We do not think this contention is sound. It was a loan in the first instance, and as such, remained in the bank without change save from an open account to one represented by a certificate. To the extent of $3,820 the certificate in controversy represents a loan.

Section 8033, Comp. St. 1922, in part, provides: "No claim to priority shall be allowed which is based upon any evidence of indebtedness in the hands of or originally issued to any stockholder, officer or employee of such bank, which represents money obtained by such stockholder, officer or employee, from himself or some other person, firm, corporation or bank in lieu of or for the purpose of effecting a loan of funds to such failed bank."

This court has held, in effect, that a claim against a failed state bank which represents money that a stockholder obtains and places in the bank for the purpose of aiding the bank to keep up its reserve is not within the protection of the depositors' guaranty fund. *State v. Farmers State Bank of Dix*, 115 Neb. 574; *State v. Atlas Bank of Neligh*, 114 Neb. 646.

The $4,000 certificate in controversy, to the extent of $3,820, represents a claim that is not protected by the guaranty fund and should be allowed, to that extent, as a general claim. It appears from the record that $180, which is included in the certificate of $4,000 does represent a *bona fide* deposit of funds of claimant, made in the usual and ordinary course of business, and, to the extent of $180, the certificate represents a claim that is entitled to preference and payable from the depositors' guaranty fund.

It appears that in June, 1923, the financial condition of the bank had grown worse instead of better, and its management was taken over by the guaranty fund commission. The department of trade and commerce was insisting that

an assessment should be made upon the stock, to place the bank in a sound financial condition. At an informal meeting of some of the stockholders there was apparently an attempt made to require an assessment of 200 per cent. upon the capital stock. No valid assessment, however, was made, and the attempt at assessment was abandoned. A few days later, at the request of the representatives of the guaranty fund commission, which was in charge of and operating the bank, a few of the stockholders were requested to and did execute to the bank their several promissory notes, each note representing the face value of the stock owned by the maker. Claimant was one of these stockholders and executed his promissory note for $1,300. These notes, so executed by the stockholders, remained in the custody of the representatives of the guaranty fund commission until the 17th day of September, 1923, at which time they were listed on the books of the bank as a part of its bills receivable, and a corresponding amount of worthless and doubtful paper was charged off. On the same day that this was done the doors of the bank were closed. Four days later a receiver was appointed. No valid assessment was made upon the stockholders; nor did the makers of these several notes receive anything of value for them. The most that may be claimed for these notes is that they were accommodation paper, given to the bank without consideration and never used or pledged by the bank. Under such circumstances, the bank could not have sued on and collected these notes from the makers. As respects these notes, the receiver stands in the shoes of the bank, and his claim is no better than would have been that of the bank. The note does not represent a valid obligation of the claimant to the bank, and the court erred in holding otherwise and in setting it off against the amount due claimant.

The judgment of the district court is reversed and the cause remanded, with directions to allow preference to the claim and decree payable from the guaranty fund as follows: The amount of the open deposit account; the $500

certificate, and $180 of the $4,000 certificate together with interest thereon, as provided by law. The remaining $3,820 of the $4,000 certificate, with interest thereon, as provided by law, shall be allowed only as a general claim. The set-off, claimed by the receiver upon the $1,300 note, must be entirely disallowed.

REVERSED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, APPELLEE, V. SECURITY STATE BANK OF EDDYVILLE: F. J. CLEARY, RECEIVER, APPELLEE: J. J. MUTCHIE, CLAIMANT, APPELLANT.

FILED MARCH 7, 1928. No. 25459.

1. **Payment.** In the absence of any agreement or instruction, where a debtor makes payments on a running account, and where neither he nor his creditor makes a particular application of the payments, ordinarily, the law will apply them to the extinguishment of those items of the debt which are earliest in point of time.
2. **Banks and Banking: RECEIVERSHIP: SET-OFF.** Where the receiver of a failed state bank comes into possession of a promissory note given to the bank by the maker without consideration and as an accommodation to the bank, he is not entitled to set off such note against a valid claim of the maker against the failed bank.

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

John A. Miller and *E. L. Randall,* for appellant.

C. M. Skiles and *Horth, Cleary & Suhr, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY and HOWELL, JJ., and BROADY, District Judge.

GOOD, J.

This case arises out of the failure of the Security State Bank of Eddyville, Nebraska, hereinafter called the bank. At the time of its failure J. J. Mutchie, a stockholder in

the bank, owned nine certificates of deposit, aggregating $2,317.78, and also had to his credit in open account in the bank $1,528.35. He filed claims for these several items and asked that they be allowed as preferred and decreed payable from the depositor's guaranty fund.

The receiver filed objections to the allowance of the claims, and averred that the several items represented loans made by claimant to the bank, for the purpose of replenishing its depleted reserves, and that they were without the protection of the guaranty fund. He also set up, as a set-off to any amount due the claimant, a promissory note for $1,200, executed by claimant to the bank. Claimant replied, denying that any of his claims represented loans to or for the benefit of the bank, and averred that the promissory note in question was obtained by fraud and without any consideration, and denied liability thereon. The trial court found that the several certificates of deposit represented *bona fide* deposits, within the protection of the guaranty fund, but that $547.80 of the open account represented a loan made by claimant to the bank, and was without the protection of the guaranty fund, and further found that claimant was liable to the bank on the promissory note for the full amount thereof, and that it should be set off as against the amount found due claimant. Claimant alone appeals.

Two questions are presented for determination: (1) Does any part of the open account represent money placed in the bank in lieu of or for the purpose of effecting a loan to the bank? (2) Was claimant liable upon his promissory note to the bank?

It appears without dispute that in February, 1923, and for some time prior thereto, the bank had been in financial distress, and its reserve was greatly depleted. The department of trade and commerce was insisting that the officers and stockholders of the bank should raise an additional sum of money to replenish its reserve. At this time a number of the stockholders raised money in different ways and placed the amount on deposit in the bank, thereby re-

plenishing its reserve. Claimant at this time owned a farm which was mortgaged for $2,600. He made a new mortgage for $3,500 upon the farm and received as the net proceeds thereof $3,325, which on February 21 was placed to the credit of his account, and a few days later $2,756 of this amount was checked out to pay and satisfy the previously existing mortgage which was then due. On the 21st day of February there was also placed to the credit of claimant's account in the bank the further sum of $100, making the total deposit for that day $3,425. Where the $100 came from is uncertain. It appears that on the same day the expense account of the bank was charged $100, and it seems to be the contention of the receiver that this $100 represented an attorney's fee or commission for securing the $3,500 loan to the claimant, and that the bank paid the expense thereof. The evidence upon this point is not very clear, but claimant has practically consented to waive any claim on account of the $100. Leaving out of the account the $100 item, there was to the credit of claimant in the bank on the 21st day of February, after the deposit for the new loan had been made, the sum of $3,697.22. Thereafter claimant made other deposits from time to time in the usual course of business. These deposits aggregated $1,445.44. Subsequent to February 21, 1923, money was withdrawn from the account by checks at various times, amounting in the aggregate to $3,731.41. It thus appears that after the deposit of the $3,325, which the court found to be a loan to the bank, there was withdrawn from the bank and paid out a sum in excess of the balance which claimant then had in the bank, including this loan.

It is a familiar rule that, when a debtor makes payments on a running account, where neither he nor his creditor makes a particular application of the payments, the law will apply them to the first items in the debt. *Mueller Furnace Co. v. Burkhart*, 149 Minn. 68; *Ganley v. City of Pipestone*, 154 Minn. 193; *Zinns Mfg. Co. v. Mendelson*, 89 Wis. 133. The rule is stated in 21 R. C. L. 103, sec. 109, in the following language: "In the absence of an

agreement or instruction to the contrary, payments should be applied to the extinguishment of those items or claims which are earliest in point of time, unless justice and equity demand a different appropriation." This court, in making application of this rule, in *Howells State Bank v. Hekrdle*, 113 Neb. 561, holds that, in determining how much credit has been exhausted in a bank account, "the rule to be applied is that, as checks are paid, the amounts thereof are to be charged against the oldest item of such credit." Applying this rule to the instant case, it is found that, by reason of the cashing of his checks drawn thereon, all the items up to and including that representing the $3,325 deposit had been entirely extinguished. It follows that the loan item in claimant's open account had been entirely eliminated therefrom, and all that remained of his open account represented *bona fide* deposits made in the usual and ordinary course of business. The full amount of this account, as found by the court, to wit, $1,428.35, together with interest thereon, as provided by law, should have been adjudged entitled to preference and payable from the guaranty fund.

The transaction concerning the giving of the note by claimant to the bank was identical with that set forth in *State v. Security State Bank, ante*, p. 521. No consideration was given for this note and it should not have been set off against the amount found due claimant.

It follows that the judgment of the district court should be, and is, reversed, and the cause remanded, with directions to allow the claim, based on open account, to the amount of $1,428.35, and interest thereon as provided by law; this amount to be entitled to a preference and decreed to be payable from the depositors' guaranty fund, and the set-off, by reason of the promissory note of claimant, to be wholly disallowed.

REVERSED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, APPELLEE, V. SECURITY STATE BANK OF EDDYVILLE: F. J. CLEARY, RECEIVER, APPELLEE: BENJAMIN GOMME, CLAIMANT, APPELLANT.

FILED MARCH 7, 1928. No. 25460.

1. **Payment.** In the absence of any agreement or instruction, where a debtor makes payments on a running account, and where neither he nor his creditor makes a particular application of the payments, ordinarily, the law will apply them to the extinguishment of those items of the debt which are earliest in point of time.
2. **Banks and Banking: GUARANTY FUND: DEPOSITS.** A claim against a failed state bank that represents money which a stockholder of said bank has obtained from another and placed in the bank for the purpose of aiding the bank to replenish its reserve is not within the protection of the depositors' guaranty fund.
3. ———: RECEIVERSHIP: SET-OFF. Where the receiver of a failed state bank comes into possession of a promissory note given to the bank by the maker without consideration and as an accommodation to the bank, he is not entitled to set off such note against a valid claim of the maker against the failed bank.

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

John A. Miller and *E. L. Randall,* for appellant.

C. M. Skiles, Homer L. Kyle and *Horth, Cleary & Suhr, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY and HOWELL, JJ., and BROADY, District Judge.

GOOD, J.

This is another case arising out of the failure of the Security State Bank of Eddyville, Nebraska. Benjamin Gomme, hereinafter referred to as claimant, a stockholder in said bank, had to the credit of his account in the bank when it closed its doors the sum of $5,694.78. A claim was filed for this amount, and it was asked that it be

allowed as a preference and decreed payable from the depositors' guaranty fund. The receiver objected to the allowance of the claim and averred that the claim represented moneys loaned by claimant to the bank, to replenish its depleted reserve, and did not represent a *bona fide* deposit, within the protection of the guaranty fund. He also pleaded, by way of a set-off, a promissory note for $700, executed by claimant to the bank. Claimant replied, denying that the deposit represented a loan to the bank, and averred that the promissory note was secured by fraud and was without consideration, and denied liability thereon. The trial court found that the claim represented money deposited in the bank for the purpose of bolstering up its cash reserve and was, in effect, a loan by claimant to the bank; that the claim was valid and should be allowed as a general claim, but that it was not entitled to preference. The court further found for the receiver upon the promissory note, and allowed the amount thereof as a set-off against the amount found due claimant. Claimant appeals.

From the record it appears that on the 9th day of December, 1922, claimant had a balance in his checking account in the bank of $905.04; that at that time the bank was in financial difficulties and its reserve was greatly depleted. The department of trade and commerce was insisting that the officers and stockholders should raise money and place it in the bank, to replenish its reserve. At that time claimant was the owner and holder of a $5,000 certificate of deposit issued by the bank. He sold and discounted this certificate to the Federal Trust Company of Lincoln for the sum of $4,780, which amount he deposited in the bank to the credit of his account.

It is apparent that this sum of $4,780 does not represent an ordinary deposit in the bank. In order to secure the money to place in the bank, claimant made a considerable financial sacrifice. This sacrifice was made and the money placed in the bank so that the bank's cash reserve might be replenished. After this deposit was made, claimant,

in the usual and ordinary course of business, made other deposits, amounting to $682.97, and by checks withdrew from his account, before the bank closed, the sum of $673.23, so that he had to his credit in the bank, when its doors were closed, the sum of $5,694.78. There is no evidence of any instruction or agreement as to what items in claimant's account should be charged with the checks which were drawn subsequent to the deposit of $4,780.

This court, in *State v. Security State Bank, ante*, p. 526, holds: "In the absence of any agreement or instruction, where a debtor makes payments on a running account, and where neither he nor his creditor makes a particular application of the payments, ordinarily, the law will apply them to the extinguishment of those items of the debt which are earliest in point of time." Applying the rule so announced, it appears that the whole of the $4,780, representing the loan, was in claimant's account when the bank closed its doors.

Section 8033, Comp. St. 1922, in part provides: "No claim to priority shall be allowed which is based upon any evidence of indebtedness in the hands of or originally issued to any stockholder, officer or employee of such bank, which represents money obtained by such stockholder, officer or employee, from himself or some other person, firm, corporation or bank in lieu of or for the purpose of effecting a loan of funds to such failed bank."

This court has held, in effect, that a claim against a failed state bank which represents money that a stockholder obtains and places in the bank for the purpose of aiding the bank to keep up its reserve is not within the protection of the depositors' guaranty fund. *State v. Farmers State Bank of Dix*, 115 Neb. 574, *State v. Atlas Bank of Neligh*, 114 Neb. 646.

The claim, to the extent of $4,780, represents a loan to the bank and is without the protection of the depositors' guaranty fund. The evidence justifies a finding that the remaining part of the claim, other than the $4,780, represents deposits made in the usual and ordinary course of

business, and is therefore within the protection of the depositors' guaranty fund. It follows that the trial court should have allowed the claim to the extent of $4,780, and interest thereon, as provided by law, as a general claim, and the remainder thereof, to wit, $914.78, should have been allowed as a preferred claim and decreed payable from the depositors' guaranty fund.

The promissory note of claimant was given under the same conditions and circumstances as the promissory note in the case of *State v. Security State Bank, ante,* p. 526. It was without consideration, and the receiver was not entitled to have it set off against the claim.

The judgment of the district court is therefore reversed, and the cause remanded, with directions to allow $4,780 of the account, with interest thereon, as provided by law, as a general claim, and $914.78, with interest thereon, as provided by law, as a preferred claim, payable from the depositors' guaranty fund, and a recovery upon the promissory note as a set-off against the claim should be and is disallowed.

REVERSED.

GEORGE O. DOVEY V. STATE OF NEBRASKA.

FILED MARCH 7, 1928. No. 25975.

1. **Banks and Banking:** NATIONAL BANKS. "National banks are brought into existence under federal legislation, are instrumentalities of the federal government and are necessarily subject to the paramount authority of the United States. Nevertheless, national banks are subject to the laws of a state in respect of their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States." *First Nat. Bank v. Missouri,* 263 U. S. 640, 656.

2. ———: DEPOSITS OF PUBLIC MONEYS: STATE PENAL STATUTE APPLIES TO NATIONAL BANKS. Article XXIII, ch. 61 (secs. 6186-6205), Comp. St. 1922, as amended by chapter 96, Laws 1925, making it a felony for an officer of a state, national or private bank to receive public money (collected and held by a

county treasurer) on deposit unless and until the bank has furnished security as provided in such statutes, applies to officers of national as well as other banks.

3. ———: ———: PENAL STATUTES: VALIDITY. Such enactment is not void as one contravening the laws of the United States governing the creation and operation of national banks.

ERROR to the district court for Cass county: WILLIAM G. HASTINGS, JUDGE. *Affirmed.*

Jesse L. Root, William R. Patrick and *A. L. Tidd,* for plaintiff in error.

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

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

THOMPSON, J.

Plaintiff in error, hereinafter called defendant, was informed against in the Cass county district court for unlawfully receiving on deposit in the First National Bank of Plattsmouth, of which he was at the time an officer, public money, collected and held by the county treasurer of such county without first having complied with the provisions of article XXIII, ch. 61, Comp. St. 1922, entitled "Deposit and Investment of Public Funds," as amended by chapter 96, Laws 1925, by furnishing bond or other security for such deposit. At the trial he was found guilty and sentenced to pay a fine of $300; to reverse which judgment, error is prosecuted.

Such article XXIII, as amended, so far as material to this case, in substance provides, that the county treasurers of the respective counties of this state shall deposit for safe-keeping in state, national or private banks doing business in their respective counties, the amount of money coming into their hands as such county treasurers, but shall not make such deposits before the board of county commissioners has selected and approved the depository

bank on its application, determined the kind of bond or security by it to be given, and such bond or security has been furnished and by the board approved; that the treasurer shall not have on deposit in the bank at any time more than the maximum amount of such bond, where the one given is a guaranty bond; that "any treasurer, or any officer of a bank, who shall directly or indirectly violate or knowingly permit to be violated the provisions of the within section, so far as it relates to the deposit of public money in a bank, shall be guilty of felony, and, upon conviction thereof, shall be fined in any sum not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000) or shall be imprisoned in the penitentiary for not less than one year and not more than three years." State banks in which deposits are protected by the depositors' guaranty fund are not required by such article to give bond or other security.

The facts, as reflected by the record, and which must have been found by the jury, are in substance as follows: Mia U. Gering was county treasurer of Cass county, and had collected and held in her possession as such, at the dates here in question, public funds amounting to $25,000 and over. The First National Bank of Plattsmouth in such county was a banking corporation duly organized for the purpose, and doing business at the place and under the laws indicated by its name. The defendant was at the time, and had been for some years, an officer of such bank, to wit, its cashier. The bank had been by the county board, on such bank's application, made a depository of public funds on its giving a guaranty (surety) bond in the sum of $20,000, conditioned as by statute provided, which bond was by the bank procured to be executed, filed with the county clerk, and approved by the county board on and prior to February 7, 1923. From this date, under the above conditions, the county treasurer had deposited in such bank public funds in different amounts, but at no one time had such deposit exceeded the bond until the challenged deposit was had and made. On or about November 15, 1926, defendant went to the office of the county treas-

urer and inquired as to the deposit in question, and the treasurer informed him that the taxes covered by his inquiry had not as yet been paid, and that when paid they would exceed the bond of $20,000, and she could not turn over to him for deposit in the aforesaid bank the funds by him requested, until the bank had procured, filed and had approved an additional bond covering the solicited deposit. Thereafter several conversations took place between defendant and the treasurer relative to the deposit in question, and on the morning of December 2, 1926, defendant again returned to the treasurer's office and inquired if the collection of taxes had been made, and was informed that they had. He then asked the treasurer to deposit the amount thereof, to wit, $25,712.34 in such bank, and was again informed by the treasurer that she could not comply with his request unless and until the above mentioned additional bond was given and approved. In response defendant told the treasurer that the additional bond had been procured and was then in the bank, and that he would have delivered it to her that morning, had he known he would call at her office; that it was ready for her, and she could have it when she came to the bank to make the deposit. Relying on this statement, and on the afternoon of the same day, to wit, December 2, 1926, at a time when there was on deposit in the bank public funds in the sum of $17,040.61 which had previously been deposited in accordance with the $20,000 surety bond heretofore referred to, the county treasurer deposited in the bank the $25,712.34, and at the same time had an item of 6 cents corrected, which made a total then on deposit in such bank of public funds of $42,753.01. After the deposit was made, the defendant told the treasurer that there was a little matter to finish on the bond, that he would attend to it, and deliver the bond to her that same afternoon. However, such bond had not been procured, and neither was it thereafter procured and filed by the bank, the defendant, or any other person. Thus, of such total deposit the sum of $22,753.01 was not secured by bond

or otherwise, all of which was well known to the defendant. Further, such bank, owing to its insolvency, was taken charge of by the comptroller of the currency on or before the 26th day of December, 1926, and a receiver thereof appointed.

To the judgment entered the defendant assigns seven claimed reasons why it should be reversed. These seven, however, may be resolved into two: (1) Does the article taken as a whole define a crime against an officer of a national bank, admitting that it is within legislative limitations? (2) Is the enactment such an interference with the vested rights, duties and privileges of an officer of a national bank, or of such bank, as to render it unenforceable?

As to the first assignment, a consideration of the enactment as a whole leads us to conclude that a felony as to an officer of a national bank is therein defined; and, further, that the information filed in this case is sufficient to charge the defendant with the commission of a felony as in such article prescribed.

As to the second assignment, it may be admitted that "National banks are brought into existence under federal legislation, are instrumentalities of the federal government and are necessarily subject to the paramount authority of the United States. Nevertheless, national banks are subject to the laws of a state in respect of their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States." *First Nat. Bank v. Missouri*, 263 U. S. 640, 656. The article here under consideration, as we view it, was enacted for the purpose of safeguarding the public funds as they accumulate in the office of the county treasurer; a police regulation enacted in furtherance of the public good. By these enactments, as to the funds mentioned, the powers and duties of the county treasurer are defined and limited, so that he as well as the bank officer dealing with him are each informed of the scope of such treasurer's author-

ity. This was at all times fully realized by the defendant, as evidenced by the hereinbefore detailed facts. The state was not, by this article, attempting to, and neither did it, interfere with the due operation of national banks in their quest for deposits, but was denying to them the possession of public funds in the custody of county treasurers, unless and until they had complied with the statutes by procuring to be executed, filed and approved, guaranty bonds. The state was clearly within its rights when it exacted this reasonable protection. *Coffey v. Harlan County*, 204 U. S. 659. It speaks to its citizens and public officers by and through its laws and enforces its demands in the same manner. An individual could have demanded of the bank that it secure him in any way by him proposed before he would permit such bank to become possessed of his money; why not the state? Such an enactment was not a denial of deposits to the bank; it was simply fixing the conditions precedent to its reception thereof, and providing a penalty both as to the county treasurer and the bank officer, who breached such statutory provisions. This enactment was not a discrimination against the banks; they were the only ones who could by any means obtain such temporary custody of the public funds; to every other it was denied. Neither were the national banks discriminated against by the exception of "state banks in which deposits are protected by the depositors' guaranty fund." While the national banks were thus required to give a surety bond, as in this case, the state banks by and through the guaranty of deposits law were required to furnish security more onerous and drastic. Thus, instead of national banks being legislated against by the statutes under consideration, if comparative consideration can be held to be in any way material, and if these statutes are open to the challenge of class legislation (which we find they are not), such national banks were the favored. An officer of a national bank is not, by reason thereof, rendered immune from the criminal laws of the state. We are impelled to conclude that the article under consideration does not contravene the

laws of the federal government which provide for the creation and operation of national banks, nor is it an encroachment thereon, either as expressed in such laws or as may be reasonably implied therefrom. These conclusions are in harmony with the constructions given the national banking act by our federal supreme court in *Waite v. Dowley*, 94 U. S. 527; *McClellan v. Chipman*, 164 U. S. 347; *Guthrie v. Harkness*, 199 U. S. 148; *First Nat. Bank v. Missouri*, 263 U. S. 640.

National Bank v. Ferguson, 48 Kan. 732, and *State v. First Nat. Bank of Clark*, 2 S. Dak. 568, while in no manner controlling on the federal courts, have also aided us in arriving at our conclusion herein.

Counsel for defendant relies mainly on *Easton v. Iowa*, 188 U. S. 220. However, it seems to us that such case is easily distinguishable from the case at bar. There, the state of Iowa had enacted a statute which made it a felony for an officer of a bank (state or national) to receive deposits when the bank was insolvent. In construing this statute the supreme court of Iowa had determined that it applied to national as well as state banks, and that the penal provisions of such statute were applicable to the former as well as the latter. Error was prosecuted to the Supreme Court of the United States, where, in the course of its opinion, it is stated, at page 238:

"Our conclusions, upon principle and authority, are that congress having power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control the exercise of their operations; that congress has directly dealt with the subject of insolvency of such banks by giving control to the secretary of the treasury and the comptroller of the currency, who are authorized to suspend the operations of the banks and appoint receivers thereof when they become insolvent, or when they fail to make good any impairment of capital; that full and adequate provisions have been made for the protection of creditors of such institutions by requiring

frequent reports to be made of their condition and by the power of visitation by federal officers; that it is not competent for state legislatures to interfere, whether with hostile or friendly intentions, with national banks or their officers in the exercise of the powers bestowed upon them by the general government."

Thus, it will be seen that in the *Easton* case congress had legislated on the subject, and to permit an investigation by a state as to the insolvency of a national bank, whenever such state might deem it wise, would be a direct interference with the operation of such bank, as well as with the duties and privileges imposed upon the secretary of the treasury and the comptroller of the currency, as by statute provided. A different situation is presented when we consider the instant case. As to these public funds of the state, congress had neither legislated in reference thereto, or attempted to do so, and neither could it by force of legislation create a rule governing the disposition of the public moneys of the state. As we view it, the Iowa statute sought to be enforced in the *Easton* case was not an incidental restriction placed upon the business of the national bank, but rather an attempted interference with the due operation of such bank. In these federal banking laws congress was acting in derogation of the rights of the states only to the extent expressed in its enactments, or as to those things that might be fairly implied therefrom.

While the reasoning in the *Easton* case is forceful and instructive, as we construe it, it is without application to the article here under consideration which in no manner interferes with, or impedes, the due operation of national banks.

It follows that the judgment of the trial court is right, and it is,

AFFIRMED.

GOOD, J., dissents.

FARMERS STATE BANK OF BELDEN ET AL., APPELLANTS, V. MARTIN NELSON ET AL., APPELLEES.

FILED MARCH 7, 1928. No. 25703.

1. **Appeal:** REVIEW. Where a statute is for any reason claimed to be invalid, the question of such invalidity should be presented by pleadings, or in some other form, to the trial court. Such objection cannot ordinarily be raised for the first time in the appellate court.
2. **Banks and Banking:** GUARANTY FUND COMMISSION: PAYMENT OF TAXES. It is the duty of the guaranty fund commission lawfully in control of a state bank, out of the assets thereof, to pay taxes lawfully levied upon the intangible property of such bank as a demand having priority to rights of the depositors and creditors it represents.

APPEAL from the district court for Cedar county: MARK J. RYAN, JUDGE. *Affirmed.*

C. M. Skiles, Fred S. Berry and *James E. Brittain,* for appellants.

R. J. Millard and *Clarence E. Haley, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

EBERLY, J.

Plaintiffs in the district court sought to enjoin certain officers of Cedar county, Nebraska, from enforcing the payment of certain personal taxes against the assets of the Farmers State Bank of Belden, Nebraska. To the petition a general demurrer, based on the ground that "the same does not contain facts sufficient to constitute a cause of action against the defendants, or any of them," was sustained. The plaintiffs electing to stand upon their petition, the action was accordingly dismissed and they now present the issues involved to this court on appeal for trial *de novo.* No brief has been submitted by appellees.

The petition, after alleging in apt terms the legal capacity of plaintiffs to sue, sets forth that during the year 1925 the Farmers State Bank of Belden, Nebraska, was

hopelessly insolvent; that on or about March 15, 1926, the department of trade and commerce, after due investigation, placed the bank in charge of the guaranty fund commission, where it still remains; that its affairs since said date have been continuously and still are being controlled by that commission "in the manner provided by law;" that the present condition of said bank is that its sole assets consist of a bank building and fixtures of the value of from $5,000 to $6,000, and "other assets" not exceeding in value the sum of $150,000, and that the aggregate of its total assets is from $60,000 to $75,000 less than its valid unpaid obligations; that on April 1, 1925, in the manner and form provided by section 5887, Comp. St. 1922, as amended, a statement was duly made to the proper taxing authorities of Cedar county by the proper officials of the bank, then a going concern, and the value of each of its shares of stock was thereupon by them determined; that upon the valuation thus determined taxes for state, county, and of the various subdivisions thereof, to the extent of $647.55 were accordingly levied, no part of which has been paid, and which, at the commencement of this action, were delinquent.

Plaintiffs further allege: "That the property represented by said shares of stock has entirely disappeared, and any lien which said bank might have thereon by reason of the payment of said taxes would be wholly worthless and without value, and there is no property or assets from which said bank could be reimbursed in case said taxes were paid by said bank or from a sale of any of its assets and property; that said tax is not a tax against said bank or against the property of said bank, and said taxes are not owing by, or an obligation or indebtedness against, said bank, and said bank, or its property and assets, cannot under the law be used or taken for the payment of said tax, or any part thereof."

It also appears that if the defendants are not enjoined they will proceed to satisfy such taxes out of the assets of the bank in question.

Plaintiffs' fundamental contentions, as outlined in their brief, upon appeal, may be fairly reduced to two, viz.: (1) That the taxes, due to the invalidity of certain provisions of our statutes, were not valid and legally assessed; (2) that the taxes, if legally assessed, were taxes against the stock alone, and were not enforceable against the assets of the bank under the circumstances disclosed by the petition.

The first contention is based upon the claim of plaintiffs that section 5887, Comp. St. 1922, as amended by chapter 165, Laws 1925, relating to the taxation of banks, is and has been since its enactment invalid and ineffective. However, the petition filed in the district court does not expressly, nor by necessary implication, present the question of the validity of the statutory provisions which appellants now attack. It nowhere appears either in the petition or in the record set forth in the transcript that the question now presented by them in their brief was ever presented to, or considered by, or even incidentally determined by, the district court, from which the appeal comes. The conclusion follows that the question involving the invalidity of the statute controlling in the instant case is not now before us for consideration, and that the usual presumptions of validity must, for the purposes of this case, attach to each legislative enactment, pursuant to which the taxes purport to be levied. *First Nat. Bank v. Chehalis County,* 166 U. S. 440; *National Bank of Commerce v. Seattle,* 166 U. S. 463; *Clearwater Bank v. Kurkonski,* 45 Neb. 1; *Pill v. State,* 43 Neb. 23; *Batty v. City of Hastings,* 69 Neb. 511.

Plaintiffs' second contention is: "That the tax in this case is not a tax on the bank, and there is no warrant of right or of law to levy on the assets of the bank."

Section 12, ch. 30, Laws 1925, provides in part as follows: "The claims of depositors, for deposits, not otherwise secured, 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."

The statute just quoted by necessary implication recognizes the force and effect of federal, state, county and municipal taxes, as claims against the assets of a bank, and makes the right of the depositors expressly subject to the same. The terms of the statute in neither substance nor effect limits the word "taxes" to taxes directly assessed against the bank as a corporate entity, or to taxes which in and of themselves have the character of a lien against the bank's assets, nor does it in terms exclude therefrom any taxes which the bank as a corporate entity, as a going concern, was required to pay. The guaranty fund commission necessarily has no greater rights than the depositors it represents.

A careful consideration of the authorities cited in plaintiffs' brief, in connection with the above cited and other statutory provisions which govern the matter in this state, convinces the writer that the question before us is to be determined by ascertaining the legislative intent as expressed in our statutory provisions applicable.

Chapter 165, Laws 1925, provides in part: "The president, cashier or other accounting officer of every bank or banking association, loan and trust or investment company, shall, on the first day of April of each year, make out a statement under oath, showing the number of shares comprising the actual capital stock of such association, bank or company; the name and residence of each stockholder, the number of shares owned by each and the value of the shares on the first day of April, and shall deliver such statement to the proper county assessor. Such capital stock shall thereupon be listed and assessed by him as intangible property at seventy per cent. of the mill rate at which tangible property is assessed in the taxing district where the principal place of business of such association, bank or company is located. * * * *Such association, bank or company* shall pay the taxes

assessed upon its stock and shall have a lien thereon for the same; and for the purposes of assessment it shall not be permissible to deduct from the amount of capital stock, the value of any United States government securities owned by such bank, association or company. Such taxes shall be in lieu of all other taxes on intangible property of such bank, association or company, as well as all other taxes on the stock or shares of such bank, association or company in the hands of the individual."

The legislative device here presented in its main outline, it is true, includes practical adoption of the method of enforcing state taxation against national banks, permitted by federal law applicable to those institutions, which is applied by the state with important modifications to certain classes of state corporations as well.

As a device applicable to national banks, White, C. J., says: "It is undoubted that the statute from the purely legal point of view, with the object of protecting the federal corporate agencies which it created from state burdens and securing the continued existence of such agencies despite the changing incidents of stock ownership, treated the banking corporations and their stockholders as different. But it is also undoubted that the statute for the purpose of preserving the state power of taxation, considering the subject from the point of view of ultimate beneficial interest, treated the stock interest, that is, the stockholder, and the bank as one and subject to one taxation by the methods which it provided." *Bank of California v. Richardson,* 248 U. S. 476.

The conclusion that the purpose of our state taxation statute, from the point of view of the "ultimate beneficial interest," was to treat the stock interest, that is, the stockholder, and the bank as one, subject to one taxation, is certainly reinforced by the following words quoted above: "Such taxes shall be in lieu of all other taxes on intangible property of such bank, association or company, as well as all other taxes on the stock or shares of such bank, association or company in the hands of the individual."

It may fairly be said that our state revenue laws should be construed in the light of the constitutional provisions relating to their enactment. And where terms are indefinite or ambiguous, the entire act should be so construed as to, if possible, harmonize with the letter and spirit of such constitutional provisions.

Section 1, art. VIII, Const., sets forth the rules to be observed in the assessment of various kinds of property in "raising necessary revenue."

Section 2, art. VIII, Const., provides for certain exemptions from taxation not applicable here, and also contains the provision: "No property shall be exempt from taxation except as provided in this section."

Section 4, art. VIII, Const., provides: "The legislature shall have no power to release or discharge any county * * * or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever."

There is in the petition a total absence of any suggestion that the powers of the county board of equalization of Cedar county, Nebraska, were invoked by the bank at any time in the instant case. It would follow that it must be conclusively presumed that the assessment made by the proper authorities of that county, after the filing of the statement of April 1, was, in effect, a proper and just apportionment to the Farmers State Bank of Belden, Nebraska, of its proportionate share of taxes to be levied for state purposes. *First Nat. Bank of Blue Hill v. Webster County*, 77 Neb. 813.

In the present case, therefore, the tax as originally assessed must be deemed a valid tax. But the question of its enforcibility against the assets of the bank, under the conditions appearing in the pleadings, is still to be determined.

It appears without question that the taxes assessed against the bank for the year in question embraced two

items: (1) A tax on tangibles assessed against the bank as a corporation *eo nomine;* (2) a tax on intangibles assessed against the stock (the evidence of ownership of the owner of the intangible assets involved). The sum of the two amounts thus assessed, it seems clear, represented the fair and just proportion of the burdens of government that the "ultimate beneficial interests" alike, represented by the "corporate entity" and the "stock," should justly bear in view of the relation its property sustained to the mass of the property then subject to taxation.

The statute quoted expressly provides that the bank in its corporate capacity shall pay both assessments thus made, and this is the sole method provided by which the payment of these taxes legally laid may be lawfully enforced.

The guaranty fund commission which has succeeded to the rights possessed by the "ultimate interests involved," together with the bank as corporate representative of such ultimate interests, now, as joint plaintiffs herein, seek to take advantage of the statutory device originally brought into being to prevent a double exaction of taxes and to secure a just taxation, as a means for defeating the payment of a portion of the taxes justly assessed against the same "ultimate beneficial interests" under the form of "stock."

It must be admitted that the language of section 12, ch. 30, Laws 1925, fairly and justly evidences a legislative intent that "federal, state, county and municipal taxes" shall be a first and prior claim against all the assets of the bank.

If the statutory language quoted, thus considered, be deemed to embrace and include the tax on intangibles and to require its payment out of the assets of the bank, it is the enforcement of a tax legally assessed. The guaranty fund commission succeeding to and standing in the shoes of the "ultimate beneficial interests" would, in that event, take the right to possess and use this intangible property forming the real basis of the tax assessed, subject to this

contribution legally due to the public. The "ultimate property" as the substantial and real basis of the assessment would thus carry no greater burden of tax than other property of identical character owned by taxpayers generally. Equality of taxation is thus sustained and enforced.

On the other hand, if this language be construed as excluding the tax assessed on the bank's intangibles, the guaranty fund commission would, it is true, take the "ultimate property," which had been assessed as the intangible property of the "ultimate beneficial interests," relieved of all public demands. But it would also be, in effect, a "release" and "discharge," without lawful payment, of the "ultimate beneficial interests," as well as the intangible property involved, from taxes legally levied and assessed. This would violate at least the spirit of section 4, art. VIII, Const., and make of our intangible tax law, not simply a device to secure an equitable taxation, but a device by means of which indirectly, at least, to effect a "discharge" or "release" of taxes duly levied and assessed, in a manner prohibited by the express terms of the Constitution. Equality in taxation would be, in effect, if not in name, wholly destroyed. Public policy therefore impels that construction by means of which the ambiguity, if any there exists, be resolved in favor of the enforcement of the tax against the ultimate property which formed the basis of the assessment in the hands of the ultimate beneficial interests sought to be assessed.

Accordingly, it follows that the words "shall have priority over all other claims, except federal, state, county and municipal taxes, and subject to such taxes, shall * * * be a first lien on all the assets of the banking corporation from which they are due, must be deemed to embrace and include all taxes levied upon the intangible property of such bank and to evince a legislative intent to make such taxes a first and prior claim against such assets as against the depositors, as well as against the guaranty fund commission, the depositors' representative.

We have given due consideration to the contention that the federal decisions construing section 5219, Rev. St. U. S. as in force prior to March 4, 1923, are controlling. It is to be remembered in this connection that "National banks are not merely private moneyed institutions but agencies of the United States created under its laws to promote its fiscal policies; and hence the banks, their property and their shares cannot be taxed under state authority except as congress consents and then only in conformity with the restrictions attached to its consent." *First Nat. Bank v. Anderson*, 269 U. S. 341.

No federal law contains provisions similar to the controlling statutory and constitutional provisions in the instant case. We therefore decline to adopt the rule announced in the federal cases on which plaintiffs rely as applicable to the questions here presented.

The basic question involved in this appeal is whether the guaranty fund commission is, under the Nebraska statutes, required to pay these taxes out of the assets of this bank. This, for the reasons stated, and in consonance with the views announced by Day, J., in *State v. American State Bank*, 114 Neb. 740, we decide in the affirmative.

It follows that the action of the district court appealed from was correct, and its judgment is

AFFIRMED.

JAMES DE MATTEO, APPELLANT, V. JOSEPH LAPIDUS, APPELLEE.

FILED MARCH 7, 1928. No. 25387.

1. Appeal: NEW TRIAL: REVIEW. An order of the trial court granting a new trial will not ordinarily be disturbed by this court, and not at all unless it clearly appears that no tenable ground existed therefor.
2. New Trial. In passing upon a motion for new trial by a *nisi prius* court, it is proper to consider conflicting and improbable evidence received upon the trial, together with all other facts, circumstances, conduct and events occurring during trial, as they appeared to the trial judge.

3. Appeal: NEW TRIAL: REVIEW. An order granting a new trial by a *nisi prius* court which affords a litigant an opportunity to present his claims fairly in another trial will not be scrutinized as closely as would an order putting an end to his demands.

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

John M. Macfarland and *Gray, Brumbaugh & McNeil,* for appellant.

Kennedy, Holland, DeLacy & McLaughlin, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY and HOWELL, JJ.

HOWELL, J.

This case is here on appeal by appellant who was plaintiff below. The action was instituted in September, 1922, to recover damages from Joseph Lapidus, appellee, for injuries inflicted upon appellant near the corner of Twenty-second and Leavenworth streets, in Omaha, while appellant, traveling on foot, was about to cross Leavenworth street and appellee was driving an automobile east. There have been three trials of the case. Once it resulted in a ten to two verdict for $20,000. On motion that verdict was set aside. The second trial was before Redick, J., the verdict being for $20,000, which was also set aside. The third trial was before Troup, J., resulting in a verdict for $4,000. A new trial was denied appellant. A bill of exceptions was settled following the second trial, which is now before this court. There was no bill of exceptions in the third trial. This court is asked to set aside the order of Redick, J., granting a new trial and to reinstate the judgment for $20,000 entered on verdict in the second trial. The sole question to be determined by this court is whether or not Redick, J., abused the discretion which the law gives to trial judges in granting new trials. It is claimed by appellant that such discretion was abused, while the appellee claims the contrary.

An examination of the pleadings, the evidence given on the second trial, and the memoranda opinion of Redick, J., granting the new trial, drives this court to the conclusion that such discretion was not abused. The evidence shows great conflict between witnesses for the parties to the suit. Much of the evidence given by the witnesses for appellant is manifestly at variance with their former testimony in the first trial and with prior written statements signed by them as to how the accident happened. There was a shifting of grounds from the cause of action stated in the first petition to that set up in the amended petition upon which the second trial was had, which were wholly inconsistent, describing the accident as having taken place in a different location and in a different manner from that first alleged; the facts having been stated by appellant to his attorney in both instances. Some of the testimony was highly improbable. In many of the material matters, appellant's witnesses were sharply contradicted by appellee and a number of disinterested witnesses.

The memoranda opinion of Redick, J., stated he was convinced that grave injustice had been done and that the verdict reflected prejudice and passion. There seems to be no conflict between counsel for appellant and appellee as to the law; rather it is a question of abused discretion. The case of *Schlaifer v. Omaha & C. B. Street R. Co.*, 98 Neb. 207, states: "A stronger showing is required to reverse an order allowing a new trial than to reverse one denying it." *Wells v. Cochran*, 84 Neb. 278, says: "Granting a new trial at the same term a verdict is rendered will not be set aside, unless it clearly and unequivocally appears that there did not exist any tenable ground to support said order, but that the court thereby abused its discretion."

This case is not without its difficulties. It is claimed that the trial judge invaded the province of the jury, hence, as a matter of law, discretion was abused. If it were clear that this was the sole ground, we might be disposed to disapprove interference with the verdict. At least one other ground appears as having influenced the

trial judge, *i. e.*, the amount of the verdict reflects passion and prejudice rather than calm judgment of the jury. At most that question is left in doubt. Under the well nigh universal rule, supported by decisions of this court and many courts of other states, the burden rests upon the complaining party to affirmatively show that there was an abuse of discretion and that there was legal error.

When a judge, as able and upright as the bench and bar know Redick, J., to be, is convinced that a new trial ought to be had of a cause, arrived at by taking into consideration all that took place upon the trial, most of which it is impossible for this court to see and know, we will be slow to question the correctness of his conclusion, and more reluctant to say, as a matter of substantive law, he has abused his discretion. It is not at all infrequent that appellate courts are urged to sustain a doubtful verdict because the same has received the approval of the trial judge. The rule seems to be that "unless it clearly and unequivocally appears that there did not exist any tenable ground to support" such an order, it will not be disturbed by the appellate court; or, stated in another way: "The *nisi prius* court has much better facilities for determining whether justice has been done, and hence its ruling is always presented here with a presumption in its favor." *Conklin v. City of Dubuque*, 54 Ia. 571. In Oklahoma (*Nale v. Herstein*, 94 Okla. 263) the rule is: "This court will not reverse the ruling of the trial court granting a new trial, unless it can be seen beyond all reasonable doubt that the trial court has manifestly and materially erred with respect to some pure, simple and unmixed question of law, and that, except for such error, the ruling of the trial court would not have been so made." That it was proper for the trial judge to consider the conflicting evidence finds support in *Gaster v. Hinkley*, 258 Pac. (Cal. App.) 988, in these words: "If the evidence is conflicting, and it does not appear that the trial court abused his discretion in granting a new trial, his order will not be disturbed on appeal." "This court does not pretend to pass

upon the credibility of witnesses, nor to determine which version of the story was correct. There was, however, a sharp conflict with respect to material facts which it was competent for the trial court to consider upon a motion for new trial."

The granting of a motion for a new trial, which does not deprive a litigant of a fair opportunity to be further heard, is not to be judged as critically as would be an order putting an end to his demands. Without intimating that such took place in this case, a situation might arise where counsel, in argument, too frequently referred to the fact that the defendant carried insurance, appeals to racial prejudice, and similar matters, when taken in connection with improbable testimony, confessions of witnesses of their prior false statements, shifting of positions and taking new holds, while no one of them is conclusive, would convince a trial judge that the verdict is unjust. There might also be instances where the granting of a new trial under such conditions would have a wholesome influence upon a future trial of the same case, as well as in other cases. There is nothing to show this court that the testimony on the third and last trial and that the conduct of that trial were the same as on the second trial. The setting aside of the order made by Redick, J., would necessarily have to be based upon much speculation on our part. Taking the record as a whole, we do not feel justified in disturbing the order.

AFFIRMED.

LEE PRATT, ADMINISTRATOR, APPELLEE, V. WESTERN BRIDGE & CONSTRUCTION COMPANY, APPELLANT.

FILED MARCH 7, 1928. No. 25445.

1. **Highways: ACTION FOR DEATH: QUESTIONS FOR JURY.** Where a contractor, employed by a county to construct culverts along the line of a newly built highway which has been completed as to grading with a roadbed 24 feet wide, open to public travel, lays culvert pipe under a fill in the road and covers the same so the roadbed at that point is narrowed to 12 feet, leaving

holes on each side of the traveled way, abandons the work in the fall, to be resumed in the spring, without filling such holes, and an automobile driven over the road in the nighttime runs into one of the holes, resulting in the death of an occupant thereof, the questions of negligence and contributory negligence will ordinarily be for the jury to determine.

2. **Comparative Negligence:** QUESTION FOR JURY. Under the disputed facts in the case at bar, the court properly submitted the case to the jury upon the question of comparative negligence.

3. **Trial:** INSTRUCTIONS. An instruction which advises the jury that, if it should find the plaintiff guilty of negligence and that "such negligence * * * was slight in comparison with the gross negligence of the defendant, then you will find for the plaintiff," is prejudicial and reversible error for that "the gross negligence of the defendant" is thereby assumed. Such error is not cured by other instructions defining "slight negligence," "gross negligence," "burden of proof," "preponderance of evidence," where the doctrine as to comparative negligence is erroneously stated by the court.

4. **Negligence:** REFUSAL OF INSTRUCTIONS. In an action for damages by the father, as administrator, for himself and the mother of a young boy who was killed by the alleged negligence of another, a requested instruction stating that this action is brought "by the father for his own benefit," "if you find * * * the accident resulted from the negligence of the father," and if the negligence of the father and "defendant were equal," the "plaintiff cannot recover," is erroneous in each of the particulars indicated and was properly refused.

5. **Highways:** ACTION FOR DEATH: LIMITATIONS. An action for damages to the parents of a young boy killed by the negligence of a contractor engaged, as such, by a county in highway construction work, such work not being repair work which is imposed by law upon the county, is not barred by section 2746, Comp. St. 1922, requiring suit to be brought within 30 days from the date of the accident against counties for damages "by means of insufficiency, or want of repairs of a highway, * * * which the county or counties are liable to keep in repair."

6. ———: ———: DEFENSE. It is not a defense to an action for damages to another, growing out of the negligence of a contractor constructing highways and culverts under a contract with a county, that the injured person was, at the time of the accident, operating or driving an unlicensed automobile upon a highway in violation of section 8388, Comp. St. 1922.

APPEAL from the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Reversed.*

Dressler & Neely, for appellant.

Helm & Lewis, M. F. Harrington and *Gerald F. Harrington, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and HOWELL, JJ.

HOWELL, J.

Lee Pratt, as administrator, sued the Western Bridge & Construction Company on behalf of himself and wife for damages for wrongful death of Rodney J. Pratt, their three and one-half year old son. The company appeals from an adverse judgment of $5,289. Several errors are assigned, but only those considered important will be noticed.

1. It is contended the verdict is not sustained by the evidence. The negligence charged is: On February 8, 1923, the boy and his father and mother were riding in an automobile at night, on a state highway near Gordon, Nebraska, and ran into a hole at the side of the road as he approached a culvert which had been completed except as to concrete wings. The concrete work had been abandoned in the fall of 1922, to be resumed in the spring of 1923. The roadway, other than the culvert, was 24 feet wide and had been completed, and, by reason of excavations at each end of the culvert, the roadway was narrowed at that place to about 12 feet.

The facts found by the jury were that the automobile lights afforded visibility for 300 feet ahead. As the automobile approached the culvert the driver saw a woman walking east on the right side of the road, and, in order to pass her, the automobile was steered toward the left side of the road and, as it was turning back to its proper place, its wheels dropped into the hole on the left side of the narrowed roadbed, throwing the boy out, resulting in his death. The appellant had a contract with the county

to put in culverts where needed on the newly graded road. The road was open for travel. The hole into which the automobile dropped was so filled with tumble weeds that lights of the automobile would not reveal the true condition, and the automobile was traveling at a moderate speed. While the evidence is conflicting and will not be detailed, we think it sufficient to go to the jury on negligence and contributory negligence.

2. Another complaint is the giving of instruction No. 4 on the court's own motion. We think it is clearly erroneous, because it stated an erroneous rule on comparative negligence, and assumed appellant guilty of "gross negligence." It assumes gross negligence, *i. e.*, it told the jury, should it find there was negligence on the part of the parents of the boy, and "such negligence of the deceased's parents was slight in comparison with *the gross negligence* of the defendant, then you will find for the plaintiff." No other comparison was allowed. It is claimed the error, if any, was cured by another instruction which told the jury "that the burden of proof is upon the plaintiff to establish by a preponderance of evidence all of the material allegations of his petition, and plaintiff must satisfy you by a preponderance of the evidence that the defendant was guilty of negligence as alleged in his petition, and that such negligence was the direct and proximate cause of the accident, and that on account thereof plaintiff has sustained damages as a result thereof, and, unless you find that plaintiff has established each of the above propositions by a preponderance of the evidence, your verdict should be for the defendant. On the other hand, if the plaintiff has satisfied you that all of the above propositions have been sustained by a preponderance of the evidence, then your verdict should be for the plaintiff."

No other instruction touched the question of comparative negligence. Since the case of *Morrison v. Scotts Bluff County*, 104 Neb. 254, decided by this court in 1920, there is scarcely any excuse for attempting to define the rule pertaining to comparative negligence otherwise than is there-

in stated. The statute defines it as one rule and not severable. In the instant case the jury were told that, "if you find that the parents were negligent," and "such negligence of the deceased's parents was slight in comparison with the gross negligence," etc. It was not said, if you find "gross negligence" of defendant, etc. The rule laid down in the *Morrison* case is that, if both parties are guilty of negligence, plaintiff could recover if the "negligence of plaintiff was slight and the negligence of defendants was gross in comparison therewith." Such comparison does not assume negligence of either, while in the instant case the comparison was required to be made with "the gross negligence of the defendant."

3. Another assigned error is that the court erred in refusing to give instruction No. 2 requested by defendant. That instruction was erroneous in at least three particulars: (a) It told the jury that the action was brought "by the *father* for his *own* benefit;" (b) "if you find from the evidence that the accident resulted from the negligence of the *father*, * * * your verdict will be for the defendant," etc.; (c) and, "if the negligence of both *plaintiff* and defendant is equally balanced, plaintiff cannot recover." If the negligence of both plaintiff and defendant were equal, without any negligence of the mother, a verdict against the mother would not necessarily follow. The action was for the benefit of both father and mother. If the defendant was guilty of actionable negligence, and the mother of none, her right to recover would not be cut off by an act of another not imputable to her.

4. The next contention is that recovery by the plaintiff is barred because of failure to sue within 30 days from the date of the injury. This is based upon section 2746, Comp. St. 1922, which denies the right of recovery against a county for damages by "means of insufficiency, or want of repairs of a highway or bridge, which the county or *counties* are liable to keep in *repair*," unless "such action is commenced within 30 days of the time of the injury." At common law there was no liability on the part of the

county. Whatever the rule may be where an agent of the county acts in accordance with its express direction, or in *repairing* its roads for the county, or as an independent contractor doing construction work according to specific plans required by the county, the authorities cited by appellant are distinguishable under the facts before us. Had the instant suit been brought within 30 days, it would not have changed the rule of evidence. There is a distinction between a cause of action and the right to sue at a given time, or under certain conditions. The right to sue the county was a conditional grant of a new cause of action which did not exist at common law. It was not the intention of the statutes referred to, to strike down any cause of action that existed at common law. The appellant did not do its work under express plans or by any command of the county in digging and leaving dangerous holes in a road open to travel, as was done. Such were not even necessary incidents to immediate or connected work in the construction of the culvert. Appellant dug the hole and purposely left it for months as a menace to the traveling public. During that time it served no useful purpose in furthering the fulfilment of appellant's contract with the county, or in performance of any duty imposed by law upon the county. The act making the county liable, conditionally, for defects makes no reference to other than defects, etc., either expressly or by reasonable implication. The argument of some courts that to hold contractors liable for their acts in performing work for a county would tend to increase the cost to the public is not appealing, except in cases where the work is to be done in a specific way, or to construct a certain thing in manner prescribed by the county, or when the individual is its *alter ego*.

We now call attention to cases cited by appellant. *Schneider v. Cahill*, 127 S. W. (Ky.) 143, does not clearly set forth the relation of Cahill to the county, other than he was a "supervisor or contractor of the county *having charge of the construction* of the county roads." It appears that the opinion was "not to be officially reported."

It also appears that an unguarded ditch was left open, into which Schneider fell, "*while* appellee (Cahill) was *supervising* the construction." The court further states: "If a liability existed it would be the liability of the county, and not that of the supervisor." This court has held that a contractor is not liable in damages for negligence in constructing works for a county in conformity to plans directed by the county, but in *Frickel v. Lancaster County*, 115 Neb. 506, both the county and the contractor were sued for negligence in the manner of doing the work, and, while the judgment of the lower court was reversed, the case was "remanded for a new trial," as to all defendants.

Nolan v. New York, N. H. & H. R. Co., 53 Conn. 461, was ruled by a statute which *created* a liability against railroads *charged by the statute* with a duty to "keep it in repair" (meaning roads and bridges), and which prohibited actions "unless written notice of such injury" be given thereof "within 60 days." The statute made it the duty of railroads to "keep in repair the surface of the streets adjoining the rails," for a certain space on each side. Prior to the statute no such duty existed. The court held that, as the duty was "founded upon a statutory liability," before an injured party could enforce its provisions, "he must perform his own duty" to give the notice required, before he could have the benefit of the new cause of action. It was loaded with a condition precedent. The rule is not only sound, but it is just. But for the statute, the railroad company would not have been liable at all.

To the same effect is *Mahoney v. Natick & C. Street R. Co.*, 173 Mass. 587. In that case a statute created a duty upon the railway company to construct its road in streets in the manner provided. Another statute required notice of an injury in a highway to "persons *by law obliged* to keep the highway in repair." This language is found in the opinion:

"The jury were instructed to consider whether the accident was caused by a defective construction, or by a want of repair; and that if it was by a want of repair, the

statute as to notice applied. That notice must be given, in order to entitle the plaintiff to recover, where the injury is caused by a neglect of the defendant to repair what it is obliged by statute to keep in repair, was decided in *Dobbins v. West End Street R. Co.*, 168 Mass. 556."

This obviates any reference to *Dobbins v. West End Street R. Co.*, 168 Mass. 556. *City of Brooklyn v. Brooklyn City R. Co.*, 47 N. Y. 475, was a suit by the city to recover upon a bond given by the railway company to indemnify the city against damages resulting from injuries caused by laying its tracks in streets. *Shalley v. Danbury & B. H. R. Co.*, 64 Conn. 381, reiterates the rule stated in *Nolan v. New York, N. H. & H. R. Co.*, 53 Conn. 461, already noticed.

Blue Grass Traction Co. v. Grover, 135 Ky. 685, involved an injury to a race-horse occasioned by a defective bridge (out of repair) over tracks, in a cut, of the traction company which the traction company had contracted with the county to keep repaired. The court held that as the traction company agreed to keep the bridge in repair, only, for the county as its *alter ego*, and was only discharging "the duty which the law places upon the county," it was not liable. The traction company was said not to be liable unless made so by the contract, and as the contract required it to do only what the county was bound in law to do, the contract did not put burdens on the traction company different than those resting upon the county. The contract was not one for profit, nor for construction of works required by law to be performed by the county.

In Nebraska, counties are not permitted to construct culverts without contracts let to bidders where the cost exceeds $500. The duty to build roads or culverts is not mandatory, as in cases of repairs; nor is a contractor to build roads an *alter ego* doing only work the county is by law bound to do. Roads of the character in question are required to follow plans and specifications. If the contractor does his work accordingly, he is not liable for injuries caused by faulty plans. The detail methods as to how the work shall be carried on are left to the contractor

and others employed by him. We do not think the provision for bringing suit against the county within 30 days has any application to present conditions.

5. The next and last assignment considered is that a person injured while operating an unlicensed automobile on a highway cannot recover damages for such injuries. The first impact with that proposition is so violent that it invites instant disapproval. Such automobile is not converted into a wolf to be shot upon the spot. Appellant cites three Massachusetts cases, one from a Pennsylvania district court and one from Manitoba to support its contention. But for those cases we would give little time to the contention. It is interesting to note that the author of one of the Massachusetts opinions speaks of the time when traveling on Sunday was illegal, and observes "the provisions of the act in question substantially resemble those of the Lord's Day act formerly in force." It was also said: "But there is a distinction between an unlawful act which is at least a contributing cause of the accident and one which is merely an attendant circumstance or a condition." Just how an unlicensed automobile, for that reason alone, could be a contributing cause with a hole in the ground may seem metaphysically easy, but legally difficult. It is not necessary for us to either sponsor or distinguish the cases referred to.

Berry, Automobiles (5th ed.) 227, sec. 267, cites cases from more than a score of states as supporting the text, that operating an automobile without a license, or registration, does not affect a person's right to defend himself or to recover damages for personal injuries. We refer to but one of the cases cited. *Wolford v. City of Grinnell,* 179 Ia. 689, opinion by Deemer, J., says: "No authorities need be cited in support of this proposition." If the mere fact that a person is violating a law deprives him of his right to damages for the injuries received by the negligence of another, the rule should work both ways, and if one injures another while violating a law, he ought to have no defense. This court has consistently ruled that a

violation of city ordinances, regulating speed of street cars and requiring signals to be given by trains approaching railroad crossings, when violated, are not *per se* negligence. All of these acts are unlawful, but they must have some proximate relation to injuries received by one who asks damages.

The rule that no duty is owing a trespasser, except to refrain from wilful or wanton injury, until after the owner of premises discovers his presence, while firmly fixed, has been greatly softened toward trespassers habitually using premises for such a period that the owner may be said to be charged with the duty of anticipating such presence. Continued use of premises by trespassers, with knowledge of the owner, makes it the duty of the owner to use reasonable care to discover them. It is common knowledge that during the first two months of every year thousands of unlicensed automobiles travel the highways with a conspicuous display of obsolete license plates, without challenge from the officers of the law. If it be clear that an unlicensed automobile contributes nothing toward causing an accident, it would be harsh and inhuman to apply the strict rules relating to trespassers. It does not behoove private litigants who have caused the death of another by their negligence, perhaps with no greater interest in law enforcement than to absolve themselves, to demand obedience to a law that the state and all law enforcing officers at least wink at. We might consistently add that, as between appellant and appellee, the latter was a trespasser in no sense. We might not be going beyond the spirit of the law to say that one who digs dangerous holes in a highway and deliberately departs, leaving them unfilled or unguarded, with the intention to allow them to remain for weeks and months, knowing that the road is open to the public generally, makes himself a metaphorical trespasser. Section 2778, Comp. St. 1922 provides: "If any person shall injure or obstruct a public road by * * * digging any ditch or other *opening thereon*," he shall "forfeit" a certain sum. Under that provision one who has a right to dig a hole

for temporary purposes does not violate either its letter or spirit by digging the hole, if he fills it when it no longer serves a legal or useful purpose, and before it certainly will become a trap to the wary traveler. We see no need for saying more. This assignment of error is without merit.

For the reasons stated, the judgment of the district court is reversed.

REVERSED AND REMANDED.

JAMES O. SWOGGER V. STATE OF NEBRASKA.

FILED MARCH 7, 1928. No. 25509.

1. **Criminal Law**: EVIDENCE OF SEPARATE OFFENSES. Except as to crimes having an element of motive, criminal intent, or guilty knowledge, evidence of separate and distinct offenses committed by accused is not admissible. If such evidence is admitted, and is prejudicial, a conviction cannot stand.
2. **Rape**: EVIDENCE OF SEPARATE OFFENSES. In a prosecution for statutory rape upon a female under the age of consent, it is reversible error to receive evidence of separate and distinct crimes committed by accused, over his objection.
3. **Witnesses**: ACCUSED AS WITNESS: CROSS-EXAMINATION. One charged with crime who becomes a witness for himself upon his trial is subject to the rules governing cross-examination of other witnesses.
4. ———: ———: IMPEACHMENT. The rules of evidence relating to discrediting or impeaching ordinary witnesses apply alike to defendants in criminal cases who become witnesses in their own behalf.
5. **Criminal Law**: PROOF OF CHARACTER OF ACCUSED. One charged with crime may prove his good character by showing his general reputation to be good, but not by specific acts. To meet that issue the state will be held to the same rule.
6. ———: ACCUSED AS WITNESS: CREDIBILITY: INSTRUCTIONS. After eliciting answers from a defendant as a witness in his own behalf in a criminal case on immaterial and irrelevant evidence upon cross-examination, and after permitting a state witness in rebuttal to contradict such testimony, it is error for the court to instruct the jury that defendant's credibility may

be determined by consideration of *all* the testimony admitted at the trial, etc., that being equivalent to saying the witness as such may be discredited by immaterial and irrelevant testimony. The state is bound by answers of such witness as to such testimony.

7. ———: EVIDENCE. PRESUMPTION. All testimony received over objection will be presumed to have been considered by the jury as material in arriving at their verdict. This is peculiarly true in the instant case where the court told the jury not to consider any testimony ordered stricken by the court.

8. ———: RULES OF EVIDENCE: REVIEW. In every prosecution, the accused is put upon trial under rules of evidence of the state's own creation; and reviewing courts should not hesitate to correct any prejudicial violation of such rules, or to cancel a conviction so obtained.

ERROR to the district court for Thayer county: ROBERT M. PROUDFIT, JUDGE. *Former judgment of affirmance vacated, and judgment of district court reversed.*

J. T. McCuistion, Herman G. Schroeder and *J. W. James*, for plaintiff in error.

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

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

HOWELL, J.

This is a rehearing in case reported in 115 Neb. 621. For sufficient reasons the opinion there reported is set aside. Plaintiff in error will be referred to as defendant and defendant in error as the state. Defendant was convicted and sentenced on one of three counts, each charging, on separate dates, a statutory crime committed upon Mary Leach, a 15-year-old girl. There are nine assignments of error, four of which relate to instructions Nos. 1, 5, 9, and 10. No. 1 is said to be erroneous because the trial court submitted all three counts. In the light of instruction No. 12 telling the jury it could find defendant guilty of only one count, we see no error there. Until verdict of guilty, it

could not be known to which count their verdict would relate.

If the evidence should show the girl to be chaste before having relations with defendant, and became unchaste by virtue of his acts, the jury might find him guilty of one and not of the other two. It might find him not guilty of the first and second counts and guilty of the third. All depends upon which particular count guilt might be found.

As to instructions Nos. 9 and 10, it is difficult to see wherein they are prejudicially erroneous in themselves. When they, and other instructions, are considered in connection with certain testimony permitted to be received, a difficult question arises which we will notice later. The insufficiency of the evidence will not be considered, in view of our conclusions on the erroneous admission of testimony. Palpable error is not discovered in admission of evidence prior to the cross-examination of defendant. No reference was made to divorce proceedings between defendant and his wife, or improper conduct toward another woman, until defendant was being cross-examined.

Over objections, the county attorney, on cross-examination, repeatedly asked defendant about a petition for divorce previously filed by him, the different charges therein lodged against his wife, his purpose of instituting the suit, and its termination by amicable adjustment. As there had been testimony that defendant contemplated marrying the girl when he could get rid of his wife, such evidence, if in proper order and time, might not be said to constitute reversible error, it being relevant, as corroboration, in an attenuated way, of the girl's testimony as to intimacy between her and the defendant. However, such evidence spent its legitimate force when showing that the defendant sought to rid himself of his wife by divorce, without parading before the jury charges which were cruel and evilly disposed. On another trial this excess zeal may not be shown, and we make no further comment, further than it accentuated later and more certain error.

The same applies to defendant's cross-examination when

asked if he had not told a woman witness that he would give her a fine silk dress if she would help him get his wife to Hastings so he could get a divorce. Defendant was asked by the county attorney if he had not, on a certain occasion, gone to the home of a Mrs. Redinger and there conducted himself in a highly improper sexual manner toward her, offering her $5, putting his hand on her person and pushing her around the room. After a denial of all such transactions, the county attorney twice asked defendant if he was "as sure of that as the other things you have testified to,"—"as sure of everything else that you have testified to here." These were improper questions and should not be put to any witness.

The apparent purpose of such questions is to lay a foundation for false impeachment argument to the jury upon an immaterial matter, to prove the defendant unworthy of belief in other matters testified to by him, vital to his liberty. Having interrogated the defendant about his conduct toward Mrs. Redinger, on cross-examination, and getting his denial, Mrs. Redinger was called on rebuttal and testified to shocking conduct of the defendant toward her.

The crime with which the defendant stood charged has three elements—(a) carnal knowledge, (b) of a girl under 18 years of age, (c) not having been previously unchaste. Neither motive, intent, nor guilty knowledge is involved. Only in crimes involving motive, intent, or guilty knowledge may evidence of independent crimes, wholly disconnected with the one charged, be received. *Leedom v. State,* 81 Neb. 585, is urged as affording ground for reversal. It is not in point. Leedom was charged in one count with a similar crime committed July 20, 1906, and divers subsequent times, without fixing the dates. Counsel for defendant contends some jurors may have found the defendant guilty on one charge, and others on another. The fact that the jury, in the instant case, rendered a verdict of guilty on three counts was corrected, by the jury itself, when instructed by the court to return to the jury room, by

finding guilt in the first count and no guilt on the second and third.

We now come to the application of the evidence to several instructions of the court. Instruction No. 9 told the jury that the defendant "cannot be convicted upon the uncorroborated evidence alone of the injured female, if you find it is without corroboration by the facts and circumstances shown in the case." Then followed, "corroboration means to confirm," and it may be by "any facts and circumstances confirming the testimony of the injured female." Laying to one side whether this is a sufficient definition, we come to instruction No. 11 relating to the defendant as a witness. The jury were given the usual cautions as to disregarding defendant's testimony for no other reason than that he is defendant, and told it would not be required "to receive" his evidence "as true." Thus, the instruction permitted discrediting the defendant by any testimony the court had received. No. 15 told the jury they were the sole judges of the credibility of witnesses and that they should take into consideration, among other things, "all the evidence and facts and circumstances proved tending * * * to contradict" the defendant, *i. e.*, if the jurors believed Mrs. Redinger's testimony as to the episode related by her—denied by the defendant—they might discredit all of his testimony.

The instructions themselves are not bad, but the testimony referred to is accentuated by what the court said. The court told the jury his instructions were binding. Without prolonging this discussion, we call attention to *Matters v. United States*, 244 Fed. 736, a prosecution for violation of the national banking law, where the insolvency of Matters was a material issue. Evidence was introduced that Matters got insurance money from a widow, which came from her husband's life insurance, which Matters could not repay. The court said Matters was not on trial for defrauding a widow. At page 739, the court said: "Conceding the insolvency of Matters was material, * * * it did not justify the admission of the evidence," because "the

primary effect of the evidence was to show that Matters had attempted to defraud Mrs. Johnson out of her money." It was said further: "The effect, if any, of the evidence upon the real issue in the case being tried was so incidental and small that it would be lost, so far as the jury was concerned, in the presence of those features of the testimony to which we have adverted. The introduction of the evidence in our judgment prevented a fair trial."

It has been long recognized that the charge of rape is one of the most difficult to defend. A charge of statutory rape inspires resentment as almost no other charge can do. The fact that the verdict was guilty on three counts, in direct violation of the instructions of the court, is not without significance. To charge an infamous crime is no proof thereof, although a mob-spirit is often aroused thereby. Tried as this defendant was, a small amount of friction could easily fire the minds of jurymen. In effect, the state's attorney, at oral argument, with commendable frankness, conceded error in the admission of the testimony indicated, unless this court will almost revolutionize tried and wise rules relating to the introduction of evidence in criminal cases. We are not inclined to do this. The evidence is sought to be justified by the fact that defendant put his character in issue. There was no evidence offered by the state on that point, except specific instances of dereliction, which was improper.

Eberly, J., in his report for rehearing, called attention to *Nickolizack v. State*, 75 Neb. 27, which, in almost every essential, is like this case. The syllabi in the *Nickolizack* case are decisive, and, as pointed out by Eberly, J., are a reannouncement of *Leahy v. State*, 31 Neb. 566, and *Myers v. State*, 51 Neb. 517, and cited in *Flege v. State*, 93 Neb. 610, 626, and *Abbott v. State*, 113 Neb. 524, 527.

For the reasons stated, the former opinion of this court will not be adhered to, and the conviction and sentence of the defendant will be reversed.

REVERSED AND REMANDED.

GOSS, C. J., dissents.

ROSE, J., dissenting.

In setting aside the conviction of defendant, who was found guilty of rape upon a female child, the majority in their opinion departed from correct rules of law and mandatory requirements of valid statutes enacted by the legislature to protect chaste female children and society at large from the outrages of ravishers.

Before the legend that "The child is the pillar of the State" was penciled in the mural decorations of the new capitol, the legislature by statute denounced the ravishment of a female child, not previously unchaste, as rape; by statute permitted a conviction for rape upon the uncorroborated testimony of the ravished victim; by statute required the supreme court in reviewing a conviction for ravishment to disregard technical errors not resulting in a miscarriage of justice.

The power to dissent imposes upon me the judicial duty to make the public records of the supreme court show that the opinion and the judgment of the majority violate statutes and rules of law essential to the administration of justice and to the protection of children and the public at large from the appalling acts of ravishers. This duty requires a partial outline of competent evidence and necessary conclusions that convinced the jury and the trial court of defendant's guilt beyond a reasonable doubt.

The date of the felony charged was January 25, 1926. From August, 1925, to March, 1926, prosecutrix, the ravished female child, made her home with her parents, two sisters and four brothers on a Thayer county farm managed by defendant. In the meantime her family resided in a house on the farm and the defendant resided with them or in another house on the same farm. The father of prosecutrix and her oldest brother were in the employ of defendant, working on the farm, each receiving stipulated wages. Defendant mingled with the members of the child's family. Prosecutrix was 15 years of age December 21, 1925. She was therefore 35 days older January 25, 1926, the date of the ravishment. She testified positively

to facts showing that the felony charged was committed at night on the latter date in her own home where defendant was a guest, while all the members of the family, except herself and her bedfast mother and two infants occupying beds in one of the rooms, were absent from home in defendant's automobile. The evidence showed that prosecutrix was ravished and the family physician testified at the trial that she was pregnant. Evidence of her chastity before ravishment to which she testified was uncontradicted. The opportunity to commit the felony was shown. For several months defendant and prosecutrix were at times alone on trips in an automobile. Defendant himself so testified. Disinterested witnesses saw him embracing and kissing her in a room in her own home. Though a married man with a divorce suit pending, he told others prosecutrix was to be his wife when he got rid of his present one. These facts were shown by competent evidence regularly and properly admitted. It was impossible for defendant to be an honorable suitor. He was a married man 58 years of age. He was bound by impulses of decent manhood, if he had any, to protect this child from his seductive arts and from ravishment, she being too young to consent to the felonious act. He had the privileges of her home. Her father and a brother were his employees. Her mother baked bread for him sometimes. All members of her family who could have protected her were absent. The direct evidence of the ravishment and the competent corroboration were complete and convincing beyond the possibility of reasonable doubt. No jury fit for service would have reached any other conclusion, even if there had been no deviation from technical procedure.

If competent testimony bearing the stamp of truth is permitted to make an honest appeal to reason and judgment, defendant not only intentionally planned and designedly committed the felony charged, but he connected this child by a ravisher's blood with the immortality of human life and by his denial of guilt added perjury to his other infamies.

The statute under which defendant was prosecuted and convicted provides:

"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, and shall be imprisoned in the penitentiary not more than twenty nor less than three years." Comp. St. 1922, sec. 9551.

Neither this nor any other statute of Nebraska requires corroboration. Statutory law is to the contrary. The majority not only follow erroneous decisions requiring corroboration but destroy proper means of corroboration. To hold contrary to statute that corroboration is necessary and by judicial utterance strike down legitimate means of corroboration is to modify, amend or partially repeal the statutory protection of chastity. The majority limit or modify and partially repeal the statute and usurp and exercise legislative power. To that extent the will of the legislature is defeated. A statute violated by the decision is in this language:

"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 or to be passed by the legislature of this state, is adopted and declared to be law within the state of Nebraska." Comp. St. 1922, sec. 3085.

This statute adopted that part of the common law permitting a conviction for rape on the uncorroborated testimony of the prosecutrix. The legislature made that part of the common law adopted the law of Nebraska. What part of the common law applicable to this case was adopted? A profound lawyer in the realms of philosophy and history, writing on the law of evidence, said:

"At common law, the testimony of the prosecutrix or injured person, in the trial of offences against the chastity of women, was alone sufficient evidence to support a con-

viction; neither a second witness nor corroborating circumstances were necessary." 3 Wigmore, Evidence, sec. 2061.

This principle of the common law is as vital a part of the statutory law of Nebraska as if it had been inserted bodily in a Nebraska statute duly enacted. It is consistent with every principle of government and statute. The supreme court of this state in reviewing a conviction for rape once correctly ruled, following the law stated by Wigmore:

"Where the jury are satisfied beyond a reasonable doubt from the testimony of the prosecutrix alone of the guilt of the accused, they will be justified in returning a verdict of guilty." *Garrison v. People,* 6 Neb. 274.

In a later case, through obvious mistake, contrary to the earlier decision, the following appears in the syllabus:

"At common law, where the accused was not permitted to testify in his own behalf, the testimony of the prosecutrix might be sufficient to warrant a conviction for rape; but under the statute, where the accused avails himself of the right to testify and clearly and explicitly denies the commission of the offense, there must be testimony corroborating that of the prosecutrix to authorize a conviction." *Mathews v. State,* 19 Neb. 330.

In the opinion in that case reference was made to utterances of Lord Chief Justice Hale in 1680, but omitting and violating part of what he then said:

"The party ravished may give evidence upon oath and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury, and is more or less credible according to the circumstances of fact that concur in that testimony. * * * It is one thing whether a witness be admissible to be heard; another thing, whether they are to be believed when heard. It is true, rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered that it is an accusation easily to be made and hard to be proved; and

harder to be defended by the party accused, though never so innocent." 1 Pleas of the Crown, 633, 635, quoted in 3 Wigmore, Evidence, sec. 2061.

When those principles were announced in 1680, a person accused of rape in England could not testify as a witness in his own behalf. He could then be convicted on the uncorroborated testimony of his victim. If found guilty by the jury and sentenced by the court, his punishment was death. No wonder the Lord Chief Justice, under the old system and the law as it then stood, said that the charge of rape was hard to defend. In the present era under entirely different laws and conditions, accused, if guilty, does not suffer death as punishment. Here and now he may have compulsory process to bring witnesses into court to testify to his good character and to his innocence. He is permitted to testify in his own behalf. The law surrounds him with the presumption of innocence until a verdict of guilty is rendered. He may ruin an innocent little girl for life and escape with imprisonment for three years. The jury are not permitted to believe the child's truthful story of the ravishment, if uncorroborated, but they must in that event acquit accused, even if his denial is perjury. Depraved boys may relate perjured stories of the child's previous unchastity, but a chaste woman, called by the state as a witness for the purpose of corroboration, cannot testify to a specific instance of an attempt by defendant to ravish such witness at a time when his relations with prosecutrix indicated an intent to ravish her. Accused may employ to defend him a technical expert in criminal law with judicial authority to bring into a modern court the awful Specter of Antiquity representing "Decapitated Innocence" and in emotional oratory make the imaginary bones of the ghostly apparition rattle in metaphor like a molested skeleton in an ancient catacomb, while the prosecuting attorney may anticipate censure from the supreme court if, in representing the ravished child and the decent public, he departs from the attitude of obsequious demeanor and impartiality that seem to be required

in the present case and in the cited case of *Flege v. State*, 93 Neb. 610.

The opinion in the case of *Mathews v. State*, 19 Neb. 330, and the cases following it, including the present case, not only violate statutory law, but they contradict a fundamental principle announced by Lord Chief Justice Hale when he expressed the view that the charge of ravishment was hard to defend. In the same connection he said the credibility of prosecutrix as a witness "must be left to the jury." 1 Pleas of the Crown, 633, 635, quoted in 3 Wigmore, Evidence, sec. 2061. The majority opinion requires the trial judge in his rulings on evidence to invade the province of the jury. The jury are not allowed to be judges of credibility and cannot give full credence to the testimony of prosecutrix, however truthful, unless corroborated, but, if uncorroborated, they are bound to acquit defendant upon his own uncorroborated testimony that he is innocent, though deserving no credence whatever. This amazing invasion of the province of the jury not only discredits prosecutrix in advance, but gives to accused's denial, though perjured, the effect of truth, if he committed the felonious act under circumstances destroying every means of corroborating her.

In *Mathews v. State*, 19 Neb. 330, the destructive departure from statutes and cherished precepts may be attributable to mistakes, but the opinions following the rulings in that case, with knowledge of the mistakes, amount to the usurpation and exercise of legislative power by the judiciary. Repetition has not sanctified the original heresies or made them into laws. The statutes are unamended and unrepealed and are still laws. The repeated decisions that violate them are not laws and should be overruled, one and all.

The supreme court of Oklahoma pointed to Nebraska as perhaps the only state in the Union requiring corroboration, where that rule had not been adopted by statute. *Brenton v. Territory*, 15 Okla. 6. In a later case the criminal court of appeals said:

"It is true that there are some decisions based upon special statutes which hold that corroboration of the prosecutrix is necessary, but, in the absence of such a statute in this state, we could not agree to establish a rule so repugnant to justice, constituting such a shame upon our civilization; so insulting to decency and so pregnant with danger to weakness and virtue." *Reeves v. Territory*, 2 Okla. Cr. Rep. 351.

Another violated statute declares:

"No judgment shall be set aside, or new trial granted, or judgment rendered, in any criminal case on the grounds of misdirection of the jury, or the improper admission, or rejection of evidence, or for error as to any matter of pleading or procedure, if the supreme court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred." Comp. St. 1922, sec. 10186.

There was no miscarriage of justice in the trial court. Any other verdict than the one rendered would have caused a miscarriage of justice. The verdict would have been the same had the trial been conducted in all respects according to strict technical rules.

After requiring the trial court to violate the statute permitting a conviction without corroboration of prosecutrix, the majority proceeded to destroy proper means of corroboration by eliminating the element of defendant's criminal intent, by preventing proof of specific instances showing accused's propensity to ravish, by adopting rules of evidence at variance with correct principles of law, and by indirectly overruling former opinions based on reason and justice. Before the present decision was rendered, the law applicable here was declared to be:

"Opportunity and disposition on the part of the defendant to commit the crime will furnish sufficient corroboration." *Dawson v. State*, 96 Neb. 777; *Whetstone v. State*, 99 Neb. 469.

Under court-made rules requiring corroboration, "opportunity and disposition" were parts of the state's case in

chief. The state had a right to, and did, prove those corroborating facts. In defense defendant testified to the effect that he took the child with him in his car to accommodate her and her parents; that his remark as to making her his second wife was a joke; that his suit for a divorce was a ruse to get his wife back. He therefore testified to his good intentions and disposition in his attitude toward the child. The necessity of showing the contrary arose on rebuttal. For that purpose the specific instance of his indecent assault upon a married woman was competent and proper from every standpoint in ascertaining the truth. It tended to show a disposition and intention to ravish. The previous chastity of the child was in issue. To disprove her testimony that she was chaste before defendant ravished her, proof of specific instances to the contrary was admissible under the authority of *Woodruff v. State*, 72 Neb. 815. By analogy specific instances apply to one situation as well as to the other. The state and the members of society as a whole are entitled to the same rules of evidence as defendant, unless equality before the law is a farce. Improper relations of the parties at other times are proper subjects of inquiry according to the following precept:

"In the prosecution of a party for rape upon a female child under the age of consent, testimony as to improper conduct on the part of the defendant, at other times than that charged, with the same child and of the same character named and set out in the information is properly received." *Evers v. State*, 84 Neb. 708.

To prevent the reversal of a conviction for excessive cross-examination not affecting the verdict was one of the very purposes of the legislature in requiring the supreme court to disregard harmless error. Comp. St. 1922, sec. 10186.

The holy attributes of sex that perpetuate human life, like the love of a kind mother, came out of the bosom of God as pure and white "as the down on an angel's wing." It is no fault of the legislature that administration of the

statute to protect chastity has fallen into utter disgrace.

I dissent from the entire opinion of the majority. I adhere to the overruled decision affirming the conviction in *Abbott v. State,* 113 Neb. 517, and in *Swogger v. State,* 115 Neb. 621.

Note—See Criminal Law, 62 L. R. A. 228; 48 L. R. A. n. s. 238; 22 R. C. L. 1204; 14 L. R. A. n. s. 689; 8 R. C. L. 210; 2 R. C. L. Supp. 575; 4 R. C. L. Supp. 535.

PETER P. KLEINSCHMIDT V. STATE OF NEBRASKA.

FILED MARCH 7, 1928. No. 26101.

1. Criminal Law: ADMISSION OF INCOMPETENT EVIDENCE. Unless it can be said, with reasonable certainty, that irrelevant and incompetent evidence received upon the trial of a criminal case is not so prejudicial as to deprive the defendant of a fair trial, a conviction secured by such evidence will be set aside.
2. ———: LARCENY: EVIDENCE OF SEPARATE OFFENSE. A defendant put on trial for stealing pigs, who, together with his wife, become witnesses for the defense, both of whom upon cross-examination are asked if each had not, at a prior time, been convicted of, or pleaded guilty to, selling intoxicating liquors, or of possession of a still, to which, over objection, they answer in the affirmative, has not had a fair trial, and a conviction thus obtained will be set aside for prejudicial error.

ERROR to the district court for Cedar county: MARK J. RYAN, JUDGE. *Reversed.*

H. E. Burkett, for plaintiff in error.

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

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and HOWELL, JJ., and BROADY, District Judge.

HOWELL, J.

This is a proceeding in error to the district court for Cedar county. Peter P. Kleinschmidt was convicted of

stealing some pigs from a man by the name of Bacon who lived several miles from the home of the accused. He was given one year in the penitentiary. When this case was argued and submitted, only three assignments of error appeared in the brief of plaintiff in error. Since that time he has been permitted to file another. Only the last error assigned will be considered, the other three being undeserving.

The accused went on trial for stealing 20 pigs belonging to Bacon. On a day stated, Bacon left home about 9 o'clock in the forenoon, returning about 5 o'clock on the evening of that day. During the interval the pigs were stolen. No one witnessed the theft. No one saw the accused within from 1½ to 2½ miles of the Bacon premises. No witness saw the pigs in possession of accused on that day, unless it be the wife, and one or two other witnesses who were probably friends and associates of the accused, all of whom said the pigs were brought to the premises of accused by one Mabis. Some days later the sheriff and Bacon went to the home of accused and there located the pigs. The accused gave a most fantastic and highly improbable explanation of his possession.

Other facts and circumstances were shown upon the trial. The conviction is based entirely upon circumstantial evidence. The defense was that the accused purchased the pigs from Mabis about noon of the day they were stolen. At the trial the accused repudiated his explanation as to how he got the pigs and testified that he bought them from Mabis. On cross-examination the record shows the following:

"Q. Are you the same Peter P. Kleinschmidt who was convicted, or plead guilty, in this court for trafficking in liquor about two years ago; are you the same fellow? Mr. Burkett: Objected to as being incompetent, irrelevant and immaterial. Overruled; to which defendant excepts. Q. Are you? A. Yes, sir. Q. You are the same guy, are you? A. Yes, sir."

The accused called his wife to testify in his behalf, who

said that she was present when Mabis brought the pigs to her home, at which time Mabis told her he had bought the pigs. They were unloaded at the place of accused. On cross-examination she testified as follows:

"Q. Are you the same Ida Kleinschmidt who was convicted in this court about two years ago for having a still in your possession and having intoxicating liquors? A. Yes, sir."

The fourth assignment of error sets out the testimony, objections and answers of Peter P. Kleinschmidt, as first above quoted. There was no objection to the question and answer, copied above, as to Mrs. Kleinschmidt. Accused had already testified, and similar testimony was admitted as to him over objection. So, it may be said, counsel for defendant yielded to the ruling of the court and, for that reason, made no further objection to that class of testimony. It is thought by some that section 10186, Comp. St. 1922, prohibiting the setting aside of judgments in criminal cases for "misdirection of the jury," "improper admission or rejection of evidence," if "no substantial miscarriage of justice has actually occurred," prevents a reversal of the conviction in this case. This section has no application where the province of the jury will necessarily have to be invaded, or, stated in another way which is more acceptable to some of the court, where the province of the jury is prejudicially invaded.

Article I, sec. XI, of the Nebraska Constitution, provides that, in all criminal prosecutions, the accused shall have the right to a fair trial by a jury. A jury consists of twelve qualified persons aided by a judge learned in the law to give directions and guidance to the trial. The judge determines for the jury what evidence it may consider and what law governs the same. When the judge admits evidence, he invites the jury to consider the same; and when he tells the jury what the law is, the jury are bound to accept it as final. The admission of immaterial evidence of a harmless nature may be of no consequence. An instruction that is technically faulty, but which clearly does

not mislead the jury, will not ordinarily prejudice the accused. Misconduct of the prosecutor, tending to prevent a fair trial, may be overcome by timely denunciation by the court. The subsequent striking of prejudicial testimony, accompanied with adequate directions by the court telling the jury not to consider it, may well be said to prevent a miscarriage of justice and a substantial wrong. Other instances, affording ample room for the application of the section, might be stated. That section does not mean that this court is to make itself a tryer of fact, contrary to the Constitution preserving trial by jury. When the jury have been improperly directed relative to the issues being tried upon testimony that is relevant, and slight and immaterial errors occur which may be said with some degree of certainty did not affect the verdict, said section is applicable and controlling. In other respects the Constitution controls.

In speaking of the federal Constitution Justice Day, in *Weeks v. United States,* 232 U. S. 383, 392, says: "This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all intrusted under our federal system with the enforcement of the laws." And in speaking of the tendency to execute the criminal laws by violating the Constitution in order to "obtain conviction," says that such "should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." See *Marron v. United States,* 48 Sup. Ct. Rep. 74.

It has become somewhat fashionable to slur the courts for allowing criminals to escape through technicalities. If it be a technicality to guard the constitutional rights of our people by the use of the sword, then may it be truly said that courts engaged in the same efforts may be too technical. The oppressions out of which our system of constitutional government grew did not originate here, but the memory of them was brought from over the seas by those who understood the reasons for their coming, and who

fought and won the manly estate which we have inherited. The courts are established to see to it that the saying, "It is only three generations from shirt sleeves to shirt sleeves," shall not be paraphrased into "It is only a few generations from oppression to oppression."

In *Dunlap v. State, ante,* p. 313, being a prosecution for "the unlawful sale of intoxicating liquor," this court held that it was reversible error for the prosecutor to inquire of the defendant, on cross-examination, while he was a witness in his own behalf, "if he had ever pleaded guilty of unlawful possession of intoxicating liquor," and that, because of such inquiry, "the defendant was denied a fair and impartial trial." The case at bar is much stronger than *Dunlap v. State.* It might be argued with some force that prior traffic in intoxicating liquors might have some relation to the subject-matter of a prosecution for the illegal sale thereof. Through no artifice, however contrived, can bootlegging be projected into the crime of hog stealing.

It is unfortunate that the prosecuting attorney, in his zeal, overstepped the line of proper cross-examination of both the defendant and his wife. There is no relation whatever between crimes against the liquor law and the crime for which defendant was being tried. We have held so often that evidence of independent crimes is inadmissible, in cases of this character, that we feel it our duty to admonish prosecutors to refrain from injecting such error into the court record. The evidence is wholly circumstantial, and while sufficient to take the case to a jury, it should be without the poisonous influence of entirely immaterial and incompetent testimony. The people of this state have voted the legitimate traffic in intoxicating liquors out of existence because of the baneful effect of the saloon. There was a strong sentiment against licensed saloons which is more pronounced against the bootlegger. It would be difficult to secure a jury of twelve men anywhere in the state, some of whose minds would not revolt against a convicted bootlegger. If, as in this case, both the defendant and his wife appear to be bootleggers, the tendency

is to at once denounce them as mere trash. It would amount to almost certain impeachment of both as witnesses in a manner contrary to law, which defines with absolute certainty the proper method of impeaching witnesses. The judgment of the district court is reversed and the cause is remanded for a new trial.

REVERSED.

JOHN HILLER V. STATE OF NEBRASKA.

FILED MARCH 7, 1928. No. 25739.

1. **Criminal Law:** INSTRUCTIONS. The court is permitted to select portions from the section in the statute in describing the crime charged, provided he includes all those parts which relate to the facts in the case on trial, and it is proper for him to omit therefrom the penalty provided by statute, as the punishment, if any, to be given the defendant is solely within the discretion and duty of the court and with which the jury have nothing to do.
2. **Mayhem.** The crime of mayhem is committed whenever any person shall wilfully, unlawfully and purposely disable any limb or member of any person, with intent to maim or disfigure such person.
3. ———: INSTRUCTIONS. A poison may be defined as any substance which, when introduced into the system, either directly or by absorption, produces violent, morbid or fatal changes or which destroys living tissue with which it comes in contact. The court committed no error in referring in the instructions to sulphuric acid as a poison.
4. ———: ———: REASONABLE DOUBT. The instruction on "reasonable doubt" set out in the opinion is *held* to be free from reversible error.

ERROR to the district court for Dawson county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

James E. Addie and *T. M. Hewitt*, for plaintiff in error.

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

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON and EBERLY, JJ., and PAINE, District Judge.

PAINE, District Judge.

John Hiller, the plaintiff in error, hereinafter called the defendant, was found guilty by a jury in Dawson county, Nebraska, of the commission of the crime of mayhem, and was sentenced to not less than five years nor more than seven years in the penitentiary.

The county attorney filed an information against John Hiller and John Claus and charged them with feloniously throwing sulphuric acid upon the limbs of one Mary Ashley, a sixteen-year-old girl, with the intent to maim and disfigure her. The said John Claus pleaded guilty, and testified against his codefendant, who denied any connection whatever with the crime.

The bill of exceptions in this case consists of more than 400 pages of evidence, and only a brief summary of the salient facts will be given in this opinion. The defendant, a single man, was 32 years of age and had but one arm, and lived near the family of Mary Ashley for a number of months, and at Christmas, 1924, had given her a skating suit of a cap and sweater. He had pitched horseshoes and played croquet with Mary and the members of the family upon frequent occasions. In October, 1925, the father of the girls had advised him not to be around the girls so much, and the defendant stopped calling on the girls and soon moved into another part of the town of Cozad. John Claus was about 18 years of age and had been acquainted with Mary Ashley, who was injured, for only two weeks prior to the time of committing the crime, and testified that he knew her only by sight and had never kept company with her nor escorted her home.

About five days prior to the date of the crime charged in the information, when Mary Ashley and her sister were going through the park immediately after leaving a church service in the evening, John Claus and his brother, Philip Claus, 14 years of age, met them and threw sulphuric acid upon Mary and it burned her hand, but not seriously, and turned her plush cloak red in the spots where it struck the coat. John Claus testified that on this occasion the

defendant had accompanied the two brothers down to the Christian church and had furnished them the syringes and had filled them with sulphuric acid, and that then the defendant went over to the grandstand in the park with Alex Kiser and waited until the act was committed, and immediately after the acid had been squirted upon Mary Ashley the Claus brothers met the defendant and Kiser about half a block away. John Claus handed the defendant his syringe and the defendant said, "Why didn't you empty it on her?"

There is more conflict in the evidence as to what happened on Sunday night, April 25, 1926. John Claus, the accomplice, testified that he met the defendant and drove with him and others to Lexington in the afternoon, returning between 6:30 and 7:00 p. m.; that they went to Louie Hiller's house and the defendant got the syringes out from under a chicken coop where he had hidden them, and that he and the defendant started to clean them out and John Claus broke the one he was cleaning; that the defendant said that he had much stronger stuff to put in, and filled the remaining syringe from a bottle and then handed it to John Claus, who refused to take it. Claus testifies that the defendant then said to him: "You better now; you are offered $30 for doing this and if you don't you will get your neck broke." That the defendant told him to throw it on Mary Ashley or any of the Ashley family, and he went over to the Christian church close by and waited a half hour, standing beside a tree, and when the people came out of church he squirted this stuff from the syringe upon Mary Ashley; that the members of the Ashley family immediately accused him of doing the act, and he denied it until later in the evening when he had been taken into custody by the chief of police. He testifies that he did not know what its effect would be except that the defendant had told him that it would eat their clothes off; that he had no personal ill will toward any member of the Ashley family; that he and his brother and the defendant were immediately arrested that night and taken to Lexington and put in the county jail; that upon being jointly

charged in this same complaint with the defendant he pleaded guilty in the county court and later pleaded guilty in the district court and that he had been promised no immunity from punishment. Alex Kiser, a sixteen-year-old lad, who was with Claus and the defendant on several occasions, corroborated the testimony of John Claus upon the vital points in the case. Philip Claus, fourteen years old, also corroborates the testimony of his brother John.

The defendant, John Hiller, took the stand in his own behalf, and stated that he had known the Ashley girls ever since they were small children; that he was ofttimes at their place, but after he had moved away from that part of town he did not visit them so often. He denied the testimony of all others who said they had seen him in front of the church before the services started, and also denied that he had driven past the Ashley home in his car several times during the Sunday afternoon that the offense was committed. He admitted that he had been to his brother Louie Hiller's house Sunday evening, but that he went there solely for the purpose of getting a mouth-harp and that he did not meet John Claus there or at any time that evening before his arrest; that he did not know anything about the acid being thrown upon Mary Ashley until two days after he was arrested. He explained that he purchased a six or eight-ounce bottle of pure sulphuric acid for the purpose of recharging a battery in a car that he had traded for the day before, and that he used all of the acid in the run-down battery in that car. He testified that he and his brother George had been in the automobile repair business for many years and were familiar with the use of sulphuric acid in charging of batteries. He denied taking any part in or having any knowledge of the crime charged, and denied making any threats or offering any money to John Claus to commit the act, and in many of these points his testimony was corroborated by several of his own witnesses.

Dr. Charles H. Sheets testified that he treated the wounds immediately after the act was done; that there

were several burns upon the limb of Mary Ashley, and from about the knee area to the ankle it looked as if it had been painted with ink; that the black silk hose she wore had been entirely dissolved where the acid struck it, and that part of her shoe was charred by the sulphuric acid burns; that he treated it with ammonia and afterwards boric acid solution, and that it was slow in healing; that the outside skin was entirely charred and dissolved away, and that later on he had been compelled to cut out a part of the disintegrated tissue; that the acid caused a sort of dry gangrene which had to be removed. The witness pointed out to the jury three distinct scars, the deepest one being about four inches below the knee. In pointing out the injury Dr. Sheets testified that one scar was two and a half to three inches long by an inch and a quarter to an inch and a half wide, and it was taking on a connecting tissue growth, and stated to the jury: "We have here what we call a telloid growth, which continues to grow and sometimes requires X-ray treatment to clear up, and requires cutting out of the scar tissue." He stated that the skin which covered the scar was a very delicate tissue and does not have the resisting qualities of natural skin; that any injury would be very apt to break it down, and that poor circulation later in life would do that, and that if this tissue broke down it would result in a running sore; that he had continued to dress the wounds for a period of six months after the injury.

Upon the evidence produced the jury returned a verdict of guilty against the defendant, John Hiller.

It is impossible to review and discuss all of the eighteen grounds for reversal found in the brief of the defendant. The right of the trial judge to give a portion of the section of the statute setting out the crime is questioned, and defendant insists that it must be given in its entirety.

The defendant in his brief urges strongly that the facts in this case do not warrant a conviction of anybody under the crime of mayhem.

This crime is set out in section 9549, Comp. St. 1922,

which reads as follows: "Whoever shall willfully, unlawfully and purposely cut or bite the nose, lip or lips, ear or ears, or cut out or disable the tongue, put out an eye, slit the nose, ear, or lip, cut or disable any limb or member of any person, with intent to murder, kill, maim, or disfigure such person, shall be imprisoned in the penitentiary, not more than twenty years nor less than one year." And the defendant argues that this section describes a crime which must deprive the injured party of his members or render him less able in fighting, and that the injury must always be a permanent injury, and cites definitions from Bouvier's Law Dictionary in support thereof.

It is admitted that mayhem at common law was defined as the violently depriving another of the use of such of his members as may render him less able in fighting, either to defend himself or to annoy his adversaries (4 Blackstone, *205) and at ancient common law was punished by a forfeiture of member for member and was deemed a felony. *Commonwealth v. Newell,* 7 Mass. 245.

The trial judge did not confuse the jury by giving to them the entire section quoted above, but in instruction No. 4 he said:

"The jury is further instructed that the Criminal Code of Nebraska defines the offense with which the defendant is charged in the second count of said information. So far as is necessary for the purpose of this case, the statute is, in substance, as follows: 'Whoever shall wilfully, unlawfully and purposely disable any limb or member of any person, with intent to maim or disfigure such person, shall be punished as by law provided.'"

This gave the jury all of that part of the section of the statute which was applicable to the case on trial and naturally did not give the jury the punishment to be meted out in case of a verdict of guilty, for the punishment is solely within the duty of the court, and not for the consideration of the jury. *Strong v. State,* 63 Neb. 440; *Holmes v. State,* 82 Neb. 406; *Simmons v. State,* 111 Neb. 644.

In this case the essential facts to sustain a conviction of

mayhem must show, first, an injury; second, malice on the part of those perpetrating the crime, and third, an intent to maim and disfigure. Underhill, Criminal Evidence (2d ed.) sec. 359. Let us consider for a moment a case in which these elements are lacking. In the case of *Dahlberg v. People*, 225 Ill. 485, it was held: "One cannot be convicted of an attempt to commit mayhem by destroying an eye with red pepper, there being no other evidence of intent than the throwing of the pepper, and the evidence showing that an eye cannot be destroyed by red pepper, unless it is allowed to stay in the eye longer than it would take to remove it in the ordinary course of events." (80 N. E. 310.)

But in the case at bar we have a scar of considerable size which at the time of the trial was covered with a scar tissue in which was found a telloid growth which would require X-ray treatment and perhaps the cutting out of the scar tissue; that this tissue would always have a poor circulation, and later in life, under conditions normal to a woman, the tissue might be broken down and result in a running sore.

This state of facts certainly justified the court in instructing the jury under mayhem, and warranted submitting to the jury whether the facts showed that the limb would be disabled, maimed and disfigured. The injury suffered was the result of premeditated malice and a clear intent to maim and disfigure the injured part, and the trial court was justified in refusing to submit an instruction of simple assault and battery, believing that the defendant was guilty of the crime of mayhem or nothing.

The defendant objects to that part of instruction No. 7 given by the court which reads: "If the defendant, John Hiller, was aiding and abetting John Claus in throwing the 'poison,' then the acts and doings of John Claus in the throwing of the poison are to be treated by you in your deliberation as the acts of John Hiller in this trial." The defendant maintains that the word "poison" was not mentioned either in the information or in the evidence, and

that such use of the word "poison" was very prejudicial to the defendant.

Poison may well be defined as any substance which when introduced into the system, either directly or by absorption, produces violent morbid or fatal changes or which destroys living tissue with which it comes in contact. Such definition clearly includes sulphuric acid because of the effects which it produces upon the human flesh, and the defendant was not prejudiced by the introduction of the word "poison" into the seventh instruction by the court, in the place of the words "sulphuric acid."

Error is alleged by the defendant because in the definition given upon reasonable doubt, "The court speaks of the same being based upon all the testimony and every part of it, but does not mention the fact that the doubt might arise from the want of evidence." Let us examine the entire instruction No. 8 as given by the trial court, which reads as follows:

"By the term 'reasonable doubt,' as used in these instructions, is meant an actual doubt, one that you are conscious of after going over in your minds the entire case, giving consideration to all the testimony and every part of it. If you then feel uncertain and not fully convinced that the defendant is guilty and believe you are acting in a reasonable manner, and believe that a reasonable man, in any matter of like importance, would hesitate to act because of such a doubt as you are conscious of having, then that is a reasonable doubt, of which the defendant is entitled to have the benefit."

To this instruction the defense takes exception because it does not mention the fact that the doubt might arise from the want of evidence, and cites *Cowan v. State*, 22 Neb. 519, although the instruction given in that case does not entirely support the defendant in its claim. The trial courts of the state have very frequently stated in giving an instruction on reasonable doubt that it was a term well understood but difficult to define, and many of the decisions are reviewed in the case of *Goemann v. State*,

100 Neb. 772, and it is held in that case that reasonable doubt may arise from a want of evidence, thereby adhering to the opinion in *Whitney v. State*, 53 Neb. 287. In the dissenting opinion in *Goemann v. State, supra*, it is stated that the jury should acquit the defendant whether the doubt arises from the evidence, the lack of evidence, or from a conflict in the evidence. However, it is impossible to exclude all doubt in the trial of a criminal case, and the following instruction is often given in the United States district court for Nebraska on this point: "The court will not undertake to define reasonable doubt further than to say that a reasonable doubt is not an unreasonable doubt; that is to say, by a reasonable doubt you are not to understand that all doubt is to be excluded, for it is impossible in the determination of these questions to be absolutely certain. You are required to decide the question submitted to you upon the strong probabilities of the case, and while the probabilities need not be so strong as to exclude all doubt or possibility of error, yet the probabilities must be so strong as to exclude all reasonable doubt." See *Dunbar v. United States*, 156 U. S. 185, 199. While the question is one that has been before this court innumerable times, yet the instruction given by the trial court in this case is very brief and follows in the main several approved forms upon reasonable doubt, and we believe it fairly instructs the jury on this point and is without error. Without doubt trial judges in all parts of the United States have for many years been partial to the instruction upon reasonable doubt given in the very able charge of Chief Justice Shaw in the trial of the homicide case of *Commonwealth v. Webster*, 5 Cush. (Mass.) 295, 320, 52 Am. Dec. 711, and while this instruction is a long one it seems to have been approved by the highest courts in every jurisdiction, and is given at length in the case of *Carr v. State*, 23 Neb. 749; and yet this instruction does not state specifically that the doubt may arise from want of evidence, but simply states, "if there is reasonable doubt remaining."

It is impossible to discuss further the contentions of the

defendant. The jury did not believe the testimony of the defendant, and we cannot set our judgment up against that of the jury who had the advantage of hearing and seeing each witness.

The judgment of the trial court is

AFFIRMED.

IN RE GUARDIANSHIP OF FRED M. DEUTSCH ET AL., MINORS. W. F. MORAN, GUARDIAN, APPELLEE, V. FRED M. DEUTSCH ET AL., WARDS, APPELLANTS.

FILED MARCH 7, 1928. No. 25187.

1. **Guardian and Ward:** ACCOUNTING. There being no bidders at a guardian's sale, and an early sale of the real estate being necessary, at the suggestion of the guardian, one of the wards (then of age) bid the property in and took title thereto, it being understood he should hold it in trust for the wards. Later the purchaser executed deeds in blank and delivered them to the guardian to facilitate a sale. The guardian inserted his own name in the deeds and had them recorded, intending to hold the title in trust until a sale could be made, and thereafter treated the property as belonging to the wards, crediting the rents to them as before, and upon final account tendered reconveyance. *Held*, that under the circumstances the wards were not entitled to an election charging guardian with the value of the property, as for conversion.
2. ———. Record examined, and *held* that the decree of the district court is amply sustained by the evidence.
3. ———. Allowance to guardian for his services reduced.

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

Charles H. Kelsey and *J. J. Ledwith*, for appellants.

Harry S. Dungan, D. W. Livingston, and *W. F. Moran, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, THOMPSON, and HOWELL, JJ., and REDICK, District Judge.

REDICK, District Judge.

Appeal from the district court upon final settlement of a guardian's account. In March, 1916, Mary Deutsch died, leaving as her heirs three sons, Fred, aged 17 years, Al, 15 years, and Eugene, 13 years. May 10, 1916, W. F. Moran, appellee, a maternal uncle, was appointed guardian of the minors, and filed his final report September 27, 1922, which, upon a spirited contest, was finally approved by the county court except as to certain matters. The report of the guardian showed the wards indebted to him as follows: Fred, $1,390.29, Al, $2,364.82, and Eugene, $969.01, but the county court charged the guardian the sum of $13,292.45, of which $12,706 represented the value of certain real estate, title to which the guardian had taken in his own name, and the remainder, $586.45, representing certain rents which the guardian should have received. Deducting the total claims of the guardian, $4,723.95, from the above amount left $8,568.50 found due from the guardian to the minors, distributed as follows: Fred, $3,040.69, Al, $2,066, and Eugene, $3,461.81. The guardian appealed to the district court, and after a lengthy trial a decree was entered finding the wards indebted to the guardian as follows: Fred, $1,390.29, Al, $2,364.82, and Eugene, $969.01, being substantially the amount claimed by the guardian in his final report, and allowed the guardian $1,500 for his services. The wards appeal alleging three errors: (1) In not charging the guardian with the value of the real estate, title to which was taken in his own name; (2) in approving the final report of the guardian as filed in the county court, and (3) in allowing the $1,500 compensation to the guardian.

The record is very voluminous, consisting of over 700 pages with 99 exhibits, and we consider it not only impracticable but unnecessary to set forth in this opinion the evidence in detail, but must content ourselves with a somewhat general statement of the facts as shown by the record and our conclusions therefrom.

We address ourselves to the first assignment, that the

district court erred in not charging the guardian with the value of the real estate taken in his name. The wards claim that by so doing the guardian converted the property and that they are entitled to charge him with its value. The guardian claims that the title was so taken merely for convenience in disposing of the same; that he holds said title in trust for the wards, and tendered conveyance thereof in the district court. The facts giving rise to this dispute are as follows: The guardian's reports all show an indebtedness of the wards to him, and the one of June 15, 1919, exhibited an indebtedness of $5,285.57. This amount was later reduced by corrections in subsequent reports, but in July, 1919, the guardian filed an application in the district court of Adams county for license to sell real estate to pay debts, and license was granted October 11, 1919, to sell, *inter alia*, block 7, Mumaw's addition to Hastings, being the home place where the mother of the wards died, and 18 vacant lots in Frances addition to Hastings. License having been granted, the two properties in question were advertised for sale on June 18, 1920. The guardian and Fred were present at the sale, with others, but no bids were made. The guardian suggested to Fred that he buy the property in so as to avoid the expense and loss of time consequent upon a second offering, and to facilitate a disposal of the property by a private sale. To this Fred agreed, and became the purchaser of the home place at $5,000 and the lots at $3,600. No money was paid, it being the understanding that Fred should hold the title in trust for himself and brothers. The sale was confirmed and the guardian executed a deed to Fred. July 13, 1920, Moran wrote Fred:

"Dear Nephew: Enclosed find three deeds to the property in Hastings. I have not heard from Cunningham since I was out there, but I want to be in a position to turn the deed over to them just as quick as the judge confirms the sale. I have every real estate man in Hastings working on the balance of the property and I want to be in a position to hand them the deed as soon as sales

can be made. Therefore, please go before some notary public and sign and acknowledge deeds and return them to me and I will fill in the consideration and the name of the party when the land is sold."

July 21, 1920, Fred replied:

"Dear Uncle: Your letter of July 13th, in regard to signing the blank deeds, which you enclosed, to the home and five acres, the bunch of lots and the lots Cunningham intends to buy, was received some time ago, but I could not get trace of a notary and therefore had to wait until I got to Alliance.

"I believe keeping the deeds in readiness is the best way to cinch a deal if any buyer should come along, as persons buying such property change their minds with the wind.

"I believe the lots should sell for a minimum of $300 each, and the house and five acres for a minimum of $6,000. The sale of either the house or the lots would place us on easy street, but if a good price could be gotten for the house and five acres after the lots were sold, I believe it would be a good idea to sell because the place is running down."

Two of the lots were sold to Cunningham and are not in controversy, being covered by a separate deed.

After receiving the deeds, blank as to grantee and consideration, Moran, the date not being shown, probably in the fall of 1920, inserted his own name as grantee in the deeds and a consideration the same as in his deed to Fred, and filed them, together with the guardian's deed, March 21, 1921. The guardian claims that this was in accordance with an understanding with Fred prior to the sale, which Fred denies, and claims not to have discovered the fact until the spring of 1921.

This manner of dealing with the sale, while irregular, did not result in any loss or detriment to the wards: It was the desire of all parties that the property be sold as quickly as possible to procure funds for the support and education of the wards, two of whom were attending the state university, and Eugene at a college in Illinois and

other schools. The guardian had paid these expenses from the receipts of the estate as far as possible, but had to piece them out with his own funds and money borrowed at the bank.

The guardian lived at Nebraska City and the wards, when not attending school, were at different places traveling around and employed some of the time at jobs of widely different character; Fred and Al at Antioch and other places, and Eugene in Sioux City, Iowa, Ponca, Oklahoma, and elsewhere. Contact by the guardian with the wards was intermittent and irregular, in fact they were never all together except when getting ready for school in the fall of 1916; and frequently it happened that the guardian did not have their address. Most of the business was transacted by correspondence with Fred, who became of age September 4, 1919; Al reached majority June 18, 1921, and Eugene May 15, 1923. In 1918 or 1919 Eugene went insane and is now in the hospital at Lincoln.

Moran gives as reasons for inserting his name in the deeds, that real estate agents with whom he dealt in an effort to sell the property advised him that purchasers were shy at dealing with deeds in which the consideration and grantee were blank; and, further, that as no money had been paid at the sale, if Fred should claim to own the property, the guardian would have to account for it; also that he would be in position to deliver deeds promptly in case of sale.

After the title was in Moran he dealt with the property the same as before, credited the rents to the wards, and also money received from one Fuller to whom he had made a lease or contract of sale of the home place on monthly instalments. This contract was subsequently surrendered and canceled. Moran and Fred treated the property as belonging to the wards; July 2, 1921, Fred writing to Moran: "This property should either be reconveyed to me or to Al and I or to the three of us, so that the record will be straight." April 25, 1922, Fred wrote about the Fuller contract, saying: "This property is sadly in need of repair and we should dispose of it or we will, of neces-

sity, be compelled to put it in repair." And he wrote again May 15, 1922, asking if Fuller would execute a release and suggesting that they take Madgett Brothers' offer ($5,000 cash) if still open. There was no suggestion of holding the guardian as a purchaser until it was made by the lawyers whom Fred consulted later. This position was maintained until about June, 1922. Moran had written several letters asking Fred to come to Nebraska City and settle up the guardianship matters; he and Al having come of age, Fred promised but never came, but about June 10, 1922, Al went there and spent the day going over the accounts with Moran's bookkeeper and made no objections. Up to this time Al had taken no part in the affairs of the estate, Fred acting for the three brothers. Moran asked that Al and Fred give him notes and mortgages for the amounts he had advanced them since they became of age, Al said he would have to see Fred, and upon leaving took the papers with him. Shortly thereafter, hearing nothing and meeting Al in Lincoln, Moran asked what was their decision, and Al told him that Hastings & Coufal, attorneys at David City, had advised to the effect that as Moran had the title they could hold him for its value and "we are going to hold you for the value of the property, and will settle on that basis." This was the first time any complaint had been made to Moran, or any claim made against him by reason of the property being in his name. Moran was very angry and the fight was on. Moran sued Fred and Al for the amounts he claimed to have advanced since their coming of age and for damages, and citation was procured from the county court requiring Moran to account. The Moran suits are held in abeyance until the determination of this proceeding.

There are many other matters contained in the record which might be mentioned and discussed, but such a course would unduly extend this opinion. The entire record has been read and critically considered, and we conclude that the finding of the district court is fully sustained by the evidence and we adopt it, as follows:

"14. The court finds that the guardian in inserting his name as grantee in said deeds did not do so for the purpose of taking the property for his own, but did so in order to further the purpose for which he as guardian sold the same to Fred M. Deutsch; that is, to have the title to the numerous tracts of land embodied in the deeds so that any sale under consideration might be readily and speedily consummated. Also, that he was justified in so doing for his own protection. He had received nothing from Fred M. Deutsch for the property, and if said Deutsch should insist on holding the property as his own, the guardian would have neither property nor money to turn over to the wards upon final settlement."

We conclude, further, that there is no evidence in the record that the guardian ever intended or attempted to take advantage of his wards in any way; on the contrary, while his conduct of the estate was far from businesslike, and if he had been a stranger might justify a stricter consideration, he seems to have treated the wards as members of his own family, and to have been anxious to aid them in every way to obtain an education and preserve their estate. Moran's appointment as guardian was not of his seeking. He pointed out to the boys that he lived in Nebraska City, that he was a very busy man, and that the properties were a great distance away and could not receive much of his personal attention, but the boys insisted upon his appointment to the exclusion of two other uncles and an aunt. Moran necessarily had to have an agent in Hastings, and he appointed Ingraham, upon whom he had to rely for the renting and collection of the rents of the Hastings property and the farm in Keith county. There is no evidence that the agent was an improper person. The evidence warrants no conclusion other than that the guardian intended to and did hold the title as trustee for the wards, and not as his own. Fred, of full age, who transacted all the business for the wards so understood and treated the situation for nearly a year. Under these circumstances, the wards were not entitled to an election to

treat the transaction as a conversion. The cases cited by appellants are not in point; they were cases of conversion and the property was lost to the estate. Where the purpose was to hold the property in trust for the estate and reconveyance is tendered, there is no conversion.

Complaint is made that three items charged to the guardian by the county court were not allowed by the district court: (1) That all of the rents collected by Ingraham had not been reported, an item of $210.51. The evidence in the county court is not before us and that received in the district court is not sufficient to support a finding on this item. The evidence of Ingraham is that he remitted all that was collected, and of the guardian that he accounted for all received.

(2) That the guardian was negligent in allowing the premises to remain vacant. There is no evidence to support this unless the mere fact of vacancy may be so considered. We think, however, some evidence should have been produced to support the charge of negligence, evidence tending to show that the premises could have been rented by the exercise of reasonable diligence.

(3) That the Keith county land was negligently leased for one-fourth instead of one-third of the crop, an item of $253.44. It appears that the same tenant had been on the land for many years and had always paid promptly. He had been the tenant of the wards' mother and stayed on during the guardianship. We are not prepared to say that a mere failure to raise the rent under the circumstances was such negligence as would warrant a charge of negligence against the guardian, even though, as appears, the tenant subsequently took a lease at one-third crop rental, there being some difference in terms as to delivery of rental share on the farm or at market.

One question remains: the allowance of $1,500 to the guardian for his services. The guardianship extended over a period of six and one-half years. The income from the estate was about an average of $600 per annum. Three growing boys had to be clothed, fed and educated, one of them

not very strong and finally having to be sent to an asylum. The boys worked sporadically in the vacation periods earning some money, but the guardian was compelled to borrow money on his own credit to make ends meet. The real estate was distant from the residence of the guardian several hundred miles, and it was necessary to employ an agent to look after it and collect the rents, the guardian could not give it much personal attention, which was understood, and he took the appointment under protest. He has accounted for all the moneys received. By the exercise of greater diligence he might have received a few hundred dollars more for the wards. Some of his acts were irregular, but done in good faith, and they resulted in no loss to the estate. His accounts were not scientifically kept and his reports irregular. He made reports until notified that his nephews intended to charge him with the value of the Hastings lots as for conversion. He had no intention, nor did he attempt, to take advantage of his wards. After two of the wards arrived at majority, he advanced them money to complete their schooling. The wards had the benefit of his services as a lawyer, for which no charge was made. The estate was managed in much the same way as a father would deal with his own children, rather than as a matter of business, probably because of the relationship of the parties.

We think under the circumstances it would be unjust to deny the guardian all compensation. While the amount allowed is not great; we believe the conditions will not warrant an allowance of more than $1,000 and it is so ordered.

The decree of the district court is affirmed in all things except the amount of allowance to the guardian, as to which it is reversed and cause remanded, with instructions to reduce the same to $1,000.

AFFIRMED IN PART, AND REVERSED IN PART.

HARRY MCINTYRE V. STATE OF NEBRASKA.

FILED MARCH 14, 1928. No. 26010.

1. **Criminal Law: INSTRUCTIONS.** In a prosecution under section 9553, Comp. St. 1922, for cutting with intent to wound, error cannot be predicated upon the failure of the trial court to define the offenses of assault and assault and battery, in the absence of a request so to instruct.
2. *Dolan v. State*, 44 Neb. 643, disapproved in so far as it is in conflict with the opinion herein.

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

Squires & Johnson, for plaintiff in error.

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

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and HOWELL, JJ., and REDICK, District Judge.

GOSS, C. J.

The plaintiff in error, hereafter called defendant, was charged, convicted and sentenced under section 9553, Comp. St. 1922. That section reads as follows:

"Whoever shall maliciously shoot, stab, cut or shoot at, any other person with intent to kill, wound or maim such person, shall be imprisoned in the penitentiary, not more than twenty years nor less than one year."

The defendant was charged with cutting and stabbing Julius Bevins with a knife with intent to wound him. This is one of the several substantive crimes defined by this statute, each a distinct, independent offense of equal rank. *Tasich v. State*, 110 Neb. 709.

Bevins resided at Seneca, in Thomas county. He was the village blacksmith, operated a livery stable, was a deputy sheriff, and was village marshal. On April 14, 1926, between 8 and 9 o'clock in the evening, he went to investigate a report that a brick had been thrown through a restaurant window. In front of the restaurant was a

parked car and the only light in the immediate neighborhood came from the restaurant. Defendant stood near the rear of the car and yelled, or, as defendant testified, "booed", at the officer. The officer did not know who defendant was, but as soon as he was near enough they came to blows and clinched. The officer had the defendant under him on the ground when the officer was cut and wounded in the shoulder and on his knee and finger, scars of which, and the clothing then worn, with holes and dried blood at places corresponding to the location of his wounds, were submitted to the jury at the trial, a year later. Bevins testified that he saw, in the hands of the defendant, when defendant was striking and wounding him, something that looked like a knife. The evidence shows that the officer was the initial aggressor, though he did testify that the defendant first struck a blow at him which glanced off. The defendant denied that he struck the officer first, but testified that the officer first took a "swipe" at him and he threw up his hand and was hit across the hand. The evidence, while disputed in some phases, was sufficient to sustain the verdict.

The defendant challenged the verdict and judgment on various grounds of alleged error; the chief of these is that the court failed to instruct the jury that assault and assault and battery were lesser crimes included in the charge described in the information. The defendant did not request any instruction on these minor offenses; indeed, he requested no instructions whatever. Even if we should assume that there was sufficient evidence of a simple assault or of assault and battery, the failure to request instructions to the jury on these lesser offenses waived error. While this court, speaking through the late Judge Sullivan, questioned whether it is "the duty of a trial court, in other than homicide cases, to instruct the jury upon every crime, or upon the different degrees of a crime, embraced within the facts stated in the information" *(Strong v. State*, 63 Neb. 440); yet this court held, in a mayhem case *(Barr v. State*, 45 Neb. 458), in a robbery case *(Curtis v. State*,

97 Neb. 397), and in a case charging assault with intent to inflict great bodily injury (*Hopperton v. State*, 110 Neb. 660), that, in order to predicate error upon the failure of the trial court to define in his instructions to the jury a lesser offense included in the crime charged, the defendant must request such instructions. In at least two of the three cases cited it was specifically claimed as error that the court did not instruct the jury on the lesser offense of assault and battery. So we may deduce the rule as applied to the case under consideration: In a prosecution under section 9553, Comp. St. 1922, for cutting with intent to wound, error cannot be predicated upon the failure of the trial court to define offenses of assault and assault and battery, in the absence of a request so to instruct.

In *Dolan v. State*, 44 Neb. 643, relied upon by defendant, the opinion states that the information charged "the crime of assault with intent to murder," and that "the court excluded from the consideration of the jury the question of the defendant's guilt of a lower grade of assault." In the course of the opinion, the court said: "The information included a charge of the lower degrees of assault, as well as assault with intent to murder, and it was the right of the accused to have all of the issues properly submitted to the jury." The judgment was reversed. We do not find that it has ever been cited in our reports. The effect of the language quoted, if strictly interpreted according to its literal meaning, is to suggest that, under a charge of assault with intent to commit murder, it is necessary for the court, on its own initiative, to instruct on assault with intent to inflict great bodily injury and assault and assault and battery, all of which now are in nearby sections grouped in the same article and chapter of our Compiled Statutes. Comp. St. 1922, secs. 9552, 9554, 9556. We do not think the learned judge who wrote it, nor the court adopting the opinion, intended to apply it so definitely. We think that portion of the body of the opinion which we have discussed ought to be, and it is hereby, disapproved

in so far as it conflicts with the views expressed in this opinion.

The defendant assigns and argues that the court failed to instruct the jury that the intent charged could not be presumed but had to be proved by the evidence beyond a reasonable doubt. The court instructed the jury what were the allegations of the information and told them these had to be proved by the evidence beyond a reasonable doubt. One of these elements was intent. If the defendant desired more specific instructions on intent he should have requested it. He requested none on any subject.

We have examined other complaints of the defendant, relating to the extent to which cross-examination of a witness for defendant was permitted, to the limitation of cross-examination by defendant of witnesses for the state, to misconduct of the special prosecutor in his argument to the jury. We find no error in these matters.

The judgment of the district court is

AFFIRMED.

PERLEY M. GREEN, APPELLANT AND CROSS-APPELLEE, V. AXTELL LUMBER COMPANY ET AL., APPELLEES: HANS HANSEN, APPELLEE AND CROSS-APPELLEE: FRED A. HARRISON, APPELLEE AND CROSS-APPELLANT.

FILED MARCH 14, 1928. No. 25302.

1. **Dismissal.** The dismissal of a suit by one partner against the other partners for an accounting *held* not erroneous, where the evidence conclusively showed that plaintiff deliberately accepted and cashed a check knowing it was tendered in full settlement and satisfaction of all matters in controversy.
2. **Judgment.** A judgment purporting to adjudicate matters not within the issues raised by the pleadings and not presented to the court for determination is erroneous.

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

M. D. King and *J. L. McPheely*, for appellant.

Hainer, Craft, Edgerton & Fraizer, James & Danly, C. P. Anderbery and *J. H. Robb, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and HOWELL, JJ.

ROSE, J.

This is a suit in equity begun by Perley M. Green to require defendants to account as former partners in the lumber business. Among other defenses there was a plea of accord and satisfaction as to all matters in controversy. Upon a trial of the issues the suit was dismissed and plaintiff appealed.

There was no error in the dismissal. It was conclusively shown by the evidence that plaintiff had deliberately accepted and cashed a check knowing it was tendered in full settlement and satisfaction of the matters in controversy.

Error, however, is apparent in that part of the decree resulting in a judgment for $139 in favor of defendant Hansen and against defendant Harrison. This item was not within the issues raised by the pleadings and was not submitted in any form for adjudication. The suit having been properly dismissed, there was also error in that part of the decree requiring defendant Harrison to pay the costs of suit. The dismissal is affirmed at the costs of plaintiff in both courts and the judgment against defendant Harrison for $139 and costs is reversed.

AFFIRMED IN PART, AND REVERSED IN PART.

JAMES COXBILL V. STATE OF NEBRASKA.

FILED MARCH 14, 1928. No. 25923.

1. Criminal Law: MISDEMEANORS: TRIAL. Two complaints accusing the same person of similar misdemeanors may, in the sound discretion of the trial judge, be tried together, where all

the offenses could properly have been included in different counts of a single information.

2. ———: EXCESSIVE SENTENCE. Where there is no prejudicial error in the record of a criminal prosecution except the imposing of an excessive sentence, the cause may be remanded for a sentence authorized by law.

ERROR to the district court for Clay county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed in part, and reversed in part.*

J. E. Willits, for plaintiff in error.

O. S. Spillman, Attorney General, and *Donald Gallagher, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

ROSE, J.

In a prosecution by the state in the county court for Clay county, James Coxbill, defendant, was charged in six separate counts of a complaint with the unlawful sale and with the unlawful possession of intoxicating liquors as follows: September 13, 1925, sale of two pints to C. R. Waters and others; September 13, 1925, possession of two pints; October 12, 1925, sale of one gallon to W. A. Cregar and C. R. Waters; October 12, 1925, possession of one gallon; October 31, 1925, sale of one gallon to W. A. Cregar and C. R. Waters; October 31, 1925, possession of one gallon. To each count defendant pleaded not guilty. On each of five counts he was sentenced to pay a fine of $100. On the other count he was sentenced to serve a term of 60 days at hard labor in the county jail.

In another complaint before the same court, defendant was also charged in three counts with the unlawful sale or possession of intoxicating liquors as follows: March 24, 1926, sale of one gallon to Clifford G. Garrett and O. O. Goben; March 24, 1926, carrying one gallon for the purpose of sale; March 24, 1926, possession of one gallon. After

a plea of not guilty as to each of the three counts, defendant was tried and found guilty as charged in the first and third counts, and not guilty as to the second. As to the latter the complaint was dismissed. On the first defendant was sentenced to serve a term of 60 days at hard labor in the county jail and on the last a term of 30 days at hard labor in the county jail. From each sentence under both complaints he appealed to the district court.

When one of the two appealed cases was called for trial in the district court, the presiding judge on his own motion, after examining the complaints, required a trial of both at the same time. To this method of procedure defendant objected, asserting that he was entitled to a separate trial on each complaint; that he was not prepared for trial on both; that he expected witnesses to appear at different times; that one case had been set for trial on Monday and the other on Tuesday of the same week. The objections were overruled, the trial court announcing that defendant's right to the attendance of witnesses would be protected. Before a single jury defendant was tried for the offenses charged in the nine counts of the two complaints. The trial in the district court resulted in acquittals as to all charges in the complaint containing the six counts and also as to the second charge in the complaint containing the three counts, but he was found guilty of the other offenses charged in the complaint containing the three counts. On the first count for the unlawful sale March 24, 1926, he was sentenced to pay a fine of $100 and to serve a term of 90 days in the county jail at hard labor. On the last of the three counts for the unlawful possession he was sentenced to pay a fine of $100 and costs. As plaintiff in error defendant has presented to the supreme court for review the record of his convictions in the district court.

The principal question for solution is the asserted right of defendant to a separate trial on each of the two complaints. In considering this problem it is proper to hold that the presiding judge in his rulings on evidence, in his

instructions to the jury, and in his declining to impose a sentence for the offense of which defendant was acquitted in the county court as charged in the second count of the complaint containing the three counts, carefully protected the rights of defendant. It should also be observed that all of the nine charges in both complaints were directed either to the unlawful sale or to the unlawful possession of intoxicating liquors. All counts in complaints were directed to similar offenses violating the statutes relating to intoxicating liquors. The charge of each offense in the different counts was brief, distinct and definite.

The bootlegger, by the very nature of his lawless business, multiplies his crimes. With the conditions created by his repeated defiance of law the courts must deal. The debauchery and death resulting from his diabolical traffic imposes upon the public distressing expenses of government and other burdens at which law-abiding citizens take alarm. From the standpoint of existing conditions the safety of the public and the enforcement of law as well as the protection of the offender's right to a fair and impartial trial must be considered.

Prosecutions involving the right of a defendant to separate trials for similar offenses have engaged the attention of courts to a considerable extent in recent years. In 1906 an annotator who reviewed many cases said:

"Upon the question whether, in the absence of statute, a defendant may be tried upon two indictments at the same time, there seems to be a diversity of opinion without a decided preponderance of authority on either side." 3 L. R. A. n. s. 412.

A collection of later cases in 1914, however, indicates a prevailing tendency to hold that two complaints or indictments accusing the same person of similar misdemeanors or crimes may, in the sound discretion of the trial court, be tried together, where all the offenses could properly have been included in different counts of a single information. 47 L. R. A. n. s. 955.

The supreme court of Massachusetts seems to have de-

parted from a former rule requiring separate trials, if demanded, saying in a recent decision:

"The superior court has discretionary power to order a defendant tried at the same time upon two complaints, in the first of which he was charged with keeping and maintaining, in a certain town during three months previous to October 5 of a certain year, a certain tenement 'by him used for the illegal sale and illegal keeping for sale of intoxicating liquor,' and in the second of which he was charged with exposing and keeping intoxicating liquor for sale in the same town on October 11 of the same year. *Commonwealth v. Bickum*, 153 Mass. 386, no longer states the correct practice in this state." *Commonwealth v. Slavski*, 245 Mass. 405.

Further rulings of the same import follow:

"Where the essential elements of the conduct which may constitute two distinct crimes are the same and to be proved in a large part by the same evidence, and where the indictment might have been drawn legally so as to include both crimes, no right of the defendant secured to him by the law as matter of right is violated by compelling a joint trial of both indictments in the exercise of a sound judicial discretion." *Commonwealth v. Rosenthal*, 211 Mass. 50.

"It is within the discretionary power of a judge presiding in the superior court to order tried together three complaints against the same defendant, respectively charging him with keeping intoxicating liquor on May 11, 1924, and during three months preceding, with intent to sell the same unlawfully; with making an unlawful sale of intoxicating liquors, to wit, ten half barrels of beer to a certain person on March 6, 1924; and with unlawfully selling intoxicating liquors, to wit, five half barrels of beer to another person on May 2, 1924." *Commonwealth v. Campopiano*, 254 Mass. 560.

"An order by a judge of the superior court allowing a motion by the commonwealth that two complaints against a single defendant, one dated July 1 and alleging that on

May 10 previous at Lawrence the defendant had sold intoxicating liquor to a certain person unlawfully, and the other dated the following October 7 and alleging that on that day at Lawrence the defendant had exposed and kept for sale intoxicating liquors with intent unlawfully to sell them, should be tried together, cannot be said as a matter of law to be improper." *Commonwealth v. D'Amico*, 254 Mass. 512. See, also, *Commonwealth v. Baldi*, 250 Mass, 528.

Decisions so holding are consistent with the weight of modern authority and are supported by the better reasoning. This procedure, however, requires of the trial court due care to protect the rights of defendant by excluding inadmissible testimony and to prevent confusion of the jury as to the applicability of the evidence to specific offenses charged.

The conclusion is that the district court made no mistake in ordering the trial of the two cases at the same time. In this view of the record error prejudicial to defendant is not affirmatively shown except in the imposing of an excessive sentence.

For the unlawful sale March 24, 1926, defendant was not punishable by both fine and imprisonment. Comp. St. 1922, sec. 3288; *Knothe v. State*, 115 Neb. 119; *Drawbridge v. State*, 115 Neb. 535. That part of the sentence imposing both fine and imprisonment for the unlawful sale is therefore reversed and the cause remanded for an authorized sentence. Otherwise the judgment is affirmed.

AFFIRMED IN PART, AND REVERSED IN PART.

Note—See Criminal Law, 16 C. J. 782 n. 35, 17 C. J. 371 n. 51; Liquors 33 C. J. 796 n. 37; 3 L. R. A. n. s. 412; 47 L. R. A. n. s. 955; 8 R. C. L. 167; 5 R. C. L. Supp. 449; 51 L. R. A. n. s. 386; L. R. A. 1915A, 526; 8 R. C. L. 239; 2 R. C. L. Supp. 580; 6 R. C. L. Supp. 495.

STATE, EX REL. CLARENCE A. DAVIS, ATTORNEY GENERAL, PLAINTIFF, V. BANKING HOUSE OF A. CASTETTER ET AL., APPELLEES: WILLIAM MEIER, INTERVENER, APPELLANT.

EMIL FOLDA, RECEIVER, PLAINTIFF, V. FREDERICK H. CLARIDGE ET AL., DEFENDANTS.

FILED MARCH 14, 1928. No. 26261.

1. **Banks and Banking:** CONSTITUTIONAL PROVISIONS. The Constitution imposes upon a stockholder in an insolvent banking corporation a double liability to the extent of his stock, after the corporate property has been exhausted. Const., art. XII, secs. 4, 7.
2. ———: INSOLVENCY: ENFORCEMENT OF STOCKHOLDERS' LIABILITY. The receiver of an insolvent banking corporation may invoke equity to prevent the payment of funds deposited by a stockholder until the latter's double liability is determined.
3. ———: ———: ———. Before corporate assets have been exhausted, a stockholder in an insolvent banking corporation, over proper objections, cannot be required to submit for adjudication his double liability.
4. ———: ———: ———. Prior to exhausting the assets of an insolvent banking corporation in the hands of a receiver, a stockholder may waive the immaturity of his double liability to creditors and submit that issue to a court of equity for determination.
5. ———: ———: ———: CONSOLIDATION OF ACTIONS. In a receivership, a proceeding by a stockholder in an insolvent banking corporation to require payment of a deposit in his favor as a preferred claim and an action by the receiver to enforce double liability of the depositor as a stockholder waiving immaturity of such liability may be consolidated by mutual agreement.
6. **Judgment:** RES JUDICATA. Litigable matters within the jurisdiction of the court and adjudicated are not open to relitigation in a subsequent action.
7. **Banks and Banking:** INSOLVENCY: SET-OFF. A third person's conditional or contingent interest in deposits by a stockholder in an insolvent bank does not necessarily prevent the receiver from setting off the claim for deposits against the liability of the depositor as a stockholder, where immaturity of such liability is waived.

8. Contracts: ASSIGNMENT. Excerpt taken from a contract and inserted in the opinion *held* not an absolute or equitable assignment of deposits in an insolvent bank.

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

L. R. Newkirk, for appellant.

C. M. Skiles, Gaines, Van Orsdel & Gaines and *Smith, Schall, Howell & Sheehan, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

ROSE, J.

William Meier is an intervening petitioner in equity, seeking to establish his right to funds deposited by Helen M. Claridge in the Banking House of A. Castetter and to resort to the bank guaranty fund for payment of the deposits. The items comprising the depositor's claim are two certificates of deposit, one for $500 and the other for $4,500, and a balance of $426.87 on a checking account, or $5,426.87 in all. Meier pleads a right to these deposits under an equitable assignment or written contract transferring them to him, as he alleges, for the purpose of applying the proceeds on a mortgage partially securing a debt owing to him by the mortgagors, Helen M. Claridge and her husband Frederick H. Claridge.

In a proceeding by the state for a receivership to wind up the affairs of the Banking House of A. Castetter, hereinafter called the "bank," an insolvent corporation formerly conducting a commercial banking business at Blair, the depositor, Helen M. Claridge, presented to the receiver for allowance, April 23, 1921, her claim of $5,426.87 for the deposits described. This is the claim to which Meier succeeded, according to his petition in equity.

The Claridges had owned capital stock issued by the bank. The receiver and the guaranty fund commission

refused to pay the claim for deposits, on the ground that the depositor is chargeable with the double liability of a stockholder in excess of her claim and that the debts of the bank would exceed its assets to the extent of $300,000. In this condition of affairs, November 25, 1924, the receiver sued the Claridges to require a disclosure of the amount of bank stock held by each and to set off against the claim of the depositor her liability as a stockholder. The allegations in the petition of the receiver were admitted by the Claridges with the exception that their ownership of stock was denied. November 29, 1924, the action against the stockholders and the action by the state for a receivership were consolidated by mutual agreement. November 29, 1924, by decree of the district court, the respective claims of the parties to the consolidated actions were equalized and set off against each other, liability of the receiver and of the guaranty fund commission for deposits and liability of the Claridges as stockholders being thus discharged.

Meier was permitted to intervene September 1, 1926. He alleged in his petition that the district court was without jurisdiction to determine the matter of the stockholders' liability or to set off against it the claim for deposits, because the affairs of the bank had not yet been closed or its assets exhausted, the decree in these respects being challenged as void; that Meier was without knowledge of the action against the stockholders until February 25, 1925; that the decree was procured by the fraud and collusion of the parties to the consolidation and should be set aside; that the preferred claim of Meier for the deposits should be allowed.

In addition to a plea of former adjudication the facts generally upon which Meier relied for equitable relief were put in issue by answers to his petition. A trial resulted in a dismissal of his cause of action and he appealed.

There was an elaborate argument on the proposition that the district court did not have jurisdiction of the subject-matter relating to the double liability of the de-

positor as a stockholder, because the assets of the bank had not yet been exhausted. The better reasoning seems to be otherwise. The affairs of the bank were in the court of equity. The parties to the consolidated actions had adverse claims relating to assets over which the receiver had control. He properly invoked equity power to prevent payment of the deposits until the liability of the depositor as a stockholder could be determined. *State v. Farmers State Bank*, 113 Neb. 497. While the depositor, over a proper objection, could not be required to submit to the determination of her liability as a stockholder until the assets of the bank had been exhausted, she had a right, when sued, to plead, as she did, the defense that she was not a stockholder and to demand a trial of that issue. She could also have said to the court: "I want my liability, if any, adjudicated without waiting until the bank assets are exhausted. You may subject whatever available property I have to my immature corporate obligations, if I am the owner of stock." In effect this was the import of her pleadings. Stated differently, she had a right to waive the immaturity of her liability. Had she been solvent, she could have prayed for the prompt determination of the issue for the purpose of immediate settlement. In agreeing to consolidate the actions and in submitting the litigable controversies for adjudication, the parties to the consolidation presented the receiver's liability for the deposits and the depositor's liability as a stockholder. Meier in his intervening petition in equity alleged that the Claridges were insolvent and there is evidence tending to prove that fact. In view of their insolvency immediate payment of the deposits would have defeated the outstanding but immature liability of the depositor as a stockholder. A careful annotator recently said:

"While there is a good deal of conflict as to whether a bank has the right to set off an immature claim against the deposit of an insolvent, in the majority of jurisdictions it is held that on the insolvency of a depositor a right of set-off exists against the insolvent or his assignee

even though the bank's claim against the insolvent is not yet due, the cases evidently proceeding on the theory that insolvency renders all debts due, and furnishes, of itself, a sufficient ground for set-off." 43 A. L. R. 1328, and cases cited in note.

This doctrine does not apply to a stockholder's double liability, for the reason that such a liability is not matured by insolvency under the terms of the Constitution. Const., art. XII, secs. 4, 7; *State v. Farmers State Bank*, 113 Neb. 497. The Constitution, however, did not prevent the insolvent depositor in the present instance from waiving the immaturity of her liability. The record shows conclusively that she not only waived immaturity but invoked the judgment of the court on the issue of her liability as a stockholder. It follows that the matters upon which Meier relies for equitable relief, including the fact that the depositor was a stockholder, were adjudicated in the former actions after consolidation and consequently were not open for relitigation herein.

It is argued further that the decree assailed is void as to Meier because he was the equitable owner of the deposits, a fact within the knowledge of the parties to the consolidated actions. The position thus taken is also untenable. Meier's interest in the deposits was conditional or contingent and did not prevent the receiver from invoking equity to set off against the deposits the liability of the depositor as a stockholder. The interest of Meier in the deposits depended upon the following provisions of a written contract:

"As soon as the account between Helen M. Claridge and the receiver of the Banking House of A. Castetter is fully settled and adjusted, then any and all moneys received by the said Helen M. Claridge from said receiver shall be immediately paid to the said William Meier to be applied on the note and mortgage held by him until the same is fully paid."

The plain import of these terms was not changed by other stipulations or by oral evidence. Under the circum-

stances disclosed the excerpt from the contract did not amount to an absolute or an equitable assignment.

Fraud or collusion entitling Meier to the equitable relief sought by him was not shown. His petition was properly dismissed.

AFFIRMED.

Note—See Banks and Banking 7 C. J. 507 n. 11, 514 n. 80 New, 736 n. 79, 746 n. 27.

EDITH L. BANEY, ADMINISTRATRIX, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT: STATE OF NEBRASKA, APPELLEE.

FILED MARCH 14, 1928. No. 26037.

1. **Negligence.** The defendant railroad company, under a state contract, hauled dirt from the state capitol square to the state fair grounds in steel dump cars. The cars were equipped with an air dumping device whereby the load could be dumped from the engine cab. The defendant company concedes that it furnished "a man to dump the car and not to unload the dirt." On a loaded car, after repeated efforts, the dumping device failed to work and the car was then dumped by hitching a tractor to one side and pulling it over into a "dump position." Thereupon the tractor was released and George Baney, the decedent, began to shovel the dirt out that remained in the car after the bulk of the load was dumped. While so engaged the dump car suddenly, and without warning, returned from a "dump position" to a "normal position," and Baney's body was caught in the moving parts of the car and he was thereby instantly killed. *Held*, that the defendant company was chargeable with actionable negligence in the premises.
2. **Appeal: AFFIRMANCE.** In a case tried to a jury which involved disputed questions of fact, the verdict, and the judgment rendered thereon, will be sustained where sufficient competent evidence is submitted to support the verdict. The record herein shows that the verdict for $45,000, as reduced by the court to $25,000, is sustained by the evidence. It follows that the judgment must be and it hereby is affirmed.

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

Byron Clark, Jesse L. Root, Reavis & Beghtol and *J. W. Weingarten*, for appellant.

O. S. Spillman, Attorney General, Lester L. Dunn, George E. Hager and *Clifford L. Rein, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD and EBERLY, JJ.

DEAN, J.

This is an action at law wherein Edith L. Baney, plaintiff, widow of George W. Baney, sued to recover damages which she alleges she sustained by the accidental death of her husband which was caused by the Chicago, Burlington & Quincy Railroad Company, defendant, in that the company negligently failed to furnish a reasonably safe, efficient, and workable air-locking device on a certain steel dump railroad car which was owned, or at least furnished and operated, by the defendant company, in hauling dirt from the state capitol square and dumping it on the state fair grounds from one of the above mentioned dump cars. Besides his widow, the decedent left surviving him four minor children, namely, Edith 8, Joan 7, Marguerite 4, and George 2, and these children, as alleged, are all dependent upon plaintiff for support and schooling and the like. Baney was an employee of the state of Nebraska when the accident happened. Hence, the state became a party defendant and, in respect of the state's liability or interest herein, the court ordered and adjudged that "the matter of rights and liabilities between plaintiff and the defendant state of Nebraska be reserved until ruling on motion for new trial."

The plaintiff filed a remittitur in the sum of $20,000, on condition that a rehearing be denied. The instrument, which includes the remittitur within its recitals, and also matter in respect of the state's alleged liability, follows:

"Comes now Edith L. Baney, administratrix of the estate of George W. Baney, deceased, plaintiff, in person and by her attorneys George E. Hager and Clifford L. Rein, and

hereby freely and voluntarily remits, from the verdict of the jury in the sum of $45,000 heretofore rendered herein, the sum of $20,000, and hereby freely and voluntarily consents that the said court may enter judgment against the Chicago, Burlington & Quincy Railroad Company, a corporation, defendant, and in favor of the state of Nebraska, defendant, for $5,400, the amount due the state of Nebraska under the Nebraska workmen's compensation act, and against the Chicago, Burlington & Quincy Railroad Company, a corporation, defendant, and in favor of Edith L. Baney, administratrix of the estate of George W. Baney, deceased, plaintiff, in the sum of $19,600, the amount due said plaintiff under the Nebraska workmen's compensation act."

Upon submission of the remittitur the court entered the following order:

"This court having heretofore ordered that the plaintiff file a remittitur of $20,000 herein, and it now appearing that the plaintiff has filed remittitur in said amount, the court now orders that the state of Nebraska will continue weekly (workmen's compensation) payments to plaintiff as heretofore ordered by this court, and upon any final judgment herein, same to be paid into this court for adjustment with compensation payments heretofore ordered."

The state has not appealed. The defendant railroad company alone has appealed to have the proceeding and judgment reviewed.

The accident occurred August 20, 1925, in connection with the unloading of dirt on the Nebraska state fair grounds adjacent to Lincoln. Baney was then a robust, able-bodied man of 31 years. As a state employee he and other workmen had somewhat to do with the filling and levelling of low and uneven surface depressions on the state fair grounds with dirt hauled from the site of the new capitol building. More than 4,500 car-loads of this dirt were loaded on steel dump cars by steam power shovels from the excavations made on the state house grounds preparatory to the erection of the new state capitol build-

ing and the substructure or basement. When a train of these cars was loaded it was hauled by gasoline tractor engines on temporary steel rail tracks from Fifteenth to Seventh street and from thence to and upon the state fair grounds. The gasoline tractors were furnished by the state, and driven by state employees, and all temporary rail tracks, which are referred to herein, and wherever laid, were furnished and installed by the state.

The loaded cars, on arrival at destination, were hauled or pushed for the most part by the defendant's locomotive engines from place to place thereon and dumped at such points as the filling and levelling process on the fair grounds might require. Baney, with other state employees, worked at spreading and levelling the dirt. Shortly after one of the cars was dumped, and while Baney and another employee were cleaning out the moist dirt that stuck to the side of the car, for it was a rainy day, the moving parts of the car suddenly, and without warning, "returned from an inclined to a horizontal position," and Baney's body was caught, his chest was crushed, and he instantly died. Shortly afterward the car was opened with crowbars and the body was released. And in defendant's answer and in its brief it is admitted that Baney's death was caused "by his being caught and fatally injured between the moving parts of a dump car."

The plaintiff contends, as above stated, that the defendant railroad company negligently failed to keep its car-locking device in a reasonably safe condition. This device, when in normal working order, was intended to hold the moving parts of the car, after it was dumped, in an upright position until such moving parts were released and, upon such release, the moving parts automatically returned to a horizontal position. The controlling mechanism of this dumping apparatus was in the cab of the locomotive as a part of its equipment and was so placed as to be readily accessible to the engineer, or engine foreman, for control and release as occasion should require. In their brief plaintiff's counsel make the following state-

ment: "On August 20, 1925, at about 11 o'clock in the morning, the Burlington's crew, in charge of its engine foreman, John Gettman, pulled into the fair grounds a train of 10 or 12 of these dump cars loaded with dirt. Before spotting the cars in the locality where the dirt was wanted, the engineer, Smith, stopped the train and Gettman got off and inspected the track."

It will not be denied that John Gettman, the engine foreman, and locomotive engineer Smith were both employees of the defendant railroad company at the time of the accident. The plaintiff alleges that Gettman applied the air. From the record it fairly appears that either Gettman or Smith must have applied the air, but the dumping device failed to work, as above noted. The defendant argues "that the railroad company furnished a man to dump the car, and not to unload the dirt." This feature will presently be discussed.

In respect of the place of the accident one of the civil engineers, who was engaged by the state in the project, testified that the track "was about level at that place." In this he was corroborated by one or more of the state's witnesses. But this was a disputed question for the jury. This engineer also testified that Baney's duties were "to maintain and construct that track in accordance with the desires of the Burlington trainmen and the Burlington officials that might be there." Upon further inquiry he repeated the above statement and added that "somewhere around 40" dump cars, each of 20-yard capacity, were used from time to time in hauling the dirt. He averred that the closing of the moving parts of the car that killed Baney could have been prevented by applying "the air to the cylinder," had the equipment of the air dumping device been in a normal working condition.

It is not denied that all of the eight or ten steel dump cars in the train were equipped with the same type of dumping device and that some of these cars were dumped by air pressure before an attempt was made to dump the car in suit. It is not denied that the air device having

failed to function after several attempts the car in suit was finally dumped in an unusual manner. A cable was attached to one side of the dump car and by this means it was pulled over into "dump position" by a tractor. And this was necessitated solely because the dumping device failed to perform its function. When the car was dumped a considerable quantity of wet dirt remained in the car and it became necessary to move forward about 100 feet to find a low spot on which to scrape out and unload the remaining dirt. The car having now been pulled over into a "dump position" by the tractor, Baney and two other workmen proceeded to scrape and shovel out the dirt that remained. As above noted it was while he was so engaged that Baney was killed, but both of his fellow employees escaped. Both of these workmen testified that they heard no warning given to Baney nor to any other workmen "that were working around that car, to the effect that the car was liable to fall and that it was in dangerous condition." It is also disclosed that before the accident, short-handled shovels were furnished by the state and were used for shoveling and scraping the remaining dirt out of the cars, but that after the accident the state supplied long-handled shovels for this work.

The defendant railroad company charges that Baney neglected to see that the tracks were reasonably level. But a witness, who was prominently identified with the manufacture of the identical steel dump cars in question here, testified that the cars were intended to be used on a track that was "somewhat uneven." The defendant company pleads ignorance of the condition of the tracks and of what Baney was doing in this language:

"The railroad company did not know about the peculiar condition of the track where the car was being unloaded, did not know what Baney was doing, nor what he directed the state's employees to do, nor their compliance with his instructions."

This argument will be presently discussed. If the argument is supported by the evidence it is important.

The superintendent of the Lincoln division of the defendant railroad company was one of the defendant's main witnesses and had then occupied the position of superintendent of the division for 15 years. He testified that he talked with Baney, while he was engaged on the work, solely in behalf of his employer and as an important part of the responsible duties which fell to him as superintendent of the division. This superintendent averred that he was on the fair grounds "a good many times" while the work was in progress, and it affirmatively appears that he not only knew "the peculiar conditions of the track," but that he also knew "what Baney was doing." He talked with and advised Baney about keeping up the track, and testified that Baney told him "that he formerly had worked on tracks, and was familiar with that kind of work." The superintendent continued: "I explained to him at that time that my experience in handling dirt was such that I always preferred to have the ties, the cross-ties, weaved closed together underneath the rails, and suggested to him that he follow that practice, and I talked with him a number of times afterwards in regard to pulling his track up, and keeping it in better shape." But the superintendent testified that Baney told him that he "did not care to weave the track ties so close together and that he would keep the track safe so that cars could be operated over it;" that he told Baney that the dump cars "were liable to dump in most any position," and that Baney immediately said he knew all about them. Continuing he testified: "Q. What would you say with respect to the elevation of the rails compared with each other? A. Well, there was a superelevation of the west rail of six or seven inches. I did not measure it, but I judge about that."

If this division superintendent's evidence fairly reflects the facts, it tends to prove that Baney was belligerent in his resentment of the superintendent's advice; that he was an incompetent person and totally unfit to have charge of the work in which he was engaged; that Baney's presence on the job in the capacity of track foreman was a menace

to himself and to the employees with whom he worked, and it was a destructive menace, as well, to the cars and the locomotive engines of the railroad company that were used in the furtherance of the project in which the defendant was engaged.

However, it does not satisfactorily appear that the division superintendent made complaint, in respect of Baney's alleged incompetence, to the state capitol commission. H. A. Baugh, a civil engineer who was employed by the capitol commission for two years on the project in question, testified that no complaint was made by the railroad company to him concerning Baney. Mr. Manion, also a civil engineer over Baney, testified that no complaint was made by any person to him. And the division superintendent himself testified on this point:

"Q. You were out there from time to time as the work was going on? A. Yes; I was there a number of times. Q. As far as you could see this track was kept up about as well as could be expected under the circumstances? A. Not as well as I would keep a track of ours up. Q. You made no complaint to Mr. Manion or any of the state officials about it? A. We talked to the capitol commission over the phone about it a number of times, and talked with Baney. Q. Who did you talk with? A. I am not sure, I have no record. Q. You knew Mr. Manion was in direct charge of the work? A. After Baugh left, but I never saw Manion, I don't believe, but once after Mr. Baugh left here, as far as I know. Q. Did you make inquiry for Manion? A. No; not that I know of. Q. He was on the job there about every day? A. I don't know. I did not see him out there. Q. You don't know whether he was there or not? A. I don't know. Q. At any rate the work was not done in such a manner as to cause you to make any complaint to Mr. Manion, who was Mr. Baney's immediate superior officer? A. Complaint about what? Q. About anything that was wrong out there, the tracks, or any other thing, that you say that was not right? A. Well, the only conversation I had—I had none with Manion. Q.

How is that? A. I had no conversation with Manion. Q. Didn't you know that Manion was in charge of that work, a gentleman by the name of Manion? A. I imagine he was the engineer, yes; in fact, Baugh told me he was relieving him. Q. Don't you know he would be the natural and logical man to whom complaint might be made, or should be made, if there was any complaint? A. Yes. Q. And yet you made none? A. No; I had no occasion to hunt Manion." And on the redirect examination he testified: "Q. You did talk to Baney however? A. Yes."

Whether an employee of the capitol commission, or of the defendant company, directed that the car be pulled over by the tractor into "dump position" does not clearly appear. On this feature, as elsewhere, the evidence conflicts. We do not agree, however, with counsel's observation that "the accident was in no way connected with this dumping process."

It appears that the dumping device had not been examined or tested within the time required by the rules of the interstate commerce commission: On cross-examination the defendant's general car foreman testified: "Q. So, then, there had been no inspection or cleaning or oiling of the cylinder in the air apparatus on the left-hand side of this car since April 22, 1924, up to the time of the accident? A. According to our record. Q. Would you say your record is reasonably correct? A. It should be. * * * Q. That would be a year, April, May, June, July, August, practically a year and four months after the inspection and oiling and cleaning of this cylinder, wouldn't it? A. That one of them." When asked if he was told that the car could not be operated by air pressure immediately before the accident, he answered: "A. No; I don't remember that I was told that exactly. Q. You say to this jury that you did not know that that car had been pulled over by the tractor immediately before? A. I was told they pulled it over with a tractor; yes, sir. Q. My question was, you were told they could not dump it by the air pressure at that time, weren't you? A. I was told that they tried

to dump it—well, I don't know that I was exactly told that; finally, in a conversation I was told that they pulled it over with a tractor. Q. Did you inquire why they pulled it over with a tractor? A. I don't know that I did. Q. That was a common thing was it, to dump these steel dump cars by pulling them over with a tractor? A. No, sir. Q. And that thing did not excite any curiosity in your mind? A. Not necessarily. Q. And you did not make any inquiry as to why they pulled it over? A. I don't know that I did. Q. You knew that they could not operate it with the air at that time, didn't you? A. I cannot say that I knew. I was told probably, but I don't know, I did not see it. Q. You were told that was true, that is my question? A. Well, I cannot say to that exactly whether I was told."

Continuing on the cross-examination this witness further testified with respect to the inspection of the car: "Q. Why didn't you inspect it? A. I did. Q. Why didn't you turn the air on and see whether or not those cylinders were leaking and whether or not you could operate them? A. I don't say I didn't look at it. Q. You didn't say you did not either? A. No; I did not say I did not. Q. Do you know when the car was moved off the fair grounds? A. No; I do not. Q. Do you know where it was taken when it was removed off the fair grounds, of your own knowledge? A. No, sir. Q. You saw it next out at the rip (repair) track, didn't you? A. Yes, sir. Q. Five days afterwards? A. Yes, sir. Q. You don't know what repairs may have been made upon the air apparatus, do you? A. Well, I know that much, that we do not make any of that stuff only on the repair track, any such repairs only on the repair track." This witness further testified: "Q. Now, Mr. Baker, I want to ask you again, can you give any reason why you did not connect up the air that was in that train line of that air dump apparatus on the day, right there at the time of the accident, and test it out? A. Well, I don't know. I might answer that this way. I did not say that I did not hook up the air, nor I don't say that I did. It ain't clear in my mind whether we did or not.

That is the reason I am not saying one way or the other."

When the side of the car collapsed, Baney, as noted above, was scraping the sticky dirt from the side of the car. That he was not idly standing by but was diligently attending to the work of his employer is affirmatively shown by the entire record. The defendant, however, argues that Baney was warned that the work in which he was engaged was a dangerous occupation. But there is the evidence of witnesses who were present and in a position to have heard such warning if it had been given, and they testified, as noted above, that they heard no such warning. But this was a question of fact for the jury, and the question of the veracity of the witnesses, or the lack of it, was also for the jury. And it may here be observed that the material facts were submitted to the jury for determination under instructions which informed the jury in respect of the weight of the evidence, the credibility of the witnesses, their fairness, candor, bias, or prejudice, and their opportunity for knowing the facts about which they testified, and the reasonableness of their testimony or the lack of it.

It will be presumed, of course, that counsel intend that the words used in argument shall have their generally accepted meaning. In the present case counsel argue "that the railroad company furnished a man to dump the car and not to unload the dirt." But, if the man who was so furnished dumped the car, would there have been anything left to "unload"? What is it to dump a car? This is an accepted definition of the word "dump": "To put or throw down with more or less of violence; hence, to unload, as from a cart by tilting it, as to dump sand, coal, etc. Chiefly U. S. * * * To deposit something in a heap or unshaped mass as from a cart or basket. Chiefly U. S." The words "dump car" are defined as follows: "A cart or car having a body that can be tilted, or a bottom opening downwards, for emptying." Webster's International Dictionary.

The record is voluminous and the assignments of alleged error are many. In a foreword in respect of this feature

of the case the defendant says: "In presenting the following 140 assignments of error, we do not wish the court to understand that those assignments, of which there are a large number dealing with the reception of evidence over objection, are based solely on technical grounds. * * * It is because counsel do not desire the court to gain the impression from the assignments that they relate only to technicalities that this brief analysis is made as introductory to our presentation."

The defendant argues that the verdict and judgment are excessive. We do not think so. In a comparatively recent case we held that a verdict and judgment for $25,000 was not excessive where a man of 24 years lost his life by electrocution, having a wife and a child of 7 months, and who earned about $2,300 a year as a motorman on a street railway car. *Pricer v. Lincoln Gas & Electric Light Co.*, 111 Neb. 209.

Briefly, and in part to recapitulate: The defendant railroad company, under a state contract, hauled dirt from the state capitol square to the state fair grounds in steel dump cars. The cars were equipped with an air-dumping device whereby the load could be dumped from the engine cab. The defendant company concedes that it furnished "a man to dump the car and not to unload the dirt." On a loaded car, after repeated efforts, the dumping device failed to work and the car was then dumped by hitching a tractor to one side and pulling it over into a "dump position." Thereupon the tractor was released and George Baney, the decedent, began to shovel the dirt out that remained in the car after the bulk of the load was dumped. While so engaged the dump car suddenly, and without warning, returned from a "dump position" to a "normal position," and Baney's body was caught in the moving parts of the car and he was thereby instantly killed.

To discuss all of the 140 assignments of alleged error, above mentioned, referred to by defendant's counsel, would require more space than should be allotted to this opinion. It appears that every material question was submitted to

the jury, under instructions which fairly stated the law applicable to the facts, and, as triers of fact, the jury have rightly determined the issues, and there is sufficient competent evidence to support the verdict. From what has been said, it follows that the verdict for $45,000, as reduced by the order of the court to $25,000, to which plaintiff assented, and the judgment thereon, must therefore be, and it hereby is,

AFFIRMED.

CONSERVATIVE SAVINGS & LOAN ASSOCIATION OF OMAHA, APPELLEE, V. D. L. ANDERSON ET AL., APPELLANTS.

FILED MARCH 14, 1928. No. 25571.

1. Statutes: CONSTITUTIONALITY. Chapter 149, Laws 1915, is not broader than its title and is not violative of the constitutional provision that "No bill shall contain more than one subject, and the same shall be clearly expressed in the title."
2. Appraisal of real estate is not a prerequisite to a sale thereof either on execution or pursuant to an order of sale issued to execute a decree foreclosing a real estate mortgage.

APPEAL from the district court for Knox county: DE WITT C. CHASE, JUDGE. *Affirmed.*

W. A. Meserve and *E. A. Houston*, for appellants.

J. F. Green and *L. R. Slonecker, contra.*

HEARD before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and HOWELL, JJ.

GOOD, J.

This is an appeal from an order confirming a sale of real estate in an action to foreclose a real estate mortgage. The only objection to the confirmation, argued in the briefs and relied upon in this court for a reversal, is that the sale was conducted without an appraisal of the real estate, as provided by sections 8068 to 8073, inclusive, Rev. St. 1913.

Defendant contends that chapter 149, Laws 1915, which purports to amend and repeal the sections mentioned, is unconstitutional and invalid because it is violative of section 14, art. III, of our Constitution, which *inter alia* provides: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title." The title to the act in question is as follows: "An act to amend sections 8071, 8073, and 8077, Revised Statutes of Nebraska for 1913, and to repeal sections 8068, 8069, 8070, 8071, 8072, 8073, 8074, and 8077 as now existing." It is argued that the title to the act in question does not allude to any subject for legislation and does not give any intimation as to what is contained in the act, and further that the act contains matter which is not germane to the subject-matter of the sections amended.

In construing the constitutional provision above quoted, it is always proper to keep in view the mischief which is sought to be prevented. The purposes of the provision were to prevent "log-rolling" legislation; to prevent surprise or fraud in the legislature by means of provisions in the bill of which the title gives no intimation; in other words, to prevent surreptitious legislation, and to apprise the people and those interested in the subject of legislation under consideration. It was not the purpose or intent of the framers of the Constitution to put the legislative body in a strait-jacket; nor to require that the titles to legislative acts should be a synopsis of the legislation to be enacted; nor to prevent the legislature from adopting a comprehensive title for a legislative act.

It is a rule of well-nigh universal recognition that the legislature may amend or repeal previous legislation by a bill, the title to which is one to amend and repeal the sections of the statute to which reference is made, and the rule is well-settled in this jurisdiction that a legislative act, the title to which is to amend certain specific sections of the statutes or a previous act of the legislature, may contain any matter which is germane to the subject-matter of the sections of the statute or legislative act sought to be

amended. Decisions by this court sustaining this rule are: *In re Estate of Austin, ante,* p. 137, and cases therein cited. The title to the act in controversy is sufficient to direct everyone interested to the particular sections of the statute which are sought to be amended and to be repealed. By reference thereto, it appears that they all relate to the sale of real estate on execution. The several sections amended or repealed provide for the levy, appraisal, the manner of appraisal, how the lands should be offered for sale, the notice of sale, redemption, sale and final confirmation of sale by the court. The whole subject-matter of all the sections relates and is germane to the one general subject of sale of real estate on execution.

Defendant argues that the new act contains matter which is not germane to the subject-matter of the sections amended. Counsel for defendant evidently overlook and do not give proper consideration to the general subject-matter contained in the sections amended. We find no matter contained in chapter 149, Laws 1915, that is not germane to the sections amended and which does not relate to the subject of sale of lands on execution. Chapter 149, Laws 1915, is not broader than its title and is not violative of the constitutional provision that "No bill shall contain more than one subject, and the same shall be clearly expressed in the title." Under the provisions of chapter 149, all provisions relating to an appraisal of real estate before sale on execution have been eliminated.

Under existing statutes, appraisal of real estate is not a prerequisite to a sale thereof either on execution or pursuant to an order of sale issued to execute a decree foreclosing a real estate mortgage. Judgment

AFFIRMED.

FAUN M. CRAWFORD V. STATE OF NEBRASKA.

FILED MARCH 14, 1928. No. 26070.

1. **Criminal Law: INSTRUCTIONS.** A defendant in a criminal action may not predicate error on an instruction that is more favorable to him than is required by the law applicable to the charge made

2. ———: ACCUSED AS WITNESS: CROSS-EXAMINATION. As a general rule, it is error to require a defendant, in a criminal action, who becomes a witness in his own behalf, to answer, on cross-examination, concerning his arrest for and conviction of other misdemeanors. Such cross-examination may be so prejudicial to defendant as to require a reversal of the judgment against him.

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

J. E. Willits, for plaintiff in error.

O. S. Spillman, Attorney General, and *Donald Gallagher, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY and HOWELL, JJ.

GOOD, J.

Faun M. Crawford, hereinafter referred to as defendant, was convicted of the unlawful transportation of intoxicating liquors within the city of Hastings, in violation of an ordinance of said city. He prosecutes error to review the record of his conviction.

Defendant alleges that there was error in that the complaint does not charge a violation of the ordinance; in the giving of instructions; in the overruling of his motion for a directed verdict; and in rulings on the admission of testimony.

It is argued that the complaint is insufficient because it does not charge that defendant "knowingly" transported the intoxicating liquors; nor that the liquor was transported for certain specific purposes, mentioned in section 3 of the ordinance. Defendant assumes that the prosecution was under section 3 of the ordinance, which is denominated the "bootlegging" section.

It will be conceded that the complaint is insufficient to charge a violation of section 3 of the ordinance. However, the state contends, and we think properly, that the complaint was intended to charge a violation of section 2 of the ordinance. This section makes it unlawful to trans-

port any intoxicating liquors within the city, except only certain liquors for specified purposes by persons especially permitted and authorized, in the manner provided by the state laws. Defendant has not questioned the sufficiency of the complaint to charge a violation of this section.

Complaint is made because the trial court did not give, in its instructions, the full text of section 3 of the ordinance; but, since the prosecution was not founded on section 3 but on section 2, it was unnecessary to instruct the jury as to what would be necessary to constitute a violation of section 3 of the ordinance. The instructions to the jury, in fact, required them to find certain facts to be established by the evidence which were unnecessary to constitute a violation of section 2. In so far as the instructions required the jury to find facts, other and outside of those necessary to constitute a violation of section 2, they were more favorable to defendant than he was entitled to. A defendant may not predicate error on an instruction that is more favorable to him than is required by the law applicable to the charge made.

Complaint is made of the giving of instruction No. 7, which informed the jury that the gist of the action was the carrying and transportation of intoxicating liquors, and that it made no difference who was the owner, or who made physical delivery, of the liquor. We find no error in this instruction. It was applicable to the charge made and the evidence adduced.

Defendant urges that the evidence is insufficient to sustain the verdict, and that therefore the court erred in overruling his motions for a directed verdict and for a new trial. There is evidence from which the jury might find that defendant and his wife drove from Grand Island to the city of Hastings in defendant's car; that they stopped in front of a café in the city of Hastings; that defendant's wife left the car and carried two bottles of liquor into the café; that defendant drove on, leaving his wife, who was arrested, and on the following morning paid a fine. The evidence relating to defendant's conduct, the

fact that it was his car, that he was driving it and drove away, and other facts and circumstances proved were sufficient to justify the jury in finding that defendant had transported the liquor within the city of Hastings, and had therefore violated the ordinance.

Defendant was a witness in his own behalf. On his cross-examination he was interrogated, over objection, as to his former conviction for a violation of the liquor law, and was asked how many times he had been arrested and whether he had been arrested prior to or subsequent to the date on which the offense is alleged to have been committed. These rulings are complained of and properly so. When a defendant in a criminal action becomes a witness in his own behalf he is subject to the same rules of cross-examination as other witnesses.

In *Coxbill v. State*, 115 Neb. 634, it was held: "Under section 8848, Comp. St. 1922, 'a witness may be interrogated as to his previous conviction for a felony.' But the act does not contemplate that a witness may be interrogated as to his alleged previous conviction for a misdemeanor." In the case of *Swogger v. State*, on rehearing, *ante*, p. 563, the rule is laid down that—"One charged with crime who becomes a witness for himself upon his trial is subject to the rules governing cross-examination of other witnesses." In the last cited case it was also held: "Except as to crimes having an element of motive, criminal intent, or guilty knowledge, evidence of separate and distinct offenses committed by accused is not admissible. If such evidence is admitted and is prejudicial, a conviction cannot stand."

In the instant case, the evidence against defendant, while sufficient to carry the case to the jury, was not of a very strong character. Under such circumstances, the scales might easily have been turned by the improper cross-examination to which defendant was subjected.

The rulings of the trial court in permitting the cross-examination of defendant, as above indicated, were prejudicially erroneous, and for this error the judgment must

be and is reversed and the cause remanded for further proceedings.

REVERSED.

FARMERS & MERCHANTS TELEPHONE COMPANY, APPELLANT, V. ORLEANS COMMUNITY CLUB, APPELLEE.

FILED MARCH 14, 1928. No. 25479.

1. **Telephone Companies:** COMMON CARRIERS. Under our Constitution and statutes telephone companies are common carriers.
2. ———: SUBJECT TO STATE RAILWAY COMMISSION. Telephone companies operating in this state are subject to all reasonable orders of the state railway commission, entered upon hearings duly and legally had, as to rates to be charged, and time and manner of service to be rendered; and such orders will not be disturbed unless clearly wrong.
3. **Evidence** examined, and found sufficient to sustain the findings and order of the state railway commission as to conditions involved, the rate established, and the necessity for the service sought.

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

R. L. Keester, for appellant.

Hugh LaMaster, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and HOWELL, JJ.

THOMPSON, J.

Complaint was filed with the Nebraska state railway commission, hereinafter called commission, by the Community Club of Orleans, an association of its citizens and property-holders, appellee, against the Farmers & Merchants Telephone Company, appellant, incorporated under the laws of this state for the purposes indicated by its name, and doing business as such in Harlan and surrounding counties, in the former of which the village of Orleans is situate. Appellee prayed that appellant be required to furnish 24-hour service on Sundays and holidays,

as then furnished on week days, at Orleans, and that a compensatory rate for such service be fixed. On such complaint issues were joined, hearing had, and order entered as by appellee prayed, save and except four legal holidays, which we find from the record to be what are known as "Decoration Day, Fourth of July, Thanksgiving, and Christmas." To reverse this judgment the action is brought to this court, and the following claimed errors, in substance, are presented: The commission was without jurisdiction; and its judgment is contrary to the evidence and to the law applicable thereto.

We have considered the facts as reflected by the record, as well as the law applicable thereto, and conclude that the commission was acting within the scope of its authority. Sections 6107, 6124, 6128, and 6139, Rev. St. 1913, now respectively sections 5466, 5483, 5487, and 5498, Comp. St. 1922; *Hooper Telephone Co. v. Nebraska Telephone Co.*, 96 Neb. 245; *Marquis v. Polk County Telephone Co.*, 100 Neb. 140. Especially are we led to this conclusion when we consider the above citations in connection with section 20, art. IV, Constitution of Nebraska, wherein it is provided: "The powers and duties of such (railway) commission shall include the regulation of rates, service and general control of common carriers (such common carriers being defined by section 5483, Comp. St. 1922, as including telephone companies) as the legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision."

We further find that there was evidence sufficient to warrant the conclusion reached as to conditions involved, the rate established, and the necessity for the service sought on each Sabbath day and each holiday, other than those holidays heretofore indicated as excluded. In arriving at this determination we have not been unmindful of section 9795, Comp. St. 1922, which provides in part: "If any person of the age of fourteen years or upward shall be found on the first day of the week, commonly called

Sunday, at common labor (work of necessity and charity only excepted) he or she shall be fined," etc. However, as the commission found on competent evidence, as above indicated, that the service sought was a "work of necessity," and as we held in *Byington v. Chicago, R. I. & P. R. Co.*, 96 Neb. 584, that "such orders (of the commission) will not be reversed unless it affirmatively appears from the record that they are clearly wrong" (which we do not find herein), it necessarily follows that the instant case is one within the above statutory exception.

The judgment of the railway commission is right, and is

AFFIRMED.

SAMUEL GREEN V. STATE OF NEBRASKA.

FILED MARCH 14, 1928. No. 25865.

1. **Intoxicating Liquors:** INFORMATION. An information charging the defendant with a sale of intoxicating liquor in one count, and with possession thereof in another count, charges misdemeanors and not felonies, and is governed by the provisions of sections 3238 and 3288, Comp. St. 1922.
2. **Evidence** examined, and judgment of the trial court as to the first count is affirmed, and as to the second count is reversed.
3. **Criminal Law:** JURISDICTION. Under section 9989, Comp. St. 1922, as amended by chapter 57, Laws 1925, district courts have jurisdiction concurrent with magistrates in all criminal cases where the punishment cannot exceed three months' imprisonment, and a fine of $100, or both.
4. ———: APPEAL: NEW TRIAL. The purpose of a motion for a new trial is to afford the trial court an opportunity to correct errors in its own proceedings without subjecting the parties to the expense, delay, and inconvenience of appeal or petition in error. Thus, it has become an elementary rule of procedure that alleged errors of the trial court in an action at law, not referred to in the motion for a new trial, will not be by us considered.
5. **Information:** DEFECTS: WAIVER. In harmony with the provisions of section 10113, Comp. St. 1922, defects which might have been attacked by a motion to quash or plea in abatement are waived when a defendant in a criminal case enters a plea of not guilty.

ERROR to the district court for Hamilton county: LOVEL S. HASTINGS, JUDGE. *Affirmed in part, and reversed in part.*

J. H. Grosvenor, for plaintiff in error.

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

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

THOMPSON, J.

An information against Samuel Green was filed in the district court for Hamilton county containing two counts, each in usual terms, the first charging him with the unlawful sale of intoxicating liquor to one Port Cool, and the second charging him with the unlawful possession of intoxicating liquor, each specifying the date as on or about July 23, 1926. Both counts charge misdemeanors, and are controlled by sections 3238 and 3288, Comp. St. 1922. *Dunlap v. State, ante,* p. 313.

On this information the defendant was duly arraigned and entered a plea of not guilty, at which time additional names were, by leave of court, added to those listed upon the information, among which was the name of the county surveyor of Hamilton county. The case was then tried to a jury, and verdict returned finding defendant guilty as to each count, upon which verdict judgment was entered sentencing defendant to imprisonment in the county jail of such county for 60 days on the first count, and to 30 days on the second, commencing on the expiration of the sentence on the first. To reverse this judgment error is prosecuted. The plaintiff in error will be hereinafter called defendant. There are seventeen different errors assigned as reasons why the judgment of the trial court should be reversed. These claimed errors will be designated as they are reached for consideration.

It is urged by defendant that the verdict is without support in the evidence. A careful reading of the bill of exceptions convinces us that this challenge, as to the first

count, is not supported by the record, and that the judgment as to it should be affirmed. However, as to the second count, we find that the verdict is not sustained by competent evidence, and the judgment as to it should be reversed.

The further challenge is presented by defendant: That this action was first lodged in the county court of Hamilton county; that defendant was arraigned and entered a plea of not guilty; evidence was introduced, at the close of which defendant was bound over to the district court, as is usual in cases of preliminary hearings, and entered into the necessary recognizance for his appearance in such district court; that the misdemeanors charged in the district court were the same as those charged in the county court, and the latter was possessed of jurisdiction to try and finally determine the matters thus involved and should have done so; that the proceedings had in the county court after the close of the evidence was without authority in law and void, and did not serve to dispossess the county court of jurisdiction or to vest the district court therewith. As to this challenge, it is sufficient to say that the record of the trial in the district court in no manner discloses that which is claimed to have taken place in the county court, save and except that the proceedings in the county court are made a part of the transcript in this present case; neither does the record here disclose that the proceedings had in the county court were in any manner called to the attention of the district court. Further, no objections were interposed on the part of defendant at the trial to the procedure had in this instant case, either by way of motion to quash, plea in abatement, or otherwise, and neither were the questions here presented in any manner called to the attention of the trial court in the motion for a new trial. As we said in *Weber v. Kirkendall,* 44 Neb. 766: "Primarily the office of a motion for a new trial is to afford the court an opportunity to correct errors in its own proceedings without subjecting parties to the expense and inconvenience of appeal or petition in error." Thus, it has become an elementary rule of our procedure

that "alleged errors of the trial court in an action at law, not referred to in the motion for a new trial, will not be considered in this court." *Pennington County Bank v. Bauman*, 81 Neb. 782. Further, the record here shows that the information was read to defendant, to which he entered a plea of not guilty and proceeded with the trial, as heretofore indicated. The jurisdiction of the district court and the county court, as to the misdemeanors charged, was concurrent. Comp. St. 1922, sec. 9989, as amended by chapter 57, Laws 1925. Then, as we concluded in *Nelson v. State*, 115 Neb. 26: "It being determined that the district court has original jurisdiction of the offense charged, the effect of the so-called waiver of preliminary examination, disclosed by the record, cannot be considered at the present time for the reason that no plea in abatement was filed." Further, as we held in *Huette v. State*, 87 Neb. 798: "Under the provisions of section 444 of the Criminal Code (now section 10113, Comp. St. 1922) defects which might have been attacked by a motion to quash, or a plea in abatement, are waived when a defendant pleads to the general issue; and this is true as well when he pleads voluntarily as when he stands mute and a plea of not guilty is entered for him by the court"—following *Trimble v. State*, 61 Neb. 604. In the course of the opinion in the *Huette* case, we said: "Section 444 of the Criminal Code provides: 'The accused shall be taken to have waived all defects which may be excepted to by a motion to quash, or a plea in abatement, by demurring to an indictment or pleading in bar, or the general issue.' We have repeatedly held that defects which should have been raised by a motion to quash or a plea in abatement are waived when a defendant pleads to the general issue." In support of this statement many of our holdings are cited. Thus, we must conclude that such challenge does not present reversible error.

As to the alleged errors occurring at the trial in the introduction of evidence, and as to the other claimed errors presented, while each thereof has been considered, they are not likely again to occur if a new trial is had on the second

count, hence a discussion thereof would serve no useful purpose, and the same is omitted. However, it might be well to state that as to the challenge to the testimony of the county surveyor and the exhibits by him furnished in connection therewith, we are convinced that prejudicial error was committed by the introduction thereof, and the objection thereto should have been sustained, as such evidence was incompetent and its tendency was to raise an issue collateral to that under consideration.

It therefore follows that the judgment of the trial court as to the first count in the information is affirmed, and as to the second count is reversed, and the cause as to such second count is remanded for further proceedings.

AFFIRMED IN PART, AND REVERSED IN PART.

HOWELL, J.

I dissent from the affirmance of the conviction of Samuel Green on the first count of the information charging him with the illegal sale of intoxicating liquor on July 23, 1926, but concur in the reversal as to the second count charging illegal possession on the same day. This case involves a question of evidence which has not been determined by this court, so far as I know, and one that is important to the enforcement of legislation pertaining to constitutional prohibition. The nature of the thing prohibited by the Constitution, and the obvious difficulties of properly enforcing the law, are such that the legislature has enacted more meticulous laws than are ordinarily necessary to the prosecution of other statutory crimes not so perplexing. It is necessary to state the facts fully, but as briefly as possible.

Shortly before July 23, 1926, one Port Cool served a jail sentence in Aurora under "Jim" Howard, the sheriff of Hamilton county. On that date the sheriff gave $10 to Cool to make a purchase of liquor from Green, who had been suspected, but not previously arrested, of bootlegging. The sheriff did not see Cool go into Green's home place, nor until he came back to the highway. Cool testified to purchasing two quarts of intoxicating liquor for $6, receiving back and returning $4 to the sheriff. Cool was stopped

by the sheriff who took the liquor from Cool's car. The sheriff immediately went to defendant's house, knocked on the door and received no answer. He said he heard a shuffling noise in the house. Cool said when he went to defendant's house he knocked and received an immediate response. The sheriff, it then being about 9:15 o'clock p. m., returned to Aurora. About 11:30, the same evening, he left two men to watch the house all night. Not until about 5 o'clock the following morning did they see defendant, when he came out with a milk bucket. Later the sheriff and others made a thorough search of Green's house, other buildings, and Green's premises which included 80 acres of land. No liquors, or any indication thereof, were discovered. Later the search was extended to land of one Adams which adjoined the land of Green, separated by a two or three-strand wire fence of 30 years' standing as a division line. Some bottles, jugs, utensils and a keg were found about five feet from the fence on the Adams side, evidently used for holding intoxicating liquor; some liquor being found in one or more of them. No liquor and no container was found on Green's land. The prosecuting attorney employed the county surveyor to run a line for the purpose of establishing what is termed "the true line" between the lands mentioned. Without notice to, or conversation with, either the defendant or Adams, the surveyor fixed "the true line" far enough away from the fence to take in the ground upon which the liquor and containers were found. There was some slight testimony, not convincing, that automobile tracks, and possibly foot tracks, were traced from Green's barn over his land to within eight or ten feet of the fence.

Defendant had never been seen in the near vicinity of the find. Cool said he had made a number of prior purchases of intoxicating liquors from the defendant. In the course of trial, in response to an objection by defendant's counsel, the court said to the prosecutor: "Your witness has shown where he found them and your surveyor shows where the true line is." The surveyor made a map which

was received in evidence, over objection, showing the fence which was of more than 30 years' standing, marking the division line in red, and "the true line" by a dotted line, the distance between the two being 8' 1⅛", the strip thus formed being where the liquors and utensils were found. Upon the trial the court allowed the surveyor to testify to "the true line" and received the tell-tale utensils in evidence, over objections of defendant's counsel. The defense was two-fold: (1) Defendant testified he did not sell liquor to Cool; (2) he went to his brother's home, a short distance away, about 7 or 8 o'clock on the evening the sale was said to have been made at about 9 o'clock, remaining there until about 10:30, when he went home. His brother, then a candidate for sheriff of Hamilton county, and his wife, both testified, positively, with the semblance of truth, that defendant was at their home during those hours, their attention being challenged to that fact by Green's arrest during the next forenoon. On the actual sale there is the testimony of an acknowledged bootlegger against an alleged bootlegger. Further, on that point, there is the testimony of the brother and his wife that Green was not present when the sale is said to have been made. Had the case ended there, Green would have had a fair trial. Whether it would have resulted in conviction is problematical and reasonably doubtful.

Testimony of the sheriff and the surveyor was received to show that the defendant owned the land within the established "true line." The display of the utensils and the testimony of two reputable county officials were thrown into the balance. For that reason, and that alone, this court has unanimously reversed the conviction as to the possession count. In the majority opinion it is said:

"However, it might be well to state that as to the challenge to the testimony of the county surveyor and the exhibits by him furnished in connection therewith, we are convinced that prejudicial error was committed by the introduction thereof, and the objection thereto should have been sustained, as such evidence was incompetent and its

tendency was to raise an issue collateral to that under consideration."

I agree with that. Two or three apparently reputable business men of Aurora testified that they were present at the preliminary hearing, heard Cool testify, and that he then testified contrary to his evidence upon the trial. In this situation the court instructed the jury to "consider the testimony on that subject of an alibi with *all other evidence in the case.*" (Italics mine.) On reasonable doubt the jury were told if, after considering "all of the evidence in the case," upon either or both counts, the jury should not be convinced beyond a reasonable doubt, "your verdict shall be not guilty," etc.; and, in considering the credibility of witnesses and the weight to be given to their testimony, it "should take into consideration * * * all the evidence and facts and circumstances proved tending to corroborate or contradict such evidence," etc.

If it be said that defendant cannot complain of reversible error as to the selling count, because of evidence relating to the possession count, he did not request an instruction to the jury to disregard the evidence as to the possession count, there are two reasons why that is not correct: (1) The court admitted the testimony as bearing upon both counts; (2) the court regarded the surveyor's testimony as fixing, as a matter of fact, the "true line" between the lands of defendant and those of Adams, as is indicated by its remark quoted above. The court regarded the land where the liquors and utensils were found as being that of the defendant. Had Green owned that land, it would have been error to tell the jury to ignore testimony relating to possession.

We thus find this situation: The trial court admitted prejudicial and irrelevant testimony of the possession of liquors. It is unquestionable that no liquor or utensils were found upon the defendant's premises, tending to prove a sale. The jury found, from evidence the court said was proper to establish illegal possession, the defendant guilty thereof. The whole matter resolves itself into proving a

crime against accused, which he did not commit at all, in order to convict him of another crime which he may, or may not, have committed; whereas, had possession on defendant's premises been shown, it would have been proper evidence for consideration by the jury on the sale charge because it then would have a "causal relation or logical and natural connection" therewith. Possession of a supply of liquors by accused on his own premises are inter-related, and has a bearing upon potential sales. There is a distinction between proving a prior sale having no relation to a subsequent sale, wholly disassociated as to time and act, and proving preparation and equipment for making sales. One sale does not aid in the making of another. Preparation, equipment and supply directly lead to making sales. Had Green been charged with sale only, proof of possession of a supply by him, found upon his own premises, would be relevant. If shown that he had no supply, that would tend to prove he did not sell. Certainly proof of a supply on premises of another could not be attributed to accused.

The state had no right to make an illegal survey and compel Green to become the owner of his neighbor's land in order to convict him. Such benevolence as that is entitled to scant praise. In civil matters even, burdensome gifts may not be forced upon another. Green was forced to accept a donation of land he never owned or claimed. "Beware of the Greeks when they come bearing gifts." I have heard of "planting" liquor on land, but never before of planting land on liquor. Did the evidence disclose, even tend to disclose, the finding of intoxicating liquors on Green's premises, I would not favor disturbing the conviction on both counts, such possession having a legitimate bearing upon both. The possession proved was not admissible on either count. The only evidence on that point is the uninvited donation by the surveyor to Green of another man's land, against the desire of both, a defiant liberalism without right or title to support his trespass or pity.

There has not been the semblance of a fair trial. Under

our system, no matter how depraved a man may be, he can demand a fair trial, which, if denied, gives him a right to appeal for constitutional protection. We may trace, by a descending scale, the range between goodness and depravity, through slight gradations, without finding any stage at which the protection afforded by the Constitution may be withdrawn. Juries are told innumerable times, the fact that the accused is charged with crime shall not be counted against him; they are the sole judges of the credibility of witnesses and, in weighing testimony, they may take into consideration all of the facts received in evidence under the guidance of the court and the circumstances appearing upon the trial. Unless appellate courts observe these rules, the farce of giving such instruction should be stopped. If it be the rule, as stated in *Jaynes v. People*, 44 Colo. 535, "that no person shall be convicted of an offense by proving that he is guilty of another" (that is the general rule with well-defined exceptions), it would be monstrous to convict a person of crime by proving a crime of another.

There is another reason why the conviction on the first count ought not to stand. Before a jury may convict it must be convinced beyond a reasonable doubt. It, not the court, determines the weight to be given to the testimony. What testimony? That which the court receives, and, of course, it receives only such as it wants the jury to accept. The court invites the jury to consider all it admits. It was to consider what the surveyor said about the results of his survey and the "true line" between the lands involved. Without believing that testimony it could not have convicted Green on the second count. Having believed it, of course Green was convicted. While the jury was weighing the word of accused and his witnesses against that of Cool, the testimony of the surveyor was pitted against that of Green. The surveyor was a public official for whom, no doubt, members of the jury had voted and in whose honesty they believed. Green said he did not own to the line. The surveyor said he did. Thus the accused

and his testimony were put out of the way—*hors de combat*—by a blow from behind. This brings us to a consideration of the relevancy of testimony, of a causal, logical and natural character, having relation to crimes charged. In *State v. Routzahn*, 81 Neb. 133, 138, this court quoted with approval the following language of the supreme court of Minnesota:

"But, reduced to its narrowest compass, the true rule is that evidence of the commission of other crimes is admissible when it tends corroboratively or directly to establish the defendant's guilt of the crime charged in the indictment on trial, or some essential ingredient of such offense, * * * or is a part of a common scheme or plan embracing two or more crimes so related to each other that the proof of one tends to establish the other."

Casteel v. State, 151 Ark. 69, was a prosecution for manufacturing intoxicating liquors. Evidence that accused had liquors on his premises, concealed near his home, after the time of the alleged offense, was held proper, as tending to show possession of a still and of manufacturing. There is an analogy between possession of liquor and footprints as evidence. Both are competent, provided the accused is connected therewith. There was evidence in the case at bar of dim automobile tracks and of signs of footprints leading from Green's farm to within eight or ten feet of the fence near where the liquor and utensils were located. There was no effort to prove, except by suspicion, that they were made by Green.

In 8 R. C. L. 183, sec. 175, the author states: "Mere evidence of footprints alone, unconnected in any way with the defendant by means of comparison or otherwise, is not admissible."

Syllabus 3 in *Kinnan v. State*, 86 Neb. 234, reads: "The admission of evidence of the finding of footprints in the corn field where it is alleged the unlawful act occurred, not shown to have been made by any shoes ever worn by the defendant, and not connected with him in any way

except that they lead in the direction of his home, held reversible error."

State v. Burch, 195 Ia. 427, states the rule to be: "In *Kinnan v. State*, 86 Neb. 234, 27 L. R. A. n. s. 478, 21 Ann. Cas. 335, it was held that evidence of footprints was erroneously admitted where there was no testimony tending to show that the footprints were made by the defendant." To the same effect *Heidelbaugh v. State*, 79 Neb. 499.

Dorsey v. State, 25 Ariz. 139, illustrates the rule relating to possession: "The fact that the gun was in appellant's house soon after the robbery did not, under the circumstances, show possession in him, since it was found in the room leased to and occupied by Hatton and Briley who were in possession of the property in this room not belonging to the owner of the house, and who, *because of this possession, were presumed to be its owners and to have taken it there themselves.*" (Italics mine.) The syllabus reads: "The finding of a gun taken from prosecuting witness (by one who robbed him) in a room of defendant's house, * * * held not to show that defendant had possession of the gun." Fitting the above to the case at bar we may word it thus: "The finding of intoxicating liquors and containers on land of another than defendant, and occupied by the other, does not show that defendant had possession of them."

Finding liquor on the premises of an accused, without knowledge thereof, would not render him liable to prosecution; but, "possession having been established, the presumption of knowledge follows as a legal consequence attached to it." *People v. Burbank*, 234 Mich. 600.

Hawes v. State of Georgia, 258 U. S. 1, states: "The existence upon land of distilling apparatus, consisting of the still itself, boxes and barrels, has a natural relation to the fact that the occupant of the land has knowledge of the existence of such objects and their situation." To the same effect is *Larsen v. State*, 190 Wis. 606.

State v. Gates, 52 N. Dak. 659, holds that the finding of liquor in a part of a rooming-house not under control of

accused would not be even a circumstance to be considered by the jury in determining his guilt or innocence.

In *State v. Lipman,* 163 Minn. 431, Lipman was prosecuted for unlawful sale of intoxicating liquors. The testimony was conflicting as to the sale, which, it was alleged, was made on August 27, 1924. On the following September 27, officers searched premises of defendant and found bottles of liquor hidden in a woodpile, which was proved upon the trial over defendant's objection. The court said: "It was relevant and admissible as showing a supply of liquor within defendant's reach, affording him the means of committing the crime. The proof was admissible as corroborative of the testimony as to the illegal sale charged in the complaint. *People v. Petrovich,* 67 Cal. App 405; 33 C. J. 752; *State v. Legendre,* 89 Vt. 526; *State v. Clark,* 155 Minn. 117."

In *State v. Work,* 47 S. Dak. 649, it was held proper to show sales as corroborative of "keeping and storing intoxicating liquors." See, also, on this point, 16 C. J. 606, sec. 1174; *Cooper v. State,* 12 Ga. App. 561; *Myers v. State,* 52 Tex. Cr. Rep. 558. In the last cited case the court said: "Certainly, if appellant could prove that he had no whiskey and never had had or handled any whiskey, this would be a strong circumstance to corroborate his statement that he did not sell appellant any whiskey. Then, with the same degree of rationality does it not follow that, if the state can prove that appellant has in his possession a large quantity of intoxicants, this fact should be admissible for the purpose of corroborating the states witness and rendering probable the fact that he did not sell the whiskey."

If there be any doubt about the admissibility of evidence showing possession of liquors as bearing upon the guilt of one charged with illegal sale only, it seems that section 3247, Comp. St. 1922, as amended by section 1, ch. 94, Laws 1923, would remove it. That section provides, in effect, if not in direct terms, that possession, "in and of itself," under certain conditions, shall constitute "*prima facie* evidence that such liquor was kept by such person

with the purpose of unlawful sale." Section 10186 Comp. St. 1922, has no application to the situation in this case. In *Dibello v. United States,* 19 Fed. (2d) 749, evidence of liquors found in the basement of a building owned by accused was held proper under the doctrine that "things connected with the crime as its fruits or as the means by which it was committed" may be shown. Many other authorities along the same line exist. None have been shown, and I find none, to the contrary.

It may be, and is readily conceded, that evidence of a separate, independent and unrelated crime is not admissible to prove another. It may be, and it is readily conceded, that one who is charged in two counts with two separate, independent and wholly unrelated offenses, must request an instruction that the jury do not consider the evidence relating to one crime as proof of the other, before he can claim error. If that were the case at bar the majority opinion would be correct. But, as hereinbefore stated, had Green been charged with selling only, proof of a supply of intoxicating liquors on his own premises would have been admissible. It would have been error for the court to have instructed the jury to disregard the evidence relating to possession, provided the possession was that of Green, or the liquor was located on his premises.

From the foregoing, it would seem the conviction on both counts should be set aside.

Note—See Criminal Law, 16 C. J. 159 n. 79, 17 C. J. 87 n. 43, 370 n. 36—Indictments and Information, 31 C. J. 871 n. 31—Intoxicating Liquors, 33 C. J. 618 n. 88, 752 n. 13.

ARTHUR J. RICHARDSON ET AL., APPELLANTS, V. JAMES N. KILDOW ET AL., APPELLEES.

FILED MARCH 14, 1928. No. 25505.

1. **Statutes.** Where a legislative act, though complete in itself, refers to another act for the procedure to be taken, the latter act, *pro tanto*, becomes a part of the former to the same extent as though actually incorporated therein.

2. Counties: ELECTIONS: NOTICE. A statute requiring that notice be published for four weeks of an election to be held submitting a proposition to the people is mandatory, and an election held without such publication is void.
3. ———: COUNTY FAIRS: ESTABLISHMENT. A county which has not accepted in the manner required by statute the provisions of an act authorizing it to establish and maintain a county fair is without authority to levy taxes for that purpose.
4. Taxation: INJUNCTION. In a proper case, upon application of a taxpayer, equity will enjoin the collection of taxes levied for an unauthorized purpose.
5. Injunction. The writ of injunction is not wholly a writ of right, and may be withheld, in the discretion of the court, when it is likely to inflict greater injury than the grievance complained of; this principle is specially applicable where the interests of the public are involved.

APPEAL from the district court for York county: LOVEL S. HASTINGS, JUDGE. *Affirmed in part, and reversed in part, with directions.*

Hainer, Flansburg & Lee and *W. L. Kirkpatrick,* for appellants.

John L. Riddell, George M. Spurlock and *Benton Perry, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, THOMPSON and HOWELL, JJ., and REDICK, District Judge.

REDICK, District Judge.

This action is brought by the plaintiff and others, as taxpayers of York county, against the board of supervisors and the treasurer of York county, to enjoin the county officers named from carrying out a plan of establishing and maintaining a county fair, and to enjoin the collection of taxes and the expenditure of moneys for such purpose. The district court found the fair itself was legally established, enjoined certain tax levies, and enjoined the county from expending money for the erection of certain buildings, but refused to enjoin a levy of taxes for the maintenance and management of a county fair. Plaintiffs appeal.

A general statement of the facts will not be necessary, but attention will be called, as we proceed, to those which are pertinent to the questions submitted.

Those questions are: (1) Whether or not the county of York has adopted, in the manner provided by statute, what is known as the county fair act; and (2) whether or not any or all of the taxes levied by the county in pursuance of the establishment of a county fair should be enjoined. The determination of these questions depends upon a proper construction of certain sections of the Compiled Statutes of 1922, the pertinent portions of which are as follows: "Section 57. Counties in the state of Nebraska are hereby authorized to establish and maintain county fairs, to purchase, hold and improve real estate for that purpose, to convey the same, to levy and collect taxes for such purposes, and to do all things necessary for the proper management of such county fairs."

"Section 58. (1) Any county may proceed under this act when such county shall have accepted the provisions hereof, which acceptance may be made by the county commissioners or board of supervisors by resolution duly adopted.

"(2) If after the adoption of a resolution for such purpose fifteen per cent. of the qualified voters of the county shall file with the county board a petition requesting that the acceptance of the provisions of this act shall be submitted to the voters of the county, the county board shall submit the same to a vote of the people in like manner as the question of voting courthouse bonds may be submitted. During the time such question is pending for the vote of the people no further proceedings shall be had for the establishment of such fair.

"(3) Whenever ten per cent. of the qualified voters of the county shall file a petition with the county board asking that the question of the acceptance of the provisions of this act be submitted to a vote of the people it shall be the duty of such board to submit such question to the voters in like manner as the question of voting courthouse bonds

may be submitted. If a majority of the votes cast upon the question, when the same is submitted under either of the provisions hereinbefore provided, shall be for such proposition the county board shall immediately proceed to establish such county fair."

The above section is not subdivided, but we have quoted it in that form for purposes of clarity.

"Section 59. Any county acting under the provisions of this act shall have authority to purchase, hold, improve and convey real estate for county fair purposes in like manner as other real estate for county purposes."

"Section 60. Bonds may be voted, or a special tax be levied, for the purchase and improvement of real estate for county fair purposes in like manner as for the building of a courthouse in any county accepting the provisions of this act."

The above sections are taken from the session laws of 1917, "An act to authorize counties in the state of Nebraska to establish and maintain a county fair, to purchase, hold and improve real estate for that purpose, to convey the same, and to levy and collect taxes for such purpose."

Section 58, *supra*, provides for the submission of the question of establishing county fairs to the voters "in like manner as the question of voting courthouse bonds may be submitted," and thereby the sections governing that procedure become a part of the county fair act. Those sections are the following:

"Section 854. It shall be the duty of the county board of each county: * * * Second. To erect or otherwise provide a suitable courthouse, jail and other necessary county buildings, and for that purpose to borrow money and issue the bonds of the county to pay the same. * * * But no appropriation exceeding fifteen hundred dollars shall be made for the erection of any county building except as hereinafter provided, without first submitting the proposition to a vote of the people of the county at a general election or a special election ordered by said board for that

purpose, and the same is ordered by a majority of the legal voters thereon."

"Section 856. The mode of submitting questions to the people for any purpose authorized by law shall be as follows: The whole question, including the sum desired to be raised, or the amount of tax desired to be levied, or the rate per annum, and the whole regulation, including the time of its taking effect, or having operation, if it be of a nature to be set forth, and the penalty of its violation, if there be one, is to be published for four weeks in some newspaper published in the county."

"Section 857. When the question submitted involves the borrowing or expenditure of money, or issuance of bonds, the proposition of the question must be accompanied by a provision to levy a tax annually for the payment of interest, if any thereof, and no vote adopting the question proposed shall be valid unless it likewise adopt the amount of tax to be levied to meet the liability incurred."

It will be noted that by section 58 two methods are provided by which the county may accept the provisions of the county fair act: (1) By a resolution adopted by the county board, subject, however, to being overturned by referendum upon a petition to that end signed by fifteen per cent. of the qualified voters of the county; or (2) by submission of the question to a vote of the county upon a petition signed by ten per cent. of the qualified voters. Either of these submissions to be made in like manner as provided for the issue of courthouse bonds.

January 9, 1924, a resolution to accept the provisions of the county fair act was voted down by the board of supervisors. On September 23, 1924, petitions containing the requisite number of signers were presented to the county board asking the submission to the people at the general election in November of the question of the acceptance of the county fair act and the establishment of a county fair. The petition was accepted by the board and the county clerk instructed to place the proposal on the ballot, which was done in the usual manner, and notice of a general

election to be held November 4, 1924, was given for filling certain offices, and also "purchase site and maintain a county fair." This was the only notice published concerning the acceptance of the county fair act, and was published once, on the 10th day of October, 1924.

In the absence of the adoption of a resolution by the board accepting the provisions of that act, it is perfectly clear, and the record so establishes, that the board was proceeding under the second method above referred to for the determination of the question. It is equally clear that the steps taken were ineffective because of a failure to publish, for four weeks, notice of the election, including the sum desired to be raised, or the amount of tax desired to be levied, and other matters as required by section 856.

It is argued by defendants that, inasmuch as the county board was authorized by resolutions alone to accept the provisions of the act, and that, as appears from the evidence, subsequent to the election, the board carried many motions and resolutions for the purpose of establishing and maintaining a county fair, the absence of a preliminary resolution is thereby supplied and the consent of the county sufficiently established. We cannot adopt this view. Counsel fail to consider that, after the adoption of the resolution by the board, an opportunity must be afforded the electors to present the matter by a referendum to the people. This is not so important, as the board adopted the second method after the defeat of the resolution of January 9, 1924. The statute requires affirmative action by one or other of the methods provided. When the statute provides the manner in which the consent of the county to be governed by the act is to be manifested, such method must be pursued. In *State v. Cherry County,* 58 Neb. 734, we held that the statutes requiring notice to be published four weeks prior to submitting a question for the issuance of courthouse bonds was jurisdictional. And in *State v. Babcock,* 21 Neb. 599, we held that the requirement of the adoption of the amount of tax to be levied was mandatory. The submission to the electors in the present instance was

insufficient for failure to publish notice for four weeks, and for failure to state the amount desired to be levied, for adoption by the people. We are clearly of the opinion that the county has failed to take the necessary steps to acquire the authority to maintain a county fair.

The second question for our consideration arises from the following facts: After the election, and November 26, 1924, the board of supervisors, assuming they had the authority, advertised for proposals for land for a county fair site, and in response thereto the board was offered the Bittinger farm of eighty acres, accepted the offer, and on January 24, 1925, purchased the farm for $25,355, and paid for the same in cash out of the general fund, which had been replenished by a transfer from several other funds. Payment was made in the form of warrants which were immediately redeemed and are now held in the general fund until the amount taken therefrom is restored by taxation.

January 13, 1925, the board passed a resolution authorizing the sale of the poor farm of the county, and the question of sale was later submitted to the voters and authorized. It seems that the intent of the board was to hook up the two propositions and use the land purchased for the county fair also as a poor farm. The poor farm has not yet been sold.

In 1925 the county board included in its estimate of expenses $40,000 for "county fair ground" and levied a tax for the same. The district court enjoined the collection of this tax in excess of the cost of the Bittinger farm, $25,355. Plaintiffs claim this entire levy was void and should be enjoined. We think, however, the holding of the district court was correct. It will be noted that the authority of the county board to purchase sites for county buildings is without restriction. There is no requirement that the question be submitted to the people. And while, if the transaction stood alone, in view of our holding that the county had no authority to establish and maintain a county fair, the purchase and the levy of this tax would

be held void, we think, in view of the proposed sale of the county poor farm and the transfer of that institution to the new ground, it presents a situation with which a court of equity should not interfere. The interests of the plaintiffs as taxpayers are not of sufficient magnitude to outweigh the loss and serious complications which would surely result to the county from a different holding, especially in view of the fact that the board was acting in good faith and, so far as the record shows, received full value for that portion of the tax held valid by the lower court. The writ of injunction is not wholly a writ of right. *Atchison, T. & S. F. R. Co. v. Meyer,* 62 Kan. 696. And it may be withheld if it is likely to inflict greater injury than the grievance complained of. *Edwards v. Allouez Mining Co.,* 38 Mich. 46. The interests of the public are to be taken into consideration by the court, and when the issuance of an injunction will cause serious public inconvenience or loss, without correspondingly great advantage to the complainant, no injunction will be granted. 22 Cy. 784.

In 1926 the county fair board, appointed by the county board, as required by the statute, presented its estimate of expense for the management of the county fair for that year in the sum of $15,000. The county board accepted the estimate, but included in its own estimate for 1926 an item of $30,000 for county fair purposes and for the improvement of the county fair premises by the erection and construction of buildings thereon; the intention being, it seems, that $15,000 should be raised for the expense of managing the fair, and $15,000 for the erection of necessary buildings. The district court enjoined the levy to the extent of $15,000 for the erection of buildings, but approved the remainder for the management of the county fair. In this we think the learned judge erred. His ruling was correct enjoining the levy for buildings, but he should also have enjoined the levy for expense of management for the reason, as we hold, that the county of York was not authorized according to law to carry on a county

fair and, therefore, the county board was without authority to levy taxes for that purpose.

It follows that the judgment of the district court must be reversed in so far as it decrees that York county is authorized to establish and maintain a county fair, and in so far as it failed to enjoin the collection of the entire $30,000 levy for county fair purposes in 1926, and the cause is remanded, with instructions to grant the injunction in in that regard as prayed. In all other respects the judgment is affirmed.

AFFIRMED IN PART, AND REVERSED IN PART, WITH DIRECTIONS.

JOHN B. WATTS, APPELLANT, V. JAMES G. LONG, APPELLEE.

FILED MARCH 14, 1928. No. 26304.

1. Master and Servant: EMPLOYERS' LIABILITY ACT: APPLICABILITY. The employers' liability law of this state is not applicable to a nonresident employer and resident employee, where the contract of employment was made in this state for services to be performed in another state, and the employer was not, at the time of the contract, engaged in any trade, business, profession, or avocation in this state.
2. ———: ———: ———. Such law is applicable where the employer is engaged in any trade, business, profession, or avocation in this state and the employee, while performing work incident to such business in another state, is there injured.
3. ———: ———: ———. An employer, resident and having his principal place of business in Kansas, was engaged in paving highways in that state and in Nebraska under contracts with municipalities. Upon completion of his last contract in Nebraska, he entered into a contract in that state with an employee, engaged upon that contract, to go to Kansas and work upon contracts for paving there, returning to Nebraska if the employer secured other contracts in Nebraska in the future. *Held*: (1) That at the date of the contract the employer was not conducting any industry in Nebraska; (2) that the work of the employee was not an incident to any such industry; and (3) that the Nebraska employers' liability act did not apply to such contract.
4. ———: ———: ———. In the above situation, where the employer carried liability insurance in both states under one

policy, *held* that the employers' liability law of the state in which the contracts for paving were being performed governed the relations and rights of the parties as to compensation to employee for injuries received while performing work under or incidental to such contracts.

APPEAL from the district court for Gage county: WILLIAM J. MOSS, JUDGE. *Reversed and dismissed.*

Montgomery, Hall, Young & Johnsen, for appellant.

Bartos, Bartos & Placek, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, THOMPSON and HOWELL, JJ., and REDICK, District Judge.

REDICK, District Judge.

This is a proceeding under the workmen's compensation law of Nebraska for injuries sustained by the employee, Long, while in the employ of Watts on a paving job at Hiawatha, Kansas. The employee, Long, will be referred to as the plaintiff, and the employer, Watts, as the defendant. The facts and circumstances giving rise to the claim are substantially as follows: Watts was a paving contractor, residing and having his principal place of business at Concordia, Kansas, and his business covered contracts for that work in both Kansas and Nebraska, and he carried compensation insurance for both states under one policy. He maintained no place of business or branch office in Nebraska other than temporary quarters required for the prosecution of work upon Nebraska contracts. In 1925 he had a contract for paving at Wymore, Nebraska. He moved his asphalt plant to Wymore, together with a regular crew for the accomplishment of the work, but for the common labor required employed local men. Among others plaintiff was employed at Wymore. This job was completed July 27, 1925, and about that date an arrangement was made between plaintiff and defendant's foreman that plaintiff should go to Hiawatha, Kansas, and work for defendant in the prosecution of a paving contract at that

place. At this time defendant had finished the Wymore contract and had no other contracts for paving in the state of Nebraska, but expected to procure further contracts if and when any such were let and defendant was the lowest bidder thereon. Late in August, and in September, 1925, defendant did procure other contracts for paving in Nebraska. In pursuance of the arrangement above referred to, plaintiff, about August 1, 1925, in an automobile loaned to him by Watts for that purpose, drove to Hiawatha, Kansas, accompanied by his family in another automobile. Upon plaintiff's arrival in Kansas plaintiff immediately began work for defendant as a helper and machinist. On December 17, 1925, while assisting in loading a tank onto a flat-car at Hiawatha, plaintiff slipped and fell to the ground, fracturing his right hip, which is the injury for which he claims compensation. After completion of the job in Kansas, and about February 4, 1926, plaintiff returned to Wymore with some of the gang, and the paving machinery and plant were shipped back to Wymore in March, 1926, preparatory to performing the contracts of August and September above mentioned. Long continued to work for defendant in Kansas after his injury, and a short time in Nebraska after his return, but was finally compelled to cease work on account of his injury. Long testifies that his arrangement or contract with defendant's foreman, Roush, in July 1925, was in substance that he should go to Kansas and work for defendant until the jobs were completed and then return to Nebraska and work for defendant on the new contracts. Plaintiff was allowed full compensation by the commissioner, but required to submit to an operation which the evidence tends rather conclusively to show would remove the disability from which he suffers. Both parties appealed to the district court, the defendant from the allowance of any compensation, and the plaintiff from the order requiring him to submit to an operation. In the district court the allowance of full compensation was granted without any condition, and defendant appeals.

It is the claim of the plaintiff that, by reason of the

fact that his contract of employment was made in this state and the defendant was engaged in carrying on an industry in this state and had elected to come under the workmen's compensation law and taken out insurance in compliance with that law, his right to compensation for his injury is governed by the laws of this state. On the other hand, it is the claim of the defendant (a) that the arrangement between Long and Roush did not constitute a binding contract, (b) that at the time of plaintiff's injury the defendant was not conducting any industry in this state, and that, therefore, (c) the courts of this state are without jurisdiction to award compensation to plaintiff.

The first question for determination is whether the injuries of plaintiff are to be compensated under the laws of Nebraska or Kansas. Plaintiff claims protection under Nebraska law for the following reasons: (1) That the contract of employment was made in Nebraska; (2) that defendant was engaged in carrying on an industry in this state; (3) that plaintiff's employment in Kansas was an incident to the Nebraska industry.

Of these in their order:

1. The defendant denies that any contract was made in Nebraska, on the grounds (a) that the agent of plaintiff with whom negotiations were had was not authorized to make the contract, and (b) that, assuming his authority, the evidence is not sufficient to establish a binding contract.

The facts are that plaintiff was working for defendant upon a job at Wymore, Nebraska, which was finished July 27, 1925; that about that time, at Wymore, defendant's foreman, Roush, asked plaintiff if he would go to Kansas and work for them, saying he would pay him 50 cents an hour, and plaintiff said he would go. Considering the usual informality of contracts of hiring of common laborers, the above would seem to be sufficient to establish a contract. But a few days later plaintiff, using an automobile loaned him by Watts, drove to Hiawatha, Kansas, his family accompanying him in another automobile, and

upon arrival went to work for defendant. Under these conditions the question of Roush's authority is unimportant. It may therefore be deemed established that, at Wymore, Nebraska, defendant hired plaintiff to work for him at Hiawatha, Kansas, at 50 cents an hour.

2. The defendant was engaged in the business of paving highways with brick and asphalt; this was the industry to be charged under compensation acts; his business involved contracts in Kansas and Nebraska; his principal place of business was Concordia, Kansas; he maintained no place of business in Nebraska, only offices at the places where contracts were being performed, for purposes connected with such contracts; he carried employers' liability insurance in one policy covering both states, Long being listed as an employee in Kansas at the time of his injury; at the time of the contract of employment of plaintiff, defendant had finished his last contract in Nebraska, and shortly thereafter removed his machinery and plant to Hiawatha; defendant had no contracts in Nebraska at that time, but expected others if, when offered, his bid were lowest; later in August and September, 1925, he obtained other contracts to be entered upon the following spring.

From these facts it follows that defendant was carrying on an industry in the state of Nebraska at such times as he had contracts for paving, but that he had no contracts, nor any certainty of contracts in the future, at the time of the contract with plaintiff. True, plaintiff said the understanding was that when they were through in Kansas they would come back to Nebraska, but this was evidently conditional upon defendant securing contracts.

3. The contract was not an incident to the industry carried on in Nebraska. It had special and sole reference to work in Kansas. There was no work in that industry in Nebraska at the time, and the defendant might never obtain another contract in that state.

We now return to the main question: Is plaintiff compensable under the workmen's compensation act of Nebraska? A goodly part of the briefs of counsel is devoted

to the discussion of the extra-territorial operation of compensation statutes, *i. e.*, whether compensation will be decreed in one state where the accident occurred in another. But this question has been set at rest in Nebraska by the case of *McGuire v. Phelan-Shirley Co.*, 111 Neb. 609, holding: "A resident of Nebraska entered into a contract in this state with a Nebraska corporation, having its principal place of business in Omaha, to perform certain labor for the corporation in Iowa, as its employee. While engaged in the allotted work in Iowa the employee incurred serious injuries. *Held*, that, under the employers' liability act, the subsequent proceedings for compensation are maintainable in Nebraska." That case, however, is not controlling here because the principal place of business of defendant was in this state, and it was in connection with the carrying on of that industry in this state that the plaintiff was employed to go to Iowa. Both parties being residents of Nebraska, the contract had a direct connection with and was an incident to the industry carried on by defendant in Nebraska. In such situation there could be no question but that it was the intention of the parties that the laws of Nebraska should govern. In the instant case plaintiff was a resident of Nebraska, defendant of Kansas, having his principal place of business in that state, and not actually carrying on *any* industry in Nebraska.

The location of the industry is important as a simple illustration will demonstrate. A corporation or individual engaged in the plumbing business in New York City sends an agent to Chicago to employ a plumber to work in New York. A contract is entered into in Chicago, and employee goes to New York and is injured in line of his duties in that state. Can it be reasonably claimed that the employee may seek compensation under the laws of Illinois? We confidently answer no. To go one step further with our illustration, suppose the employer had a branch house in Chicago, and the employee worked therein? The answer to the question would still be "no," for the simple reason that the accident was not referable to the industry carried

on in Chicago, but to that in New York. But plaintiff argues that, the contract having been made in Nebraska, the law of that state governs. The general rule is well established that, where the place of the contract and the place of performance are the same, the law of the place where made will govern the contract; but it is equally well established that, where the contract is made in one place to be executed in another, it will be governed by the law of the place of performance. *Andrews v. Pond*, 13 Pet. (U. S.) *65; *London Assurance v. Companhia De Moagens*, 167 U. S. 149; *Hall v. Cordell*, 142 U. S. 116; *Leader Specialty Co. v. Chapman*, 85 Ind. App. 296.

Plaintiff cites *Pierce v. Bekins Van & Storage Co.*, 185 Ia. 1346. In that case the defendant's business was localized in Sioux City, Iowa, where plaintiff resided and was hired, and plaintiff was injured in Nebraska while driving a moving van of defendant from Sioux City to Homer, Nebraska. This case was cited and followed in *McGuire v. Phelan-Shirley Co., supra*, and goes no further than that case.

Also, *Grinnell v. Wilkinson*, 39 R. I. 447. In that case both parties were residents of Rhode Island, and it was conceded they were subject to the provisions of the workmen's compensation act of that state. Moreover, the injury was received in Connecticut while completing a piece of carpenter work begun in Rhode Island.

Also, *Crane v. Leonard, Crossette & Riley*, 214 Mich. 218. Plaintiff was in the employ of defendant, an Ohio corporation authorized to do business in Michigan, and engaged in buying and shipping produce at about 40 points in that state. Defendant had elected to come under the workmen's compensation act of that state. Crane, the employee, accompanied a shipment of potatoes in the line of his employment to Chicago, where he was killed. The only defense was that the accident occurred outside the state of Michigan. None of these cases nor those cited by defendant are identical in their facts with the case at bar, and it is fair to state that we have found none which are. That the mere

fact of the contract being made in this state is not controlling is supported by the following cases: *In re Smith v. Heine Safety Boiler Co.*, 224 N. Y. 9. The contract was made in New York. Defendant was a Missouri corporation having factories in that state and in Pennsylvania. The accident occurred in Maine. *Ginsburg v. Byers*, 171 Minn. 366, where the contract was made in Iowa for work to be performed in Minnesota. The facts in that case were almost identical with the one at bar, but claim was made in Minnesota. The syllabus is as follows:

"The defendant was engaged in road-building in Minnesota and lived there. He built roads in Iowa and the plaintiff worked for him there. He hired the plaintiff, in Iowa, to come into Minnesota and work for him after finishing the Iowa work, and while so working the plaintiff was injured. It is held that plaintiff was under the Minnesota compensation act."

The case is authority for holding that the claim of plaintiff in this case should be presented to the Kansas courts. If in that case the claim had been made in Iowa it would have been on all fours with this. *Johnson v. Nelson*, 128 Minn. 158, in which it was held that, though the contract was made in Minnesota, it was to be performed in Wisconsin, where the accident occurred, and defendant having elected to come under the compensation act, plaintiff could look for redress only under that act. In *Anderson v. Jarrett Chambers Co.*, 206 N. Y. Supp. 458, it was held: "Where employee was injured in another state, place of contract is not necessarily controlling in determining liability under workmen's compensation law, and in absence of evidence that employer was engaged in hazardous occupations in this state, and that claimant's work was incidental thereto, award must be reversed."

The case of *Donohue v. Robertson Co.*, 205 App. Div. (N. Y.) 176, although not from the highest court of that state, deserves special consideration on account of its logic and close application to the facts of the instant case. The employer was a Pennsylvania corporation engaged

in the business of fireproof construction in several states. The contract of employment was made in New York, where the claimant resided. The claimant worked on a roofing job for defendant at Ebenezer and remained continuously in that employment, moving to various places in Pennsylvania, and then to Washington, D. C., where he received the injury for which he received compensation in proceedings instituted in New York. Compensation was allowed by the industrial board, but the award was reversed upon appeal. The court said:

"Apparently the state industrial board has made an award upon the theory that jurisdiction was obtained through the making of a contract of employment in this state under the authority of *In re Post v. Burger & Gohlke*, 216 N. Y. 544. The decision in that case, however, has been distinguished. (Citing cases.) The place of the contract is not necessarily controlling. The workmen's compensation law involves an exercise of the police power of the state, and 'does not attempt to regulate the duty of foreign employers in the conduct of their business within foreign jurisdictions. * * * A duty is imposed by law on employers conducting a hazardous employment in New York to insure their workmen against injury, and the insurance covers injuries incidental to that employment though suffered in another state. * * * The duty to insure does not outlast the existence within our borders of the business or relation which calls it into life. *In re Smith v. Heine Safety Boiler Co.*, 224 N. Y. 9.

"The real question in the case is whether at the time of the accident the employer was carrying on a hazardous employment within the state of New York and whether the claimant suffered an injury incidental to that employment though suffered in another state." The opinion closes as follows: "It seems that this employer, a foreign corporation, carried compensation insurance with another insurance company for its business done outside the state of New York and that the appellant carrier (the insurance company) furnished a policy which by its terms covered

only the business conducted within the state of New York. If the appellant carrier is to be held liable under this policy, it must be for injuries sustained by virtue of the conduct of the business of the employer within the state of New York or work outside the same but incidental to the New York business."

Applied to the present case, as regards the liability of the insurance company, the result of that decision is that compensation for injuries received must be sought in the state where the industry is being carried on.

What is the situation here? Assuming the existence of a binding contract in the terms claimed by the plaintiff, it had specific reference to work to be performed in the state of Kansas. The defendant at the time had no contracts for and was not engaged in any work in the state of Nebraska and, therefore, was not carrying on any industry in this state to which the contract was referable or to which the work in Kansas was an incident. The argument of plaintiff that the work in Kansas was incidental to the industry carried on in Nebraska by reason of the provision that upon completion of the work in Kansas plaintiff should return to work for defendant in Nebraska is unsound for the reason that at that time there was no work in Nebraska to which the provision might be applied and none might ever be secured. This provision, therefore, falls for want of a subject, or at least lay dormant until further contracts were secured.

It is well established that the law of the state in which a contract is made and is to be performed is considered as written into and becomes a part of and governs the contract; but, where a contract made in one state is to be performed in another, the rule is equally well established, as hereinbefore noted, that the law of the place of performance governs the contract. We are, therefore, of opinion that when the parties entered into the contract in question for the performance of work in the state of Kansas, the workmen's compensation law of Kansas became a part

of the contract so far as that work was involved, and that plaintiff must seek compensation in that state.

We conclude that the courts of this state are without jurisdiction in the premises, on the ground that plaintiff's employment was not incidental to any industry conducted in this state, and that, in fact, no such industry was being conducted at the time of plaintiff's injury, and that the district court and commissioner erred in holding to the contrary. In view of this conclusion, it will not be necessary to discuss the other matters presented by the briefs.

It is therefore ordered that the judgment of the district court be reversed and the proceedings dismissed.

REVERSED AND DISMISSED.

FRED J. DRIVER, JR., ET AL. V. STATE OF NEBRASKA.

FILED MARCH 26, 1928. No. 26087.

1. **Sales: DEFAULT. RECAPTION.** A seller retaining title to a chattel but parting with possession under a sale contract authorizing recaption for nonpayment of a delinquent instalment of the purchase price may peaceably retake possession upon default without resorting to replevin.
2. **Assault and Battery: REVERSAL.** Evidence outlined in opinion *held* insufficient to prove assault and battery beyond a reasonable doubt.

ERROR to the district court for Douglas county: L. B. DAY, JUDGE. *Reversed and dismissed.*

Charles S. Reed and *William L. Randall,* for plaintiffs in error.

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

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and HOWELL, JJ., and BROADY, District Judge.

ROSE, J.

In two prosecutions by the state in the district court for Douglas county Fred J. Driver, Jr., and H. R. Mitchell, defendants, were separately accused of assault and battery upon the person of Walter Rosicky in Omaha, April 23, 1927. They pleaded not guilty and were tried together, a jury being waived. Each defendant was convicted and sentenced to pay a fine of five dollars and costs. As plaintiffs in error they present for review the record of their convictions.

The determining question is the sufficiency of the evidence to prove guilt beyond a reasonable doubt. William Rosicky was complainant. The prosecutions grew out of a controversy between him and defendants over the recaption of an automobile for nonpayment of a delinquent instalment of the purchase price.

Addie M. Rosicky, wife of complainant, entered into a conditional sale contract July 30, 1926, with the Julien Chevrolet Company for the purchase of a Chevrolet coach. Of the purchase price $408.75, payable in instalments of $34.06 on the 30th day of each month, remained unpaid. Payment in full was a condition of passing title to the purchaser. Recaption without demand was authorized by the purchaser upon failure to pay an instalment when due. Time was of the essence of the contract. It was agreed that possession of the purchaser after a breach of contract on her part should be considered unlawful. On these terms she procured possession of the coach. She did not pay any monthly instalment when due. Both the conditional sale contract and the title of the Julien Chevrolet Company to the coach were formally transferred to the General Motors Acceptance Corporation. Defendants represented that corporation in making collections. Repeated demands for delinquent instalments had been made. The conditional purchaser, when requested to make payments, had referred Mitchell to her husband, the complaining witness, who occasionally remitted instalments and attended to some of the correspondence. More than 20 letters insisting on

payment after default had been sent through the mails by Mitchell to the purchaser or her husband. The letters demanded performance and contained repeated references to the terms of the conditional sale. Following a telephonic conversation relating to the unpaid purchase price, Mitchell, April 19, 1927, representing, as in all his letters, the credit department of the General Motors Acceptance Corporation, addressed and mailed to the complaining witness a letter stating that the unpaid balance of the purchase price was then $170.30 and demanding payment of the instalment due March 30, 1927. In a reply written by the complaining witness himself April 20, 1927, the balance stated was questioned, a discount suggested and delinquency treated as "a minor matter." He testified at the trial that he was assaulted by defendants April 23, 1927. He was a wholesale dealer in neckties with an office in the Uptown Theatre at Twenty-ninth and Leavenworth streets, Omaha. At the time of the alleged assault the Chevrolet coach in controversy was standing in the street near the Uptown Theatre. In material respects his version of what occurred, as told on the witness-stand, may be summarized for the purposes of review as follows:

Defendants came to his office April 23, 1927, demanded $34.06 on peril of towing the coach away, and left. He followed them and asked them "what they proposed to do." They said they intended to tow the car away. He suggested that the three of them go to his home and talk to his wife. Defendants consented. He wanted to go in the coach but Driver said to leave it and go in the company's car. The witness agreed and they started to his home. On the way all consented to stop for a moment near the Keeline Building at Seventeenth and Harney streets. There the witness excused himself, went upstairs to see his attorney, explained the situation, was told defendants had no right to seize the coach and was advised to go back to it, get into it and drive home. In a taxi witness returned to Twenty-ninth and Leavenworth streets. When he arrived defendants were there. While he was approaching

the coach on foot, defendants walked toward him, trying to block his way. He stated what his attorney had advised and told them if they wanted the car to get it in a lawful manner. Mitchell tried to block his way and grabbed him by the shoulder. He tussled with Mitchell a few moments, shook him off and walked to the door of the coach. Driver was standing on the running board. Witness unlocked the door. Driver started to get in, pulled at the former's overcoat and grabbed his left arm, which had been broken in a street car accident, causing considerable pain. Witness got in and slammed the door. Driver opened it. Mitchell wedged his way in. Following the testimony narrated witness continued in his own language as follows:

"I ordered him out of the car and he said: 'No, I propose to sit right here—sit right in this car.' I said: 'I am going on back to my attorney.' He said: 'That is all right. I will go down with you.' And he says: 'We will thrash this matter out before an attorney.' So I drove to Seventeenth and Harney, and I said: 'Here we are.' I was expecting him to get out of the car, and he said: 'No, I am going to stay in this car. If your attorney wants to see me he will have to come downstairs to talk to me.' I didn't want any more scuffling with him, because I had quite a little pain, so I got out of the car and went up."

He testified also that his attorney was absent and there is nothing to show any further assault.

On the evidence outlined defendants were found guilty of assault and battery, though five witnesses testified to the contrary. In connection with the contract granting the purchaser the right to possession and use of the coach while performing her obligations, the testimony of the complaining witness himself indicates that he was in the wrong when he refused to pay a past due instalment and at the same time forcibly opposed the recaption which had been authorized in direct and positive terms. The complaining witness had no greater right than his wife to resist recaption. His own testimony shows that defend-

ants, before depriving him of possession, consented to his consulting with his wife and with his attorney. It also shows that the opportunity to pay the delinquent instalment or to yield peaceable possession on stipulated terms was open to him. The consideration shown by defendants under the circumstances was inconsistent with intentional and criminal violence on their part. It may fairly be inferred that they were attempting to perform their duties to their principal. The conditional sale contract was drawn in a form to avoid the necessity of replevin in the event of a default in payment. This theory of the law has been recognized in Nebraska. *Barr v. Post,* 56 Neb. 698.

Furthermore, each defendant testified positively that he did not make an assault on, or pull at the arm, shoulder or coat of, the complaining witness. In addition three disinterested witnesses who observed what occurred at the time and place in question testified that defendants did not strike or otherwise assault the complaining witness. The conclusion is that the evidence is wholly insufficient to prove beyond a reasonable doubt that defendants were guilty as charged. There should have been no conviction. The sentences are reversed and both prosecutions dismissed.

REVERSED AND DISMISSED.

Note—See Assault and Battery, 5 C. J. 788 n. 2; 13 L. R. A. n. s. 1132; 19 L. R. A. n. s. 607; L. R. A. 1915F, 673—36 A. L. R. 853; 24 R. C. L. 486; 6 R. C. L. Supp. 1421.

IN RE ESTATE OF THOMAS BAYER. ANNA HAMILTON ET AL., APPELLANTS, V. ANTON M. BAYER ET AL., APPELLEES.

FILED MARCH 26, 1928. No. 26318.

1. Wills: PROBATE: INFANTS: GUARDIAN AD LITEM. Under the laws of Nebraska, the appointment of a guardian *ad litem* for infants interested in the probate of a will, in a proceeding commenced and carried on in the county court for that purpose, or in an appeal therefrom, is not required.

2. **Attorney and Client:** ATTORNEY AS WITNESS. An attorney ordinarily is a competent witness for his client, and he may properly testify to mere formal matters, such as to account for the possession of an exhibit or the like. But if he testifies generally, it is unbecoming for him to examine witnesses or address the jury. *Cox v. Kee*, 107 Neb. 587.
3. **Witnesses:** ATTORNEY AND CLIENT: PRIVILEGED COMMUNICATIONS. Section 8835, Comp. St. 1922, construed, and *held* to render an attorney incompetent to testify concerning communications made to him by his client in that relation without the client's consent in open court, or in writing produced in court. Such incompetency is not removed by the client's death.
4. ———: ———: ———. Section 8835, Comp. St. 1922, is applicable and controlling and renders communications made to an attorney by his client, in absence of proper waiver, inadmissible in a contested probate proceeding to establish as the last will of such client an instrument not drawn or witnessed by such attorney, in which persons named in such instrument as legatees and devisees are proponents, and legal heirs of such deceased client are contestants.

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

Lewis C. Paulson, for appellants.

C. P. Anderbery and *King & Bracken, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

EBERLY, J.

This action was originally commenced by Anna Hamilton in the county court of Kearney county, Nebraska, by filing a petition therein to probate an instrument alleged by her to be the last will of Thomas Bayer, deceased. Notice of pendency of proceedings was given by publication in the manner provided by law. Certain objections were filed by a brother and two sisters of the proponents. The trial which followed resulted in a decree in the county court admitting the instrument to probate. The contestants appealed to the district court. By stipulation it was there

agreed that the cause should be "tried in the district court upon the pleadings filed in said cause in the county court as included in the transcript on file therein." No guardian *ad litem* had been applied for or appointed by the county court. Neither was there any subsequent application made by way of the parties to be relieved from the terms of the stipulation above quoted. The trial in the district court resulted in a judgment determining that the instrument offered was not the last will and testament of the deceased. From this decree Anna Hamilton and John Bayer et al. have appealed.

The first question presented here is, that the failure of the district court to appoint a guardian *ad litem* for certain minor appellants who are alleged to be minors constituted reversible error. The question was presented in the form of objections made by the proponents and by the minors involved through and by next friends.

The controlling statutory provision seems to be the following, section 1258, Comp. St. 1922, which provides: "When any will shall have been delivered into or deposited in any probate court having jurisdiction of the same, together with a petition for its probate, such court shall appoint a time and place for proving it"—and give public notice thereof by publication as in the section referred to specified. There is no provision for special service on minors. Neither are there any express requirements in chapter 15 (secs. 1220-1488) Comp. St. 1922, for the appointment of a guardian *ad litem* for minors in such proceedings. This court has determined that the proceedings in the probate court to settle the estate of a decedent is a proceeding *in rem*, and every one interested is a party in the probate court whether named or not. *In re Estate of Sweeney*, 94 Neb. 834.

Section 8533, Comp. St. 1922, relied upon by appellants, would seem to have no application to this case, because its terms are limited to the requirement that the defense of an infant must be by a guardian *ad litem*. Assuming the minors in the instant case are parties in interest, the na-

ture of the case and the nature of their rights are such that the necessary steps to maintain them cannot be considered as "a defense." The procedure, if any, required in their behalf, is rather in the nature of an "affirmative action." It is "offensive," not "defensive," in its general nature. Speaking generally, the burden of proof is upon the proponents, and not upon the contestants. It would appear, indeed, that sections 1588 and 8531, Comp. St. 1922, properly construed, authorize and provide for intervention by infants in probate proceedings when deemed necessary or advisable to advance their interests through and by a "next friend." The record before us discloses that this actually occurred in the instant case. Therefore, no error could possibly have been committed in the refusal to appoint a guardian *ad litem* under the facts as disclosed by the record. This conclusion appears to have the support of the following: "A guardian *ad litem* need not be appointed in a probate court, if the statutes instituting and regulating the practice in such courts do not require such appointment." 31 C. J. 1120. In the absence of any statutory requirement to that effect, the appointment of a guardian *ad litem* for infants interested in the probate of a will is unnecessary. *Mousseau's Will*, 30 Minn. 202.

The next question presented is as to the admissibility of the testimony of a witness who was an attorney actively engaged in the trial of this case on the part of the contestants, and who had been engaged and consulted by the deceased in his lifetime with reference to the disposition of his property by will. This evidence discloses without question that in 1921 the deceased sent for this attorney and expressed to him in general terms the disposition of his property he desired to make by will, and employed the latter to prepare such instrument. The attorney was then given time to "figure out some way" to accomplish the desired end. A second conference was also held between these parties on the same subject. The attorney being somewhat delayed in executing this commission, he was still later advised by the deceased "to pay no more

attention to the employment," that it "was already fixed." The evidence given by this witness in the present case discloses the oral instructions received by him from his deceased client, and the substance of the conversation had between them in relation thereto. This evidence was admitted in the district court over the objections of the proponents of the will, and, if competent, was material in view of the issues then being tried.

It is thought proper at this time to suggest that the canon of professional ethics applicable to the situation before us is: "When an attorney is a witness for his client except as to formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the cause to other counsel. Except when essential to the ends of justice, an attorney should scrupulously avoid testifying in court in behalf of his client." American Bar Ass'n Canons of Ethics (1926) 142, sec. 18. The above has been fully approved by this court. *Wilson v. Wilson,* 89 Neb. 749; *Cox v. Kee,* 107 Neb. 587.

Under the admitted facts in the record, there can be no question as to the employment of this attorney by the deceased. It has been held: "An attorney, in receiving the directions or instructions of one intending to make a will, although he asks no questions and gives no advice, but simply reduces to writing the directions given to him, still acts in a professional capacity and is prohibited from disclosing any communication so made to him by his client." *Loder v. Whelpley,* 111 N. Y. 239.

Indeed, this court is committed to the doctrine that privilege attaches to "statements made to an attorney, with a view to his employment in the litigation in which he is called to testify, * * * even though no fee has been paid and the attorney subsequently refuses a retainer." *Fimple v. State,* 104 Neb. 471.

The essential question presented by the record is, therefore, where an attorney is duly employed and counseled with in reference to drawing a will which was never executed, after such employer's death may such attorney tes-

tify to such client's communications thus made while the relation was still in existence? The appellees answer in the affirmative, cite certain authorities, and contend that *Brown v. Brown*, 77 Neb. 125, to a limited degree "appears to be the only Nebraska case where this point has been presented or decided." This case, however, discloses that this conclusion hardly is supported by the case cited. It appears in *Brown v. Brown, supra*, the attorney who drafted the will was also an attesting witness thereto. The ground of the decision of this court appears in the following quotation: "While section 333 of the Code prohibits the disclosure of confidential communications made to a practicing attorney, and certain other classes of professional men, the next section provides that such prohibition may be waived by the party in whose favor it was enacted. When a will is offered for probate, the witnesses thereto may be examined at length as to the mental capacity of the testator, and the facts and circumstances attending its execution. And the testator, by permitting his attorney to become a witness to the will, thereby consented that he might be examined as a witness to such matters after his death." See, also, *McMaster v. Scriven*, 85 Wis. 162, 39 Am. St. Rep. 828; *Blackburn v. Crawfords*, 3 Wall. (U. S.) 175; *Denning v. Butcher*, 91 Ia. 425; *In re Will of Coleman*, 111 N. Y. 220; *Daniel v. Daniel*, 39 Pa. St. 191; *Western Travelers Accident Ass'n v. Munson*, 73 Neb. 858.

It is true the opinion also cites approvingly 3 Jones, Law of Evidence, sec. 773. However, the further statement is made in connection with the rule cited: "But it is not necessary to go to that extent in this case, the waiver to be implied from permitting the attorney to attest the will as a witness being sufficient ground for the admission of the evidence in question." *Brown v. Brown, supra.*

Even in New York where the doctrine on the general subject before us is admittedly opposed to appellees' contention, the doctrine of *Brown v. Brown, supra*, is approved. *In re Will of Coleman*, 111 N. Y. 220. See, also, *Knepper v. Knepper, Exr.*, 103 Ohio St. 529. The con-

clusion therefore follows that the determining point in the instant case has not been heretofore considered or decided by this tribunal.

A consideration of other authorities cited by appellees discloses that they are merely the announcement of the rule as to "privilege" at common law or relate to construction of statutes and application held to be merely declaratory of the common-law rule.

In this state it is thought the question presented here is controlled by our own statutory provisions: Sections 8835, 8840, 8841, Comp. St. 1922.

Sections 8840, 8841, Comp. St. 1922, above referred to, were first adopted as part of "an act adopting certain parts of the Code of Iowa duly passed by the territorial legislature of Nebraska in 1855." They constituted sections 841 and 842 of that act, and were continued in force as sections 6 and 7, chapter 33, of "an act respecting practice and proceedings in courts of justice and other purposes," passed by the territorial legislature in 1857, and as sections 315 and 316 of "an act to establish a Civil Code of Procedure" in force April 1, 1859, and also as appears in our present Code adopted in 1866. The two sections now under consideration were never amended, and from the time of their original enactment in 1855 have been continuously in full force and effect, and in the following form:

"No practicing attorney, counselor, physician, surgeon, minister of the gospel or priest of any denomination, shall be allowed in giving testimony to disclose any confidential communication, properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline." Comp. St. 1922, sec. 8840.

"The prohibitions in the preceding sections do not apply to cases where the party in whose favor the respective provisions are enacted, waives the rights thereby conferred." Comp. St. 1922, sec. 8841.

Appellees cite the case of *Winters v. Winters*, 102 Ia. 53.

We note that this opinion is in fact an interpretation of section 3643 of the Code of Iowa which is identical with section 8840, Comp. St. 1922, and substantially includes, in addition, the substance of our section 8841, Comp. St. 1922. As this section is interpreted by the supreme court of Iowa in the above cited case, it permits the physician and attorney therein referred to to testify as to matters embraced in the terms of the statute after death of the client in a contest or dispute between devisees or legal representatives and heirs at law, all claiming under the deceased. The decision proceeds on the basis that the statute in question is but declaratory of the common-law right so far as attorneys were concerned, and extends its protection to physicians and other classes named therein only to an equal degree; that, at common law, in controversies between heirs at law, devisees and personal representatives, the claim that the communication was privileged could not be urged, and therefore this provision of this Iowa statute being merely declaratory of the common law would not exclude them.

In *O'Brien v. Spalding,* 102 Ga. 490, cited by appellees, the controlling statute was not couched in language identical with the Nebraska statutes now under consideration, but, as construed by the supreme court of Georgia, did no more than to declare the rule at common law.

In re Young's Estate, 33 Utah, 382, also cited by appellees, so far as applicable to the case before us, may be stated as: "The mere fact that the common-law privilege is declared in statutory form does not extend the scope of its operation," the gist of the decision being that the Utah statute construed by the court was no more than a declaratory enactment preserving the common-law privilege.

Appellees also cite *Doherty v. O'Callaghan,* 157 Mass. 90, and *Phillips v. Chase,* 201 Mass. 444, as sustaining their contention. The question determined in the first case is well stated in the language of that eminent court, as follows: "The question before us, however, is not what con-

struction is to be given to the language of a Code, but what is the rule at common law, and the further question whether the case at bar comes within the rule." *Phillips v. Chase, supra,* cites as controlling on the point before us the case of *Doherty v. O'Callaghan, supra.* It follows that the two authorities last referred to are applicable merely as determining the extent of the common-law privilege in favor of clients, and as binding upon attorneys.

However, eight years after the adoption of sections 8840, 8841, Comp. St. 1922, the laws of this state were amended, and section 8835, Comp. St. 1922, was so changed to read as follows: "Every human being of sufficient capacity to understand the obligation of an oath, is a competent witness in all cases, civil and criminal, except as otherwise herein declared. The following persons shall be incompetent to testify: * * * An attorney concerning any communication made to him by his client in that relation or his advice thereon, without the client's consent in open court or in writing produced in court." This latest and controlling statute would seem to determine the question before us.

In consideration of this legislative enactment, the following principles are deemed important: To ascertain the intent of the legislature is the cardinal rule in the construction of statutes. *People v. Weston,* 3 Neb. 312; *State v. Moore,* 45 Neb. 12; *Little v. State,* 60 Neb. 749; *Nebraska Railway Co. v. Van Dusen,* 6 Neb. 160.

"In the construction of a statute, courts will take judicial notice of events which are generally known, and matters of common knowledge within the limits of their jurisdiction." *Redell v. Moores,* 63 Neb. 219. The course of legislation may also be considered. *Campbell v. Youngson,* 80 Neb. 322.

But where the words of a statute are plain, direct, and unambiguous, an interpretation is unnecessary. *Stoppert v. Nierle,* 45 Neb. 105. And, "The court will not read into a statute exceptions not made by the legislature." *Siren v. State,* 78 Neb. 778; *State v. School District,* 99 Neb. 338.

Conceding, for the purpose of this opinion, but not so determining, that sections 8840, 8841, Comp. St. 1922, prior to the enactment of the amendment to section 8835, Comp. St. 1922, in 1866, could well be construed as but declaratory of common-law privilege in statutory form (which would not extend the scope of its operation in view of the authorities cited by appellees), and would sustain the rule of evidence applied in the lower court which admitted the testimony objected to, would we be justified in accepting the view that the amendment to section 8835, *supra,* failed to alter the situation that prevailed prior to its adoption? The conclusion it seems is inevitable, in view of the substance of that amendment and the course of legislative history that preceded it, that in its enactment a change was intended by the legislature. If no change was intended, why was amendment made? The extent of change effected must be gleaned from the amendment itself. It must be conceded that the words of this statute are plain and simple.

With reference to communications received from clients during the existence of the relations, attorneys are declared incompetent to testify.

The statute also expressly enjoins that the question of the competency of an attorney as a witness in a case can be waived only by the consent of the client in open court or in writing produced in court. This statutory language, directed to the subject of "incompetency of witnesses," expresses a definite legal idea. *Wamsley v. Crook and Hall,* 3 Neb. 344.

The difference in legal effect between a statute rendering a witness incompetent, and a statute making the testimony of a witness incompetent, is well understood and has been judicially declared in this state. *Sharmer v. McIntosh,* 43 Neb. 509.

In view of the simplicity of the language employed, it would seem that the court can read into this statute no exceptions or no terms that the legislature has omitted therefrom. The conclusion necessarily is, we are bound

to enforce it as the latest expression of legislative intent without any unexpressed common-law qualifications of its terms.

We are not without authority for this conclusion. As will be seen by the opinion in *Winters v. Winters*, 102 Ia. 53, cited by appellees, New York had followed for many years the practice the parties seek to uphold in the instant case. *Allen v. Public Administrator*, 1 Bradf. Sur. (N. Y.) 221. But in 1877 an amendment to the then New York Code was made which appeared subsequently as sections 834, 835, 836. So far as they relate to the subject here under consideration, the important provision was: "An attorney or counselor at law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon in the course of his professional employment." A subsequent section to the language quoted provided that the foregoing section should "apply to every examination of a person as a witness, unless the provisions thereof are expressly waived by the * * * client."

The New York supreme court, in construing these sections, held: "Without further discussion or citation of authorities, we think the statute admits of no other construction than that, where the evidence comes within the prohibition of the statute, its reception, if objected to, can be justified only when the patient, penitent, or client, as the case may be, waives the protection the statutes give him." *Westover v. Ætna Life Ins. Co.*, 99 N. Y. 56.

In a still later case the supreme court of New York determined: "The prohibition of the Code of Civil Procedure (sec. 835) against the disclosure by an attorney of a communication by his client to him or his advice thereon, in the course of his professional employment, applies to instructions given, by one proposing to execute a will, to an attorney employed to draw it, and to conversations had with the attorney for the purpose of enabling him to carry out the instructions." *In re Will of Coleman*, 111 N. Y. 220. See, also, *Loder v. Whelpley*, 111 N. Y.

239; *In re McCarthy's Will*, 20 N. Y. Supp. 581; *Butler v. Fayerweather*, 91 Fed. 458.

It is to be noted in this connection that the identical language of the New York statute is embodied in the Nebraska amendment now under consideration, and that the provisions as to waiver are more limited in the Nebraska statute than in the New York enactment.

The exact question here involved was recently determined by the supreme court of Ohio. In all of its essentials the Ohio statute is substantially the Nebraska statute under consideration. It is section 11494 of the general Code of Ohio. This section of the Code, so far as pertinent here, reads as follows: "The following persons shall not testify in certain respects: 1. An attorney, concerning a communication made to him by his client in that relation, or his advice to his client; * * * but the attorney * * * may testify by express consent of the client; * * * and if the client * * * voluntarily testifies, the attorney * * * may be compelled to testify on the same subject." *Swetland v. Miles*, 101 Ohio St. 501. The question decided by the Ohio court in the case above is as follows: "Was the testimony of one C. V. Trott, an attorney at law, who was consulted in that relation by the testatrix in reference to the paper writing, competent? Those supporting the will offered said Trott as a witness, and sought to introduce the communications of Phoebe Thompson made to him, and his communications to Phoebe Thompson; but particularly the former." The case itself was a will contest, and the communications were held inadmissible. The following excerpt from the opinion of the court by Wanamaker, J., is pertinent to the matter under consideration: "Is there any room for doubt as to the scope or meaning of this statute? If there is no room for doubt as to its scope and meaning, there is no right to construe, for the judicial right to construe is wholly based upon the presence of doubt as to the meaning of the statute. There is abundant reason for this rule. Every bar association, state and national, has for years bemoaned the growing uncertainty and con-

fusion in our laws, much of which the courts themselves are responsible for, by undertaking to make cloudy legislative acts that are clear; by undertaking to place limitations upon legislation that is absolute and unlimited, rendering doubtful the general and all-comprehensive provisions of the statute by reference to some suggested reason for the law. All these rules of construction or interpretation are helpful and illuminating where there is doubt as to the meaning of the statute, but they serve no duty where there is no doubt. * * * Now it is urged that this court should read into the statute another exception, to wit, 'that if the client be dead, her personal representative or heirs should waive the right for her.' This squarely involves so-called judge-made amendments to legislative acts that are otherwise clear and unmistakable as to meaning. In reason there is much force in the logic of plaintiff in error as to the relevancy of this testimony; but the statute, which is clear and explicit, expressly says that the attorney *shall not* testify." The supreme court of Ohio unanimously concurred in the adoption of the above opinion by which the evidence proffered was held inadmissible. *Collins v. Collins*, 110 Ohio St. 105.

In view of the legislative history of the matter under consideration, and the perfect simplicity of the terms of the amendment of 1866, it would seem that the principles announced by the supreme courts of Ohio and New York are applicable to the question presented here and are controlling. It follows that the district court, in admitting the testimony of the attorney, over the objections, committed reversible error.

The appellants urge certain objections to instructions given and refused on the subject of competency of Thomas Bayer, deceased. Their consideration would serve no good purpose in the present case. Indeed, the trial court should have withdrawn the question of competency from the jury, the evidence in the record being wholly insufficient to sustain a finding in favor of the contestants on that issue.

It may be said that instruction No. 4, as given by the

court on its own motion, so far as it pertains to the subject of competency, is not commended. Nor, in view of the fact that another trial will be had with possibly other and different evidence, has the subject of the sufficiency of the evidence on the issue of alleged undue influence received any consideration whatever.

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

REVERSED.

Note—See Infants, 31 C. J. 1120 n. 76—Witnesses, 40 Cyc. 2232 n. 73, 2233 n. 75, 2361 n. 81, 2380 n. 19, 2405 n. 15; 49 L. R. A. n. s. 442; 28 R. C. L. 469, et seq.; 4 R. C. L. Supp. 1825.

M. L. DONOVAN, APPELLANT, V. ORSON K. CHITWOOD, ADMINISTRATOR, APPELLEE.

FILED MARCH 26, 1928. No. 25844.

1. Pleading: PETITION. A petition which has not been assailed by motion or demurrer will be liberally construed and upheld, if reasonably possible, as against an objection at the trial to the introduction of any evidence on the part of the plaintiff that it does not state a cause of action.
2. ———: ———. A petition, taken as a whole, which states facts showing the plaintiff is entitled to some relief, is not fatally defective merely because it may require some disentanglement, when it is impugned for the first time by a demurrer *ore tenus*.

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

George J. Marshall and *M. L. Donovan*, for appellant.

C. A. Sorensen, Thomas Robertson and *Leon Samuelson, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

HOWELL, J.

This case comes to us by appeal from a ruling of the lower court sustaining appellee's objection to all evidence about to be offered by appellant in support of his petition, for the reason that the petition did not state a cause of action.

The petition alleges, among other matters, that on July 16, 1920, the defendant's intestate, Vansycle, made a written contract with one G. P. North and plaintiff, as attorneys, the substance of which is: Vansycle employed the attorneys to represent him in suits against the Missouri Valley Cattle Loan Company and others, their fees not to exceed 25 per cent. of $50,000, "depending upon the amount of money and notes recovered," to "take all steps necessary to protect the rights of the said H. E. Vansycle;" "Vansycle is not to pay them any sum unless he is entirely satisfied, and that in no case are the fees he is to pay to exceed the reasonable and actual value of the services rendered;" that, in accordance with the contract, said attorneys performed services in a suit against Vansycle and Missouri Valley Cattle Loan Company by Shawnee State Bank upon a $12,500 note given by Vansycle to the loan company. On July 11, 1923, North withdrew from the litigation, and appellant thereafter represented Vansycle, under the contract, by consent, until December 15, 1924, when that action was finally disposed of in Vansycle's favor. On that date, after the suit ended, appellant and Vansycle orally agreed that appellant "should receive under said contract * * * as plaintiff's fees for representing said defendant twenty-five per cent. of the face of the note involved, * * * or the sum of $3,125." On January 13, 1925, appellant sent a letter to Vansycle in which it was stated:

"Under my contract with you and in accordance with our arrangement at the time this case was dismissed as was talked over by you and myself in my office, there is now due and owing to me $3,125 as attorney fees for representing you in the Shawnee State Bank case, being 25 per cent. of the face of the note involved. Now, Mr. Van-

sycle, I do not expect you to pay me all of this fee at this time, but I do expect, especially in view of the fact that I have been fighting in your behalf on this case since January, 1921, up until the present time, which fight has been all the way through the supreme court, and for which I have never received a cent in fees, I feel at this time, having completed my work covering four years of labor, that I am entitled to some pay, and I trust that you will arrange to send me at this time at least one thousand dollars on account."

In reply to the above, Vansycle wrote appellant a letter, dated January 20, 1925, saying:

"Am able after so long a time to send you a little money. I have been very sick again. Am sorry to say that I am not able to send as much as you thought you should have. But, however, I will send three hundred dollars, that amount being my limit at present. Hoping that this will be satisfactory for now, I am, as ever, yours truly, H. E. Vansycle."

Vansycle paid $300 to appellant pursuant to that letter. Vansycle had net credits of $420, leaving due appellant the sum of $2,705, and, "by reason of all the foregoing," there is due to appellant from Vansycle $2,705.

Much was said in the briefs and oral arguments about whether the action was on the written contract, *quantum meruit*, accord, or account stated, as though the decision of those questions determined the case. Matters of mere form should not defeat justice. No attack was made upon the sufficiency of the petition until, at the trial, the plaintiff encountered an objection to the introduction of any evidence because it failed to state a cause of action of any kind. The facts recited in the petition so clearly entitle the appellant to recover $2,705, plus interest, if they can be proved, that it would be an extravagance to devote much time to discussion, or citation of authorities. The appellee's brief has been examined with care. It sheds no light on the question here decided. The judgment

of the district court is reversed and the cause remanded for trial. Costs to be taxed to appellee.

REVERSED.

IN RE ESTATE OF CARL M. JOHNSON. TIENA L. BENZON ET AL., APPELLANTS, V. MARGARET E. JOHNSON, ADMINISTRATRIX, APPELLEE.

FILED MARCH 26, 1928. No. 25010.

1. **Husband and Wife: GIFTS: JOINT TENANCY.** Where a husband deposits money in a bank on time certificates which are payable to himself or wife, in some of which the certificate expressly provided for right of survivorship as joint tenants, a completed gift is consummated by the husband to the wife, notwithstanding the wife may not have had manual possession of the certificates, she having been told by her husband that the certificates were in his safety deposit box in a trust company vault, to which the wife had a key but had not signed the card of admission to the vault.
2. ———: ———: ———. A deposit of money in a bank by a husband and made payable to himself or wife, whether expressly as joint tenants with survivorship or not, is presumed to have been made by the husband with a donative intent and for the benefit of the wife with the intention of giving to her, if she survives, the complete title to the funds.
3. **Joint Tenancy.** The relation of and estate of joint tenancies may be created in any kind of personal property that is subject to be held in severalty.
4. ———: BANK DEPOSITS. Section 8046, Comp. St. 1922, relating to the payment by a bank of deposits entered as payable to any one of two or more persons named therein, not only is intended for the protection of the bank, but also fixed the property right of the persons named, unless the contrary appears from the terms of the deposit.

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

Brogan, Ellick & Raymond, for appellants.

Morsman & Maxwell and *Wear, Moriarty, Garrotto & Boland, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY and HOWELL, JJ., and BROADY, District Judge.

BROADY, District Judge.

The only question presented by this action is whether certain bank deposits, represented by time certificates of deposit, payable to either of the two persons named, belong solely to the survivor of the two or is the property of the estate of the deceased, who had made the original deposit.

Carl M. Johnson and Margaret E. Johnson were husband and wife and resided in Omaha. Johnson made several time desposits in four banks, for which he received from the respective banks the usual certificates of deposit, the payment obligation of each differed somewhat in their terms. There were ten separate deposits and a like number of certificates. Those issued by three of the banks provided for payments "to the order of self or Margaret E. Johnson," upon return of the certificates properly indorsed, and one of this class contained the additional clause, *"subject to the order of either, or the survivor."* The certificate of one bank states "Carl M. Johnson or Margaret E. Johnson have deposited in this bank exactly $1,500 * * * payable to either of them," etc. Johnson placed all the certificates in his safety deposit box in a trust company vault. Johnson had two keys to the deposit box. One of these he kept at home and to which both he and his wife had access at any time, and Johnson, according to the wife's testimony, had told her the certificates were in the deposit box, though she had never signed the card at the trust company which would entitle her to open the box. Johnson left no will, and upon his death his wife was appointed administratrix of the estate, and as such opened the deposit box, when all of the certificates were found. Mrs. Johnson claimed the funds as her sole property. The appellants, in this court, who are brothers and sisters of Johnson, claim the certificates, and funds represented, are property belonging to the state. The probate court held in favor of the appellants, and, on appeal, the

district court reversed that finding and held the certificates were the sole property of Mrs. Johnson.

Appellants, who were plaintiffs in the lower court, appeal, and the question here presented is whether, under these circumstances, the certificates belong solely to Mrs. Johnson, as survivor, either by way of a gift or as a joint tenant with the right of survivorship, or by virtue of the provisions of section 8046, Comp. St. 1922.

Counsel on both sides argued that the question had never before been decided in this state, strenuously urged the importance of the questions involved, and by exhaustive briefs cited a great many adjudicated cases in other jurisdictions. In pursuance to these briefs and arguments, we have read, studied and analyzed the cases cited, and, also, many others, when we find this court has recently decided a case very similar to the one at bar. *In re Estate of Kamrath,* 114 Neb. 230.

Questions involving the same general problems have been decided in a multitude of cases in other jurisdictions. The facts and circumstances of no two are exactly alike. In *McLeod v. Hennepin County Savings Bank,* 145 Minn. 299, the Minnesota court say: "That there are in the cases confusion, contradiction and perplexing distinctions is obvious." Many states have statutes which provide, in effect, that the relation of joint tenancy should not be recognized unless the instrument of grant expressly so states, and in those states the cases are usually determined on the gift theory. *In re Lower's Estate,* 48 S. Dak. 173. In a few jurisdictions the question is disposed of on the trust theory; that is, in deposits of this sort each holds the title in trust for the other. See notes and annotations in 48 A. L. R. 182, and L. R. A. 1917C, 550.

In those cases in which the question is disposed of on the gift theory a long technical discussion is engaged in as to whether or not there could be a delivery sufficient to meet the common-law requirement of a gift where the donor retained possession of the certificate of deposit or the passbook; also, where the donee does not sign the deposit card

which is usually required by the bank. Practically all of such decisions finally turn on the question of the intention of the donor, and that is the rule in this state.

In the case of *In re Estate of Kamrath*, 114 Neb. 230, one Wilhelm Kamrath had deposited, on time certificates, three separate amounts in his local bank. One, at least, was payable to "Wilhelm Kamrath or Mary Hodges." Upon the death of Kamrath these certificates were found in his deposit box at the bank. The question arose whether they belonged to Mary Hodges or to Kamrath's estate. The court first decided the question that this certificate had not been altered by Mary Hodges after the death of Wilhelm Kamrath, and then held that the transaction constituted a gift from Kamrath to Mary. The court considered the general circumstances, which were as follows: Mary Hodges was the daughter of Kamrath, and the plaintiffs, appellants, were his sons. Prior to making the deposits the father had executed a will in which he divided his property in equal shares and interests to his various children. After making the will he gave, by deed or otherwise, a farm to each of his sons, but had not given any land to the daughter. The court also mentions that Mary was present in the bank at the time the deposit was made, that she, at one time, had had manual possession of the certificates, and that thereafter her father had apparently put the certificates in his safety deposit box, where they were found after his death. Mary did not have a key to the deposit box. The court holds that the transaction constituted a gift to Mary, and that there was a delivery of the certificate to her with the intention of making a gift. In its discussion, the court say:

"As between Wilhelm Kamrath and Mary Hodges as well as the world it was not necessary for Kamrath to indorse the certificate of deposit, it being payable to 'himself or Mary Hodges.' Either party was authorized to negotiate and transfer the same by his own indorsement. * * * Nor did the reservation of the interest by Wilhelm Kamrath prevent the consummation of the gift and the vesting of

the title in the donee. * * * So, too, it cannot be said that, because certificate No. 9272 was found after the death of Wilhelm Kamrath in the safety deposit box owned by him, it necessarily negatived the right of Mary Hodges to the principal sum evidenced thereby. The gift had been fully executed and the title vested before the death of Kamrath. The terms of the gift imported the right in him to collect the interest thereon, which fact made his possession of the certificate wholly consistent with the title of the principal as being in Mary Hodges."

We think the foregoing case is controlling of the case at bar except that some may make the distinction that in that case Mary, the donee, at one time, apparently, for just a moment, had the certificate of deposit in her own hands. If that phase of the case is and was controlling, it is not easily distinguished—that circumstance—from the circumstances of the instant case in which Mrs. Johnson said in her testimony that, while she never had physical possession of the certificates, there were two keys to her husband's safety deposit box, one of which she kept, and that her husband had told her the certificates were in the box.

Johnson's business partner and one or two of his employees also testified to the effect that he had told them he had made these deposits so either he or his wife could draw the money on them. It seems to me that, where the husband had told the wife the certificates were in the box, even though she was not, under the rules of the deposit company, permitted to open the box, there was just as much a completed delivery and gift as there was in the *Kamrath* case. Delivery may be either manual, constructive, or symbolical. 28 C. J. 636. And, too, the circumstances of the relationship of Carl M. Johnson and his wife were such as to compel one to think that it was his intention to give her, at that time, such an interest in this money as would entitle her to payment of the certificates. As was well said in the *Kamrath* case, either person named in the certificate could cash it by his own

separate indorsement. Nor does the fact that Johnson collected the interest on the deposits defeat the idea of a gift. "The mere fact that actual enjoyment of the gift by the donee is, by the declaration of the gift, postponed until the death of the donor, does not render the gift either conditional or testamentary, or in any way invalid." *Dinslage v. Stratman,* 105 Neb. 274. In an Iowa case, *In re Estate of Belgard,* 202 Ia. 1356, a husband made a deposit in a savings account payable to himself or wife, and the husband showed the passbook to the wife. It was held a delivery and completed gift to the surviving wife. A bank deposit to the credit of the depositor or his wife, "or the survivor of them," operates as a gift, though the wife never had possession of the passbook. *McElroy v. Albany Savings Bank,* 40 N. Y. Supp. 422. See, also, *Diel's Admr. v. Merchants & Mechanics Savings Bank,* 120 Va. 297.

It was argued by counsel for the appellant that the use of the word *"or"* was conclusive as against the wife, and suggested that, had the word *"and"* been used, it might have had a different meaning. We think just the reverse of that argument. Had he used the word "and," he would have had an interest in the nature of a tenant in common and it would have required the indorsement of both the donor and donee.

Johnson left no children. When he deposited this money in these banks he undoubtedly intended that his wife should have a beneficial interest in the money, and that no other person should have. If he had intended otherwise, it would have been a far easier matter to have left the bank officials name him, alone, as the payee, which undoubtedly would have been done, in the absence of an affirmative request, on his part, to the contrary. We hold, therefore, that there was a completed, executed gift of whatever remained in this deposit to Mrs. Carl M. Johnson. Massachusetts and New Jersey hold that joint deposit cases are matters of contract between banks and persons named in the certificates or passbooks.

"It is argued that there was no gift from the donor to the donee because there was no delivery. But we think that is not so. The right was contractual and was vested in both depositors jointly and the survivor. The contract entered into by the bank with the mother and her daughter exhibited a donative purpose from the donor to donee, and hence constituted a valid gift." *New Jersey Title Guarantee & Trust Co. v. Archibald,* 91 N. J. Eq. 82. This case also holds the arrangement is not void because testamentary in character, and therefore contrary to the statutes on wills. See, also, *Dinslage v. Stratman,* 105 Neb. 274.

"Nor can the fact that the contract leaves Mrs. Kaufman (donor) with power, or some power, of disposition of the debt due from the bank be of any controlling materiality." *Kaufman v. Edwards,* 92 N. J. Eq. 554.

"In such case it is not necessary to establish the existence of a technical joint tenancy to create the right of survivorship; in other words, the incident of survivorship which exists by implication in a joint tenancy is expressly provided for by such a form of deposit." *New Jersey Title Guarantee & Trust Co. v. Archibald, supra.*

Massachusetts holds that the act of making the deposit in a joint account is a completed transaction. In a note to *Chippendale v. North Adams Savings Bank,* 222 Mass. 499, in 48 A. L. R. 206, it is said:

"It thus appears clear that the Massachusetts court has not abandoned the general rule that the effect to be given a joint tenancy in a bank account depends upon the intention of the donor. The extent to which the decisions of this court can be said to have gone is that the creation of a 'joint tenancy,' or a deposit in this form, is such a delivery as completes the execution of the gift. * * * The delivery which must accompany an ordinary gift is rendered unnecessary by the contract by which the bank becomes obligated to both donor and donee." See, also, *Perry v. Leveroni,* 252 Mass. 390, and *Kelly v. Snow,* 185 Mass. 288.

The act of the deposit itself is sufficient if there is a donative intent. *Kaufman v. Edwards,* 92 N. J. Eq. 554.

The controlling element is whether the donor intended the deposit as a gift or merely one of convenience, and if to a stranger it is presumed to be for convenience, but in case the donee is the donor's wife the husband is presumed to have intended to benefit the wife. 28 C. J. 664. And where there is a joint deposit to a husband and wife it is deemed to confer upon the wife the right of survivorship and the transaction must be deemed donative in character. *Read v. Huff*, 40 N. J. Eq. 229; *Matter of Lydig*, 113 Misc. Rep. (N. Y.) 263. Nor does it require the same strict rules of proof of delivery when the donor and donee are husband and wife as where the relationship were otherwise. 28 C. J. 638.

The certificates issued by the Omaha National Bank, Nos. 92,908 and 92,909, both expressly provided payment to either or the survivor. Of these there can be no question but that they belong solely to Mrs. Johnson. Those issued by the United States National Bank expressly stated "Carl M. or Margaret Johnson have deposited," etc., "payable to either." While it may be conceded the husband in fact made the deposit, he certainly, by that deposit, gave his wife an indivisible and unseverable interest in the deposit. It must, therefore, be an interest in the nature of a joint tenancy with the attendant right of survivorship. The deposits in the First National Bank and the State Bank were payable to either the husband or wife, but we think the same principles and reasoning above set forth equally applies to these deposits.

It is argued pro and con that section 8046, Comp. St. 1922, fixes the property rights of the persons named in a joint deposit, and is not merely for the protection of the bank. This section is contained in the chapter entitled "Banks" and provides: "When a deposit in any bank in this state is made in the name of two or more persons deliverable or payable to either or to their survivor or survivors, such deposit or any part thereof, or increase thereof, may be delivered or paid to either of said persons or to the survivor or survivors in due course of business."

Both parties cite cases in support of their respective theories. But on inspection we find the statutes of each state differ somewhat from our own. Michigan is a fair sample. There the first part of the statute is practically the same as our entire section, but following, and as part of the same section, is a provision that payment by the bank to the survivor shall operate as a release of the bank from further liability.

The same question arose in that state in *In re Rehfeld's Estate,* 198 Mich. 249, where the court held the statute fixed the property right, in the following language: "But, in the first instance, and in the absence of competent evidence to the contrary, to actually fix the ownership of the fund in the persons named as joint tenants with the attendant right of survivorship." Four judges concur in the decision and four dissent. The same result and the same vote of the judges follow in *In re Sadler's Estate,* 201 Mich. 281, and in *Ludwig v. Bruner,* 203 Mich. 556. California holds the same, while others take the view of the Michigan dissenting opinion. In Minnesota, while not deciding the particular question as not necessary to show intent of the donor, the court say, however, in *McLeod v. Hennepin County Savings Bank,* 145 Minn. 299: "It is of course true that Mrs. McLeod knew that by force of the statute her sister if she survived her might withdraw the deposit." New Jersey holds the statute of that state only protects the bank. *Gordon v. Toler,* 83 N. J. Eq. 25. Other state courts hold both ways on their particular statutes. We think that, when Johnson made the deposit payable to himself or to his wife, he must have known, and so he presumed, that the bank would pay the obligation to either himself or to his wife, and to no other person. We must assume that he knew of the statute, and that the bank would follow its provisions. We think the legislature must also have had that exact thought in mind when it enacted the law. We, therefore, hold that the legal title to the funds is fixed in the persons named in the certificates, and that the survivor, if one dies, takes the whole legal

title. This does not, however, prevent the determination, in another action, whether such survivor may hold the property as trustee for the benefit of another, as, for instance, if the circumstances show the account was one of mere convenience, as between partners of a like relation. But we think that question must be settled in a separate action.

The judgment of the district court was right, and it is

AFFIRMED.

ROSE, GOOD and HOWELL, JJ., concur in the result.

SAMUEL P. DELATOUR, APPELLEE, V. R. H. SMITH ET AL., APPELLANTS.

FILED MARCH 26, 1928. No. 25154.

1. Taxation: PERSONAL PROPERTY. Where 573 head of two-year-old steers are driven some 30 miles from the owner's home ranch and into an adjoining county in December and there kept by hired men and fed hay until April 15 following, such steers are "not connected with the farm," as set out in section 5917, Comp. St. 1922, but should be taxed in the county in which they are being fed on April 1.
2. ———: INJUNCTION. The plaintiff, under facts stated in this case, was not entitled to an injunction to restrain the collection of the taxes assessed upon his cattle.

APPEAL from the district court for Garden county: P. J. BARRON, JUDGE. *Reversed, with directions.*

E. E. Richards and *W. I. Tillinghast,* for appellants.

Frank A. Dutton, contra.

Heard before GOSS, C. J., DEAN, DAY, GOOD, THOMPSON and EBERLY, JJ., and PAINE, District Judge.

PAINE, District Judge.

Samuel P. Delatour, the plaintiff and appellee, brought an injunction suit against the sheriff of Garden county and the treasurer of Arthur county to restrain the sheriff

of Garden county from seizing his property under a distress warrant, issued by the county treasurer of Arthur county, for delinquent personal taxes, and in a trial of the case in Garden county, Nebraska, the district court granted a permanent injunction to the plaintiff, and the defendants have appealed. This is rather an unusual case, in that there is little dispute between the parties as to the facts in the case.

It appears from the pleadings, bill of exceptions, and the findings of the trial court that Mr. Delatour is a banker and stockman, and that his principal place of business is at a large stock ranch which he owns in Garden county, Nebraska, where he has resided for 41 years; that upon December 15, 1923, he moved 573 head of two-year-old steers from said ranch in Garden county into Arthur county to feed up 600 tons of hay which he had previously bought in Arthur county, and that said cattle remained in Arthur county under the charge of hired men as caretakers until April 15, 1924, at which time they were moved back to his stock ranch in Garden county, Nebraska; that on or about April 9, 1924, D. D. Cole, the county assessor of Arthur county, Nebraska, assessed said two-year-old steers as the property of the plaintiff, Delatour, in Arthur county, Nebraska, and that taxes were levied on said cattle as the personal property of the plaintiff in Arthur county, amounting to $186.50 for the year 1924; that the county assessor of Arthur county, Nebraska, duly notified the plaintiff, Delatour, of such assessment by mailing him a copy of the assessment on April 9, 1924, the same day it was made, and that he had notice and knowledge thereof before said cattle were removed from Arthur county to his Garden county ranch, and that thereafter the county board of equalization of Arthur county sat for the purpose of equalizing taxes after having given due and legal notice of the same, but that at no time did the plaintiff, Delatour, appear before the board of equalization of Arthur county nor file any objections to the assessment or levy of said personal taxes; that he made no protest

thereon, as by law provided and allowed, and made no effort to protect his alleged rights before said board, or in any manner, in Arthur county, Nebraska; that the two-year-old steers were moved back to Garden county about April 15, 1924, and later in the same month, to wit, April 19, 1924, these same steers with other cattle were given in by the owner for assessment in Garden county, Nebraska; that thereafter he sent by mail to the officers of Arthur county a certificate of the county clerk of Garden county that the 573 head assessed in Arthur county had been scheduled by him for assessment in Garden county; that afterwards he paid the taxes in Garden county, but has at all times refused to pay the taxes assessed upon the steers in Arthur county, nor did he protest or appear before the board of equalization and object thereto in any way except by the bringing of this injunction suit.

1. It is agreed that section 5917, Comp. St. 1922, should govern this case, and said section reads as follows: "Live stock in charge of an agistor, caretaker, or nonresident owners on the first day of April of the year for which the property is required to be listed, and not connected with the farm, shall be assessed where so kept; and any live stock which shall be brought into any county of this state for grazing purposes between the first day of April and the first day of July of any year shall be assessed by the assessor or by the county board in such county and in the proper taxing district unless the owner of said live stock produce a certificate from the county clerk, or other proper officer, showing that such property has been assessed elsewhere."

The appellants contend that the said steers brought into Arthur county in this case, and which were there on the first day of April, should be assessed in that county, and the county assessor so assessed them, and that at the time of this assessment they had not been assessed elsewhere, and that the owner was notified of the assessment on the same day it was made, but that he did not appear before the board of equalization for a hearing on this assessment, nor did he pay his taxes under protest or otherwise to the

Arthur county authorities, nor did he ever make any complaint of the regularity of any of the proceedings in relation thereto.

On the other hand, the plaintiff and appellee contends that the clause in the statute cited, *"and not connected with the farm,"* is the important point in this case, and that these two-year-old steers were connected with his ranch in Garden county, and were simply moved into Arthur county in December of 1923, and remained there several months, for the sole purpose of eating up the 600 tons of hay which he had purchased there.

Said section 5917 and the clause quoted, "and not connected with the farm," would in its plain intent and purpose protect the owner of a farm from assessment of his tractor, binder, threshing machine, work horses, or milk cows, if they happened to be in use away from his farm upon April 1, but it is strongly contended by the defendants that such natural and clear purpose of the legislature should not be magnified and extended to work an injustice to certain range counties or elsewhere.

In the case of *Diemer & Guilfoil v. Grant County*, 76 Neb. 78, some 1,500 head of cattle were assessed in Hyannis precinct, school district No. 1, where the taxes were high. Plaintiffs insisted that these cattle should be assessed at the home ranch about 15 miles in the country, which was in school district No. 3, where the taxes were much lower. The small ranch adjoining the town of Hyannis produced some hay and had a winter and summer range, and cattle were driven in there to use this feed. The same cattle were driven back to the home ranch at times to be dipped and for other purposes, but soon the same or other cattle to the amount of about 1,500 would be brought back to the small ranch at Hyannis. About May 1 of each year all of these cattle would either be shipped out or returned to the home ranch for summer grazing. This case turned upon the section of the statute which is now section 5928, Comp. St. 1922, which provides that, if property may be listed in several places in the same county, the place may be de-

termined by the county board. This court upheld the board in assessing these 1,500 head of cattle in Hyannis precinct, school district No. 1. The same reasoning would require the assessment in the case at bar to be made April 1 where the steers were being fed, even though they might be taken back to the headquarters' ranch later.

In the case of *Jandt v. Sioux County*, 73 Neb. 381, certain range horses were delivered to the owner, Jandt, in Box Butte county, on April 7, in which county he voluntarily listed them for taxation and paid the taxes. However, his agents, who had the horses in charge on April 1, listed the horses for taxation in Sioux county some time after they had delivered up possession of them to the owner, Jandt, and also after he had scheduled them for taxation in Box Butte county. Commissioner Letton held in this case that, as the horses were not in Box Butte county on April 1, they were not taxable in that county, and that the agents had the right to list the horses for taxation even after they had passed out of their keeping, if they had them in their possession in Sioux county on April 1; that the owner was under no legal or moral obligation to list them in Box Butte county, where he paid taxes upon them, and the fact that he did so was no ground of defense against the enforcement of the taxes in Sioux county, where the property was properly and legally located on April 1, and where it was listed for assessment and taxation.

While there has been a slight change in the statute since this decision was entered, yet it does not affect the merits of the case. It is made clear by Judge Letton that the owner should pay taxes to the county where his live stock is being fed on April 1, and in the case at bar, if plaintiff desired to avoid paying taxes in Arthur county, he could easily have removed them to the home ranch the last day of March.

No other Nebraska case is cited to the court that is as nearly in point, but several cases are cited from other states. In the case of *Clampitt v. Johnson & Miller*, 17

Tex. Civ. App. 281, it was held that cattle owned and kept in one county, but which were taken over into another county on November 2 for pasturage purposes upon lands leased for that purpose, but with the intention of moving them back to the main ranch not later than April 1 if the pasturage became sufficient in the home ranch, were properly taxable in the county where they were actually located on January 1.

In the case of *Morse v. Stanley County*, 26 S. Dak. 313, it was held that horses ranging in a county between June 1 and November 1 were properly assessable in such county on June 1, and states if under the facts as found here these horses were not taxable in Stanley county, then if a person lives in one county, or his foreman or superintendent lives therein, and from such point manages and conducts ranches throughout the whole state, no matter if such ranches cover large parts of other counties, still all of his property, no matter of how great value, would be taxable only in the county where he or his foreman lives, while as a matter of fact such county would have no equitable right to any of such tax whatsoever.

Cattle and sheep may be required by statute to be assessed where they are kept or where they have been taken to graze or to be fed. 2 Cooley, Taxation (4th ed.), sec. 451.

"Where the owner of cattle resides in one county and his cattle are kept on a farm in another county, which farm is entirely disconnected from the home of the owner, such cattle are properly taxed in the county where kept." Opinions Attorney General, Nebraska, 1913-1914, p. 191.

In the Wyoming case of *Kelly v. Rhoades*, 9 Wyo. 352, it was held that, where the owner drove a band of sheep into the state and in eight weeks drove them a distance of 500 miles, allowing them to graze on inclosed pastures and the public domain, they acquired a situs within the state and could be taxed therein; that, even though the owner claimed to be driving them directly across the state, this was not an interference with interstate commerce.

"A nonresident who brings cattle into the Osage Indian reservation for grazing purposes between March 1 and September 1 is liable for taxes assessed and levied thereon for that year by the county officials of the county to which said reservation is attached for judicial and taxing purposes, even though such cattle have been listed for taxation in another state for the same year, and prior to the time they were brought into such reservation." *Lasater & Noble v. Green*, 10 Okla. 335.

The trend of authorities in cattle feeding states indicates that bands of sheep or herds of cattle being prepared for market are a distinct entity from operations on the home ranch and may be taxed for the benefit of the county they are being fed in on the taxing date. As a typical illustration, let us assume that an extensive live stock owner residing near Grand Island, in Hall county, Nebraska, has his headquarters ranch there; that he owns, leases and controls ranch lands, consisting of both summer and winter ranges, in Cherry, Sheridan, Grant, and Arthur counties; that upon these lands he runs trainloads of cattle or sheep at various times in the year, which live stock may be all shipped to his headquarters ranch to be "topped off" before being shipped to market. He absolutely looks to the officials of the counties in which he ranges this live stock to be vigilant to protect it from thieves, to run down and prosecute to the limit any offender who butchers one of his animals, to promptly pay bounty upon any wolves caught killing his sheep, and to prosecute all trespassers hunting on his range in violation of law. A construction of section 5917, Comp. St. 1922, which considered all this live stock as "connected with the farm" in Hall county and to be scheduled there only for taxation, might require the Hall county assessor to go 200 miles from his county and drive a range 50 miles long to properly check the live stock listed in Hall county, yet on the small salary allowed an assessor this is impossible. In such a case such live stock should be assessed in the county where it is found upon April 1 by the local assessor, who is on the ground, familiar

with all the facts, and can easily and correctly check the same, and the taxes so assessed should be paid into the county upon which the burden and expense rests for guarding said live stock. In this connection Judge Letton concisely said:

"In fact, an inspection of the whole law shows the clear intention on the part of the legislature to give the people of the taxing subdivision in which personal property is situated and used for the profit of the owner the right and privilege of collecting taxes upon it, so that it may bear its proper share of the expenses of government at that place." *Nye-Schneider-Fowler Co. v. Boone County*, 99 Neb. 383.

2. Section 6018, Comp. St. 1922, states in its first section: "No injunction shall be granted by any court or judge in this state to restrain the collection of any tax, or any part thereof hereinafter levied, nor to restrain the sale of any property for the nonpayment of any such tax, except such tax or the part thereof enjoined be levied or assessed for any illegal or unauthorized purpose."

The taxes complained of should have been paid under protest and then an attempt made by plaintiff to get his money back in the manner provided by law. *Darr v. Dawson County*, 93 Neb. 93; *Burlington & M. R. R. Co. v. Seward County*, 10 Neb. 211; *Janike v. Butler County*, 103 Neb. 865.

The district court should have sustained the demurrer to the petition. The cause is hereby reversed, with instructions to dismiss the action at costs of plaintiff.

REVERSED.

WAYLON J. MILLER V. STATE OF NEBRASKA.

FILED MARCH 28, 1928. No. 26044.

Jury. A defendant in a criminal action, where the offense charged is a misdemeanor, punishable by fine only, may waive his right to a jury trial and may consent to a trial by a jury of less than twelve.

ERROR to the district court for Gage county: WILLIAM J. MOSS, JUDGE. *Affirmed.*

S. D. Killen, for plaintiff in error.

O. S. Spillman, Attorney General, and *Donald Gallagher, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

GOOD, J.

Plaintiff in error, hereinafter called defendant, was convicted and sentenced to pay a fine of $50 for carelessly, wilfully and unlawfully neglecting to provide sufficient sustenance for four mules and six horses, which he, as owner, had in his charge. He prosecutes error to review the record of his conviction.

Defendant asserts that the trial court erred in submitting the case to a jury of eleven; in its rulings on admission and exclusion of evidence; and in giving and refusing instructions. He further contends that the verdict is not sustained by the evidence.

After the jury were sworn and opening statements made by counsel, one of the jurors, because of illness, was unable to serve. Thereupon, defendant and the prosecuting attorney, in open court, agreed that the trial should proceed to the eleven remaining jurors.

Defendant now contends that, notwithstanding his consent thereto, a trial to a jury of less than twelve is illegal. He invokes the provision of section 11, art. I of the Constitution, which gives to the accused in criminal prosecutions a right to trial by an impartial jury of the county in which the offense is alleged to have been committed, and he argues that the constitutional provision contemplates a jury of twelve, and that he could not waive such constitutional right. There is a diversity of judicial opinion upon the question in the courts of other jurisdictions, and the decisions in our own are not harmonious. In *Arnold v. State,* 38 Neb. 752, it was held that it is beyond

the power of the state's attorney and prisoner to substitute, by agreement, another tribunal than the one prescribed by statute for the trial of a plea in bar in a criminal action. It was further held that the prisoner charged with a felony cannot waive the right to a trial by jury of the issues presented by a plea in bar. In *Michaelson v. Beemer,* 72 Neb. 761, it was held that a defendant charged with a felony, on a plea of not guilty, cannot waive his right to a trial by jury.

On the other hand, in *State v. Crinklaw,* 40 Neb. 759, in a habeas corpus proceeding, it was held that the constitutional right to a trial by a jury of the county where the crime is alleged to have been committed is a mere personal privilege of the accused, and that he may waive such privilege. In *McCarty v. Hopkins,* 61 Neb. 550, it was held that a person charged with a crime may, by a judicial confession of guilt, waive all the rights secured to him by section 11, art. I of the Constitution. In *Kennison v. State,* 83 Neb. 391, it was held that a defendant in a criminal action may waive the right to a trial by a jury of a county other than that where the crime was alleged to have been committed. And in *Marino v. State,* 111 Neb. 623, it was held that the constitutional right to a trial by jury in the county where the offense was alleged to have been committed, as provided in section 11, art. I of our Bill of Rights, is a mere personal privilege of the accused which he may waive.

Each of these cases involved a charge of felony. In the instant case defendant is charged with a misdemeanor, created by statute, and which was not an offense at common law. While one charged with a statutory misdemeanor has a right to demand a trial by a jury of the county where the offense is alleged to have been committed, yet the great weight of authority, and the better view, is that the defendant in such a case may waive his right to a jury trial. 35 C. J. 199, sec. 106, and cases there cited. Particularly is this true where the offense is punishable by a fine only. 35 C. J. 191, sec. 95.

If one may waive an entire jury trial in such a case, it certainly follows that he may consent to a trial by a jury of a less number than twelve. We have no doubt that, had the jury found the defendant not guilty, he would have been protected by such a verdict, even though it was rendered by a jury of eleven. Having once been put in jeopardy, he could not be subjected to a second trial for the same offense. A defendant should not be permitted to speculate and take the chance of a verdict, favorable to himself, which would be a protection to him, and be relieved of liability in the event of an adverse verdict.

We are constrained to hold that the court committed no error in submitting the cause to a jury of eleven.

We have carefully examined all of the instructions given and refused, and all rulings on admission and rejection of evidence, and fail to find any prejudicial error, as respects either the instructions or rulings on evidence.

The defendant argues that the evidence is insufficient to show that he was the owner of the horses and mules, or that he carelessly or wilfully neglected to provide sustenance therefor. There is evidence in the record from which the jury might properly find that the defendant confined four mules and six horses in a pasture from the 7th of September until about the 1st of January following; that there was little water and practically no forage in the pasture; that these animals were insufficiently nourished; and that a number of them died from lack of food and water. The evidence is sufficient to warrant the jury in finding also that defendant was the owner of and placed the mules and horses in the pasture. While the evidence as to the amount of water and amount and character of the forage in the pasture is in conflict, it presented a question for the jury, and their finding is conclusive.

The record is free from prejudicial error. The judgment is therefore

AFFIRMED.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, PLAINTIFF, V. STEPHEN QUALSET, APPELLANT: FARMERS STATE BANK OF PETERSBURG, INTERVENER, APPELLEE.

FILED MARCH 28, 1928. No. 25396.

1. **Appeal in Equity:** TRIAL DE NOVO. "It is undoubtedly true when an action in equity is appealed, it is the duty of this court to try the issues *de novo*, and to reach an independent conclusion without reference to the findings of the district court. But when evidence on material issues so conflicts that it cannot be reconciled, this court will consider the fact that the trial court heard the witnesses and observed their manner of testifying, and must have accepted one version of the facts rather than the other. In this view of the case we find no difficulty in adopting as our own independent conclusion the determination as to facts made by the trial court." *Weaverling v. McLennan*, *ante* p, 466.
2. **Subrogation:** MORTGAGES. Generally, where one pays or advances money to pay a mortgage debt in whole or in part with the understanding that he is to have the benefit of the mortgage, he becomes a holder of the lien by subrogation.
3. **Appeal:** ISSUES. "Cases appealed to this court must be considered upon the issues presented in the district court." *Nielsen v. Central Nebraska Land & Investment Co.*, 87 Neb. 518.
4. **Evidence** examined, and *held* to sustain the decree entered herein.

APPEAL from the district court for Boone county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

H. Halderson, for appellant.

Vail & Flory, contra.

J. P. Moore, Jr., and *T. B. Dysart*, for plaintiff.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

EBERLY, J.

In a pending foreclosure proceeding wherein the Prudential Insurance Company of America, plaintiff, sought to

enforce a first mortgage against Stephen Qualset (owner of fee), Anna G. Qualset (wife), Carrie Qualset McDonald, a subsequent mortgagee, and others, defendants, the Farmers State Bank of Petersburg intervened. Omitting unessential averments, it may be said the intervener alleged that on March 3, 1923, it paid interest due on plaintiff's notes executed by defendants, secured by mortgage in suit, in the sum of $387, and on July 11, 1923, for the same purpose, the sum of $744. Intervener also alleged in substance that each of said sums was advanced and paid by it at the request of Stephen Qualset, and pursuant to an express oral agreement with him that, to the extent of the payments thus made, it would be subrogated to the lien of plaintiff under the mortgage set forth in plaintiff's petition filed herein. It also appears from the transcript herein that ultimately an issue was joined between intervener on one side and Stephen Qualset and Carrie Qualset McDonald on the other. The pleadings of the defendant Stephen Qualset, in effect, denied specifically, but not generally, the allegations of the intervener's pleadings, so far as facts upon which subrogation was claimed were concerned, and were evidently treated by all parties in the district court as an answer, and will be so treated here.

On the issue thus joined, a hearing was had in the district court, evidence adduced, and a decree finally entered fully sustaining the intervener's contentions. Stephen Qualset, alone, appeals.

It is contended that no proper summons or other process was served upon Qualset of the pendency of intervener's pleadings. But the record shows without question that, subsequent to the filing of intervener's petition, appellant entered a general appearance therein and contested intervener's claims on the merits. Service of summons was therefore unnecessary.

As to intervener's claim to subrogation, it is substantially admitted by all parties to the litigation that the interest payments in controversy were accomplished by use of a $387 check, a $744 check, and a $2 check; and that

these checks were drawn and charged against the checking account of Stephen Qualset in the intervener bank.

Intervener's evidence is to the effect that, at the time of the transactions, the parties interested were both of the opinion that the interest then unpaid on the mortgage now in suit herein was represented by coupon notes; that intervener thereupon advanced the necessary funds to Stephen Qualset and made these payments of interest to avoid a foreclosure proceeding at Qualset's request; that, pursuant to an express oral agreement with him, the interest coupons thus paid were to be assigned to the intervener by the mortgagee and held by it as security for the money thus advanced and loaned.

The evidence also discloses that, while these parties were correctly informed as to the amount of unpaid interest due at the time of these payments, they were mutually mistaken as to its form. This interest was not evidenced by a coupon note.

However, the Prudential Insurance Company, as mortgagee and the then holder of the obligation secured, acknowledged in writing the receipt of each remittance, thus made, contemporaneously with the receipt thereof, and also acknowledged the demand for the assignment of the coupon note evidencing the interest thus paid. It, in turn, explained the situation and forwarded to the intervener a receipt showing payment by this bank, and which it represented would accomplish a result identical with the assignment of a coupon interest note.

It may be said in passing that, whatever be the legal effect of this correspondence with the plaintiff and of plaintiff's receipts, it certainly evidences knowledge of the transaction and consent thereto on part of the then owner of the mortgage indebtedness involved herein.

Assuming that this correspondence was not binding upon Qualset, the determination as to the disputed facts as to the alleged oral agreement is controlled by the conflicting evidence of the record. The bank's witnesses swear that this oral agreement was made, money was advanced, and

remittances made by it pursuant thereto, with the intent evidenced thereby. Qualset denies the making of any such oral agreement and affirms the transaction to be no more or other than a payment of his checks drawn for this purpose upon his checking account.

It was, in the first place, for the trial judge, who saw and heard these conflicting witnesses and observed their demeanor while testifying, to determine this disputed question of fact in the light of all the evidence of the record. This question of fact, it is evident, the trial court determined against the appellant.

"It is undoubtedly true when an action in equity is appealed, it is the duty of this court to try the issues *de novo*, and to reach an independent conclusion without reference to the findings of the district court. But when evidence on material issues so conflicts that it cannot be reconciled, this court will consider the fact that the trial court heard the witnesses and observed their manner of testifying, and must have accepted one version of the facts rather than the other. In this view of the case we find no difficulty in adopting as our own independent conclusion the determination as to facts made by the trial court." *Weaverling v. McLennan, ante,* p. 466. See, also, *Greusel v. Payne,* 107 Neb. 84.

The appellant, however, makes the further contention that, even if these contested facts be found against him, the record presented is still insufficient, as a matter of law, to sustain the decree declaring and enforcing subrogation; that it amounts to no more than a voluntary payment which would be insufficient to subrogate the payor to the rights of the original creditor; and that the same rule holds against one who advances or loans money to pay a mortgage.

That a mere volunteer is not entitled to subrogation may be conceded, but that principle has no application to the case here presented.

In *Bohn Sash & Door Co. v. Case,* 42 Neb. 281, this court said: "The right of subrogation for moneys loaned on a mortgage used to pay prior mortgages must be predicated

upon some recognized equitable principle, such as mistake, an agreement or understanding that the loan was for the express purpose designated, or the like."

It would seem that "an agreement or understanding that the loan was for the express purpose designated, or the like," fairly applies to the oral agreement presented by this record.

Indeed, the language of this court in *Meeker v. Larsen*, 65 Neb. 158, with reference to "an agreement or understanding that the mortgage is to be kept alive for his benefit," is at least an implied recognition of the rule stated in Cyc. in the following form: "And generally, where one pays or advances money to pay a mortgage debt with the understanding that he is to have the benefit of the mortgage, he becomes the holder of the lien by subrogation, although the creditor is not a party to the agreement." 37 Cyc. 472. See, also, 41 C. J. 678, sec. 692.

It follows that the decree of the district court awarding subrogation is approved.

We do not overlook appellant's contention that the petition of intervention failing to allege that "no proceedings at law have been had or commenced for the collection of the mortgage," and there being no proof in the record "that no proceedings at law have been had by the Farmers State Bank and by the original mortgagee," the decree is neither sustained by the evidence nor supported by the pleadings.

It is to be noted, however, that the Prudential Insurance Company, as plaintiff in the instant case, declares upon the original mortgage to the benefit of the terms of which intervener bank, by its pleadings, seeks subrogation. The proceedings thus instituted to secure a subrogation are a part of the proceedings instituted by the plaintiff herein to secure a foreclosure of the mortgage in suit. In this petition of plaintiff, paragraph 16 thereof alleges: "No action at law has been had for the recovery of said mortgage debt or any part thereof, and no part thereof has been collected or paid." The form and substance of the allegation were not questioned by any of the defendants

in the district court, and appellant, by his pleadings, failed to deny it. The usual decree was entered thereon.

It is also true that the petition of intervener bank upon which the original decree in its favor was entered, and which was sought to be set aside by the proceedings appealed from, did not, in express terms, contain the allegations with reference to "no proceedings at law," etc., above set forth. However, the pleadings of appellant with which we are dealing do not attack the pleadings of the bank but rather apply to the setting aside of the decree only, notwithstanding that the bank's petition doubtless was referred to by the court as containing the facts which appellant sought to deny. In addition to this, the record also discloses that the appellant wholly failed to challenge the sufficiency of the pleadings of the intervener bank in the district court on this ground; nor did the appellant attempt to raise the question in any other manner whatever. The decree which was attacked by the appellant never having been set aside by the court, we are not concerned with the pleading of the appellant bank upon which it was entered.

However, appellant cites *Reed v. Good,* 114 Neb. 777, as controlling. The rule therein stated is as follows: "In an action to foreclose a real estate mortgage, when the allegations of the petition are denied, the burden is on plaintiff to make *prima facie* proof that no action at law has been instituted for the recovery of the debt." See *Beebe v. Bahr,* 84 Neb. 191.

But this issue not having been presented to the trial court, the appellant may not urge it now.

The rule applicable and controlling here is: "Cases appealed to this court must be considered upon the issues presented in the district court." *Nielsen v. Central Nebraska Land & Investment Co.,* 87 Neb. 518. See, also, *Etheredge v. Chicago, B. & Q. R. Co.,* 105 Neb. 778, 783.

It follows that the action of the district court in this case as presented to it at the trial by the parties then before it is correct, and its decree then entered is

AFFIRMED.

C. J. FARRINGTON ET AL., V. STATE OF NEBRASKA.

FILED MARCH 28, 1928. No. 25868.

Criminal Law: REVIEW. A criminal case, tried in the district court to a jury, cannot be reviewed by this court before final judgment has been entered upon the verdict in the court below and a duly certified transcript of the record thereof filed herein.

ERROR to the district court for Scotts Bluff county: J. LEONARD TEWELL, JUDGE. *Dismissed.*

Raymond & Fitzgerald, for plaintiffs in error.

O. S. Spillman, Attorney General, and *Donald Gallagher, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and HOWELL, JJ., and REDICK, District Judge.

EBERLY, J.

This is a proceeding in error prosecuted by C. J. Farrington and Jack Wrinkle from the district court for Scotts Bluff county, Nebraska. According to the briefs of the plaintiffs in error, they were convicted in that court for a violation of section 3252, Comp. St. 1922.

An inspection of the transcript discloses that it contains no order of the district court overruling the motions for new trial filed by the defendants in that court; neither is the judgment of that court, imposing sentence, made a part of it. The certificate of the clerk of the district court, attached to the transcript, limits it to being "a true and compared copy of the information, instructions to the jury, verdict of jury, motions for new trial, notices and affidavits and recognizances, as the same appear on file and now in my hands remaining as clerk aforesaid."

The transcript before us imports absolute verity and fails to disclose the rendition of a final judgment.

"It has been held in this state, in an unbroken line of decisions in civil cases, that a writ of error does not lie to review the rulings of the district court in a cause until a final judgment has been rendered therein, disposing of

the entire suit. And the rule is the same in criminal cases. *Green v. State,* 10 Neb. 102." *Gartner v. State,* 36 Neb. 280. See, also, *Seven Valleys Bank v. Smith,* 43 Neb. 237.

The present condition of this record therefore necessitates the dismissal of the petition in error for want of jurisdiction.

DISMISSED.

FIRST STATE BANK OF ST. EDWARD, APPELLEE, V. SVEN NIKLASSON: NEWMAN GROVE STATE BANK, APPELLANT.

FILED MARCH 28, 1928. No. 25558.

1. **Mortgages:** ACKNOWLEDGMENT. A cashier of a bank, not a stockholder therein, is competent as a notary public to take the acknowledgment of the mortgagors to a mortgage to the bank.
2. ———: MERGER. Where a mortgagee takes title to the real estate from the mortgagor, the question of a merger of the two estates depends upon the intention of the mortgagee, and if none is expressed, in the absence of circumstances indicating a contrary purpose, it will be presumed that he intended to do that which would prove most advantageous to himself.
3. ———: SUBROGATION. A subsequent mortgagee may not add to the amount secured by his mortgage sums paid for interest upon a prior mortgage, where authority so to do is not contained in his own security; in such case he is subrogated to the lien of the prior mortgage to the extent of the payments and, in order to recover them on foreclosure of his mortgage, must plead the prior mortgage lien, and facts showing such a breach of conditions thereof as give a right to foreclose that mortgage.
4. ———: MARSHALING SECURITIES. A junior mortgagee of real estate is not entitled to have the value of other property, held as additional security for the prior mortgage debt and released to the debtor, credited upon the prior lien, unless, at the time of such release, the prior mortgagee had notice of the intention of the junior to require him to first exhaust the property not covered by the junior lien.
5. **Usury,** DEFENSE OF. The defense of usury is personal to the debtor, and may not be successfully pleaded by the holder of a junior mortgage expressly taken subject to the mortgage to which the defense is sought to be applied.

APPEAL from the district court for Platte county: LOUIS LIGHTNER, JUDGE. *Affirmed in part, and reversed in part.*

H. Halderson, for appellant.

O. M. Needham and *Kemp & Brower, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, THOMPSON and HOWELL, JJ., and REDICK, District Judge.

REDICK, District Judge.

Action of foreclosure. This action was brought by the First State Bank of St. Edward, hereafter referred to as the St. Edward bank, against Sven Niklasson et al., defendants, to foreclose a second mortgage upon certain lands in Platte county. The first mortgage for $10,000 is not in controversy and the holder thereof is not a party. The Newman Grove State Bank, hereafter referred to as the Newman Grove bank, was made defendant and filed its answer, a general denial, and a cross-petition setting up a third mortgage in the sum of $2,235.60; and the defendant Smith National Bank filed an answer and cross-petition setting up a judgment against defendant Niklasson for the sum of $2,731.15 and costs. Trial resulted in a decree foreclosing the two mortgages and declaring the mortgage of plaintiff a first lien in the sum of $6,767.65, a second lien in favor of the Newman Grove bank for $3,101.42, and a third lien in favor of the Smith National Bank for $3,836.07, all subject to the first mortgage above mentioned. The Newman Grove bank appeals, and the only contest is between it and the plaintiff as to the existence of plaintiff's lien, the amount thereof, and its priority over that of the Newman Grove bank.

The original petition was filed July 6, 1925, to which the mortgagors filed an answer admitting the signature of the note and mortgage, but alleging that the same was usurious because of the fact that the note and mortgage bore 10 per cent. interest from date and required the mortgagor to pay all taxes and assessments levied upon said mortgage and note. Said answer also set up that the premises were

the homestead of the defendants, that the mortgage was acknowledged by the cashier of the plaintiff bank, who was also a stockholder therein, and that said mortgage was not properly witnessed. The answer and cross-petition of the Newman Grove bank also presented the three defenses just mentioned and, further, that the plaintiff held other security for its debt in the way of a chattel mortgage for the sum of $750 upon eight head of horses belonging to defendant Niklasson, and requesting a marshalling of assets requiring the plaintiff to first exhaust its chattel security. The answer further alleged that on July 13, 1925, defendants Niklasson executed a quitclaim deed of the mortgaged premises to the plaintiff, that said deed was recorded August 20, 1925, and that thereby the parties to said deed intended that plaintiff's mortgage should be merged therein, and that said plaintiff's debt had been fully paid. The plaintiff replied to said cross-petition, and admitted the execution of the note and mortgage of the Newman Grove bank, denied that the premises were the homestead of the Niklassons, denied that the cashier, J. L. Carter, who took the acknowledgement of plaintiff's mortgage, was a stockholder in plaintiff's bank, admitted the execution of the quitclaim deed, but denied that it was taken in settlement or discharge of plaintiff's mortgage or that the mortgage was merged in said deed, admitted it held a chattel mortgage, as alleged, upon eight horses, but alleged that two of said horses had been sold for $150 and the amount credited upon defendant's note, and that upon execution of said deed the mortgage upon the remainder of said horses had been released to the mortgagor. Upon the filing for record of the quitclaim deed above mentioned, plaintiff filed a dismissal with prejudice as to Sven and Augusta Niklasson of his action to foreclose.

Upon this record a number of questions are presented, three of which may be disposed of very briefly: (1) The cashier, Carter, is not shown to have been a stockholder in the St. Edward bank, and therefore, was competent to take the acknowledgment of and witness the mortgage

to that bank; (2) the evidence fails to show that the premises in question was the homestead of the Niklassons, and (3) the evidence shows that the mortgage was properly witnessed.

Several questions remain for consideration:

1. Whether the mortgage of the St. Edward bank was merged in the title conveyed by the quitclaim deed. Ordinarily, when a lesser and a greater estate in the same land unite in one person, the former is extinguished and becomes merged in the latter; but in equity the question of merger depends upon the intention of the parties, and in absence of direct evidence or circumstances indicating such intention, when other liens or rights have intervened between the prior lien and the deed, it will be presumed that the intention of the prior lienholder was to preserve it as against such intervening claims. *Citizens State Bank v. Petersen,* 114 Neb. 809; *Wyatt-Bullard Lumber Co. v. Bourke,* 55 Neb. 9. The evidence in this case is insufficient to establish an intention of the mortgagee that the mortgage should merge in the title, and therefore the lien of plaintiff's mortgage was not subordinated to that of the Newman Grove bank; the latter mortgage was made expressly subject to that of plaintiff, and plaintiff is entitled to hold his lien for the protection of his title as against the mortgage of the Newman Grove bank.

2. The original petition of the St. Edward bank contained an allegation that the defendant Niklasson defaulted in the payment of interest upon the first mortgage of $10,000, and that for the purpose of protecting its security plaintiff paid said interest in the sum of $666.79, taking an assignment of the coupon evidencing the same, and claimed the right to add said amount to its mortgage. This was allowed by the district court and included in the amount found due the plaintiff. We think this was error. The mortgage of plaintiff provided that, if the mortgagors should fail to pay the taxes on said land or to have the improvements thereon insured, the plaintiffs might pay the same and add the amount thereof to the mortgage debt,

but contained no provision for the payment of interest upon the first mortgage. Furthermore, plaintiff had dismissed his action of foreclosure as to the Niklassons with prejudice, and therefore no action was pending for that purpose. If the action could be deemed still pending as a foreclosure of the first mortgage by the assignee of the coupon, the petition is defective for want of an allegation that no proceedings at law had been had for the collection thereof, and facts showing such a breach of conditions of the prior mortgage as give a right to foreclose the same. *United States Trust Co. v. Miller, ante,* p. 25. Furthermore, the dismissal was without reservation and carried with it the claim upon the coupon. We are therefore of the opinion that the plaintiff's lien should be reduced by the amount allowed on this item, to wit, $726.99.

3. It is contended by the Newman Grove bank that the plaintiff should be required to exhaust its chattel mortgage security before being allowed to foreclose its mortgage upon the real estate, or that its lien should be reduced to the extent of the value of such chattel security. It appears that upon execution of the quitclaim deed the plaintiff released its chattel security, and the question is whether, under the doctrine of marshalling of assets, it should be required to credit the value thereof as against the claims of the Newman Grove bank. We have held, contrary to defendant's contention, in *Ocobock v. Baker,* 52 Neb. 447, that, in the absence of notice by the junior lienholder that he would require the senior to first exhaust the property not covered by the junior lien, a release of the latter property from the senior lien would not subrogate the junior lien to a first lien upon the property covered by both liens. See, also, 26 Cyc. 935b, where it is said: "In any case the prior incumbrancer is entitled to notice of the existence of the junior claim, and of the intention of the junior creditor to compel the former to make his election in compliance with this principle." No such notice was here given prior to the release of the chattel mortgage.

4. The further contention of defendant that the note

and mortgage of St. Edward bank was usurious cannot be sustained, for the reason that the defense of usury is personal to the debtor, his privies and sureties. *Building & Loan Ass'n v. Walker*, 59 Neb. 456; *Male v. Wink*, 61 Neb. 748. By the execution of the quitclaim deed the Niklassons waived the defense of usury so far as the mortgaged property was concerned, and the Newman Grove bank cannot make it, as it is neither a privy nor surety.

We conclude that the judgment of the district court is without error except as to amount of the lien of St. Edward bank, and with that exception is affirmed. With respect to the lien of said bank, the judgment is reversed and cause remanded, with instructions to correct the decree by fixing the amount of said lien at $6,040.56 with interest as provided in the decree.

AFFIRMED IN PART, AND REVERSED IN PART.

LUCILE BOOMER, APPELLANT, V. LANCASTER COUNTY, APPELLEE.

FILED APRIL 6, 1928. No. 26083.

1. **Highways: MAINTENANCE: CARE REQUIRED.** "A county cannot be held to be an insurer of those who have occasion to use a county highway in process of repair. It is required to use such care as, under the circumstances, is reasonable and ordinary in its inspection of the highway and in the execution of such repairs as it finds necessary or undertakes to make. It is required to use reasonable and ordinary care to maintain the highways reasonably safe for the traveler using them while in the exercise of reasonable and ordinary care." *Frickel v. Lancaster County*, 115 Neb. 506.
2. **Appeal: NONPREJUDICIAL ERROR.** Where, under the evidence, a court should sustain a motion made by the defendant for a directed verdict in favor of defendant, but refuses so to do, and, after instructions by the court submitting the case to the jury, the jury returns a verdict in favor of the defendant, this court will not review the instructions to determine if there was error in connection therewith; such error, if any, would be without prejudice to the real rights of the plaintiff.

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

Clinton J. Campbell, Harry R. Ankeny, Don D. Elliott and *Verda Vallier,* for appellant.

Charles E. Matson, Max G. Towle and *Farley Young, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

GOSS, C. J.

This is an appeal by plaintiff from a judgment on a verdict of the jury against her. She sued the county for damages for personal injuries received while riding in an automobile upon the public highway, claiming that her injuries were proximately caused by the unsafe condition of the highway. This is the second time the cause has been before this court. In the former trial, the court sustained the motion of the defendant at the end of plaintiff's evidence and directed a verdict for the county. On review the judgment was reversed. *Boomer v. Lancaster County,* 115 Neb. 295. On this trial the evidence of both sides was presented to the jury, the court overruled the motions of the defendant to direct a verdict in its favor at the conclusion of the testimony for the plaintiff and again at the conclusion of all the testimony, the case was submitted to the jury and it returned a verdict for the county.

The reader is referred to the former opinion for the general layout of the case, though the details are somewhat different here. While plaintiff's brief says that the evidence on her behalf is substantially the same on the second trial, we find that the evidence now leaves us with quite a different impression of the facts than we had when we reviewed the first trial. The evidence on behalf of the plaintiff shows that, in the middle of the roadway at the end of the pavement south of the penitentiary, there stood a large post in front of which, as shown in the picture

offered by plaintiff, was a sign on another post indicating "Closed road" and some other words not readable in the photograph. Leaning off to the east from these obstructions was a plank barricading several feet east of the center of the road. Plaintiff saw this and testified that when the party reached that point there was a conversation between Walter Larson, who was then driving, and Donald Robb about the road being closed south of that point, and that Donald said in substance that the road had been closed but he thought they could get through now. It seems that Donald had driven to the end of the pavement a few weeks earlier, had found the sign there and two planks barricading both tracks and so had turned around there. Not long after driving past this point the car was stopped and Larson and plaintiff, who were in the front seat, exchanged seats with Donald Robb, and another of the girls and Donald Robb drove the car from that time until the accident occurred. The culvert where the plaintiff was injured is about two and one-half miles south of the penitentiary. The culvert was undergoing repair. The county had excavated a considerable portion of the east part of the roadway occupied by the culvert but had left a passageway for traffic between the dirt excavated and the north end or banister of the culvert. On account of the fresh dirt and the size of the pile thereof, the passageway was not so level nor so smooth as is ordinarily the case in a highway, but the pictures of it taken the next day do not show that there would be any difficulty in driving through it in the exercise of ordinary care. A driver of a bus who testified in the case said the Beatrice busses drove through there four times daily. These busses require a clearance of 18 inches in excess of the ordinary touring car.

Donald Robb testified he was driving 30 to 35 miles per hour, that he did not see any red light or the pile of dirt and did not see the dirt until within two or three car lengths of it. He then swerved the car toward the opening, but the car struck the west banister, tore off the rear

door and the right rear of the car, threw the plaintiff over the banister into the mud and water and turned part way around a little south of the culvert. Five of the six members of the party testified on the trial. None of them saw any signs other than the one referred to as at the end of the pavement and none of them saw the red lantern on the dirt pile at the culvert until after the accident. The fact that they did not see the signs nor the red light does not prove that the signs and lights were not visible.

That there was a red lantern at the west side of the dirt pile to mark it, and the open passageway between it and the west end or banister of the culvert is established so well by the evidence that a jury could not find otherwise and be within the truth. Indeed, it was so established by the witness, E. D. Stewart, who testified on behalf of plaintiff. He lived about 150 yards north of the culvert on the west side of the road and was the first one to arrive there after the injury to plaintiff. He testified that he saw the red lantern there that night, that it was burning, and that it could have been seen by those approaching from the north for a distance of 250 to 300 yards. This red light was on a stick at the west side of the bank. This witness testified that a picture taken the next morning did not show the lantern extending quite so far out over the east track as the lantern ordinarily did. The picture shows the lantern plainly visible from the north where the camera was located. Mr. Stewart testified to the sign at the south end of the pavement; he testified that there was another sign "right on the shoulder of the road at McNeil's place about half a mile north of the culvert where the accident was, with the words on it 'Road under construction' or something to that effect."

The testimony on behalf of the county is in effect cumulative of what is indicated as the evidence of the plaintiff heretofore abstracted. The inevitable impression on the reader, as it must be upon a juror, is that the county was not negligent in the matter of having the roadway open for general travel, nor was it negligent at the culvert.

It would have been a great hardship to those living along the line and to those having business there to barricade the road against all travel during all the time of the improvement of the road. It was sufficient if such signs and warnings were given, and such passageways past the improvements were provided, so that one driving with due and ordinary care might go through without mishap. The pictures offered by the plaintiff and received in evidence and the testimony offered by plaintiff show that such signs and warnings were provided for those who would look and see, and such a red light was provided at the culvert as to call attention to special danger, and then such ample passageway was there provided as to protect fully one who was proceeding on the highway at that point with ordinary care in all the circumstances of the occasion. We said in *Frickel v. Lancaster County*, 115 Neb. 506:

"A county cannot be held to be an insurer of those who have occasion to use a county highway in process of repair. It is required to use such care as, under the circumstances, is reasonable and ordinary in its inspection of the highway and in the execution of such repairs as it finds necessary or undertakes to make. It is required to use reasonable and ordinary care to maintain the highways reasonably safe for the traveler using them while in the exercise of reasonable and ordinary care."

We are of the opinion from the evidence that the county was not at all negligent in the premises and that the proximate cause of the unfortunate and deplorable injury to the plaintiff was the want of care in driving the car in which she was riding.

So the court might well, in this trial, have sustained the motion for a verdict in its favor made by the county at the conclusion of plaintiff's evidence and renewed at the conclusion of all the evidence. This view renders it unnecessary for us to consider the many assignments of error set up and argued by the plaintiff, having to do with errors alleged to inhere in the instructions given by the court. The jury having arrived at a verdict for the defendant,

which would have been justified by direction of the court, whatever errors the court may have made in the instructions given are without prejudice to the plaintiff.

Where, under the evidence, a court should sustain a motion made by the defendant for a directed verdict in favor of defendant, but refuses so to do, and, after instructions by the court submitting the case to the jury, the jury returns a verdict in favor of the defendant, this court will not review the instructions to determine if there was error in connection therewith; such error, if any, would be without prejudice to the real rights of the plaintiff.

So the judgment of the district court is

AFFIRMED.

Note—See Highways, 2 A. L. R. 721; 13 R. C. L. 308; 3 R. C. L. Supp. 40; 4 R. C. L. Supp. 808; 5 R. C. L. Supp. 694; 29 C. J. 680 n. 63, 67.

MICHAEL REGAN, ALIAS JACK REGAN, V. STATE OF NEBRASKA.

FILED APRIL 6, 1928. No. 26230.

Criminal Law: BURGLARY: REFUSAL OF CONTINUANCE. A defendant was charged with having made an attempt to burglarize a bank by forcibly and violently putting in fear certain of the bank officers. He was armed at the time with a revolver which he discharged over the head of the cashier. He was positively identified as the person who attempted to commit the burglary by more than ten witnesses. The defendant maintained that he was in New Jersey when the attempted burglary was perpetrated and tendered affidavits to establish that alleged fact if a continuance was granted. The court overruled his application, and, in view of the evidence, we do not think the court erred in its ruling. *Held*, that the identity of the defendant was abundantly established by the evidence and that the court did not err in denying a new trial.

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

Merrow & Murphy, for plaintiff in error.

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

Heard before GOSS, C. J., ROSE, DEAN, GOOD and HOWELL, JJ.

DEAN, J.

Michael Regan, alias Jack Regan, hereinafter called the defendant, was informed against in Dodge county and there charged with having entered in the daytime the First National Bank of Hooper, and that he "then and there intending by violence and by putting in fear the persons in charge thereof, to steal, take and carry away * * * certain money, goods, chattels, and other property belonging to said bank and depository, did then and there unlawfully, feloniously, forcibly and by violence put in fear one Norman Shaffer, cashier, one William Basler, teller, and one Marvin Fritz, bookkeeper, then * * * in charge of and connected with said bank and depository" as officers and employees thereof. The jury returned a verdict of guilty and the court sentenced the defendant to the penitentiary for a term of 20 years. The defendant's motion for a new trial was denied, and he prosecutes error.

From the state's evidence it appears that the defendant and an unidentified man, on November 12, 1926, entered the bank together shortly after the noon hour. Shaffer was reading a newspaper when the defendant and his companion, unnoticed, entered the bank. On looking up, Shaffer saw the defendant standing in front of the cashier's window with a gun pushed through the bars. With an oath, the defendant said to Shaffer, "Stick 'em up." But Shaffer dropped behind the counter and in a crouching posture entered the customers' room. He testified that the defendant discharged his revolver and the bullet was imbedded in the transom of the door that led from the directors' room to the street. Shaffer then saw Fritz coming out of the clothes closet, and he, Shaffer, ran out of the building and ordered a telephone operator to blow the fire whistle. He immediately returned to the bank,

but the defendant had gone away taking nothing with him. When the defendant appeared at the window, Shaffer saw no masks or covering worn by either the defendant or his companion and never before had seen either of them. At the trial Shaffer testified in respect of the sort of clothing worn by the defendant when he first entered the bank. He said the defendant had a mark or a scar on his cheek, which was plainly visible at the trial, and also a beard of a few days' growth; that his collar was turned up; that he wore a brown hat with the brim partly pulled down, and that defendant's eyes were blue. He also observed that the defendant's companion was the smaller of the two. Shaffer saw the defendant two or three times at the Dodge county jail when he went with witnesses who came to identify him.

Subsequently, learning that the defendant was in jail at Paterson, New Jersey, the witness and Sheriff Johnson of Dodge county, on or about May 9, 1927, went to Paterson, and from among 26 men lined up in the jail, all dressed alike, the witness testified that he identified the defendant as one of the men who attempted the burglary at Hooper. On the way back from Paterson to Dodge county, Shaffer and the sheriff and the defendant rode in the same coach, but no conversation was had with the defendant about the attempted burglary. The defendant, however, pleaded an alibi and protested that he had never been so far west as Dodge county.

The bookkeeper of the bank testified that he saw the defendant two days before the attempted robbery when the defendant obtained small change for a 10-dollar bill. He recognized him on November 12 as the same man when the defendant grabbed him and ordered him to put his hands up. This witness did not see the defendant again until he was brought back from New Jersey, when he recognized him. The teller of the bank likewise identified the defendant as the man who made the attempted burglary. The defendant was also identified by Lorena and Clara Herman, two school girls, who lived about a block from

the bank, as being the man whom they saw coming from the bank on November 12 and enter a car that was parked in front of their home. These girls testified that another man was with the defendant and that one of them had a gun in his hand. Two other school girls also recognized the defendant as the man who picked them up and took them to school in his car shortly before the bank was robbed. John Lehman, the sheriff at Columbus, was notified by state sheriff Condit of the attempted robbery. He saw the car in which the defendants rode and ordered its occupants to stop, but they refused and he shot after them, but the car got away. In fact, the record conclusively shows that the defendant was identified by more than ten people who testified that they had seen him in the vicinity of the bank at the time in question here.

The defendant testified that he could establish the fact, and produced affidavits in support of his contention, that he was in New Jersey at the time of the burglary, and he made a showing for a continuance, by affidavits, in order that he might obtain the depositions of his alleged alibi witnesses. But the court overruled the defendant's application and, in view of all the evidence before us, we do not think the court erred in its ruling.

The defendant complains that the penalty imposed is too severe and asks that we reduce the sentence. In view of the facts, we do not think the sentence should be reduced. When a man enters a bank or any other building, and brandishes a loaded revolver, or other deadly weapon, with a view to obtaining money, or other thing of value, by force or by putting in fear the person or persons in charge of such bank or building, a sentence of 20 years in the penitentiary is none too severe. The act of the defendant was the act of a malignant desperado who was bent on accomplishing his evil purpose at any cost, even to the taking of human life.

The defendant also assigns as prejudicial error the giving of every instruction which was submitted by the court. But the instructions are not discussed nor are the alleged

errors pointed out. It follows that this assignment of alleged error cannot be considered by us. Other assignments of alleged error are urged which we do not find it necessary to discuss and do not decide. Finding no reversible error, the judgment of the district court is

AFFIRMED.

HOWELL, J., concurring.

In addition to the reasons stated in the foregoing opinion, when the motion for continuance was presented and supported by affidavits, the county attorney agreed "if the witnesses named in said affidavits were present in court they would testify to the facts set forth in said affidavits."

In an order denying a continuance it is recited: "Thereupon the county attorney stated in open court that he would stipulate that if the witnesses named in said affidavits were present in court at the time of trial they would testify to the facts set forth in said affidavits." The affidavits related to witnesses whose only evidence would be to support an alibi. A situation might arise when a defendant would be prejudiced by being denied the privilege of having the jury hear and see the witnesses testify. This is not such a case. Most, if not all, of the testimony would have been in the form of depositions had the case been continued.

DAWSON COUNTY STATE BANK, APPELLEE, V. GUY A. TEMPLE ET AL., APPELLANTS.

FILED APRIL 6, 1928. No. 25707.

Usury: MORTGAGES. "A mortgage which, by its express terms, requires the mortgagor to pay the maximum legal rate of interest on the debt which it secures, and, in addition, to pay the taxes on the mortgagee's interest in the mortgaged premises, is usurious." *Stuart v. Durland*, 115 Neb. 211.

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

T. M. Hewitt, for appellants.

W. A. Stewart, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and HOWELL, JJ., and LANDIS, District Judge.

GOOD, J.

This is an action to foreclose two real estate mortgages, and incidentally to include therein the taxes on the mortgaged premises paid by the mortgagee. Usury was pleaded by the defendants as a defense to each of the mortgages. The trial court found for plaintiff and entered a decree of foreclosure for the full amount of both mortgages, with interest and taxes. Defendants appeal.

From the record it appears that on the 27th day of June, 1921, defendants Guy A. Temple and wife executed and delivered to plaintiff two promissory notes, each for $5,000, and maturing, respectively, on December 27, 1921, and June 27, 1922, each bearing interest at the rate of 10 per cent. per annum from date until paid. Each of the promissory notes was secured by a mortgage on real estate in Dawson county. Each of the mortgages contained provisions requiring the mortgagors to pay all taxes and assessments levied upon the mortgaged real estate and all other taxes, levies and assessments levied upon the mortgages or the notes which they were given to secure.

The facts in the instant case are practically identical with those presented by the record in *Stuart v. Durland,* 115 Neb. 211, and the decision in that will control the decision in this case. In *Stuart v. Durland,* it was held: "A mortgage which, by its express terms, requires the mortgagor to pay the maximum legal rate of interest on the debt which it secures, and, in addition, to pay the taxes on the mortgagee's interest in the mortgaged premises, is usurious." Under this holding the defense of usury is sustained by the record.

It appears that the mortgagee has paid taxes upon the mortgaged premises, a part of which would represent taxes upon the mortgagee's interest and a part on the mortgagors' interest in the real estate, but there is nothing apparent

in the record from which it can be determined what portion of the tax paid was upon the respective interests of the mortgagors and the mortgagee in the real estate.

Following the ruling in *Stuart v. Durland, supra,* the judgment of the district court is reversed, and the cause remanded, with directions to allow plaintiff a decree of foreclosure for the principal of its mortgages without interest; also to allow plaintiff a recovery for that part of the tax which was paid upon the mortgagors' interest in the real estate and to adduce additional evidence to establish the amount thereof. On this latter amount plaintiff is entitled to recover interest.

REVERSED.

NATHAN ELSON & COMPANY, APPELLANT, V. H. BESELIN & SON, APPELLEE.

FILED APRIL 6, 1928. No. 25167.

1. **Contracts:** CONSIDERATION. Mutuality of obligation of both parties to a contract is not essential to effectuate a binding agreement where there is a separate valid consideration as an inducement to the agreement; and where one of the parties to an exclusive sales agency agreement discontinues and dismantles his own factory of a competing line of merchandise, as a condition to being given the agency, otherwise optional, the performance of such condition constitutes such a sufficient consideration.
2. **Trial:** CONTRACT: BREACH: DAMAGES: PAROL EVIDENCE. In an action for damages for breach of a contract of an exclusive sales agency for a manufacturer of cigars, oral testimony of an expert accountant of the agent's gross and net income and the apportioned expenses and profits of the agent's business *held* not error when no specific objection was made at the time the testimony was offered, it appearing such records were offered to opposing side and could have been obtained by subpœna *duces tecum.*
3. **Principal and Agent:** CONTRACT: BREACH: WAIVER. Where a manufacturer of cigars and a wholesale jobber enter into an oral agreement appointing the latter exclusive sales agent of the manufacturer in a specified territory, and the agent is

allowed certain discounts on monthly settlement if paid within an agreed time, a continuance of the relation by accepting orders after continual breach of such condition by the buyer constitutes a waiver thereof.

4. ———: SALES AGENCY: CONSTRUCTION. Where an exclusive sales agency contract provides, among other things, that the agent would have to sell at least $60,000 worth of goods a year in order to hold the agency, without specific reference to the duration of the agreement, such agent would be entitled to the sales for a full year to determine whether he had met that condition.

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

Stout, Rose, Wells & Martin and *Decker & Golden,* for appellant.

Andrew M. Morrissey and *Weaver & Giller, contra.*

Heard before GOSS, C. J., EBERLY, DEAN, GOOD and HOWELL, JJ., and BROADY, District Judge.

BROADY, District Judge.

This action was brought by the plaintiff to recover the balance of a running account for cigars sold to the defendant, to which the defendant counterclaimed for damages from the plaintiff for breach of an oral contract making defendant the exclusive sales and distributing agent for the plaintiff in a specified territory. Defendant admits the plaintiff's account. Hence, the only issues in the case are upon the defendant's counterclaim, and, as presented by argument and briefs of counsel, are: (1) That the contract, as pleaded and proved, upon which the counterclaim is based, is void for want of mutuality in that no binding obligation on either party is shown. (2) That the court erred in permitting an expert accountant to testify as to the contents of defendant's books of accounts from his personal examination without having the books before him in court. (3) Waiver of default in payments by performance thereafter. (4) Duration of the agreement which is indefinite as to time.

Plaintiff is a manufacturer of cigars in Chicago and the defendant a wholesale jobber and, prior to making the contract with plaintiff, was a manufacturer of cigars in Omaha. In the summer of 1921 plaintiff, desiring to secure the defendant to handle its line of cigars, began negotiations toward that end, and the defendant placed a few trial orders with the plaintiff, and in November of the same year defendant took on an exclusive selling agency for two brands of plaintiff's cigars in a territory of Nebraska and part of western Iowa. By cross-petition the defendant alleges that the parties, at that time, entered into an oral contract substantially as follows: That plaintiff agreed to give the defendant the exclusive sale agency in the territory, mentioned for the sale and distribution of two brands of cigars known as Ben Bey and Illiad, conditioned that the defendant would discontinue its cigar factory in Omaha and also discontinue handling all competing brands of cigars, push the sale of plaintiff's cigars and increase its force of salesmen; and that defendant would have to sell at least $60,000 worth of cigars per year in order to hold the agency. Defendant alleges full performance of the above conditions on its part, in that it dismantled and discontinued its factory and the brand of cigars that it had been making, also stopped jobbing certain other cigars which were deemed as competitors, employed an extra traveling salesman and generally centered their efforts at selling plaintiff's cigars; and claim they sold more than $120,000 worth of plaintiff's cigars a year until in March, 1923, at which time the plaintiff canceled the defendant's agency without cause.

Plaintiff then brought this action to recover the balance for goods sold in the sum of $8,040.80. This amount included accounts from December 15, 1922, to March 5, 1923. The defendant counterclaims for damages for such breach of the agency contract. Plaintiff, by reply, denies the facts pleaded in the counterclaim and claims defendant breached its contract in that it did not make payments as required or sell sufficient cigars to satisfy plaintiff. Ver-

dict and judgment were for defendant on its counterclaim, after deducting the amount of plaintiff's claim, which was admitted by the defendant, and awarded defendant $8,018.36. Plaintiff appeals and is the appellant in this court, and will be hereafter called the plaintiff.

First. As to the first question, that the contract of agency is wanting in mutuality. The plaintiff contends that the contract, if there was such an agreement, did not bind either party to buy or sell any specific quantity of goods and, therefore, the agreement was lacking in mutuality, or, as otherwise stated, it was a promise for a promise calling for a will, want or wish performance on the part of the defendant and therefore unenforceable and cites many cases in support of that theory. There can be no dispute of that general rule of law, if applicable. *State v. Holcomb,* 46 Neb. 612. The question is, is it applicable to the circumstances of this case. Only confusion could arise from an attempt to discuss the various cases dealing with this question. We think the law governing is clearly and well stated in 6 R. C. L. 686, sec. 93. It is as follows:

"As a promise by one person is merely one of the kinds of consideration that will support a promise by another, mutuality of obligation is not an essential element in every contract. Therefore, to say the least, language which is susceptible of the interpretation that consideration and mutuality of obligation are two distinct elements lacks precision. Consideration is essential; mutuality of obligation is not unless the want of mutuality would leave one party without a valid or available consideration for his promise. The doctrine of mutuality of obligation appears therefore to be merely one aspect of the rule that mutual promises constitute considerations for each other. Where there is no other consideration for a contract, the mutual promises must be binding on both parties. But where there is any other consideration for the contract, mutuality of obligation is not essential."

Also: "If mutuality, in a broad sense, were held to be

an essential element in every valid contract, * * * there could be no such thing as a valid unilateral or option contract." 6 R. C. L. 687, sec. 94.

As above noted, "where there is any other consideration for the contract, mutuality of obligation is not essential." If defendant dismantled its factory and discontinued all competing cigars, as we assume it did, that certainly was a detriment to the defendant which would independently supply a consideration for the contract. While, under the terms of the agreement, the defendant may not have been obligated to buy any specific quantity of cigars, there was a sufficient consideration passing from the defendant which would bind the plaintiff to accept orders from the defendant sufficient to meet its needs so long as the defendant met the other yearly requirements.

The question whether the defendant, under the evidence, obligated itself to buy $60,000 worth of cigars per year was determined by the verdict. And, too, the plaintiff requested an instruction which, in effect, submitted the question of mutuality to the jury, which was given by the court.

Second. Plaintiff contends that the admission of oral testimony of an expert accountant as to the contents of defendant's books without first producing the books for which plaintiff claims it made timely demand was reversible error, and cites *Bee Publishing Co. v. World Publishing Co.*, 59 Neb. 713. That case holds that similar evidence was not the best evidence, and that the other party had the right to cross-examine the witness with the books before him. In the case at bar the testimony brought out by the witness went to the question of the damages sustained by the defendant. The plaintiff claimed that without this testimony there is a total lack of evidence as to the damages sustained. The testimony was a summary of the business done by defendant, as made by him from the defendant's books and records, and particularly the total sales, income and cost of overhead of that business, both on a yearly and monthly basis, apportioned to trans-

actions with the plaintiff separate from its other business. There was no definite objection to the testimony until after the witness had told his story, and at the close of his examination in chief a general objection to the whole was made on the grounds of no foundation and that the source of witness' investigation had not been authenticated as required by law or produced or made available to the plaintiff. Witness had previously, without objection, testified to sales per month by defendant of plaintiff's cigars. In the examination of another witness it appears that all of defendant's records, which plaintiff's counsel had previously called for, were in court and were turned over to plaintiff's counsel, and records not called for could have been secured by subpœna *duces tecum*. Therefore, in view of the condition of the record and the absence of timely motion and objection, the retention of this evidence was not error. *Miller v. Drainage District*, 112 Neb. 206; *Conley Camera Co. v. Multiscope & Film Co.*, 216 Fed. 892. The evidence went merely to defendant's business and profits during the time of his dealing with plaintiff. Other witnesses had testified to the same subject, only in more general terms, to the effect of defendant's gross business and the proportion thereof of the plaintiff's transactions; also of the percentage thereof of defendant's profits per year, as derived from the sale of plaintiff's goods, which would much more than equal the amount of the verdict; therefore the evidence objected to was at most merely cumulative, even though important.

Third. The plaintiff gave as one of its principal reasons for cancelation that defendant had repeatedly been in default of payments, and for taking out unearned discounts. It goes without saying that, generally, under a contract of this sort, if there is a definite understanding as to terms of payment and the buyer breaches those conditions, the seller, of course, has a right to discontinue the relationship without submitting himself to damages. In other words, if the buyer first breaches his agreement the seller could consider his contract at an end. Even

though defendant may have been in default of its payment under contract terms, the plaintiff continued to carry on under the agreement by accepting and filling orders from the defendant, and therefore must be deemed to have waived such breaches on the part of defendant.

Where the aggrieved party does not act upon the breach by the other of the terms of a contract, but does anything which draws on the other party to execute its agreement after default in respect to time, or which shows it is deemed a subsisting agreement after such default, it will amount to a waiver, as will also a failure to avail oneself of it at the first fit occasion and before or when the other begins, after default, to act again on the agreement. 6 R. C. L. 1022, sec. 383; *Knowlson v. Piehl,* 130 Mich. 597; *Carter v. Root,* 84 Neb. 723.

Fourth. The contract of agency being indefinite as to the time it was to run, what was its duration? Where the continuation of a contract is without definite duration the law implies a reasonable time, and what is a reasonable time is to be determined from the general nature and circumstances of the case. When the obligor has expended a substantial sum of money or value or has substantially rearranged his business, as in this case, preparatory to engaging upon the terms of agreement for the benefit of obligee, he ought, through fairness, to have a reasonable time and notice of the cancelation of the contract in order that he might have a reasonable opportunity to put his house in order. And the notice of termination should be such as to clearly convey the intention of the parties, 13 C. J. 604, sec. 630; 6 R. C. L. 896, sec. 283. The foregoing rules are specifically applied to an exclusive agency contract in *Erskine v. Chevrolet Motors Co.,* 185 N. Car. 479, with exhaustive annotations in 32 A. L. R. 196.

It is disputed that the plaintiff stated to the defendant that the latter would be required to sell at least $60,000 worth of cigars per year in order to hold the contract. The verdict of the jury settled that question in favor of

the defendant. The question then arises of the time for measuring defendant's damages, if any. Certainly the plaintiff could not cancel the agency contract if the defendant did not sell that amount of cigars at the end of the first month. The same would be true at the end of the first six months' period. We think under the conditions stated that the defendant would have the volume of sales for an entire year before it could be ascertained whether or not that particular condition had been met, and that the plaintiff could not exercise the option to cancel on that ground short of the expiration of a full year. The plaintiff canceled the contract when the defendant was well into the second year of dealings with the plaintiff, as the relations under the contract began in November, 1921. There could have been no means by which the parties could determine whether the defendant was making the required sales until the year had expired in the following November. Without this phase of the case the argument of the plaintiff's counsel would be conclusive. We think, however, that the terms and general circumstances would render this contract terminable only at the end of a full year.

Defendant alleged that it did, in fact, sell over $100,000 worth of cigars in the year 1922, and for the two months in 1923, before the plaintiff canceled the contract, had increased its sale. There was evidence to support that allegation and it was for the jury to consider in arriving at a verdict.

The judgment of the district court is

AFFIRMED.

STATE, EX REL. KEITH COUNTY, APPELLANT, V. WESTERN IRRIGATION DISTRICT DITCH COMPANY ET AL., APPELLEES.

FILED APRIL 10, 1928. No. 25631.

Waters: IRRIGATION CANAL: CONSTRUCTION OF BRIDGES. Where an irrigation ditch or canal was established in 1897 across a section line and no public road was actually ordered or established

on said line until May 15, 1925, there is no authority given the county, by virtue of the common law or by statute, and particularly by section 2734, Comp. St. 1922, to compel the owners of said ditch or canal to erect and maintain a bridge over said ditch or canal where it crosses said section line.

APPEAL from the district court for Keith county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

L. A. DeVoe and *M. M. Maupin,* for appellant.

Beeler, Crosby & Baskins, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON and HOWELL, JJ., and LANDIS, District Judge.

GOSS, C. J.

Plaintiff sought by mandamus to compel the defendants to construct and maintain a bridge or culvert over defendant's canal, existing since 1897, so as to carry over the canal a new public road laid out, established and ordered open to public travel by the county board in 1925 on a section line. The defendants demurred to the petition and the demurrer was sustained. Plaintiff appeals.

The sole question at issue is whether, under the law as existing then and now, it was the duty of the ditch company or the duty of the county to provide a bridge for this new public road over an old ditch.

From 1897 to 1913 it probably was the duty of owners of railroads, canals or ditches to build bridges within their right of way for the accommodation of public roads, regardless of priorities of establishment. Laws, 1887, ch. 73; Comp. St. 1911, sec. 5363. But in 1913 this chapter was repealed and reenacted to the extent only that it was left applicable to railroads. Laws 1913, ch. 89; Rev. St. 1913, sec. 3016. And that same session of the legislature provided for the building and maintaining of bridges by drainage or irrigation districts across public highways. Laws, 1913, ch. 172, now section 2734, Comp. St. 1922. The last-named section and section 8469, Comp. St. 1922, relating to duties of owners of ditches, laterals or canals,

constructed upon or across any highway, to construct wagon bridges "as soon as practicable after such ditch, lateral or canal is constructed across such highway," are the only sections of the statute cited to us or found by us to which the present question is referable. Section 2734, above cited, reads as follows:

"Whenever any public drainage or irrigation district organized under any law of this state has in the past excavated, or shall in the future excavate any ditch, or any new channel of any running stream, across the then existing public highway, it shall be the duty of the governing board of said drainage or irrigation district and the governing board of the county or municipal corporation involved, to negotiate and agree for the building and maintaining of bridges and approaches thereto on such terms as shall be equitable, all things considered, between such drainage or irrigation district and county or municipality; and any such agreement between such governing boards that has heretofore been or shall hereafter be entered into shall be binding. If said boards for any reason fail or neglect to agree with reference to said matter, then it shall be the duty of said drainage or irrigation district to restore said highway when so crossed or intersected, to its former state as near as may be, or in a sufficient manner not to have impaired unnecessarily its usefulness, and it shall be the duty of the county or municipal corporation involved, as the case may be, to maintain said bridge and approaches after the same have been built by said drainage or irrigation district: Provided, however, any bridge that may be built by any drainage or irrigation district on any county road shall be constructed under the supervision of the county board and in accord with the established plans and specifications of said county board; and provided further, the provisions of this section shall not set aside, vacate, modify or in any manner affect any decree or judgment heretofore rendered by any court."

The express language of the section quoted fails to place upon a drainage or irrigation district the duty of building

or maintaining bridges unless the ditch or channel be excavated across a "then existing public highway." According to the petition, the canal of the defendants was established in 1897, and the highway was not ordered opened for public travel until May 15, 1925. It was, therefore, not a "then existing public highway" when the canal was established.

Appellant alleged in the petition and argued that the section line so crossed by the irrigation ditch was, at the time of the construction of the ditch, a "potential road" under and by virtue of section 2607, Comp. St. 1922, declaring section lines to be public roads and allowing the county authorities to open them to public travel whenever the public good requires it, but upon appraisal and allowance of damages. This court held that the act declaring section lines public roads did not of itself create a lawful public highway along such lines, and that, before it can have such effect, the proper authorities must provide for the payment of damages for the right of way. *Van Wanning v. Deeter*, 78 Neb. 282, affirmed on rehearing, 78 Neb. 284. Doubtless the legislature had in mind not a potential highway but a real highway when it used the words "the then existing highway." That the common law did not so require, and that, in the absence of an express statute, the defendants could not be required to bridge a road ordered long after their canal was established, finds support in our previous holdings. *Franklin County v. Wilt & Polly*, 87 Neb. 132; *Richardson County v. Drainage District*, 92 Neb. 776. See, also, 4 R. C. L. 478, sec. 28; 9 C. J. 1132, sec. 16; *Morris Canal & Banking Co. v. State*, 24 N. J. Law, 62.

We are of the opinion that, where an irrigation ditch or canal was established in 1897 across a section line and no public road was actually ordered or established on said line until May 15, 1925, there is no authority given the county, by virtue of the common law or by statute, and particularly by section 2734, Comp. St. 1922, to compel the owners of said ditch or canal to erect and maintain a bridge

over said ditch or canal where it crosses said section line.

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

AFFIRMED.

ESTEBAN RAMIREZ, ADMINISTRATOR, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL., APPELLANTS.

FILED APRIL 10, 1928. No. 25521.

1. **Limitation of Actions.** As to defendant, an action is deemed commenced, within the meaning of the statute of limitations, "at the date of the summons which is served upon him." Comp. St. 1922, sec. 8523.
2. **Action:** COMMENCEMENT. For the purpose of summoning defendants in different counties, the action is commenced by filing in the office of the clerk of the proper court a petition and causing a summons to issue thereon. Comp. St. 1922, sec. 8567.
3. ———: SUMMONS TO ANOTHER COUNTY. When an action is rightly brought in any county, the statutory rule permits the issuance of a summons to any other county for any one or more of the defendants. Comp. St. 1922, sec. 8570.
4. **Process:** IRREGULARITIES. An irregularity of the clerk of the district court in changing the dates of an unserved summons does not necessarily invalidate subsequent service.
5. **Parent and Child.** Parents whose negligence is the sole cause of injury to their child should not be rewarded for their wrong by the recovery of damages from innocent third persons.
6. **Negligence:** INFANTS. There are circumstances under which performance of the common duty to refrain from inflicting wanton or wilful injury is not the full measure of liability for failure to protect a child of tender years from known and obvious danger on premises to which it resorted for play without permission.
7. ———: ACTION FOR DEATH. In an action for the wrongful death of a boy who fell into an unguarded manhole to a sewer, the evidence outlined in the opinion *held* sufficient to sustain a verdict in favor of plaintiff.
8. ———: EXCESSIVE VERDICT. A verdict of $6,000 for the wrong-

ful death of a child six years of age *held* excessive to the extent of $1,000.

APPEAL from the district court for Sheridan county: WILLIAM H. WESTOVER, JUDGE. *Affirmed on condition.*

Byron Clark, Jesse L. Root, J. W. Weingarten and *P. E. Romig*, for appellants.

M. F. Harrington, George M. Harrington and *E. C. Barker, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and HOWELL, JJ.

ROSE, J.

This is an action to recover $15,000 in damages for alleged negligence resulting in the death of Joseph Ramirez. At the age of six years, November 5, 1925, he fell into an uncovered manhole to a sewer containing scalding water and steam and died as a result. The names of his father and mother were respectively Estéban Ramirez and Juana Ramirez. They resided at the time in the body of a railroad boxcar from which the wheels and trucks had been removed. It stood on the ground in the railroad yards of the Chicago, Burlington & Quincy Railroad Company at Alliance, Nebraska. For the use of the boxcar as a residence the Ramirez family paid the railroad company $6 a month. The father of the boy was an employee of the railroad company. The boxcar was one of 16 situated in two rows with a space of 25 feet between. Each boxcar was occupied by the family of a railroad employee. The general direction of the rows of boxcars was east and west. Both north and south of them there were railroad tracks. Children of railroad employees played on the railroad grounds. The manhole was north of, and near, the northern row, a short distance south of a railroad water tank, a water treating plant and other buildings on the railroad grounds, not far from the boxcar body occupied by the Ramirez family. On the date mentioned Cecil F. Buckley and Clarence C. Holms, employees of the railroad com-

pany, removed the cover from the manhole in the course of their employment. The child fell into it and was fatally injured. Esteban Ramirez, Administrator of the Estate of Joseph Ramirez, deceased, is plaintiff. The Chicago, Burlington & Quincy Railroad Company, Cecil F. Buckley and Clarence C. Holms are defendants. Details of facts thus outlined were alleged in the petition which contained pleas that defendants had knowledge of existing conditions and surroundings and that the child had a right to be on the premises of the railroad company. Negligence imputed to defendants was their failure to perform their duty to guard the uncovered manhole and their failure to perform their duty to warn the child of the danger of falling into the opening.

Defendants, among other things, denied the negligence charged and alleged that the boy was a trespasser at the place of the accident, that he had been warned to keep away, that his parents had been told to keep him away, and that his own negligence and that of his parents caused his death.

The alleged facts constituting defenses were put in issue by a reply.

Upon a trial of the case the jury rendered a verdict in favor of plaintiff and against all of the defendants for $6,000. From a judgment therefor defendants appealed.

The trial court overruled a challenge to its jurisdiction over the persons of Buckley and Holms, defendants, and the ruling is assigned as error. The petition was filed in the district court for Sheridan county December 21, 1925, the railroad company, Buckley and Holms being sued jointly as defendants. Together they were, in effect, charged with negligence resulting in a joint liability to plaintiff. A summons for Buckley and Holms was issued out of the district court for Sheridan county to the sheriff of Box Butte county December 22, 1925, and therein was served by him on Buckley December 26, 1925, and on Holms December 30, 1925. A summons for the railroad company was issued out of the district court for Sheridan county

to the sheriff thereof December 22, 1925, but there was a delay in service owing to a snowstorm. It was returned by the sheriff to the clerk who changed its date from December 22, 1925, to January 9, 1926. The return and answer days were changed accordingly. In the changed form the summons was again delivered to the sheriff of Sheridan county and therein served on the railroad company January 15, 1926. The position of Buckley and Holms on their objection to jurisdiction was stated by them as follows:

"It is our contention that until a summons shall have been issued that is served upon the resident defendant, a court has no jurisdiction to issue a summons to residents of another county who are not in the county at the time the petition is filed, and who did not consent to be sued."

The statutory authority to issue from the district court a summons to the sheriff of another county for defendants residing therein was granted in this form:

"When the action is rightly brought in any county, according to the provisions of this code, a summons shall be issued to any other county, against any one or more of the defendants at the plaintiff's request." Comp. St. 1922, sec. 8570.

"A civil action must be commenced by filing in the office of the clerk of the proper court a petition," says another section of the statute, "and causing a summons to be issued thereon." Comp. St. 1922, sec. 8567.

These statutory provisions seem to require issuance of summons for the resident defendant but do not require subsequent service thereof as a prerequisite of jurisdiction to issue a summons to another county for defendants residing therein. After the filing of the petition two summonses were in fact issued the same day—December 22, 1925. One of them was directed to the sheriff of Box Butte county for Buckley and Holms and was subsequently served upon them. The other was issued to the sheriff of Sheridan county for the resident defendant, the railroad company, and as changed in the manner indicated it was served

January 15, 1926. The changing of dates was an irregularity but did not impair actual service as notice or invalidate the summons. The railroad company was properly sued and served with summons in Sheridan county. Buckley and Holms who resided in Box Butte county were charged with negligence imputed also to the railroad company. Under the petition the three defendants were jointly answerable to plaintiff in the same action for the same liability. The words, "rightly brought," in the clause, "When the action is rightly brought in any county," relate to "the action" for the purpose of summoning defendants. The better interpretation of the statute seems to be that, for the purpose of summoning resident defendants and other defendants residing in another county, the action is "rightly brought" upon the filing of a petition charging in good faith all defendants jointly with actionable liability to plaintiff and issuing for all defendants summonses directed to the sheriffs of the proper counties. In this view of the statutes there was no error in the order overruling the objection to jurisdiction.

The principal controversies relate to questions of evidence and law applicable to plaintiff's charges of negligence and in defense to alleged negligence of parents and child. Defendants contend that actionable negligence on their part was not shown, that the negligence of parents and child was the proximate cause of the latter's death and that therefore there should have been a peremptory instruction in favor of defendants. The problems for solution require consideration of the circumstances surrounding the fatal incident. The manhole was a surface opening to an underground sewer draining hot water from locomotive boilers and other refuse matter. Over the manhole, level with the ground, was a perforated cast-iron cover weighing 80 or 90 pounds, admitting surface water and permitting steam to escape. Northwest at a distance of 18 feet there was a water treating plant extending from the ground to a considerable height where water was treated and prepared for locomotive boilers. In the upper

part of the plant sediment consisting of sugar, sulphate of iron, hydrate of lime and soda ash, forming a sticky substance, accumulated. Removal of sludge once in 30 days was necessary. It was lowered from the upper part of the treating plant in a bucket by means of a rope, carried 18 feet to the manhole and there emptied into the sewer. To perform this task Buckley and Holms came on the grounds at 2:45 p. m. on the fateful day. Buckley pried the cover from the manhole, went to the treating plant 18 feet away and proceeded to remove sediment, filling and lowering the bucket which was carried by Holms to the manhole and emptied. While thus engaged, when neither was at the uncovered manhole, the boy fell into it. Without identifying him Holms saw his form as he fell. Buckley at the instant was out of view.

On behalf of defendants there is testimony that children of railroad employees residing in boxcar bodies, designated in the record as the "Mexican Village," were never allowed on the premises north of the boxcars; that children were told not to go there; that they were never invited to or permitted on that part of the grounds; that railroad employees who had charge of the Mexican Village and authority over laborers in the railroad yards had orders to keep children away from the premises north of the boxcar bodies where the manhole was situated; that children were often taken home from there and parents cautioned to prevent further trespassing; that parents of the deceased child were familiar with existing dangers and surroundings, having lived within 50 feet of the manhole for two years, while the father was an employee of the railroad company, performing at the time of the accident services in the roundhouse northeast of the boxcar body in which he and his family made their home; that there were available playgrounds in the open space between the rows of boxcar bodies and in an unoccupied 50-foot strip of ground south of them, there being a fence at the southern boundary of the strip north of the railroad tracks and stockyards.

Under the circumstances disclosed by the evidence defendants contend that they owed the parents and child no duty except to refrain from inflicting wanton or wilful injury, a duty conscientiously performed, citing *Shults v. Chicago, B. & Q. R. Co.*, 83 Neb. 272, 91 Neb. 587, and *Spence v. Polenski Bros., Schellak & Co.*, 110 Neb. 56.

In each of those cases reference is made to the opinion in *Chesley v. Rocheford & Gould*, 4 Neb. (Unof.) 768, where this language was used:

"As to the bare licensee who goes as an uninvited guest to the premises, no duty is owed by the licensor as long as no wanton or wilful injury is inflicted by the act or misconduct of the licensor or his servants."

In that case, however, liability for failure to exercise reasonable care to prevent injury from unusual dangers under peculiar circumstances was recognized. In a later action to recover damages for the death of a child negligence and contributory negligence were held to be questions for the jury, the court quoting with approval the following:

"Much may depend upon the character of the injury, the circumstances under which it occurred, and the size, intelligence and maturity of the child." *Tucker v. Draper*, 62 Neb. 66.

There is wisdom in the precept that parents whose negligence is the sole cause of injury to their child should not be rewarded for their wrong by compensation in damages recovered from innocent third persons. There are circumstances, however, under which performance of the common duty to refrain from inflicting wanton or wilful injury is not the full measure of accountability for failure to protect a child of tender years from known and obvious danger. Did the record present such a case to the jury for determination?

The railroad company itself created the environment in which the Ramirez family lived. The Mexican Village had been in existence 20 years. It was a corporate creation in the midst of a system of railroad tracks and other rail-

road facilities. The railroad company provided the only means of ingress and egress. Vehicles entered and left at grade. There was a viaduct for pedestrians but they sometimes walked on the railroad tracks. These were the means of access to town, church and school. The boxcar home of the Ramirez family was about 8 feet wide and 42 feet long. They slept in one end and the meals were cooked in the other end. They had resided there two years. The distance from the Ramirez boxcar to the manhole was about 45 feet, there being another boxcar between. There was no fence or other obstruction between the Ramirez home and the manhole. The boxcars in the rows were three or four feet apart. Children went between them to the forbidden ground on the north. They played around the covered manhole and jumped over it. They did not obey the orders to keep away. This was known to defendants who had given disregarded warnings. There was nothing to indicate danger at the manhole when covered. Ordinarily the cover was removed for a few hours at intervals of 30 days. The playground 25 feet wide between the rows of boxcars was used at times by delivery trucks and other vehicles conveying passengers and supplies to the Mexican Village. The other playgrounds 50 feet or more in width south of the boxcars were not far from railroad tracks, stockyards and the loading platform for stock. The warnings and orders to keep away from the grounds north of the boxcar bodies did not repress the natural and wholesome impulses of children for freedom, light, air, sunshine and play or supply the judgment and caution lacking in children of tender years.

At the time of the accident the father of the boy was at home changing his clothes for work in the roundhouse. His earnings indicated that he was without means to employ a servant to care for his boy. Presumably the mother was at her household duties. Buckley and Holms had knowledge of existing conditions and surroundings and were working at or near the place of danger. A watchman at the manhole for a few hours once in 30 days would

have prevented the accident. A proper metallic screen around the open manhole would have accomplished the same purpose without interfering with the use of the sewer as a conduit for water and sludge. One or the other of these precautions would have saved the boy. To measure such a simple and reasonable degree of care with human life and sustain the defense as a matter of law under the circumstances on the ground that defendants did not wantonly or wilfully inflict injury would disregard common dictates of humanity and justice. Plaintiff made a case for the consideration of the jury and the evidence is sufficient to sustain a judgment in his favor. In this view of the record error prejudicial to defendants has not been found in the rulings on evidence or in the giving or refusing of instructions.

The damages allowed by the jury are assailed as excessive and seem to exceed the amount generally sustained by reviewing courts for the pecuniary loss resulting from the death of a child of tender years—six years in the present instance. The judgment of the district court will stand reversed unless a remittitur for $1,000 is filed with the clerk of this court within 20 days. If so filed, the judgment to the extent of $5,000 will stand affirmed.

AFFIRMED ON CONDITION.

IN RE APPEAL OF GEORGE WILKINS.
GEORGE WILKINS, APPELLEE, V. STATE OF NEBRASKA, APPELLANT.

FILED APRIL 10, 1928. No. 26268.

States: LEGISLATORS: COMPENSATION. For any service that he may render as a member of the state legislature, or as a member of a senate committee, a state senator can receive from the state no other compensation than that provided for by section 7, art. III, of the Constitution.

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

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

J. P. Palmer and *Seymour L. Smith, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

GOOD, J.

Plaintiff filed with the state auditor a claim against the state of Nebraska for services rendered and expenses incurred. From the auditor's disallowance of the claim, he appealed to the district court for Lancaster county, where, after trial, judgment was rendered in his favor. The state has appealed. The following facts appear from the record:

Plaintiff was a member of the Nebraska state senate for the years 1923 and 1924. During the closing days of the legislative session of 1923, the state senate, by resolution, appointed a committee of three of its members, of which plaintiff was one, for the purpose of investigating charges made by the governor regarding discrepancies in the financial reports of some of the departments of the state. The resolution empowered the committee to summon witnesses and do all things that, in its judgment, were necessary to investigate the charges, and provided that the committee should report its findings at such time and in such manner as, in its judgment, was proper. Immediately after the close of the legislative session of 1923, the committee met, organized and proceeded to a consideration of the work before it. The committee seems to have deemed it essential to a performance of its duties to have the services of an expert accountant, to examine the accounts of the departments under investigation. Plaintiff is an expert accountant and performed that service. The claim which he filed was for services as an accountant while a member of such committee and for expenses incurred, aggregating the sum of $4,405.35, of which amount

$1,615.35 was for expenditures by plaintiff and $2,760 was for compensation for his services rendered.

Plaintiff does not contend that there was any contract or agreement that he should be compensated for his services, but that it was a voluntary service rendered to the state, and for which the legislature, in its wisdom, may make an appropriation to compensate him. On the other hand, it is contended by the state that the service was rendered in the performance of official work as a member of the legislature, and that under constitutional provisions (hereinafter quoted) it was not within the power of the legislature to make an appropriation to compensate him for such services. It seems to be admitted by the state that he may be entitled to recover for any expense incurred in the performance of his duty as a member of the senate committee.

Section 7, art. III, of the Constitution, among other things, provides: "Senators and representatives shall be elected for a term of two years. They shall each receive the sum of eight hundred dollars for attendance at each regular biennial session of the legislature and ten dollars for each day in actual attendance at special sessions; but in no case shall compensation for attendance at any one special session exceed one hundred dollars. They shall also be paid ten cents per mile for each mile traveled in once going to and returning from each regular or special session of the legislature by the most usual route. Members of the legislature shall receive no pay nor perquisites other than their mileage and salary or per diem, as the case may be, nor shall employees receive any other compensation than their salary or per diem."

Section 9, art. III, of the Constitution, in part, provides: "Nor shall any person interested in a contract with, or an unadjusted claim, against the state hold a seat in the legislature."

Section 16, art. III, of the Constitution, provides: "No person elected or appointed to the legislature shall receive any civil appointment to a state office during the term for

which he has been elected or appointed, and all such appointments shall be void; nor shall any member of the legislature, or any state officer be interested, either directly or indirectly in any contract, with the state or any county or municipality thereof, authorized by any law enacted during the term for which he shall have been elected or appointed, or within one year after the expiration of such term."

Section 19, art. III, of the Constitution, provides: "The legislature shall never grant any extra compensation to any public officer, agent, or servant after the services have been rendered nor to any contractor after the contract has been entered into, nor shall the compensation of any public officer, including any officer whose compensation is fixed by the legislature subsequent to the adoption hereof, be increased or diminished during his term of office."

A careful consideration of these several constitutional provisions clearly reveals a purpose not to permit any incentive or temptation for emoluments, gains, or position, to influence members of the legislature in any of their official actions. There is a clear purpose to limit their compensation to the amount permitted by the Constitution for any service they may perform in their official capacity. By removing any temptation or incentive to act with a view to a reward, pecuniary or otherwise, it was the evident purpose so far as could be accomplished, to require every member of the legislature to perform every act of official conduct with a view to the public interests and welfare alone. In the instant case, it may be conceded, for the purposes of this decision, that there was no ulterior motive on the part of any member of the legislature in appointing the committee, or adopting the resolution which created it, and, too, it may be conceded that plaintiff acted in the utmost good faith and honestly performed a service for the state that may have been equal in value to the amount which he demands, but good faith and service honestly rendered will not suffice. If that were sufficient, then any member of the legislature

might render a service for the state in the course of his official duties, and yet one not strictly required of him, and receive compensation therefor. Such a course is not sanctioned by the Constitution. If a recovery were permitted in this case, it is conceivable that future legislatures might appoint a multitude of committees to investigate various industries and activities of the state. Members might spend weeks or months in making their investigations and report again to the legislature, or to the various officers of the state, and, while their services might be valuable, yet they should not be permitted, because thereof, to compensate themselves from the state treasury for the services so rendered.

In the instant case, it is possible, nay probable, that the committee of the senate might have employed an accountant to perform the service that was rendered by the plaintiff in this action, and that the legislature might have made an appropriation and properly compensated him therefor, but that question is not before us and is unnecessary to decide. In the instant case, the labor that was performed was by a member of the committee, was a part of the work of the committee, and, when performed as a part of the committee's work, it was the work of a member of the senate. To permit a recovery in this case would be to permit the plaintiff to receive extra compensation for services so closely allied to his work, as a member of the legislature, as to be a part thereof.

It follows that plaintiff cannot be compensated, out of the state treasury, for the service so rendered. The Constitution forbids it. The legislative appropriation of funds, in so far as it attempts to provide funds for the payment of services rendered by plaintiff, is ineffectual.

It follows that the district court erred in allowing plaintiff's claim in full. Since no real objection is lodged to the part of plaintiff's claim based upon expenditures amounting to $1,615.35, his claim should have been allowed to that extent, and to that extent only.

The judgment of the district court is therefore reversed, and the cause remanded, with directions to allow plaintiff a recovery for the sum of $1,615.35, for expenses incurred.

REVERSED.

LEXINGTON MILL & ELEVATOR COMPANY ET AL., APPELLANTS, V. THORNE A. BROWNE ET AL., APPELLEES.

FILED APRIL 10, 1928. No. 26073.

1. Agriculture: COOPERATIVE MARKETING ASSOCIATIONS. In view of the declared public policy of this state, a nonstock, nonprofit, cooperative marketing association, duly organized, may lawfully adopt and carry out a plan of cooperative marketing whereby the grain produced by its members is by them delivered to it and then pooled and sold in the orderly course of marketing. In carrying out this undertaking, it is authorized to do and perform each and every thing reasonably necessary, suitable and proper for the accomplishment of such purpose.
2. ———: ———: CONTRACTS: VALIDITY. The contract, the substance of which appears in the opinion, examined and approved as being within the powers of a cooperative marketing association to make and, in effect, to constitute the plaintiffs herein its lawful agents for the purposes therein set forth.
3. ———: ———: ———: ———. The fact that, pursuant to the plan adopted by the Nebraska Wheat Growers' Association, its membership, on deliveries of grain to it, received an advance, and upon such delivery became thereby vested with an ascertainable undivided interest in the ultimate results of the entire business transacted by it at the end of the pool year, did not constitute the grain so delivered while thereafter in the possession of such association either "grain held in storage" or "grain * * * for which payment has not been made within ten days after receipt of the same," as those words are employed in section 7224, Comp. St. 1922.
4. ———: ———: WAREHOUSEMEN. The business, as carried on by the Nebraska Wheat Growers' Association and as set forth in this record, was not that of a public warehouseman, as defined and regulated by sections 7224-7231, Comp. St. 1922.
5. ———: ———: ACTS OF AGENTS. The acts which the Nebraska Wheat Growers' Association are lawfully authorized to perform, and the business it is lawfully empowered to carry on, may not be considered criminal as to its lawful agents,

by whose hands alone it may and does function, perform and transact when such agents are acting within the scope of authority by it lawfully conferred.

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

Corcoran & Sprague, for appellants.

O. S. Spillman, Attorney General, and *Hugh La Master, contra.*

Peterson & DeVoe, amici curiæ.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and HOWELL, JJ.

EBERLY, J.

This is an action by plaintiffs to enjoin the enforcement by the Nebraska state railway commission of chapter 69, art. II, Comp. St. 1922 (sections 7224-7231), against them. From an adverse decision of the district court, appeal has been prosecuted to this tribunal by the plaintiffs herein.

The real controversy before us arises out of the business carried on by the Nebraska Wheat Growers' Association. This association functions as a cooperative marketing agency. Through and by it, grain, covered by contracts with its membership, is pooled and collectively sold in an orderly course of marketing within the pool year. As a "purchaser," using this term in the sense of one who acquires property for a consideration, it compensates for the grain received from its membership as follows: (1) A certain price in money paid as an "advance;" (2) by vesting in them an ascertainable undivided interest in the ultimate results of the business it carries on as an entirety.

As part of a transaction which results in the receipt of the membership grain, its induction into the channels of trade and final marketing thereof, and as a proper and reasonable incident thereto, the following contract was entered into by and between this association, the representative of certain of its local membership, and the plain-

tiffs in the present case, which, omitting formal parts and unessential particulars, is in the following terms:

"Witnessed: In consideration of the mutual obligation of the respective parties hereto, and as an aid in carrying out the undertaking on the part of the Nebraska Wheat Growers' Association to provide an efficient cooperate marketing system for wheat as set forth in existing contracts and agreements between the Nebraska Wheat Growers' Association and its individual members, and in consideration of the expense incurred and to be incurred by the company in providing local handling facilities for wheat and in pursuance of the provisions of the contract between the company and the Nebraska Wheat Growers' Association; it is agreed: 1. The local shall use the facilities of the company located at Oshkosh, Nebraska, in making the delivery of wheat of its members to the Nebraska Wheat Growers' Association, and deliveries of wheat which shall be made at Oshkosh, Nebraska, by the members of the local shall be made through the facilities of the company. 2. The charges for the receiving, handling, weighing, testing, grading, storing, loading and billing of the wheat to the Nebraska Wheat Growers' Association shall be as follows: Three and one-half cents per bushel (3½c per bushel) for all wheat delivered to elevator company. In consideration of this charge, the company agrees to deliver f.o.b. cars, the equivalent number of bushels of wheat as represented by scale tickets issued."

The above contract presents the difficulty in the case. A good faith performance by the parties thereto and with the evident purpose therein indicated, in fact, establishes the foundation on which this litigation proceeds. In substance, the state railway commission segregates the acts constituting a part of this incident from the general transaction in which they occur, and of which they form only a part. From this limited premise it draws the conclusion that, as on all of the grain received, only an "advance" was paid, and some of this grain remained in the elevators of

plaintiffs for more than ten days, this grain so possessed must be deemed "grain held in storage for a period longer than ten days," and in view of the fact that only an "advance" was paid thereon must also be considered as "grain which has been received at any grain elevator or grain warehouse for which payment has not been made within ten days after receipt of the same" (section 7224); that plaintiffs therefore must be deemed public warehousemen and, as such, are subject to the regulations and penalties provided by sections 7224-7231, Comp. St. 1922.

There is little or no conflict in the evidence. It fairly appears that, under the terms of this contract, as interpreted by all parties to it, members of this association hauled the grain produced by them to this contract elevator just the same as any other elevator, received a scale ticket issued by the elevator, and went to a bank and drew the advance on their wheat from the association. The elevator pays no part of the purchase price on the wheat, and enters into no obligation so to do.

The evidence also supports the conclusion that shipment by carload lots is contemplated by all parties to this contract, and that wheat delivered to contract elevators is held until carload lots have been accumulated; that ordinarily the "average bushel" did not remain in these elevators more than 3, 4, or 5 days, but in exceptional cases, due to delay in accumulating carload lots, or incidental to shipping and marketing, some of the wheat thus received from members of the association remained in these contract elevators in excess of 10 days.

It further appears that, while the owners of these contract elevators were employed in the business of buying and selling grain on their own account, they were not engaged in the public warehouse business in any way whatever save and except as the performance of the contract with the grain growers' association may have imposed or exacted such services from them. It fairly appears that all parties acted in good faith; that the purpose and intent of the contract and the result intended and accomplished

by it is fairly reflected by the terms employed which are hereinbefore quoted; that, as a matter of fact, the contract elevator in each case is and was the local representative of the association as contemplated by the contract before us as well as by the contracts between the members and the association; that the services under consideration, rendered as an entirety, were incidental to and essential and necessary in accomplishing the plan of cooperative marketing, adopted and carried out by the Nebraska Wheat Growers' Association.

The fundamental question therefore presented by the record before us is whether these acts and proceedings had by the plaintiffs, in view of all the circumstances of which they formed a part, bring the parties in interest within the provisions of sections 7224-7231, Comp. St. 1922, and subject them to the penalties therein provided.

"In order to determine the meaning of the language of an act of the legislature, it is proper to examine the course of legislation upon the same general subject." *State v. Cosgrave*, 85 Neb. 187.

The first legislation devoted to the subject before us was enacted in 1915 as chapter 243, Laws 1915, and is entitled, "An act to provide a public warehouse system for handling grain and to regulate the procedure thereunder." Section 1 of this act defines a public warehouse. Sections 2 to 7, inclusive, provide regulations of the government of that business. Section 8 is devoted to penalties for failure to conform to the provisions of the act.

The next, in order of time, was the enactment of chapter 155, Laws 1917, entitled, "An act to amend sections 1, 2, 4, and 8 of chapter 243, Session Laws of 1915, relating to public warehouses, and to repeal the original sections." This, with exception of one feature, is in force at the present time. Section 1 provides:

"Any grain dealer, person, firm, corporation, or association, in this state who receives grain for storage or shipment, or both, may avail himself of the provisions of this act by filing notice of his acceptance thereof with

the state railway commission and become thereby a public warehouseman. Any grain elevator or grain warehouse (other than at terminal points, which terminal points shall be designated by the state railway commission) in which grain is held in storage for a period longer than ten days is hereby declared a public warehouse within the meaning of this act, and any grain which has been received at any grain elevator or grain warehouse for which payment has not been made within ten days after the receipt of the same is hereby deemed to be held in storage."

In 1921 chapter 4, Laws 1921, was passed, which appears to be complete within itself and which is entitled, "An act to provide farm warehouses on the farm for storage of grains; to regulate the procedure thereof and to provide penalties for the violation of the same, and to declare an emergency." Section 1 of this act provided: "That any landowner, tenant, or manager of any lands in this state may store wheat or any other grain upon said land in a farm warehouse built and situated thereon and receive a warehouse receipt for same by complying with the provisions of this act." Sections 2 to 7, inclusive, provided regulations for the government of the business. Section 8 provided penalties for violation of the act. Section 9 related to the redemption of receipts issued by such warehouse. Section 10 provided that the provisions of chapter 76, Rev. St. 1913, "shall be applicable to this act whenever the same are not inconsistent herewith."

The last legislation relating to the matter under consideration appears to have been enacted in 1925 as chapter 80, Laws 1925, and is entitled, "An act to provide for the organization and incorporation of nonstock cooperative marketing companies and associations; and to define their powers."

For the purpose of this case we summarize the provisions of this last named act as follows: "Any number of persons, not less than five, engaged in the production of agricultural products of (or) two or more nonprofit cooperative associations of producers may form a nonprofit co-

operative association without capital stock for the purpose of producing, handling, processing, preparing for market, warehousing, preserving, * * * utilizing, and marketing * * * agricultural products of its members," and enable itself to engage in any activities for its membership of any of the things enumerated, including the purchasing or securing for its members of equipment, machinery, etc. Laws 1925, ch. 80, sec. 2.

The corporation thus authorized to be organized is expressly vested, by the terms of the act before us, with the following powers, in addition to others not herein enumerated: "(2) To buy, lease or hold any real or personal property necessary or convenient for the conduct and operation of the business or incidental thereto. (3) To buy and sell agricultural products including live stock for itself and its members and stockholders and others, and as agents on commission. (4) To enter into contracts with its members for periods not over five years requiring them to sell or market all or a specified part of their live stock or other products to or through the association. * * * (7) To act as agent or representative of any member or members or of nonmembers in carrying out the objects of the association. (8) To receive and employ warehouse receipts or other written instruments covering products of members stored on farms or elsewhere under suitable conditions issued or executed by any warehouseman, warehousing association, or other entity, which products may or may not have been inspected by inspectors licensed or authorized to inspect, sample, classify, grade, or weigh agricultural products under state or federal laws and which warehouse receipts or other written instruments may or may not be accompanied by the certificate or certificates issued by such inspectors on such products. * * * (10) To do each and everything necessary, suitable or proper for the accomplishment of any one or more of the purposes or the attainment of any one or more of the objects herein enumerated or the objects or purposes for which formed. * * * and to contract and act accordingly; and in addition to exercise and pos-

sess all powers, rights and privileges necessary or incidental to the objects or purposes for which formed or to the activities in which it is engaged or which further the accomplishment of such objects or purposes or the conduct of such activities; and in addition any other rights, powers and privileges granted by the laws of this state to ordinary corporations, except such as are inconsistent with the provisions of this act; and to do any such thing anywhere." Laws 1925, ch. 80, sec. 5.

We have thus before us three separate and distinct legislative acts, each evidently intended to be exclusive and complete within itself, so far as persons and transactions to which their terms apply. True, if any provisions appear in the earlier acts which are repugnant to the provisions incorporated in the last one in point of time, they are necessarily repealed by implication. But a careful examination of these enactments with reference to the transactions here involved, however, convinces us that as to it there is no necessary conflict between the provisions of any of them, and especially no conflict between the exercise of the "power of warehousing" conferred on the nonstock marketing association created by the act of 1925 and the restrictive and regulative provisions of the act of 1915, as amended in 1917, applicable solely to the business of public warehousing. Each act occupies and covers a definite sphere, and within that sphere is supreme and controlling. They do not overlap. A transaction properly within the purview of any one of them is not subject to the requirements of either of the remaining enactments.

If we are in error in arriving at this conclusion, so far as it applies to any of the legislation mentioned, there can be no question as to the correctness of the conclusion as applied to the act of 1925. Subparagraph (8) above set forth serves no purpose except to express the legislative intent to render the cooperative agency created by it wholly free from, and independent of, the restrictions and regulations therein referred to which were established by previous legislation. In addition to this, by section 14,

ch. 80, Laws 1925, it is further expressly provided that, "Any provision of law which is in conflict with this act shall not be construed as applying to any association herein provided for." So far as matters fairly within the scope of its powers are concerned, this act therefore must be deemed as exclusive and controlling.

The act of 1915, as amended, is occupied with a definition and regulation of an ultimate public business, public employment, a public vocation. Its purpose is the creation of a public warehouse system therein provided for. It has to do with the storage of property of others. Whatever may be said as to the option it, in terms, confers, as a mandatory enactment its sanctions are not concerned with the storage of the private property of the owner of the elevator or warehouse therein. In fact, public storage of grain is the sole, ultimate and controlling object of the public relation it assumes to define and regulate.

In view of the foregoing, the facts of the record sustain but one conclusion. All of the acts which the plaintiffs performed, as shown by the evidence, were within the terms of the contract under which they were employed; were acts authorized to be performed by the Nebraska Wheat Growers' Association by the terms of its constating act; were acts essential and necessary to be performed in order that the legislative intent disclosed by the terms of this legislation might be upheld, the business contemplated carried on, and the benefits intended for agriculture realized. Nothing was done by any person connected with the transaction as a colorable device to evade the penalties of the act of 1915, as amended.

Neither is this conclusion as to the relation of the parties modified because the terms of the contract involved the use of property belonging to the plaintiffs as such agents and employees of the corporation. This organization, it is to be remembered, is a cooperative corporation. It can act and perform only by agents and employees. Unless the state, by law, has established some distinctive police regulations applicable to agents and employees as distinguished from

the corporate employer, in the performance of an act authorized to the latter, such agents in that connection must be deemed authorized by the legislation of 1925. We find no such provision in the laws before us now under consideration.

By the terms of the law of 1925 the corporate entity it created was expressly empowered "to do each and everything necessary, suitable or proper for the accomplishment of any one or more of the purposes or the attainment of any one or more of the objects herein enumerated or objects or purposes for which formed, * * * and to contract and act accordingly; and in addition to exercise and possess all powers, rights and privileges necessary or incidental to the objects or purposes for which formed or to the activities in which it is engaged or which further the accomplishment of such objects or purposes or the conduct of such activities." Laws 1925, ch. 80, sec. 5, subd. (10). Indeed, this act, viewed as an entirety, must be deemed, not only as authorizing the formation of cooperative corporations, but also as declaratory of the public policy of this state on the subject of the cooperative marketing of grain (including all business and the details thereof related and forming a part thereof). As a remedial statute this court is warranted in giving it a liberal and effective construction.

There can be no question but what the terms of the contract quoted at the commencement of this opinion may be properly construed only in the light of the principles above set forth. When the rule is applied to this agreement, it is obvious that its provisions are in harmony with the controlling principles of public policy as thus established, and within the powers vested expressly, or by necessary implication, in the Nebraska Wheat Growers' Association. The effect of this contract was, therefore, to establish as binding upon the association and upon the state the fact that the acts of receiving, testing, grading, weighing, and the possession of wheat which ensued by

plaintiff is, under the facts of the record before us, the act of the association itself. On this basis this association is and was responsible to its membership for the contract grain delivered. It is, in fact, the relation which was contemplated by all parties and intended to be created by the contracts which they made. The conclusion is, (a) that this association, in the transactions before us, was if "warehousing," in legal effect, "warehousing" its own grain; (b) that the penalties of the act of 1915 apply only where the transaction questioned embodies "warehousing" the grain of others, as such "grain" is defined therein.

Neither does the fact that only an "advance" was made at the time of the receipt of the grain operate to change the rule. This is a cooperative transaction and the co-operators, by the terms of the contract, contribute grain to a going business in which they are not only parties in interest but actual proprietors. If the payment of "advance" be regarded as only a part payment, as contended for by the state, then, in the light of the entire transaction, the remainder of the compensation must be deemed to be the definite concrete contract right which, by the acceptance of the grain at delivery, became fully vested, contemporaneous with such delivery, in the member so delivering. Thereafter, such member was, in legal effect, neither the sole owner of the wheat he had delivered nor in strictness a creditor of the corporation. He was then in fact one of the proprietors of a going business, and, in event of successful termination thereof at end of pool year, would receive his *pro rata* share in the results of the pool. In the event of disaster, he might get nothing.

It follows, therefore, that, under the facts of this record, the wheat with which we are here concerned, after delivery, was the wheat of the association, in legal effect, in its continuous possession, and was not wheat "for which payment had not been made."

The facts of the present case thus fairly bring it within the reason and letter of the provisions of chapter 80, Laws 1925, and the public policy evidenced thereby.

The acts that the Nebraska Wheat Growers' Association are thereby lawfully authorized to perform, and the business it is lawfully empowered to carry on, may not be considered criminal as to its lawful agents by whose hands alone it may and does function, perform and transact.

Sections 7224-7231, Comp. St. 1922, therefore have no application whatever, and plaintiffs herein are not subject to penalties therein provided. The controlling element, under such circumstances as to be exempt from its terms, is "commerce," not "storage," as it is employed therein. *Kettenhofen v. Globe Transfer & Storage Co.*, 70 Wash. 645, 42 L. R. A. n. s. 902, and note. See, also, *Town of Arlington v. Central R. Co.*, 127 Ga. 721.

The act of 1915, as amended, having no application to the subject-matter before us, the question of the validity of the provisions thereof is not now for our consideration.

We may not wholly agree with the theories of the parties presenting this case; yet, under the evidence, plaintiffs are entitled to enjoin further action on part of the Nebraska state railway commission in reference to the transactions set forth in their petition.

The judgment of the district court dismissing the action is therefore reversed, and the cause is remanded, with directions to the district court to enter a decree in favor of plaintiffs in conformity with this opinion.

REVERSED.

Note—See Agriculture, 2 C. J. 998 n. 31 (New)—Warehousemen, 40 Cyc. 401 n. 6; 25 A. L. R. 1113; 33 A. L. R. 247; 47 A. L. R. 936.

IN RE ESTATE OF ELIZA KOLLER.
IDA CRAIG, APPELLEE, V. KATE WESTERHOFF, APPELLANT.

FILED APRIL 10, 1928. No. 25965.

1. **Equity.** It is a rule of law, quite general in its application, that no one should be permitted to profit by his own wrong. As an offshoot to that rule, it may be said, a wrong done by

one person ought not to be allowed to work injustice to others in no way connected with or responsible for such wrong.

2. Wills: CONSTRUCTION. It is the general rule that a will containing several separate, distinct and wholly unrelated bequests, some valid and some invalid, will be sustained as to those that are valid, if in so doing no injustice will follow, and rejected as to those that are invalid.

3. ———: ———. Where, as in this case, a will contains several bequests, one of which was clearly the result of fraud and undue influence practiced by the legatee of that bequest, and the other bequests were free from the vice of both fraud and undue influence, the will may stand as to all except the infected bequest, which latter bequest will be committed to the laws of inheritance, where there is left no residuary clause in the will.

4. ———: ———. Under the undisputed facts in this case the bequest to Ida Craig, the residuary legatee, ought to be declared inoperative.

APPEAL from the district court for Seward county: HARRY D. LANDIS, JUDGE. *Affirmed in part, and reversed in part.*

Thomas & Vail and *McKillip & Barth,* for appellant.

Harry L. Norval, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and HOWELL, JJ.

HOWELL, J.

This is an appeal from a verdict and judgment of the district court establishing the last will of Eliza Koller who died June 17, 1926, leaving two daughters, Kate Westerhoff and Ida Craig, as sole heirs. The will was executed November 14, 1925, when testatrix was over 80 years of age, there being some discrepancy as to her precise age. The date of birth is said to have been in 1840. That would make her 85 years old at the date of the will, and 86 when she died. Her husband predeceased her on July 30, 1925.

This litigation is principally between the sisters. The real question before us is fraud or undue influence as af-

fecting the devise of the residue of the estate to Ida Craig, to the entire exclusion of her sister, Kate Westerhoff, after paying minor bequests to others. There was ample evidence to support a finding that the testatrix, Eliza Koller, was of disposing mind when the will was executed.

The substantial evidence establishes about the following facts: Kate and Ida were on normal sisterly terms until after September 2, 1925, and apparently until the date of the will. Both daughters were married and, in so far as their opportunities of visiting their parents were concerned, neither seems to have been wanting in affection for their mother. Kate lived near the parents, while Ida lived at greater distances, sometimes in Nebraska and sometimes in other states. By mutual agreement between the sisters, formal applications were made to appoint Kate as administratrix of the estate of the father and guardian of the person and property of the mother. Those arrangements were made at the office of an attorney where the whole matter was fully discussed and the necessary papers drawn. The sisters and the attorney together took the papers to, and filed them in, the county court. Personal service of the guardianship papers was made by the sheriff upon testatrix. Kate's appointment was favored by Ida as a matter of economy, Kate being willing to divide her compensation with her sister. For a time there was no complaint from any source. As too frequently happens, neighbors indulged in more or less gossip which, it is proper to say, resulted in some scandal concerning the relative treatment by the sisters of their mother. Both sisters regarded the care of the mother, as more or less burdensome. They discussed the mental state of the mother, as to her insanity, about which the record shows disagreement among the witnesses.

On September 2, 1925, while Kate and Ida were working at common purposes to save the estate of the father for themselves, and to throw about the mother the protection of a guardian to prevent her squandering it, some correspondence passed between them. Ida executed a paper

consenting to Kate's appointment as administratrix of the father's estate. She wrote Kate a letter saying: "I sure was surprised to think that some people was so little as to stick in our business and have the lawyers get the little us girls ought to have. * * * We will have to do something and mabey what we were talking about. With lots of love, Ida." As to "what we were talking about," Ida could not remember. Kate testified that it related to having the board of insanity investigate her mother's condition. Ida did not deny it.

The letter from Kate to Ida of September 2, 1925, acknowledges a letter from Ida. Kate's language was not any too refined, but it stated the housekeeper, the mother and some lawyer were making statements that Kate was incompetent to handle the business and that Kate had fought against her folks and was antagonistic to them. This was followed with statements of a character calculated to prejudice Kate in the mind of her mother, and a reference to preparation for the trial of the administratrix and guardianship proceedings.

The letter from Ida to Kate above quoted from was evidently in answer to the one just referred to. In referring to the trial Ida said: "If you need me, the boy and I can come any time. * * * * I will stop on my way up town and find out the phone number of my nearest neighbor. We will have to do something and mabey what we were talking about." On the back of that letter a telephone number was written.

Ida got into communication with an attorney about September 15, 1925, who went to Council Bluffs to see her. She turned Kate's letter of September 2, 1925, over to the attorney, who represented both the proponent of the will and testatrix on her application to set aside the appointment of Kate as administratrix and guardian. On September 19, 1925, testatrix wrote an attorney: "I want you to come and make my will. Come down and make it soon." Later, on November 11, 1925, testatrix wrote the same attorney: "I want you to come and make my will.

You hafe not made it yet. I want to give some to Willie Koller at Omaha and some to M. E. Church and some to my friends and the rest to my daughter, Ida Craig. I don't want my daughter, Kate Westerhoff, to hafe annything."

Shortly after November 11, 1925, the attorney went to the home of testatrix, taking with him Kate's letter of September 2, 1925, and the court files relating to both the appointment of Kate as administratrix of her father's estate and guardian of her mother. The attorney testified he received the letter from Kate and he took it and the two court files along and explained them to the testatrix because he wanted to show "her how her daughter had treated her." It is clear from the record that by that time the testatrix had become flagrantly incensed against Kate. No explanation was made to the testatrix as to the part Ida had been taking in having Kate appointed administratrix and guardian.

The old lady complained to many of her neighbors about Kate's treatment and about having a guardian over her. She manifested a feeling of resentment toward Kate which had not theretofore existed. Prior to, and even after the death of, the father, Kate was much at the home of her parents, did many things for them, stayed at the home for days and even weeks, helped to do the work about the home, etc.

A Mrs. Dunton, apparently a most excellent woman, testified for proponents and said that her feeling for Kate was kindly; "up until it just seems as though she didn't treat her mother like she ought to." Mr. Kahle, and other witnesses for proponent, testified that testatrix complained to him about the guardianship and that she said "she blamed it all on Kate," also, that testatrix told him that Kate was going to put her in the asylum "if she wouldn't behave herself." Alice Dillenbeck, a witness for proponent, said she had nothing against Kate "only the way she had treated her mother." None of these witnesses testified to any personal knowledge of bad treatment. Mrs.

Shaw said she was prejudiced against Kate because "the way she heard she had treated her mother." She heard it talked about sending testatrix to the asylum, but nothing of that kind from Mrs. Koller. Walter Best said testatrix complained to him about Kate being guardian. Most of the witnesses for proponent either manifested an open, or ill-concealed, prejudice against Kate. Mrs. Dunton and Mr. Norval, people of standing and character, hearing one side only, manifested a decided prejudice against Kate because of the treatment said to have been received by her mother at her hands. After the will was executed, Mr. Norval testified it was put "in our vault in our office." Ida testified she first learned of the will during her mother's last sickness in Omaha; up to the death of the father her relations with her sister were friendly and normal—no estrangement; Tuesday or Wednesday after the funeral of her father she and Kate went with the sheriff to her mother when administration papers were served upon the mother; admitted being at the office of the attorneys who prepared the administration and guardianship papers; denied that she knew what they meant; admitted that she went to the courthouse with the attorney when the papers were filed; was at her mother's home when the sheriff served the papers and discussed the matter of Kate acting as administratrix without charge; changed her mind about Kate being administratrix in September, 1925; admitted that she stated to Mr. and Mrs. Omar Westerhoff, "I am so glad that Kate will act as administratrix of the estate and guardian of mother; we now have it all settled and I can go home," this being shortly after the father's death; saw her mother in August, 1925, on October 1, 1925, and on Christmas, 1925.

Attorney Stoner testified, and it is not denied, that on August 4, 1925, Kate and Ida were in his office; that they talked over the matter of Kate acting as administratrix and guardian; everything was explained in detail to Ida; he told Kate if the mother was as bad as Ida and she stated she was, a guardian would have to be appointed to

take care of both her person and her property, and both girls talked of the then insanity of the mother. Both Kate and Ida testified that they had planned together to save the mother's property for themselves as they were entitled to the same as her daughters.

The estate had a valuation of upwards of $13,000. The will gave to William W. Koller, of Omaha, at whose home the testatrix died, $1,000; to the Methodist Church, $300; to Cynthia Best, $50; to Mary Kahle, $50; to Mary Bills, the housekeeper who was unfriendly to Kate, $300; and the residue to Ida Craig.

Among other grounds of contest it was alleged that the will was procured by undue influence through insidious propaganda to influence Eliza Koller against her daughter, Kate. We cannot resist the conclusion that Ida Craig, with the aid of others, released a letter of September 2, 1925, written to Ida by Kate when they were working at common purposes, and that the community in which testatrix lived, being a small town, was thereby, as Ida intended it should be, more than filled with a rivalry of gossip aimed exclusively at Kate, all of which, and more, got to the ears of testatrix. It is inconceivable that Ida was not a party to that systematic project. Ida's connection with the things that so offended the testatrix were not explained to her. No doubt the alleged conduct of Kate was laid bare before the testatrix in the most offensive and exaggerated form of which evil intent could avail itself. Ida knew the facts, but did nothing to bring down upon her head the consequences of her participation therein, all the while keeping herself within the background until the influence thereof had dealt the lethal blow to her mother's affections for Kate.

William W. Koller, one of the legatees and witness for the probate of the will, testified that the testatrix's conduct was all right with him, but "once in a while she got righteous indignation."

The record shows that the testatrix had been in feeble health for more than a dozen years; she had ceased to

attend church for that length of time; she was formerly an active church worker; she had practically lost the use of her hands and could no longer do quilting for the church; she had frequent violent attacks which at times left her unconscious, and was a woman of strong prejudices.

Undue influence may consist of setting up mental disturbances calculated to direct the mind into channels not normally proper or natural; arousing bitter feeling that would be unwarranted if the whole truth were known; a system of secret propaganda put on foot by broadcasting half truths so directed that they will, in all probability, reach the person to be affected to the injury or prejudice of another who is ignorant of what is going on and thereby deprived of an opportunity to place himself in the true light to prevent his undoing. Ordinarily, one sister would not take delight in deliberately exposing another to contempt and hatred, certainly not to that of the mother in her few remaining days, without a motive.

We have examined the propositions of law stated by appellee and the authorities there cited. Under proper facts, they cannot be questioned. Kate was a woman about 55 years of age; she was married when 16, and has lived with her husband and raised a family. A possible indiscretion of hers with the man whom she married and with whom she has lived almost 40 years in apparent successful wedlock ought not to have been projected into the trial. The jury found that the testatrix had mental capacity to execute a will. With that conclusion we agree. The record is too large to attempt to reflect all the facts in detail; however, from a due consideration thereof we have concluded that the judgment below be affirmed in part and reversed in part. As to all of the legatees, except Ida Craig, we think that there was not sufficient evidence, as a matter of law, to charge them with undue influence. As between Ida Craig and Kate Westerhoff, we do think, as a matter of law, the disinheriting of Kate and the devise to Ida of the entire residue of testatrix's estate were

brought about by undue influence and fraud. This brings us to the law applicable to the situation. No one should be permitted to profit by his own wrong, nor should others be made to suffer by such wrong. To prevent a wrongdoer's profiting by her own acts, at the same time to do no injustice to others, it seems appropriate to cancel the legacy to Ida Craig and to subject the same to the inheritance laws, but to otherwise sustain the will. No wrong will then be done to any one.

It is certain from this record that neither the $50 legacies nor that of the Methodist Church were in the remotest degree connected with any fraud or undue influence. As to the legacies to William W. Koller and Mary Bills we think there was testimony to go to the jury on the issue of undue influence, although that might be open to serious question.

The following cases relate to legacies procured by undue influence: *Randolph v. Lampkin,* 90 Ky. 551, 10 L. R. A. 87: "While a will may be valid as to one devisee, and on account of undue influence invalid as to another, one portion of a will cannot be rejected for want of testamentary capacity."

Snodgrass v. Smith, 42 Colo. 60, dealing with eight bequests and undue influence as to only one: "Where such conditions exist, the will should not have been *refused probate* as to the undisputed legacies."

Holmes v. Campbell College, 87 Kan. 597, 599: "A portion of a will may be refused probate because of undue influence, while the remainder is admitted. *In re Welsh,* 1 Redf. Surr. (N. Y.) 238; note, 31 Am. St. Rep. 691."

Harrison's Appeal, 48 Conn. 202: "A will may be valid as to some parts and invalid as to others. * * * Fraud or undue influence in procuring one legacy does not invalidate other legacies."

Florey's Executors v. Florey, 24 Ala. 241, 248: "It is in accordance with the dictates of reason, and the principles of natural justice, that fraud or undue importunity,

on the part of one legatee, should not affect the other legacies."

Ogden v. Greenleaf, 143 Mass. 349: "Had the conduct of Ogden been fraudulent, or had he been guilty of undue influence, the codicil would have been partially set aside only."

Old Colony Trust Co. v. Bailey, 202 Mass. 283, 289; "That, upon proper evidence, the will might not be found to be procured by fraud in part and to be good in other parts. That this may be so found seems to be generally held by the courts"—citing a number of cases.

Morris v. Stokes, 21 Ga. 552, 569: "And the jury, upon sufficient proof, may strike out his legacy and establish the balance of the will, so that a will may be good as to one party, and bad as to another."

Palmer v. Bradley, 142 Fed. 193, 198: "Therefore since it is the province of the court in a probate proceeding to determine whether or not the instrument propounded is the will of the alleged testator, it is obvious on principle and well settled by authority that the court may find that a part only of the instrument is the testator's will, or that it is operative as to a part only of the property which it assumes to dispose of, and may admit it to probate as to such part and reject the balance, or may limit the probate as to such property as the will is effectual to pass."

In the case of *Post v. Mason,* 91 N. Y. 539, 43 Am. Rep. 689, the court held that, not having raised the charge of fraud as to a part of the will, as might have been done, complainants could not raise it in a general chancery proceeding. In *Steadman v. Steadman,* 10 Sadler (Pa.) 539, 14 Atl. 406, the jury were told, " 'In the case before us, if, in your judgment, the evidence shows such to be the fact, you can find in favor of the defendant, except as to so much of the will as provides for' devises not alleged to have been procured by undue influence. Held, no error."

Lilly v. Tobbein, 103 Mo. 477: "Where a particular clause has been inserted in the will by fraud or forgery,

it may, in such suit, be rejected for the reason that it is no part of the will."

Walker v. Irby, 238 S. W. (Tex.) 884, a contest over the probate of a will: "The general holding is that, where the undue influence does not affect the whole will, but only a part, and that portion and the remainder are separable, only the part affected will be held void."

28 R. C. L. 359: "A will which is void as to a legatee who exercised undue influence is not necessarily void as to other legatees who did not exercise such influence, and one part of a will may be void because of undue influence and another part valid because not affected thereby."

28 R. C. L. 138: "When the probate of a will is contested on the ground of undue influence, one or more of the provisions of the will may be sustained as valid, while others are set aside. The whole will is not necessarily void because of undue influence, but will be left to the jury to determine what gifts or devises were obtained by such fraudulent influence, and such gifts or devises only will be declared void."

40 Cyc. 1149: "Where the fraud or undue influence does not affect the whole will, but only a part, and that portion and the remainder are separable, only the part affected will be held void."

40 Cyc. 1233: The court "may reject any provision which was procured by undue influence, or was inserted by fraud or mistake."

Innumerable authorities may be cited that, in a will, one out of several devises may be shown to be illegal; to be so uncertain as to be unintelligible; to be contrary to public policy; and many other causes appearing upon the face of the will may be such that the valid parts will be enforced in proceedings of probate and the invalid part rejected. As is stated in 40 Cyc. 1080: "It is a rule of general application that if a will is valid as to some of its provisions and invalid as to others, and the valid provisions can be separated from the invalid, and upheld without doing injustice to any of the beneficiaries

under the will, or defeating the general intent of the testator, the will must be sustained in so far as it is valid."

Again, at page 1081: "The rule has been applied where part of the will was invalid for uncertainty, or where it contained provisions void as against public policy, or in violation of statutes prohibiting the emancipation of slaves, or the unlawful suspension of the power of alienation, or regulating testamentary disposition of property for charitable uses, or in violation of the rule against perpetuities. So the rule has been applied in cases where some of the provisions of the will were void for undue influence, or as providing for an illegal accumulation of income."

Applying the foregoing rule, complete justice may be done and further litigation ended. Unless this case can be disposed of in this manner, and rightly so, we feel that for errors of law in the admission and rejection of testimony upon the trial (which related almost entirely to the competency of witnesses and to contestant's claim of fraud and undue influence) the verdict and judgment would have to be set aside in its entirety. Rather than do that and subject the parties and the innocent legatees to further burdensome litigation and expense, and in view of the fact that the sustained legacies are minor, and that three of them at least are sustainable in morals and affection, it is our conclusion that the verdict and judgment be affirmed as to the following legacies: $1,000 to William W. Koller, $300 to the Methodist Church, $50 to Cynthia Best, $50 to Mary Kahle, and $300 to Mary Bills; that the judgment be reversed as to the bequest to Ida Craig of the rest and residue of the estate; said bequest is set aside and the cause remanded to the district court, with directions to remand the case to the county court with directions that the rest and residue of the estate so bequeathed to Ida Craig be distributed according to the laws of inheritance.

AFFIRMED IN PART, AND REVERSED IN PART.

GOOD, J., dissents.

Note—See Wills, 41 L. R. A. n. s. 1126; 28 R. C. L. 359.

ANNA SINDELAR, APPELLEE, V. T. B. HORD GRAIN COMPANY, APPELLANT.

FILED APRIL 13, 1928. No. 25829.

1. **Corporations**: CONTRACT: VALIDITY. Evidence examined, and found that the transaction involved was one had by and between the plaintiff and the defendant corporation acting through its agent, and was without collusion.
2. **Trial**: DIRECTION OF VERDICT. In a case where reasonable minds would not be warranted in drawing different conclusions from the evidence, it is not error for the court to direct a verdict.
3. **Principal and Agent**: ACTS OF AGENT. "An act of an agent, although without actual authority from his principal, may be with such apparent authority as to bind his principal." *Union P. R. Co. v. Gregory Coal Co.*, 103 Neb. 421.
4. ———: ———. Such apparent authority of the agent cannot be extended or restricted by by-laws or other instructions to the agent by its principal, in the absence of actual notice thereof.
5. **Witnesses**: IMPEACHING TESTIMONY. A witness may be impeached by evidence tending to prove that he made statements out of court contrary to those made by him at the trial, in respect to matters material to the issues. However, such impeaching declarations are not substantive evidence of the facts declared when made by one not a party to the action, but merely serve as an aid to the court or the jury in determining the weight to be given the testimony of such witness.

APPEAL from the district court for Merrick county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

E. J. Patterson and *Elmer E. Ross*, for appellant.

Bartos, Bartos & Placek, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

THOMPSON, J.

We find submitted for our consideration an action at law appealed by the defendant, T. B. Hord Grain Company, from a judgment rendered in the district court for

Merrick county on a directed verdict at the close of the evidence on motion of plaintiff, Anna Sindelar, for the sum of $2,274.44. The errors relied on for reversal in the motion for new trial, as well as in the briefs here, may be resolved into two: (a) The court erred in sustaining the motion for a directed verdict; (b) the court erred in permitting the plaintiff's witnesses to testify to declarations of defendant's agent concerning his power to receive and store grain in defendant's elevator.

The record discloses that defendant is, and was at the times involved herein, a corporation organized for the purpose of buying, storing and selling grain; that in furtherance of such purpose it had built and equipped, and was operating, numerous elevators at sundry places in the north central part of this state, the main office and elevators being situate in Central City, Merrick county; that of the elevators so owned and operated was one at Ord, Valley county, which latter was in charge of one Geseking, and had been at the dates in question herein for five years or more; that the plaintiff operated a farm near Ord, and had raised and had in her possession 1639 bushels of wheat; that her son and husband were farmers also, the husband being the owner of wheat which he had raised; that these people had concluded to move to Saline county, Nebraska, which necessitated a disposition of these wheat holdings; that, in furtherance thereof, the husband testified at the trial as follows:

"Q. Now just tell the jury what that transaction was (in November, 1924). A. I hauled a load of (my) wheat into the elevator and he (Geseking) bought it of me, and I didn't feel like selling it on account it was too low, and he said 'You can haul in the rest of it and I will store it for you, T. B. Hord Company storage, and you can leave it as long as you want to.' And I said, 'What about storage?' And he said, 'I will charge you two cents a bushel,' and I sold him the first load at $1.10. I received the check for it, and the next day I started to haul. Q. How much did you haul? A. 285 bushels. Q. Did you

leave it for storage? A. Yes, sir. Q. How long was that in the elevator before you sold it? A. About two months. Q. When did you get the money for it? A. December 30. Q. Who paid you for it? A. Ben Geseking. Q. What kind of a check did he give you, his own, or what? A. Just an elevator check. Q. Hord Grain Company check? A. Yes, sir. Q. Did he charge you any storage? A. Yes, sir. Q. Do you remember how much it was? A. The wheat was $1.55 and he gave me $1.53, so he charged me two cents a bushel." Further, as to the wheat here in question, the husband testified: At the time he delivered the first load of his wheat, "I told him (Geseking) my wife had good wheat and we would like to haul it but the price was so low we didn't feel like hauling it, and he said we might as well haul it 'just like you, T. B. Hord Company storage, just like you,' she can leave it as long as she wants to and when she wants the money he will give her the check. Q. Did you tell your wife that? A. Yes, sir. Q. Did you help haul this wheat of your wife's? A. Yes, sir. Q. How many loads did you haul? A. Fourteen loads."

As to a conversation between Geseking and the husband relative to plaintiff's wheat on March 7, 1925 (the three being present), the husband testified:

"Q. Tell us what that conversation was. * * * A. She asked him (Geseking) about the price and he told her the price, if I am not mistaken it was $1.40, and she thought it was low, and he said 'You might as well leave it here in storage with the T. B. Hord Company.' * * * He said she can leave it just as long as she wants to, and we said all right, and we told him that whenever she be ready for it she going to phone him or writing him or let him know and he could send the check, and she said, 'If the wheat come to $1.50 you don't need to wait for call or letter, just sell the wheat and send the money to me,' and he said, 'All right.'"

Further, the husband had a talk with Geseking over the telephone in October, 1925, and Geseking told him:

"At any time you are ready I will be willing to send the check, just drop me a few lines." "Q. Then, you never heard Geseking say anything about storing your wife's wheat, did you? A. Yes, sir; he told me he would do just the same thing with her he done with me—store her wheat and she can leave it as long as she wants to. Q. There was no time fixed when she would have to take the money for her wheat? A. No; she could leave it. Q. Indefinitely? A. Yes, sir; she could get the money whenever she wants to."

The son testified, as to plaintiff's wheat: "Well, I went to the Hord elevator (about January 23, 1925,) and asked him (Geseking) about the price and he told me $1.10, and I said, 'That is pretty low, but we got to haul it some place because we are going to move to Saline county.' And he said, 'You don't have to sell it, you can leave it here.' And I said, 'How do you do it? They told me they don't store wheat in the other elevator' (there were two elevators at Ord). And he said, 'The T. B. Hord Company has a license.' And I said, 'Will you charge me storage?' And he said, 'Yes; two cents a bushel.'" He testified that they started to haul this wheat about January 30, 1925, and finished sometime the last of February of that year; that the wheat tested about 60 pounds per bushel measure. Further, the son testified: "Well, when I got done hauling I told him (Geseking) it was the last load, and he gave me the last slip I had from the loads, and he told me whenever I get ready I can make demand for payment and he will give me the check."

This evidence is corroborated and strengthened by other witnesses, and by these witnesses by way of subsequent conversations had with Geseking. The demand for payment for the wheat was made before the commencement of this action, and at a time when the wheat was of the market value of $1.39 a bushel, to wit, March 5, 1926, and payment therefor refused. The record further shows that there were 31 loads of wheat so delivered and placed in such elevator at Ord, and that at the time each load

was delivered the deliverer thereof received from Geseking a slip showing the gross weight of the load, the tare weight, the net pounds of wheat, and in some instances the number of bushels. There is also evidence showing that other wheat had been similarly received, stored and paid for at this Ord elevator, previous to the receipt of plaintiff's wheat, from other farmers, which was known by the son and husband of plaintiff at the time.

Under the record as thus disclosed, the defendant introduced evidence tending to prove that the manager of the corporation was one J. W. Hutchinson, domiciled at Central City, and that he had been such manager since about 1902; that the corporation had never procured a warehouse or storage license for any one or more of its elevators; that as such manager Hutchinson had procured to be prepared and distributed to the different agents in charge of defendant's respective elevators a circular letter of instructions in which such agent was directed not to receive grain for storage for a time longer than nine days, and that within such limitation all grain so received should be paid for by him; that such manager, as a further instruction to such agent in charge, and as a means of conveying such information to those dealing with him, procured to be prepared and sent to each elevator a pasteboard placard, approximately 11 by 14 inches, containing thereon in bold type:

"THIS IS NOT A PUBLIC WAREHOUSE. NO STORAGE. UNDER THE NEW STATE LAW WE WOULD BE SUBJECT TO HEAVY PENALTY IF WE SHOULD STORE GRAIN. T. B. HORD GRAIN CO."

That such circular was seen by the witness Hutchinson, and also by defendant's auditor, Barkmeier, in the elevator at Ord, posted in a conspicuous place at times before and after the dates in question, as was also the placard which was posted on one side of the driveway leading to the dump where grain brought to such elevator was unloaded. It might be said in this connection that on cross-examination, had on the part of the defendant, the son of plaintiff testi-

fied that he did not see, and neither did he ever know of, such circular or placard, and no one testified that he did see them or either thereof, and, as we find, he was the one who finally closed the deal for plaintiff. Further, the record is without evidence showing or tending to show that the plaintiff was in or around this elevator before the delivery of her wheat. The defendant was also permitted to submit testimony tending to show that a book kept at the Ord elevator showed that the husband had delivered and placed in defendant's elevator the number of bushels of his wheat which his testimony indicated, but that the same was delivered on December 27, and check issued in payment therefor, and that the receipt of the husband's wheat was not shown by such book prior to that date. This witness who identified such book was also permitted to testify that he had examined it and that there was nothing therein contained showing the receipt of the wheat delivered by the plaintiff. The book was not introduced in evidence, and neither was there any foundation laid for its introduction as by our statutes required, or otherwise. The evidence is conclusive that the husband delivered his wheat in November, 1924, and got his pay therefor the latter part of December of the same year. Hence, the most that could be credited to the evidence of what the book showed, if competent, would be that Geseking, acting for the corporation, did not enter on this book the receipt of wheat received by it for storage until such stored wheat was paid for. This, however, could not militate against the plaintiff. The witness Hutchinson, on the part of the defense, testified that at the time and place the demand was made for an accounting for the wheat, in the presence of a number of persons, the son, herein referred to, stated that Geseking said, "If you keep your mouth shut, it will be all right," meaning as to the transaction in question. The defendant's witness King, who was present at the time, in detailing the conversation stated: "He (the son) said that they wanted to get more money for the wheat, and wanted to store it, and Geseking told him that he

did not have the authority to store it, but if he kept his mouth shut he would store it for him." It might also be suggested here that the son was interrogated on cross-examination as to whether or not he had not made the statements at this meeting, as related by the witnesses Hutchinson and King, respectively, and in answer to each of such questions he entered a positive denial. This contradiction of the son's testimony as to a statement made by him in regard to a long past event, he not being a party to the action, was not substantive evidence. At best, such evidence, if believed by the jury, could only go to the weight of the son's testimony. *Zimmerman v. Kearney County Bank*, 59 Neb. 23. As we have seen, as to the material facts this witness is sustained by the testimony of the father, the mother, and in some regards by other disinterested witnesses. Under this record, the son's testimony might be omitted entirely from the consideration of the jury, or that of the court, as the testimony of each of the other witnesses for plaintiff is without evidence of a refuting nature. Geseking, the only person who could have, under the detailed facts in this case, given any other version of the transaction than that given by the plaintiff's witnesses, was not sworn nor examined at the trial.

That the defendant received the wheat in its elevator, without collusion or connivance on the part of plaintiff either with the defendant or its agent, that it was of the market value and consisted of the number of bushels, and that the same had not been paid for or accounted for by defendant on due demand having been made therefor by plaintiff, as found by the trial court, is without question.

In considering whether or not the trial court erred in its instruction directing the jury to return a verdict in favor of the plaintiff as it did, we must bear in mind that this court has never adopted the *scintilla* of evidence rule. As stated in 2 Thompson on Trials (2d ed.) p. 1504 (quoting with approval from *Ryder v. Wombwell*, L. R. 4 Exch. 32, 38): "It was formerly considered necessary in all cases

to leave the question to the jury, if there was any evidence, even a *scintilla,* in support of the case; but it is now settled that the question for the judge (subject, of course, to review) is, as stated by Maule, J., in *Jewel v. Parr* (13 C. B. 909, 916, 'not whether there is literally *no* evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established.'" In speaking of this rule, it is further stated in the above text at page 1505 (quoting with approval from *Commissioners v. Clark,* 94 U. S. 278, 284): "Decided cases may be found, where it is held that, if there is a *scintilla* of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to wit, that, before the evidence is left to the jury, there is, or may be in every case, a preliminary question for the judge, not whether there is literally *no* evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed."

Thus, the question for our determination is: Whether or not, taking the evidence as a whole, any other verdict than the one directed could have been returned by the jury?

"It is not reversible error for the trial court to direct the jury to return a verdict for one of the parties where, upon the evidence, no other verdict than the one directed can be sustained." *Zimmerman v. Kearney County Bank,* 3 Neb. (Unof.) 323.

"Where only one conclusion can be drawn from the evidence, the court should direct a verdict." *Chesley v. Rocheford & Gould,* 4 Neb. (Unof.) 768.

Where, under the record, reasonable minds would not be warranted in drawing different conclusions as to the involved facts, it is not error for the court to direct a verdict.

In *Pollock v. Pearson,* 101 Neb. 284, we held: "It is the duty of the trial court to instruct the jury to find

for defendant when the evidence is not sufficient to sustain a verdict for the plaintiff."

If the foregoing is a correct statement of the law under the proved facts in that case, then the converse thereof would be applicable under the proved facts in this case. Our holding in *Pollock v. Pearson, supra,* was by us amplified and strengthened in *Farmers State Bank v. Butler,* 101 Neb. 635, wherein we announced the following rule:

"When there is no substantial conflict in the evidence upon matters to be submitted to the jury, so that a verdict for the defendant upon those matters could not be sustained, it is the duty of the court to instruct for the plaintiff upon those issues."

As to the challenge that the court erred in permitting the evidence of the son, the husband, and others to be introduced as to conversations had with Geseking, it is sufficient to say that Geseking was the only one in charge of the Ord elevator, and was the only person that could, with practical business expediency, be interrogated in reference to the matters inquired about. Hence, he was acting in the apparent scope of his authority in the matters detailed by these respective witnesses, and, as we held in *Union P. R. Co. v. Gregory Coal Co.,* 103 Neb. 421: "An act of an agent, although without actual authority from his principal, may be with such apparent authority as to bind his principal." Such apparent authority of the agent cannot be extended or restricted by by-laws or other instructions to the agent by its principal, in the absence of actual notice thereof. *Johnson v. Milwaukee & Wyoming Investment Co.,* 46 Neb. 480.

It is our conclusion that error was not committed by the trial court, either in sustaining the motion for a directed verdict in favor of the plaintiff, or in permitting the complained of testimony to be introduced.

The judgment of the trial court is right, and is

AFFIRMED.

FLORENCE A. MOFFITT, APPELLANT, V. ED M. WILLIAMS, APPELLEE.

FILED APRIL 13, 1928. No. 26144.

1. **Deeds: CONSTRUCTION: INCONSISTENT CLAUSES.** "The settled rule of law is that, if a deed or will conveys an absolute title in fee simple, an inconsistent clause in the instrument attempting merely to limit that title or convey to the same person a limited title in the same land will be disregarded." *Grant v. Hover*, 103 Neb. 730.
2. ———: ———. A deed from father and mother to their daughter, in which they "grant, bargain, sell, convey and confirm unto" the daughter certain land, and containing covenants of seisin and warranties to defend the title running to the grantee and "her heirs and assigns," without creating any other or different estate in her, or others, creates a title in fee simple, notwithstanding the deed contains a provision, "This deed shall be void if grantee deeds to any party except her heirs or their heirs."

APPEAL from the district court for Hamilton county: LOVEL S. HASTINGS, JUDGE. *Reversed, with directions.*

Craft, Edgerton & Fraizer, for appellant.

J. H. Grosvenor, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and HOWELL, JJ., and LANDIS, District Judge.

HOWELL, J.

This is an appeal from the denial of specific performance of a contract for the sale of real estate. The plaintiff, Florence A. Moffitt, agreed in writing to sell 120 acres of Hamilton county land to Ed M. Williams, and to give a "good title of record" therefor. She held title under a deed from her father and mother dated September 24, 1902, containing the usual granting and warranty clauses, with a special provision as follows: "This deed shall be void if grantee deeds to any party except her heirs or their heirs." The granting clause reads, "do hereby grant, bargain, sell, convey and confirm unto Florence A.

Gray" (now Moffitt) the lands described. The covenants of seisin, against incumbrance, right to sell, and to defend the title, run to Florence A. Gray (Moffitt) and "her heirs and assigns." The trial court denied specific enforcement solely upon the ground that Florence A. (Gray) Moffitt could not give a merchantable and "good title of record" by a direct deed to Ed M. Williams, because of the provision making the deed from her father and mother void if she "deeds to any party except her heirs," etc.

The parties to this action are friendly and neither want their contract enforced unless Florence A. Moffitt can convey a good title by her deed. Counsel for neither party has cited a case exactly in point. The sole question is: What effect, if any, is to be given to the provision making the deed to Florence A. Moffitt void if she deeds to another than "her heirs or their heirs," it being in the nature of a forfeiture or restraint of alienation? The deed put the fee title in the grantee. Rigidly construed, Florence never could deed to any one, for, as long as she lives, she has no heirs; at least, they may not now be known. 29 C. J. 290, sec. 6, note 22. "Heirs" answer to persons at the death of an ancestor or testator. *Hill v. Hill,* 90 Neb. 43. The deed does not say at what time or under what law, whether existing or to be enacted, her heirs are to be determined. Should she have a child or children, and if it or they should die leaving heirs in the persons of their children, Florence could deed to the heirs of her deceased children because the heirs of her heirs would be known, unless the children of the deceased children at once step in and become her immediate heirs. Such a puzzle might be extended under varying conditions to render the provision so uncertain and meaningless as to be unenforceable. If Florence may not deed to any one, it may well be said the provision is void, either as being repugnant to the grant, an illegal restraint as to alienation, or for want of terms of reversion of title upon the happening of a condition subsequent, which very condition is prohibited in spirit. It does not seem reasonable that a deed once

valid can be rendered void by direction of the grantor who has conveyed all his interest to another, in the property conveyed, reserving nothing to himself. Section 5591, Comp. St. 1922, provides, all of a grantor's interest passes with his deed unless the contrary intent is shown by its terms. The grantor made a covenant with Florence "and with her heirs and assigns." He parted with the fee and lost control over directing its future. The provision is neither a condition precedent, or condition subsequent with a reversion attached. It is against public policy. It falls out of the deed by its own weight and is made incapable, by self-divestment. The law favors fixed titles and abhors forfeitures. At most the clause in question is a condition, a breach of which would not cause the estate to revert to any one, by express terms. The rule most directly applicable to the matter before us seems to be well stated in 18 C. J. 337, sec. 336d, as follows: "Where an estate in fee simple is granted to a person by proper and sufficient words, a clause in the deed which is in restraint of alienation is void and will be rejected."

As supporting the text many cases are cited, a few of which are: *Graves v. Wheeler*, 180 Ala. 412; *Walker v. Shepard*, 210 Ill. 100; *Kessner v. Phillips*, 189 Mo. 515; *Hill v. Gray*, 160 Ala. 273; *Diamond v. Rotan*, 58 Tex. Civ. App. 263.

The practical effect of the condition is to deny the grantee power to deed or alienate, if strict construction be the rule; and we think it is, unless it defeats the intention of the grantor, when construing the instrument as a whole. The deed is made void if the grantee deeds to any one but heirs. Who the heirs are to be cannot be determined until the grantee dies. There being no heirs, so long as the grantee lives, she can never convey. The clause does not recognize a right in the grantee to select one or more persons in being who may, or may not, be an heir or heirs, at her death. It says "her heirs" (plural) "or their heirs." Suppose grantee deeds to one of her children who dies before grantee dies, would her deed be void *then*, or become

void *later* on, upon her death, for the reason that the deceased child was not an heir when the deed was made, nor at her death? The clause generates much non-sense.

As will be observed, the deed does not limit the title in grantee to her life and thereafter cast it elsewhere. So far as the language of the deed speaks, it affects merely the title of the grantee. It first gives her the fee and secondly undertakes to take it away, if she should deed it contrary to grantor's wish, without fastening it elsewhere. *Grant v. Hover,* 103 Neb. 730, announces a principle applicable to the case before us in this language: "It has been regarded by the courts that it is impossible to convey an absolute title to real estate in fee simple by deed or will, and at the same time in the same instrument convey to the same person a limited right or title in the same land. It therefore follows that when there was an attempt to do so, and no other disposition of the land was made in the will, the courts, on the theory that real estate must have an owner, rejected the attempt to convey the limited title, and treated the conveyance as of a fee simple title."

Syllabus 1 of that case reads: "The settled rule of law is that, if a deed or will conveys an absolute title in fee simple, an inconsistent clause in the instrument attempting merely to limit that title or convey to the same person a limited title in the same land will be disregarded."

In *Yates v. Yates,* 104 Neb. 678, 683, it is said, quoting from a Kansas case, "to vest the fee in the grantee, but to disable him from alienating it," cannot be done, "and the attempted restriction is ineffective." As stated at page 684, in the *Yates* case: "The tendency of the rule in Shelley's case is to prevent estates from being held in abeyance and to throw land into commercial channels one generation sooner."

At the oral argument counsel for both parties stated their willingness, in fact desire, to perform the contract if the title to the land as it stands is good in law, so far as the clause discussed is concerned. This being a trial *de novo,* in which this court may finally determine the law in such

manner as to remove any doubt as to the title, we dispose of the case by decreeing specific performance as prayed in plaintiff's petition. We are not unmindful of the discretion of trial courts in cases of this character; and that, ordinarily, they will not decree performance as to a title "if there be doubt or uncertainty about it sufficient to form the basis of litigation." *Shonsey v. Clayton*, 107 Neb. 695. We say this in justice to the learned judge who denied the decree in the court below and whose views, as to the clause in question, were much the same as those expressed by this court. For the reasons stated, the decree of the lower court is reversed, with instructions to enter a decree to conform to this opinion. As both parties have properly conducted this litigation in good faith, each will be left to pay their own costs, unless they otherwise agree.

REVERSED.

FRANK DENESIA, APPELLANT, V. CHARLES DENESIA, ADMINISTRATOR, ET AL., APPELLEES.

FILED APRIL 13, 1928. No. 25793.

1. **Homestead: PAROL AGREEMENT TO DEVISE.** The fact that the premises involved was the homestead of the promisor does not, of itself, render void and unenforceable an oral agreement between the parents and a son, whereby the former agreed that, in consideration of the son remaining at home, running the farm, and providing necessary care and support to the parents as long as either should live, the place would belong to the son upon the death of the parents. *Teske v. Dittberner*, 63 Neb. 607, and 70 Neb. 544, overruled.
2. **Statute of Frauds: AGREEMENT TO DEVISE HOMESTEAD: RATIFICATION.** If an oral agreement between parents and one of their sons, whereby the former promised to leave the home place to the son in consideration of the son remaining at home and providing support and maintenance to the parents during their remaining lives, is void, because not in writing and acknowledged, it could not be subsequently orally ratified by the parents.
3. **Specific Performance: PAROL AGREEMENT TO DEVISE HOMESTEAD.** Where the evidence sufficiently proved the agreement

and its performance by the son of an oral contract between parents and a son, whereby the former agree to leave the home place to the son, in consideration of the latter providing care and support to the parents, the fact that several years later the parents removed to a nearby town where they resided for several years and during that time the son paid the father $300 in cash each year which the father enters as "rent", in a small account book, does not necessarily prove an abandonment of the original agreement.

4. ———: ———: SUFFICIENCY OF EVIDENCE. Evidence examined, and *held* sufficient to prove the plaintiff and his parents agreed to and that the son sufficiently performed an oral contract whereby the son was to provide care and maintenance in consideration of the parents' oral promise that the home place would be left to the son.

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

A. R. Oleson, for appellant.

P. M. Moodie and *A. R. Davis, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY and HOWELL, JJ., and BROADY, District Judge.

BROADY, District Judge.

This is an action, in equity, for specific performance of an alleged oral agreement between Noah Denesia, and his son, Frank, by the terms of which the father promised the home farm should go to the son after the death of the parents, in consideration of the son remaining at home, running the farm, looking after and caring for his parents as long as they should live. The son, the plaintiff in this action, remained with the parents from that time, 1893, continuously, and now occupies the place. In 1905 the parents moved to the town of West Point where they lived until 1915. They then lived with a married daughter at Cedar Bluffs for one year, and then went back to the home farm and lived one year with plaintiff and his wife. It seems plaintiff married during the period the old folks lived in West Point. Later the parents made their home

at an old folks' home. The mother died in 1920 and in 1922 the father went to live with a daughter at Cedar Bluffs, where he died in 1923. This action is brought by the son, plaintiff, against the administrator of the father's estate, and his brothers and sisters, as heirs of the parents. The defendants denied the agreement and alleged the premises was the homestead of the parents and, if made, the agreement was void, because not in writing and not signed by both the father and mother, as is required by the homestead statutes; and, further, that there was no sufficient compliance of the conditions of the agreement, if any.

The trial court found, as a question of fact, that such an agreement was made, as alleged by plaintiff; that the premises involved was, at the time, the homestead of the promisor, but not being in writing and signed and acknowledged by both himself and his wife was void. The court also found that the son, the plaintiff, occupied the premises, after the removal of the parents, for some ten years, as a tenant, and that he should be accountable for rent; also that he had put valuable improvements on the land, for which he should receive credit; set off one against the other, and entered a general decree for the partition of the land among the respective heirs, including the plaintiff, in accord with the cross-petition of defendants.

Plaintiff appeals from the decree of the trial court. The questions presented by the appeal are: (1) Is such an oral agreement enforceable as against a homestead? (2) If made, may it be ratified by the promisor, by oral affirmance, after a surrender of the homestead character by removal from the premises? (3) If made, and at least partially performed, was the agreement abandoned by removal by the parents and their receipt of cash payments from the son as "rent"?

The evidence conflicts somewhat on each of the main controverted questions. The plaintiff is supported directly to the original agreement by one sister, Mrs. Stone, who was living at home at the time, and says she heard the father make the alleged promise to the plaintiff, and she

also says that her mother was present at the time and consented and affirmatively assented to the arrangements. A granddaughter, which we assume was Mrs. Stone's daughter, and now grown, says she lived much of her life at the grandparents, and that she had always heard the farm spoken of as "Frank's" (plaintiff), and that she "grew up in that knowledge." Several residents of West Point testified that, after the father had removed to town, he often talked to them of having promised the farm to the plaintiff and spoke of plaintiff with great affection. The adverse defendants testified they never heard of any such arrangement until this suit was started. There is no evidence whatever of any ill feeling of the old gentleman toward the plaintiff. We think the trial court rightly found the agreement had, in fact, been made. We also feel and find the plaintiff sufficiently complied with the conditions of his promise.

Defendants insist that the agreement was bad as no consideration passed from the son in that he was not placed in a worse financial position on account of the promise. That, of course, if true, is a good objection. It is only another way of expressing the fundamental rule and definition of a consideration as a benefit to the promisor or a detriment to the promisee. In this case the detriment to the promisee would be his obligation to keep and support the parents so long as they might live. *In re Estate of Griswold*, 113 Neb. 256.

One of the defendants, Mrs. Stone, a sister of plaintiff, did not contest plaintiff's claim but, in fact, by her answer and also her testimony, affirmatively acknowledged plaintiff's claim and right to the premises and testified that plaintiff had fully performed all of his obligations to his parents. The adverse defendants argue that the plaintiff gave the old people only butter, eggs, ham, bacon, and fresh meat when he butchered, and paid the father $300 in cash a year after the parents removed to town, and assert that the relation of landlord and tenant existed, as shown by the father keeping books and entering the

payments as "rent." These adverse defendants argue that plaintiff therefore abandoned the contract. The record also shows that for a long period a reasonable rental for the farm was far in excess of $300 a year. This would indicate the old gentleman took only what he needed, not as rent, but as "keep," and supports the contention of plaintiff.

Waiver or surrender or abandonment of the homestead is suggested; but we prefer to first discuss the direct question at hand.

It is clear the premises was the homestead at the time the agreement was made. If the agreement was void when it was made, of course, was completely dead. It could not be ratified at a later date and then spring to life. If the statute of frauds or the homestead statute smothered it in the beginning, because not in writing and signed and acknowledged by both husband and wife, the promise remained dead notwithstanding its subsequent affirmation by them. The defendants insist upon the demise, as above suggested, and cite *Teske v. Dittberner*, 70 Neb. 544, as conclusive on that question. That case was three times before this court. Twice by opinion of the court commission and once, the last, by the court, on a second rehearing, and is reported in 63 Neb. 607; 65 Neb. 167, and 70 Neb. 544. In that case the plaintiff orally agreed with his father and mother that he would remain on the home farm, provide the necessities of life to them, and at their death the farm would be his. The agreement continued some years when the mother died. A few years later the father left the farm and went to live with a daughter, when the father conveyed the farm to this daughter, and the son brought an action to quiet title in himself and cancel the deed to the sister, alleging the oral contract and performance on his part. The action was defended on the ground that the premises was, at the time, the homestead, and therefore the agreement was void, it not being in writing and signed and acknowledged by both husband and wife. The trial court found in favor of the son. The

supreme court commission reversed the trial court and held the agreement was void, as violating the homestead statute. A rehearing was granted (65 Neb. 167) and by a more exhaustive opinion, by Judge Ames, set aside the first decision, and held the agreement was not void, but that its enforcement could not be decreed during the lifetime of the then surviving father, directed the sister to hold title in trust for the benefit of the promisee to become complete upon the death of the father, and ordered the son to put up a bond to secure the support of the father until his death. A second rehearing was granted, and this was heard by the court (70 Neb. 544). In a long, exhaustive and complete opinion by Judge Holcomb, the court held the agreement void as against the homestead, quashed everything in the previous decisions, and directed that part of the farm not occupied as a homestead, *i. e.*, all except the house and grounds adjacent to the value of $2,000, be conveyed to the son. The house, buildings and so much of the lands to the value of $2,000 was exempt from the decree.

If the last decision was the final word on the subject, the instant inquiry would end here. But in 1912 the court decided *Moline v. Carlson*, 92 Neb. 419, Judge Fawcett writing the opinion. And it is there held that such an oral agreement is enforceable, even though the premises involved, at the time, constituted the homestead of the promisor. The decision is based on the oft-repeated theory that the promisor having promised to devise the premises by will and not having done so, the court will do it for him. It further argues that, notwithstanding the homestead character rights, no one could object to the owner directing the disposal of real estate by will, properly executed, and that therefore the homestead statute does not apply. It also states that the original promise was to devise all of the lands of the promisor, which might or might not be the homestead, at the death of the promisor. Of course, that was merely a detour to avoid the *Teske* decision.

These two decisions, both of which establish a distinct property right, are directly opposed to each other. The *Teske* case clearly holds the homestead character of the premises renders the agreement void; the *Moline* decision holds it does not. Now here we are confronted with another case involving the identical question. We cannot follow either of the above decisions without violating the precedent of the other. Waiver, surrender or abandonment of the homestead was suggested in the *Moline* case, as was also suggested at the oral argument of counsel in the case at bar. To reach out for that distinction would only add to the confusion. This court should now finally and definitely adopt either the *Teske* case or the *Moline* case and expressly overrule the other. There are other decisions of this state which are cited by counsel, but it seems to the writer to further distinguish would only add more confusion. There is a clear division of holdings in strong legal jurisdiction on this question. This court is firmly committed to the rule that such oral agreements, otherwise unobjectionable, are enforceable *(Davis v. Murphy,* 105 Neb. 839; *Warnick v. Warnick,* 107 Neb. 747; *Moline v. Carlson,* 92 Neb. 419), but is in confusion whether they are or are not void as against the homestead. If such oral agreements are to be recognized at all, it must follow that they must also be enforced as against the homestead; therefore, we should follow the *Moline* case and expressly overrule the adverse holding in the *Teske* case. The statute of frauds, the statute on wills, and the homestead statute all require contracts affecting the respective subjects to be in writing. But this jurisdiction, and most others, hold, under general similar statutes, oral agreements to devise real estate are not void because of such statutes. If good as against any one of the above statutes, they certainly ought to be binding as against the others. There is no reason why they should not be. And there is this added reason why the homestead character of the premises should not exempt that particular class of cases. A very large proportion, if not a majority, of

such agreements are in cases where the promisors are the father and mother of the promisee. They are usually old folks first beginning to fear the coming years of loneliness and old age, and assure one of the children that, in consideration of his or her staying on the home place with them, and looking after them while they recede down hill, the place shall be his or hers when the old folks are gone. Often the other brothers and sisters, at that time, are enthusiastic for that understanding. And it is our guess that all this usually takes place in the parlor of the old home, which most naturally and humanly calls out the family confidence in each other, and nobody thinks of or would permit a writing. The arrangements being complete, the one stays on watching, the brothers and sisters pack up and leave, while John takes the milk bucket and goes out to the cow shed.

The trouble starts long afterwards. So, it seems to the writer, that if oral agreements, otherwise unobjectionable, are to be upheld at all, it cannot in right and equity be said they are good as to all except the homestead. And this court now so holds and the holding to the contrary, in *Teske v. Dittberner*, 63 Neb. 607, and 70 Neb. 544, is hereby overruled.

It follows that the decree of the district court is reversed and the cause remanded, with directions to enter findings and a decree, in accordance herewith, of specific performance in favor of the plaintiff, Frank Denesia, as prayed in his petition.

REVERSED.

J. B. KELKENNY REALTY COMPANY, APPELLEE, V. DOUGLAS COUNTY, APPELLANT.

FILED APRIL 13, 1928. No. 26414.

Taxation: DOMESTIC CORPORATION STOCK: ASSESSMENT. For the purpose of determining the valuation for assessment of shares of stock in domestic corporations, the value of mortgages, owned by the corporation, in which the mortgagor has agreed

to pay the tax levied upon the mortgage interest, should not be deducted from the full value of the capital stock.

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

W. W. Slabaugh and *Henry J. Beall,* for appellant.

James B. Kelkenny and *Milton R. Abrahams, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, THOMPSON and HOWELL, JJ., and REDICK, District Judge.

REDICK, District Judge.

This is an appeal from a judgment of the district court reversing a decision of the board of equalization of Douglas county fixing the value of stock of a corporation for purposes of taxation. The J. B. Kelkenny Realty Company, a corporation, returned its schedule for 1927 personal tax assessment, listing its paid-up capital stock, surplus and undivided profits at $150,000, divided as follows:

Real estate in Douglas county	$69,245.00
Real estate mortgages in Douglas county	75,100.00
Building and loan association stock	5,000.00
Cash on hand	655.00
Total	$150,000.00

The corporation deducted from such total the assessed value of the real estate, $69,245, and the value of the real estate mortgages, $75,100, claiming that the remainder of the total sum was all that was subject to assessment. The board of equalization restored the item of mortgages, $75,100, but on appeal the district court reversed the board and held that the mortgage item was deductible; to review this ruling of the district court the county appeals.

It is conceded that the corporation is not a banking association, loan and trust or investment company; it is further admitted that all of the mortgages of the company contain a clause that the mortgagor should pay all taxes levied upon the mortgage. The proper solution of the

question presented depends upon the construction of section 1, ch. 169, Laws 1927, which went into effect April 1 of that year. The act provided a scheme for the assessment of intangible property and divided the same into two classes, A and B, the shares of stock of domestic corporations being placed in class B, and provided for assessment as follows:

"All intangible property in class B shall be taxed where said intangible property is assessed at the rate of five mills on the dollar of the actual value thereof, the same to be assessed and collected where the owner resides. Provided, that the value of the shares of stock of corporations organized under the laws of this state shall be determined for the purpose of this section by deducting from the actual value of the paid-up capital stock, surplus and undivided profits of such corporation available for stock dividends, the assessed value of the property of the corporation, both intangible and tangible, listed and taxed in this state and the actual value of the property of the corporation outside of this state."

By section 5951, Comp. St. 1922, it is provided:

"For the purpose of assessment and taxation, a mortgage on real estate in this state is hereby declared to be an interest therein. The amount and value of any mortgage upon real estate in this state when taxable to the mortgagee shall be assessed and taxed to the mortgagee or his assigns, and the taxes levied thereon shall be a lien on the mortgage interest. The value of the real estate in excess of any mortgages taxable to and taxed to the mortgagee shall be assessed and taxed to the mortgagor or owner."

And by section 5952, Comp. St. 1922, it is provided:

"When any mortgage contains a condition that the mortgagor shall pay the tax levied upon the mortgage or debt secured thereby, the mortgage shall not be entered for separate assessment and taxation, but both interests shall be assessed and taxed to the mortgagor or owner of the real estate."

Prior to 1915 the two provisions last quoted were construed by this court, and, in view of the fact that a mortgage upon real estate was declared by the statute to be an interest therein, it was held, for the purpose of arriving at the value of the shares of stock of a corporation, that the amount of the mortgages held should be deducted from the total value of the capital stock, regardless of the fact whether the mortgagee or mortgagor paid the taxes upon the mortgage. *First Trust Co. v. Lancaster County*, 93 Neb. 792; *State Bank v. Seward County*, 95 Neb. 665. The statute as it existed at the time of these decisions, and shortly thereafter, was amended in 1915 (Laws 1915, ch. 108), since which time it has been uniformly held by this court that mortgages containing a clause requiring the mortgagor to pay taxes assessed upon the mortgage may not be deducted in determining the value for taxation of the shares of stock of the corporation. *Nemaha County Bank v. County Board*, 103 Neb. 53; *Creighton Nat. Bank v. Knox County*, 108 Neb. 610.

In the *Nemaha County Bank* case, *supra*, it was said by Cornish, Justice: "When, as in the instant case, no attempt is made to tax the bank or shareholders on the securities, no deduction should be made, and the action of the taxing authorities in Nemaha county should be upheld.

"If it is contended that, equitably considered, the owners of the shares are the owners and proprietors of the bank, and that not to make the deduction amounts to double taxation, since the valuation of the shares includes the mortgages assessed to the mortgagor, it must be answered that, if this is double taxation, then such taxation is common. The two interests represent separate property rights and therefore each is taxable. This was always the rule until the mortgage tax law was enacted. It is the rule today, if the owner of a farm has given only a note for the remainder due upon it. A chattel mortgage is taxed against the holder and the mortgaged chattel against the owner. The farmer's implement is taxed against him and what he owes on it is taxed against the implement dealer.

The owner of a bunch of fat hogs must pay taxes on their full value, even though he could show that the corn which fattened them was purchased from a neighbor, who had paid his taxes upon the corn. Objectionable double taxation occurs when the property assessed is overvalued."

Recurring now to the act of 1927, we are to inquire if there is anything in its provisions requiring the adoption of a different rule than that laid down in the two cases last cited. This act was not amendatory; it is complete in itself, and repealed all prior acts on the same subject. What is meant by the words "the assessed value of the property of the corporation, both intangible and tangible, listed and taxed in this state?" It is the contention of appellee that, when the land and the mortgage are taxed together, the mortgage interest has been listed and taxed in this state, and therefore comes within the terms of the statute and should be deducted. It seems to us, however, that this construction leaves out of view the purpose of the legislature, apparent upon the face of the act and deducible from its language, viz., to protect the corporation and shareholders, in the assessment of the capital stock, from being taxed twice upon its property; and where it appears that such double taxation will result unless deduction is made, it will be allowed. Such was the situation in *City Trust Co. v. Douglas County,* 101 Neb. 792, where the mortgagee was required to pay the tax upon the mortgage interest, and the deduction was allowed. In that case the mortgagors had not agreed to pay the taxes upon the mortgages, and the trust company was compelled to pay them, and the deduction was held proper. In the opinion it was said by Letton, J., page 795:

"Where the mortgagor agrees to pay the tax a different condition may arise if the individual mortgage owner is assessed at his place of residence on the value of the mortgage he holds. In such a case, if the corporation is under no duty to return its mortgages for taxation, there would seem to be a discrimination in its favor, though this is not before us and we do not so decide."

In view of the purpose of the act as above stated, we think that the only property which can be deducted in arriving at the value of the shares of stock is that property upon which the corporation has paid or is required to pay the tax. The language is "assessed value of the property of the corporation, * * * listed and taxed in this state." This unquestionably means listed and taxed to the corporation. We cannot think, and the language of the statute does not require us to hold, that it was the intention of the legislature to allow a deduction of the value of property upon which the corporation was not otherwise taxed. Any other construction would, in many cases, result in the exemption from taxation of many holders of valuable stock in domestic corporations, upon which they receive regular dividends; for example, the holders of stock in a corporation whose entire assets consisted of real estate mortgages containing a clause that the mortgagor should pay the taxes upon the mortgage interest would escape taxation upon a very valuable species of property. This would be contrary to the provision of section 5820, Comp. St. 1922, that—"All property in this state, not expressly exempt therefrom, shall be subject to taxation." The construction we have adopted does not subject the corporation or the shareholder to double taxation—the corporation, because it has paid no taxes on the mortgage; and the shareholder, because he is only taxed upon the actual value of the shares of stock. The mortgagor probably received his compensation in a reduced rate of interest as a consequence of his agreement to pay the taxes on the mortgage, but this question is not before us. We are constrained to hold that the learned district court erred in holding that the mortgages in the amount of $75,100 should be deducted from the full value of the shares. The judgment of the district court is reversed and cause remanded, with directions to confirm the assessment as made by the board of equalization.

REVERSED.

JOHN S. MARVEL, APPELLANT, V. CHARLES P. CRAFT ET AL., APPELLEES.

FILED APRIL 24, 1928. No. 26451.

1. Appeal: DISMISSAL. As a general rule an appellant may dismiss his appeal without appellee's consent, but one appellant cannot dismiss the appeal of another appellant or of a cross-appellant.
2. ———: JURISDICTION. Where the statutory notice of appeal is properly given in the district court as disclosed by the final judgment, the supreme court acquires jurisdiction by the filing of a duly certified transcript, and other or further notice of the appeal is unnecessary.
3. ———: DISMISSAL. Whether an appeal or a cross-appeal should be dismissed for failure to file a præcipe within the time limited by the rules is a judicial question, and for good and sufficient reasons permission to file a præcipe at a later date may be granted, where the appellate court has jurisdiction of the appeal of both appellant and cross-appellant.

APPEAL from the district for Morrill county: EDWARD F. CARTER, JUDGE. *Motion sustained in part.*

Charles E. Bruckman, for appellant.

Hainer, Flansburg & Lee, Raymond & Fitzgerald, Charles P. Craft and *Butler & James, contra.*

Heard before GOSS, C. J., ROSE, DEAN, THOMPSON, EBERLY and HOWELL, JJ., REDICK and WHEELER, District Judges.

ROSE, J.

The action was commenced in the district court for Morrill county to foreclose a mortgage on a quarter section of land. John S. Marvel was plaintiff. The defendants named in his petition were Charles P. Craft, Anna C. Craft, Royal Highlanders, Eugene J. Hainer, Bank of Commerce of Hastings and its receiver, Van E. Peterson. The Crafts were mortgagors and made default. The Royal Highlanders pleaded another mortgage not yet due. Hainer had acquired from the Crafts their equity of redemption and his answer contained a cross-petition and counterclaim against

the bank and the plaintiff for $25,000. The receiver claimed as an asset of the bank the mortgage that plaintiff sought to foreclose. Upon a trial of the issues raised by the pleadings the district court rendered in favor of the bank and the receiver a decree foreclosing the mortgage pleaded by plaintiff. Hainer's counterclaim was disallowed. For the purposes of review John S. Marvel, plaintiff, filed in the supreme court February 16, 1928, a transcript of the proceedings in the district court, and gave defendants notice of his appeal.

March 22, 1928, plaintiff filed a dismissal of his appeal, having settled with the receiver the controversy between them. Plaintiff's appeal was accordingly dismissed March 22, 1928, but a mandate directing the district court to carry its decree into effect was not issued.

The questions now presented for determination arise on a motion by Hainer for an order withholding the mandate, denominating him as cross-appellant and authorizing notice of his cross-appeal. The motion was filed March 30, 1928, and the sustaining thereof is vigorously resisted by the receiver on the grounds that he settled his controversy with plaintiff, thus changing his status, relying on the dismissal, and that the supreme court is without jurisdiction to sustain the motion. He directs attention to the record, which shows that plaintiff's motion for a new trial was overruled in the court below November 21, 1927; that the transcript for the appeal was filed in the supreme court February 16, 1928; that the time for the filing of a præcipe for a cross-appeal expired under the rules of the supreme court within four months after the overruling of plaintiff's motion for a new trial on November 21, 1927; that Hainer has not filed the necessary præcipe denominating himself as cross-appellant and the other parties as cross-appellees. In this connection it is argued by the receiver that the filing of such a præcipe within the four months after the date of the judgment below is jurisdictional and that consequently the supreme court is without power to extend the time or to sustain the motion of Hainer who

had been designated by plaintiff as appellee only; that an appellant had a right to dismiss his appeal without the consent of any appellee; that the receiver had a right to rely on the dismissal as the end of the litigation and to settle the controversy between himself and plaintiff on that basis and did so in good faith.

The argument does not seem to be conclusive. As a general rule an appellant may dismiss his appeal without the consent of the appellee. One appellant, however, cannot dismiss the appeal of another appellant or cross-appellant. Was Hainer an appellant or a cross-appellant when plaintiff dismissed his appeal? This is the decisive question. The supreme court acquired jurisdiction of the cause upon the filing of the transcript. Comp. St. 1922, sec. 9138; *Sheldon v. Bills*, 102 Neb. 93. The failure to give other or further notice of appeal did not affect the jurisdiction of the appellate court. *Shold v. Van Treeck*, 82 Neb. 99; *Anderson v. Griswold*, 87 Neb. 578. A statute provides:

"It shall be sufficient notice of such appeal to file in the office of the clerk of the district court in which such judgment, decree or final order was rendered, within ninety days after the rendition thereof, a notice of intention to prosecute such appeal signed by the appellant or appellants or his or their attorney of record; but if such notice is not given, the supreme court may provide by rule for notice after the appeal is lodged in that court." Comp. St. 1922, sec. 9140.

The decree from which the appeal was taken contains the following notice to all appellees:

"Plaintiff and defendant Eugene J. Hainer give notice of appeal in open court."

All parties to the decree upon the filing of the transcript were thus notified of the appeal of both plaintiff and Hainer on an equal footing. The transcript was prepared on behalf of both, each by mutual agreement to pay one-half the clerk's fees for making it. One complete transcript is all that is needed. Plaintiff filed the transcript with a præcipe designating himself alone as appellant and Hainer

and other defendants as appellees. Plaintiff made use of the appeal and of the joint transcript to settle his controversy with the receiver. The receiver joined in the settlement while charged by the decree and by the filing of the transcript with notice that Hainer was an appellant. The supreme court had jurisdiction of his appeal and all other parties to the action had notice of it. That appeal has not been dismissed. No one made a motion to dismiss it for failure to comply with the rules of the appellate court, which provide:

"The party or parties appealing shall file with the transcript a præcipe, which shall state the court from which the appeal is taken, the date of the judgment appealed from, the names of all parties and their relations to the case as they appeared in the court below. The præcipe shall also specify the party or parties appealing and designate all others made parties to the appeal as appellees.

"Coparties of appellants may join in the appeal or take cross-appeal, or any appellee may take cross-appeal, by filing with the clerk of this court, within four months after the date of the judgment appealed from or the overruling of the motion for a new trial, a præcipe which shall designate the name of such party as cross-appellant, and the names of all adverse parties as cross-appellees."

The failure to comply with the rules requiring a præcipe within the time limited did not defeat the jurisdiction acquired or the notice given under the statute. Whether an appeal should be dismissed for noncompliance with the rules or for irregularities in the præcipe is a question for the court. *Sheldon v. Bills*, 102 Neb. 93. On the very day that the "four months after the date of the judgment" expired, plaintiff and the receiver, adverse litigants, united in a settlement that resulted in the dismissal. Had it not been for the præcipe in which plaintiff was designated as sole appellant, the clerk of the supreme court would have followed the decree and docketed the cause with both plaintiff and Hainer as appellants. The appeal of Hainer was not disturbed by plaintiff's dismissal and is still pend-

ing. The filing of a præcipe not being jurisdictional, Hainer will, under the circumstances, be permitted to denominate himself as cross-appellant. To that extent his motion is sustained, but further notice is unnecessary, since proper notice of his appeal was given in the district court as shown by the decree and by the filing of the transcript. Until further order the mandate will be withheld.

MOTION SUSTAINED IN PART.

FRANK SHEPHERDSON ET AL., APPELLEES, V. CLARENCE FAGIN ET AL., APPELLANTS.

FILED APRIL 24, 1928. NO. 25635.

1. **Judgment: RES JUDICATA.** Where a proceeding is instituted under article IV, ch. 17 (secs. 1744-1812) Comp. St. 1922, seeking the establishment of a drainage district and objections are interposed to the inclusion of certain lands therein, and a judgment is entered sustaining such objections, but which is limited in its scope as follows: "This without prejudice, however, to the subsequent inclusion of the lands so excluded * * * that may be shown proper under the provisions of section 1762," of such statutes, *held*, that such judgment is not a final adjudication of the facts involved so as to bar a subsequent inquiry.
2. **Evidence** examined and found that the lands involved herein are within the provisions of article IV, ch. 17, Comp. St. 1922.

APPEAL from the district court for Franklin county: LOUIS H. BLACKLEDGE, JUDGE. *Affirmed.*

C. C. Flansburg and *J. G. Thompson*, for appellants.

George J. Marshall, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and HOWELL, JJ., and LANDIS, District Judge.

THOMPSON, J.

Appellants seek to have reversed an order of the district court for Franklin county which extended the boundaries of the Republican Valley drainage district so as to include

therein certain of their lands. The record discloses that some years prior to the entering of the order herein complained of, certain owners of lands in such county, under the provisions of article IV, ch. 17, Comp. St. 1922, sought to have established the above-named drainage district, and to have included therein the lands of appellants. To such inclusion appellants herein filed objections. Issues were duly joined and evidence taken, and it was considered by the court that the prayer of the applicants be granted, and the drainage district established, but that the lands of objectors, appellants herein, be not included within the boundaries of such district, they not being overflowed, swamp or submerged lands, and "this without prejudice, however, to the subsequent inclusion of the lands so excluded or any part thereof that may be shown proper under the provisions of section 1762, Comp. St. 1922" (which section is a part of the above article). After the entry of the judgment, and within the statutory period, an election was held and a board of five supervisors selected, which board, as provided in such article, caused a topographical survey to be made of the district by a competent engineer, whose report found, among other material things, that appellants' lands should be included in the district, and in justice should be required to bear their proportion of the expense and cost of such improvement. In furtherance of this report and the law applicable, the district, through its proper officers, the appellees, filed a supplemental petition in the original action, again seeking the inclusion of appellants' lands in such drainage district. Upon such petition, and after objections were interposed thereto, issues were duly joined, evidence submitted, and judgment entered as hereinbefore indicated.

As we view this record, it presents but two questions for our consideration: (a) Was the original decree finding that the lands here in question were not wet, submerged, swampy or overflowed lands a final adjudication of such facts, and thus constituted a bar to further inquiry? (b) If not, under the evidence, are the lands involved herein

wet, submerged and swamp lands or land within a district subject to overflow?

In our consideration of challenge (a), it might prove helpful to quote, in connection with that part of the initial judgment hereinbefore set forth, the part of the judgment herein complained of applicable thereto, which is as follows: "That by the findings and decree of this court rendered July 14, 1924, the matter of the inclusion of the lands of these defendants or objectors was left open and undetermined so that further proceedings might be had to that end if justified by further and more detailed information as to the involved flow of waters, elevations, benefits and feasible plan of drainage. That the court considers said findings and decree of July 14, 1924, in the determination of the present proceeding and this matter as a further proceeding in the same case."

It is sufficient to say that article IV, ch. 17, Comp. St. 1922, entitled, "Drainage Districts Organized by Proceedings in District Court," is controlling as to all matters involved in this litigation; that, applying the provisions of these statutes to the initial judgment, it is considered by us that such judgment was not a final adjudication of the facts involved so as to bar a subsequent inquiry. Hence, we conclude that the initial proceeding and judgment, as well as that part of the judgment here in question construing the same, are each clearly in accord with the above enactment.

This brings us to challenge (b): As we view this article, it was intentionally made comprehensive in its terms so that its provisions might serve a beneficial purpose in all parts of our state, a state unusually varied as to its contour of surface, its climatic conditions, and its quality of soil; thus, the proviso therein, "No land shall be included in such drainage district or subject to taxation for the drainage except wet, submerged and swamp lands or land within a district subject to overflow." Comp. St. 1922, sec. 1762. As we determine from the record, the lands in question are within the provisions of

such article, that is, appellants' lands are within a district subject to overflow from accumulated waters arising from falling rains and melting snows, and from the overflow of what is known in the record as "Wortham creek," and incidentally from the Republican river. We further conclude that such lands were legally and fairly included in the district, were benefited by such inclusion, and that such benefits were properly estimated and justly apportioned.

The judgment of the trial court is right, and is, in all things,

AFFIRMED.

FIRST NATIONAL BANK OF LINCOLN, APPELLEE AND CROSS-APPELLANT, V. LINCOLN GRAIN COMPANY, DEFENDANT: GLOBE INDEMNITY COMPANY, APPELLANT AND CROSS-APPELLEE.

FILED APRIL 24, 1928. No. 25199.

1. Warehousemen: PURPOSE OF STATUTE. Sections 7224-7231, Comp. St. 1922, originally adopted as "An act to provide a public warehouse system for handling grain and to regulate the procedure thereunder," construed as an entirety and giving due effect to each part thereof, discloses an evident policy to promote and enforce primary conditions for successful commerce. It seeks to provide for, encourage and, so far as possible, compel, through the creation of a "public warehouse system for handling grain," the course of marketing and storing by and through agencies whose responsibilities were assured by securities they were required to provide.
2. ———: STATUTE: CONSTRUCTION. This statute is remedial in its nature and should be liberally construed.
3. ———. "Any grain dealer * * * in this state who receives grain for storage or shipment, or both," may voluntarily accept the terms of this public warehouse act by substantial compliance therewith, undertake its burdens and secure its benefits and thereby become a "public warehouseman," possessing all of the powers and subject to all the liabilities therein provided and contemplated. The public thereafter deal with him in that capacity.

4. ———. It follows that the grain company in this case having accepted and complied with the requirements of this act must be deemed a "public warehouseman" authorized to issue "technical warehouse receipts," and responsible as such for transactions in which it might engage which, in contemplation of this statute, constitute "warehousing transactions."
5. ———: WAREHOUSE RECEIPTS. Under this act the right of a "warehouseman" who has complied with the requirements thereof to issue warehouse receipts on his own grain in storage in his own "public warehouse," and to secure his own indebtedness, is recognized and approved.
6. ———: ———: DELIVERY OF GRAIN. Evidence examined, and *held* to sustain the finding of the district court as to the completed delivery of certain wheat for which certain warehouse receipts in controversy were issued.
7. ———: ———: RIGHTS OF HOLDER. The terms of the controlling statute heretofore referred to impose the clear duty of the warehouseman, licensed thereunder, to deliver grain, covered by warehouse receipts lawfully issued by him, upon presentation of such instruments by the hands of a party then entitled to the possession of the grain therein described. The terms of the warehouse bond, in effect, guarantee the performance of this obligation by the warehouseman and afford indemnity for damages occasioned by his default. Whether the original transaction involved in the original issuance of the warehouse receipts in question be considered as a pledge or as evidence of unqualified ownership, the right of possession of the grain covered thereby, under the facts in this case, would be identical and vested in the lawful holder of the receipts.

APPEAL from the district court for Lancaster county: MASON WHEELER, JUDGE. *Affirmed in part, and reversed in part.*

Allen & Requartte and *Edward F. Leary*, for appellant.

Hall, Cline & Williams, contra.

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

EBERLY, J.

In the district court for Lancaster county, Nebraska, the First National Bank of Lincoln, Nebraska, plaintiff,

sued the Lincoln Grain Company, as principal (hereinafter referred to as grain company), and the Globe Indemnity Company, as surety (hereinafter referred to as surety company), defendant, on two bonds, each in the sum of $25,000, and each purporting to have been given under the provisions of article II, ch. 69, Comp. St. 1922, for the conversion of certain grain represented by warehouse receipts issued by the grain company, as a public warehouseman, to plaintiff as collateral security for money lent by it to the grain company. A jury was waived and trial to the court had which resulted in a finding and judgment in favor of the plaintiff in the sum of $50,000, and $1,500 taxed as attorney's fees. From this judgment the surety company appeals, and from the amount of attorney's fees taxed the plaintiff has filed a cross-appeal.

The grain company, as a grain dealer, was a copartnership engaged in buying and shipping grain at Lincoln, Nebraska. For this purpose they operated a "grain elevator" or "grain warehouse" located "on or near the right of way of the Chicago, Burlington & Quincy Railroad Company, and which was adjacent to and connected with the switch track of that railroad company. In December, 1923, while still continuously engaged in the business mentioned, the grain company made application in due form, accompanied by a proper bond in the sum of $25,000, for license to carry on and conduct the business of public grain warehouseman in conformity with the provisions of Senate File No. 1, enacted by the legislature of 1915, as amended by Senate File No. 145, enacted by the legislature of 1917. The application was approved by the Nebraska state railway commission and license thereafter duly issued which was kept posted by the grain company in its place of business. Thereafter an additional bond in the sum of $25,000 was obtained by the grain company in order that it might store additional grain. The conditions of these bonds were identical and in the following form:

"Now, therefore, if the said Lincoln Grain Company shall

fully and faithfully discharge and perform all their duties as such public grain warehouseman, and shall fully and faithfully comply with all the laws of the state of Nebraska, and the rules of the Nebraska state railway commission in relation thereto, and shall promptly pay to the storers of stored grain, their successors, personal representatives, or assigns, for all loss and damage of whatsoever nature (except loss due to changes in market value) to grain held in storage by them, in said grain warehouse, including all damage resulting from nondelivery of grain, as provided by law, then this obligation to be void, otherwise to be and remain in full force and effect."

During the period covered by the license and while these bonds, by their terms, were in full force, nine distinct loans were made by the plaintiff to the defendant. Each loan was evidenced by a note executed by the grain company and accompanied by a warehouse receipt as collateral security thereto. Each of these notes contained a clause pledging the warehouse receipt, described therein, "as security for all indebtedness of the grain company to the plaintiff."

The warehouse receipts, themselves, were in form as prescribed by the Nebraska state railway commission. They were executed, issued and delivered by the grain company to plaintiff. Each of these instruments recited in substance, "State of Nebraska, Grain Warehouse Receipt, Lincoln Grain Company;" that the maker on a day certain "received of First National Bank of Lincoln, Nebraska (date and amount stated) bushels, grade (kind of grain), to be stored and insured under the following conditions: (Conditions here set out and specified)." It is further stated: "Upon the return of this receipt and payment or tender of stated lawful charges accrued up to the time of said return of this receipt, the above amount, kind and grade of grain will be delivered within the time required by law to the person above named or his order."

It affirmatively appears in the record that the plaintiff accepted the warehouse receipts in suit relying upon the

bonds given by the grain company and the surety company.

The questions of fact and of law presented by the surety company as basis of its appeal may be summarized as follows: That the corn and wheat mentioned in the various receipts were all the property, in so far as they ever existed, of the grain company; as to certain receipts covering wheat, the wheat described therein was not in the company's elevator or in its possession at date of issuance; that the grain company was not technically a warehouseman; that the grain company was wholly unauthorized to issue receipts covering its own grain in its own elevator as security for its own debt; that the pledge of warehouse receipts issued on its own grain by the grain company as security for its own debt is, in legal effect, a chattel mortgage and is not entitled to protection of the bond.

The controlling legislation in this case is article II, ch. 69, Comp. St. 1922. It was first enacted in 1915 and appears as chapter 243, Laws 1915, under the title: "An act to provide a public warehouse system for handling grain and to regulate the procedure thereunder." It was amended in 1917 and appears as chapter 155, Laws 1917. It is a remedial statute and should receive a liberal and not a restrictive construction. *McIntosh v. Johnson*, 51 Neb. 33. Its validity not having been challenged in any manner in the procedure before us, it is presumed in this intrastate transaction to be valid and subject to application of the rule that one part of a statute must be construed with another that the whole may, if possible, stand. *Ut res magis valeat quam pereat.* Indeed, it may be said that this rule of construction extends, for this limited purpose only, to the inclusion of parts of a statute that are in themselves unconstitutional or that have been repealed. As construed, in entirety, giving due effect to each part, its evident policy is to promote and enforce primary conditions for successful commerce. It sought to provide for, encourage and, so far as possible, compel, through the creation of a "public warehouse system," the course of marketing and storing by and through agencies whose responsibilities were assured by

securities they were required to provide. It is a police regulation for the protection of the citizens of an agricultural state in a matter of vital concern.

True, this statute, by its terms, is limited in its application to "public warehouseman" and "warehousing" as therein defined. These definitions are not common-law definitions but the result of statutory provisions. Under the express terms of the enactment the character and responsibilities of a "public warehouseman" are to be determined in two ways: (1) Its voluntary assumption as provided therein; (2) by the nature of the business transacted.

Thus, section 7224, Comp. St. 1922, provides: "Any grain dealer * * * in this state who receives grain for storage or shipment, or both, may avail himself of the provisions of this act by filing notice of his acceptance thereof with the state railway commission and become thereby a public warehouseman." The language, as to qualities required to undertake this public employment, is broad and inclusive. It obviously includes, as a party qualified to be licensed thereunder with reference to transactions therein contemplated, a grain dealer who never received into, shipped from, handled, deposited, or in any way stored in his warehouse any grain in which any other person or persons had any property right or interest; nor issued, nor offered to issue, any warehouse receipts or storage tickets for grain received there; nor carried on, nor offered, nor attempted to carry on in his warehouse the business of handling, storing, or shipping grain of or for any other person or persons whose warehouse was used, occupied, and operated solely for the purpose of purchasing, handling, and shipping his own grain in his private capacity as a grain merchant. *Cargill Co. v. Minnesota*, 180 U. S. 452.

In the act now under consideration, the state in a proper attempt to promote public good and to provide a safe and dependable public warehouse system has adopted a plan whereby the proprietor of a business of the kind and char-

acter carried on as just described may voluntarily accept its terms, undertake its burdens, and secure its benefits, and become, in fact, what it assumes to create and regulate. When this is done, he is thereafter, in truth, a "public warehouseman" as defined by the statute, possessing all the powers and subject to all liabilities therein provided, and the public thereafter deal with him in that capacity.

It therefore follows that the grain company must be deemed a "warehouseman," authorized to issue "technical warehouse receipts," and responsible for such transactions in which it might engage which, in contemplation of this statute, constitute "warehousing transactions," especially when the same are intrastate in character.

At common law a warehouseman having property of his own in store may make a pledge by executing and delivering an ordinary warehouse receipt which will be valid as between the parties and also against subsequent creditors. 31 Cyc. 806.

The obvious purpose of our controlling statute is not restrictive. Its policy necessitates extension of powers and responsibilities of warehousemen whose business it assumes to regulate. The statutory scheme embodied in it necessarily involves an increased protection to the public and to those who deal in grain. It must be deemed to have been passed by legislators who had in view the general, established course of dealing in grain, the customs of the trade, and the established devices employed in this class of commerce at the date of its enactment.

Therefore, in the light of the common-law principle quoted, and in view of the terms of the legislation before us, no difficulty is found in reaching the conclusion that under this act the right of a warehouseman to issue warehouse receipts on his own grain in storage in his own public warehouse, to secure his own indebtedness, is recognized. This, indeed, is not without authority in jurisdictions other than our own. *Merchants & Manufacturers Bank of Detroit v. Hibbard,* 48 Mich. 118; *National Exchange Bank of Hartford v. Wilder,* 34 Minn. 149; *State v. Robb-Lawrence*

Co., 17 N. Dak. 257; *Cowley County Nat. Bank v. Rawlins-Dobbs Elevator Co.*, 96 Kan. 461; *Alabama State Bank v. Barnes*, 82 Ala. 607; *Broadwell v. Howard*, 77 Ill. 305; *Herrick v. Barnes*, 87 Minn. 475; *Eggers v. National Bank of Commerce*, 40 Minn. 182.

The next contention is that, as to certain warehouse receipts covering wheat, the grain was neither owned by, nor actually stored in the warehouse of, the grain company at the time of issuance. This question of fact the trial court determined against the surety company in a law action. The evidence before it was conflicting, but seems ample to support its finding on this point; at least, there is competent evidence in the record that the grain was actually received, inspected and accepted by the grain company on track in the near vicinity of the elevator with intent to accept and receive title thereto. The switchtrack on which the cars containing this grain was then and there located, it may be said, was not only adjacent to but, so far as use was concerned, was practically an appurtenance of the elevator itself.

It may be conceded in this connection that it is necessary to the validity of warehouse receipts that the warehouseman issuing the same have possession of the goods covered by them. But to say a delivery to a warehouseman to come within the protection of his bond must be in or within the four walls of a certain building would ignore the established course of the business of the trade as well as the terms of the controlling statute. The rule as to delivery to a warehouseman seems to be that, if the property is delivered in the vicinity of its warehouse in such a manner that it may be said to have passed from the control of the owner to the possession and control of the warehouseman, such delivery is sufficient for all purposes. The terms of our controlling statute are in harmony with that idea. It speaks of the grain as "received *at* such warehouse" (not *in* such warehouse) and the duty of issuing warehouse receipts is enjoined upon the warehouseman "upon delivery of grain thereto" (not therein).

In *Bursow v. Doerr*, 96 Neb. 219, this court had occasion to discuss and construe the word "at" in connection with the statutory requirement as to service of summons "by leaving a copy *at* defendant's usual place of residence." It was contended in that case, as it is in this case, that the word "at" as used in the statute means "in" in an exclusive sense, and that the officer making service was therefore required to leave the copy of the summons in some part of the house, just as it is contended here that the grain which a warehouseman receives as such must be received in the warehouse. This contention, however, was not sustained. Rose, J., in delivering the opinion of the court, in reply to this contention, said in part:

"In the general use of the word there is a diversity of meaning, owing to the context. Had the lawmakers intended to limit the meaning to 'in,' they would have used that word. 'At,' in the language quoted, has a wider signification, referring evidently to a point in space. In this sense, some of the definitions given by the Standard Dictionary are: 'In proximity to; in the vicinity or region of; close to; by.; near.' "

It was accordingly held that the word "at," as used in the statute then construed, means by, or near, and the case was determined on this basis. The same definition is properly applicable to the language of the public warehouse system statute, "received at any grain elevator," etc., as well as the provisions contained therein requiring every public warehouseman on the day of delivery of any grain "thereto" for storage to issue a lawful receipt to the owner, etc. "Thereto," as thus used, is not synonymous with "therein." "Thereto" is, as Webster defines, "to that or this." "Therein" is, as Webster defines, "in or into that or this place, time or thing."

It follows, in view of the terms of the statute and the evidence of the record, that the action of the trial court in determining that the grain conveyed by the questioned receipts was in possession of the warehouseman at the time

of their issuance is in harmony with and supported by the evidence.

With reference to the last contention of the surety company, in effect, that the transaction between the grain company and plaintiff amounted, in legal effect, to a chattel mortgage, it may be said that the plain terms of the controlling statute, heretofore quoted, impose the clear duty on the warehouseman, licensed thereunder, to deliver grain, covered by warehouse receipts issued by him, upon presentation of such receipts by the hands of a party then entitled to possession of the grain therein described. Whether the transfer of the receipts be considered as a pledge for security or evidence of unqualified ownership, the right of possession would be equally vested in the lawful holder of the receipts.

The bonds executed by the surety company in this case, in terms, expressly reaffirm these statutory obligations and expressly provide and engage that the licensee in whose behalf the bonds are given shall promptly pay to the storers of the grain, their successors, personal representatives, or assigns, for all loss or damage of whatsoever nature to all grains held in storage, including damage resulting from nondelivery of said grain.

Under the facts, as disclosed by the record herein, it may be said that all statutory regulations pertaining to procedure under this act, as expressed therein, appear to have been fully complied with by all parties to this litigation up until the default of the grain company occurred, occasioned by its failure to deliver grain as required by the terms of the warehouse receipts in suit; that the plaintiff made its loans to the grain company in good faith, relying upon warehouse receipts issued and delivered to it by the grain company, and in reliance upon the bonds executed in the grain company's behalf by the surety company, defendant herein; that the surety company received due and valuable consideration for the execution of each of the undertakings set forth in the petition herein and voluntarily assumed the engagements and obligations contemplated by the stat-

ute, and the terms of its bonds issued thereunder. The due enforcement of these obligations so assumed constitutes the subject of an action here presented. The evidence thus sustains the judgment of the district court.

We have not overlooked the other questions discussed in the briefs of appellant, but deem the above and foregoing controlling as to all questions properly presented for consideration by the record in this court.

The cross-appeal of the plaintiff presents the single question of the adequacy of the attorney's fee of $1,500 as taxed by the trial court.

Section 7811, Comp. St. 1922, provides: "In all cases where the beneficiary, or other person entitled thereto, brings an action at law upon any policy of life, accident, liability, sickness, guaranty, fidelity or other insurance of a similar nature, * * * the court, upon rendering judgment against such company, person, or association, shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his recovery, to be taxed as part of the costs."

It is solely a question of fact. The plaintiff's evidence as to the actual services performed by its attorneys in carrying on this litigation to the conclusion of the trial in the district court, including the nature, extent and value of the same, sustains without question that "a reasonable sum as an attorney's fee" for the services rendered was not less than $7,500. The defendant submitted no evidence whatever on this subject in the court below. We find nothing in the record, as an entirety, that in any manner discredits the competency, qualifications or character of any of plaintiff's witnesses on this point or tends to controvert the conclusion they expressed in their testimony.

It may be conceded that a substantial portion of the services which were the subject of this testimony was actually performed in the presence of the trial judge and subject, therefore, to his personal observation; and that in the determination of this question there was necessarily involved the exercise of judicial discretion.

Still, in view of uncontroverted evidence in the record, we find that the district court erred in the exercise of this discretion; that the sum of $5,000 is a reasonable attorney's fee which should have been so taxed in the district court as part of the costs awarded plaintiff.

It follows that the judgment in favor of plaintiff for the amount of its recovery is affirmed, but that the order of the district court awarding attorney's fee and taxing the same is reversed, with directions to enter an order therefor in conformity with this opinion.

AFFIRMED IN PART, AND REVERSED IN PART.

THOMAS FRANCIS LYNCH, APPELLEE, V. JAMES ROHAN ET AL., APPELLEES: OAK CREEK VALLEY BANK, APPELLANT.

FILED APRIL 24, 1928. No. 25654.

Husband and Wife: DECREE FOR MAINTENANCE: LIEN. In an action for divorce *a mensa et thoro*, under the statutes of this state, a judgment in favor of the wife for an allowance of $50 a month for her maintenance for an indefinite period is a lien upon the real estate of the husband for all amounts due and to become due under such decree, and will have priority over the lien of a judgment subsequently rendered against the husband.

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

Perry & Van Pelt, for appellant.

Fawcett, Mockett & Finkelstein, Roy B. Ford, M. L. Easterday, R. J. Greene and *G. P. Putnam, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

REDICK, District Judge.

This is an action to foreclose a mortgage in which were impleaded, as defendants, the holders of two judg-

ments against the mortgagor. The first was in favor of Mary Rohan, dated November 28, 1922, having been recovered by her in an action against her husband for separate maintenance, whereby she was given alimony or allowance for her maintenance of $50 a month, payable on the 1st day of each month beginning with December 1, 1922, upon which, at the time of the trial, there was due and unpaid $780.30 up to July 1, 1926. The other judgment was in favor of the Oak Creek Valley Bank, recovered April 7, 1926, for $8,507.46. Decree was entered in the district court foreclosing the mortgage and finding the decree of Mary Rohan a second lien for the amount due thereon and $50 a month thereafter, and the judgment of the bank a third lien, and, upon failure of defendants to pay said liens, ordered the mortgaged property sold, and, after paying costs and amount due upon the mortgage, ordered any balance to be brought into court for the benefit of the judgment creditors in order of priority as provided by the decree. The Oak Creek Valley Bank appeals.

The contest is between Mary Rohan and the bank, the former claiming that her judgment is a valid lien, not only for the amount due thereon at the time of the recovery of judgment by the bank, but also for all instalments to become due thereafter. The bank claims that its judgment should have priority over all instalments of the Rohan judgment not due at the date of its judgment.

The only question presented for our consideration is, whether a decree for maintenance for $50 a month, payable in monthly instalments for an indefinite period, is a lien upon the real estate of the defendant as to instalments not due. The question is new in this state. Appellant relies upon *Wharton v. Jackson*, 107 Neb. 288, as authority for a negative answer, citing the following language of the opinion:

"The reason why alimony judgments for payments to be continued indefinitely do not become liens for unpaid pay-

ments rests in the fact that the owner of property or those dealing with it cannot ascertain how much to pay to discharge the property from such a lien."

The case presented there, however, was an allowance for support of children until their arrival at majority, the years of their birth being stated in the decree, and the court held that the amount was sufficiently definite to support a lien under the general statutes declaring judgment liens. The particular question here under consideration was not involved, and, moreover, the clause quoted was manifestly merely *arguendo*. Under these circumstances the question remains an open one.

The clause quoted, however, states the rule according to the great weight of authority, where dependence for the existence of the lien was placed only upon general statutes declaring judgment liens upon real property. *Beesley v. Badger*, 66 Utah, 194; *Bird v. Murphy*, 82 Cal. App. 691, and cases cited, page 694; *Mansfield v. Hill*, 56 Or. 400. Such decisions are based upon the proposition stated in *Noe v. Moutray*, 170 Ill. 169:

"A valid judgment in order to create a lien must possess two qualifications: First, it must be final and for a definite sum; and, second, it must be such a judgment that execution may issue thereon. 12 Am. & Eng. Ency. Law, p. 104; 1 Black, Judgments (2d ed.) secs. 407, 408."

These cases are cited by appellant, but in none of those states were there statutes having express reference to alimony decrees, and in *Bird v. Murphy, supra*, this fact was stated as distinguishing that case from cases where such statutes exist. In some states a contrary rule is adopted. *Goff v. Goff*, 60 W. Va. 9; *Isaacs v. Isaacs*, 115 Va. 562. In these two cases, however, the decree of divorce expressly declared a lien upon the real estate of defendant. See, also, *Murphy v. Moyle*, 17 Utah, 113.

As the operation of a judgment as a lien upon real property is purely statutory, we will now examine the statutes of this state. They are as follows:

Section 1534, Comp. St. 1922. "All judgments and orders for payment of alimony or of maintenance in actions of divorce or maintenance shall be liens upon property in like manner as in other actions, and may in the same manner be enforced and collected by executions and proceedings in aid thereof, or other action or process as other judgments."

This section was first enacted in 1883 (Laws 1883 ch. 40) and is still in force.

Section 26, ch. 16, Rev. St. 1866, prior to amendment, was as follows:

"In all cases where alimony or other allowance shall be decreed for the wife or children, the court may require sufficient security to be given by the husband for the payment thereof, according to the terms of the decree. And upon neglect or refusal of the husband to give such security, or upon his failure to pay such alimony or allowance,* the court may sequester his personal estate, and the rents and profits of his real estate, and may appoint a receiver thereof, and cause such personal estate, and the rents and profits of such real estate, to be applied to the payment thereof."

By chapter 41, Laws 1883, the above section was amended by substituting after the asterisk the following:

"His real or personal estate may be sold as upon execution for the payment of any sums due upon such decree. And in default of security for payment of instalments in future to fall due, the court may also appoint a receiver to take charge of his real or personal estate, or both, and hold the same and the rents, issues and profits thereof for security for the payment of instalments in future falling due. *And judgments and decrees for alimony or maintenance shall be liens upon the property of the husband,* and may be enforced and collected in the same manner as other judgments of the court wherein they are rendered."

The section as amended is now known as section 1538, Comp. St. 1922.

The proper construction of these statutes will furnish the answer to our problem. First, it will be noted that by section 1534, *supra*, the judgments for alimony are declared liens "upon property in like manner as in other actions," and appellant argues that this requires it to be for a definite amount, thus bringing it under the general rule. He seems to have overlooked that part of section 1538, *supra*, which declares them *"liens upon the property of the husband"* without qualification. By section 1534 the quality of the judgment lien is the same as "in other cases," while by section 1538 the lien is given its own body, and the manner of its enforcement only is to be as in other cases. We think the difference is quite significant, especially when considered in connection with the provisions of section 1538 immediately preceding the closing sentence. It is our opinion that the last sentence of section 1538 was intended by the legislature to enlarge the lien already provided by section 1534, in order to render it impossible for defendant, by a conveyance or incumbrance of the property, to defeat the beneficent provisions of section 1538 as to the appointment of a receiver and sequestration of the rents and profits. Any other construction would convict the legislature of doing a vain thing. The presumption is to the contrary.

The effect of the statute is to charge the real estate of defendant with the payment of the allowances, the same as the owner might do by will or deed. Such instruments, in the absence of fraud, take precedence over judgment liens of later date. We are not prepared to hold that the legislature intended to give the court power to require a husband to support his wife, and withhold the means by which its exercise may be made efficient.

We conclude that the decree of the district court is correct and the same is

AFFIRMED.

GOOD, J., dissents.

STATE, EX REL. CLARENCE A. DAVIS, ATTORNEY GENERAL, V. OCTAVIA STATE BANK: LOMA STATE BANK, INTERVENER, APPELLEE: EMIL FOLDA, RECEIVER, APPELLANT.

FILED APRIL 24, 1928. No. 25684.

1. **Banks and Banking:** DEPOSIT. A charge against the account of a depositor made by a remittance of forged paper does not affect the deposit or a depositor's claim against the guaranty fund.
2. ———: ———: INTEREST. Interest on a certificate of deposit should be computed at the contract rate until maturity, and, after judgment, at the rate of 7 per cent. per annum. *State v. Farmers State Bank*, 113 Neb. 679.

APPEAL from the district court for Butler county: LOVEL S. HASTINGS, JUDGE. *Affirmed as modified.*

C. M. Skiles, for appellant.

Joseph T. Votova and *Coufal & Shaw, contra.*

Heard before GOSS, C. J., ROSE, DEAN, THOMPSON, EBERLY and HOWELL, JJ., REDICK and WHEELER, District Judges.

WHEELER, District Judge.

The Octavia State Bank, of Octavia, Nebraska, was incorporated in 1901 and continued the transaction of a banking business until closed by the banking department of the state of Nebraska in September, 1921. The Loma State Bank kept a deposit with the Octavia bank from June, 1912, until the Octavia State Bank was closed. The account was opened by the deposit of $10,400 by the Loma bank, nearly the entire capital of the Loma bank. From time to time the Octavia bank discounted notes with the Loma bank and charged the deposit of the Loma bank with these notes. When the Octavia bank was closed the deposit of the Loma bank amounted to $342.76, which was paid. The Loma bank now claims an additional deposit of $6,500 because the Octavia bank had sent the Loma bank five forged notes totalling this amount and had charged the

deposit of the Loma bank with the amount of the notes. It appears from the bank statements that the Eberly note of $1,700 was charged against the deposit of the Loma bank on March 23, 1921; the Hookstra notes of $1,100 on January 16, 1919; the Morback note of $500 on August 20, 1919; and the Dodendorf note of $1,200 on August 30, 1919. These notes were all made payable to the order of and indorsed by E. A. Rusher, who was cashier of the Octavia bank, now a fugitive from justice. The Loma bank took these notes with no knowledge that they were forged and did not discover the forgery until after the Octavia bank was closed. The Loma bank accepted the statements of the Octavia bank charging the Loma deposit with the amount of the forged notes and made no effort to ascertain their genuineness. A forged note is wholly inoperative as a negotiable instrument. Comp. St. 1922, sec. 4634. Hence, the Octavia bank could not charge the deposit of the Loma bank with the amount of forged paper remitted the Loma bank. The deposit of the Loma bank with the Octavia bank at the time the Octavia bank was closed was actually $6,842.76 and the whole a valid claim against the guaranty fund. The fact that the Loma bank was lax in investigating the paper and ascertaining the forgery is immaterial. It was the obligation of the Octavia bank to credit the Loma deposit with the amount it had charged against it because of the forged notes as soon as the forgeries were discovered. Had they been discovered sooner, the deposit should have been credited sooner, and the Octavia bank is not harmed by the laches of the Loma bank. The district court was right in holding that a charge against the account of a depositor by remittance of forged paper amounts to a false entry and does not deprive the depositor from recovering the true deposit from the guaranty fund.

The district court did err, however, in allowing $2,275 interest, having calculated the interest on the deposit at 7 per cent. during the time the Octavia bank remained open. The agreed rate of interest on the deposit was 3 per cent., and 3 per cent. only should be allowed until the certificate

became due. No interest should be then allowed until the claim reaches judgment, after which the judgment draws 7 per cent. *State v. Farmers State Bank*, 113 Neb. 679. The interest, therefore, should be computed at $975 and the judgment against the guaranty fund reduced from $8,775 to $7,475. The judgment of the district court, as modified, is affirmed.

AFFIRMED AS MODIFIED.

IN RE ESTATE OF JOHN J. LYELL.
FRANK DAFOE, PROPONENT, V. LUCIUS L. LYELL ET AL., CONTESTANTS, APPELLEES: EVERETT ERNST ET AL., APPELLANTS.

FILED APRIL 27, 1928. No. 25789.

1. Appeal: WITNESSES: MEMORANDUM. Before error can be predicated upon the use by a witness of a memorandum to refresh his recollection while testifying, and which was not made at or about the time of the happening of the events concerning which he is testifying, the record must disclose that the witness actually used the memorandum, referred thereto and refreshed his recollection therefrom in giving his testimony, and that the memorandum was of such a nature or character as to have been prejudicial to the complaining party.
2. Wills: TESTAMENTARY CAPACITY. In a will contest, where want of testamentary capacity is one of the objections to the probate of a proposed will, the terms of the will, if it be unnatural, unjust, inequitable, or unreasonable, may be considered by the jury, in connection with all the other evidence, in determining whether the decedent possessed testamentary capacity.
3. Trial: INSTRUCTIONS. Error cannot be predicated upon the failure of the trial court to state the entire law applicable to the questions submitted to the jury in one instruction. The charge must be considered as a whole, to determine whether or not the jury have been properly instructed upon all questions which are submitted to the jury for their determination.
4. Wills: PROBATE: INSTRUCTIONS. In a proceeding to probate a will, where the person named as executor in the instrument proposes it for probate, it is not incumbent upon the trial court

to instruct the jury that the will is proposed by such person and that it is his duty to present it for probate.

5. ———: ———: TESTAMENTARY CAPACITY: QUESTION FOR JURY. In a proceeding to probate an alleged will, where there is evidence tending to show a want of testamentary capacity, the court is not warranted in withdrawing that question from the jury. If, upon the question of testamentary capacity, the evidence is in conflict, the finding of the jury is conclusive upon this court.

6. ———: ———: ———: ———. Under the facts outlined in the opinion, the question of decedent's testamentary capacity to execute a will was properly submitted to the jury.

7. Appeal: REVIEW. As a general rule, this court will not consider affidavits which have been used in support of a motion for a new trial, unless they are contained in the bill of exceptions.

APPEAL from the district court for Johnson county: MASON WHEELER, JUDGE. *Affirmed.*

Lewis C. Westwood, for appellants.

Burkett, Wilson, Brown & Wilson, Jay C. Moore, Edgar Ferneau, Ernest F. Armstrong and *Al. N. Dafoe, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and HOWELL, JJ., and LANDIS, District Judge.

GOOD, J.

This proceeding originated in the county court of Johnson county, seeking the probate of an instrument purporting to be the last will of John J. Lyell, who departed this life on the 17th day of July, 1925, leaving him surviving three adult children. The instrument was proposed for probate by the person therein named as executor. The three children of decedent (hereinafter designated as contestants) filed objections to the probate of the instrument, on the grounds that it was not executed in the manner prescribed by statute; that it was procured by undue influence; and that decedent was incompetent at the time to make and execute a will. From an order and decree of the county court finding that the instrument was the will of decedent

and entitled to probate, the contestants appealed to the district court. After the evidence was all adduced, the trial court submitted to the jury one question only: Whether decedent possessed testamentary capacity at the time the instrument was executed. The jury found for contestants, and the court entered a judgment on the verdict, denying the instrument probate. The case is brought to this court by the guardian *ad litem*, representing the children of the contestants, who were beneficiaries named in the instrument.

The instrument in question was executed on the 10th day of July, 1925, seven days before the death of Mr. Lyell. By its terms he bequeathed and devised to Frank Dafoe, named in the instrument as executor and trustee, the sum of $24,000; $7,000 to be held in trust and the income therefrom paid to Alonzo Lyell (one of the contestants) and his wife, so long as they both should live, and, upon the death of Alonzo and his wife, the trustee to pay the principal of the $7,000 to the lawfully begotten issue of said Alonzo and his wife. A further sum of $9,000 was devised in trust to Dafoe, to be by him invested and the income therefrom paid to Rua F. Ernst (one of the contestants) so long as she should live, and, upon her death, the principal to be paid to her lawfully begotten issue. A third bequest to the trustee was an $8,000 mortgage, owned by the decedent, in which Lucius L. Lyell (one of the contestants) and his wife were mortgagors, and which provided that he should not pay any interest upon the mortgage; that it should be kept alive so long as he should live, and that at the death of Lucius and his wife the $8,000 mortgage, or renewal thereof, should be collected and the proceeds paid to the issue of Lucius. Another clause devised the remainder of his estate to his three children in equal shares. It is stated in one of the briefs that decedent left an estate of the value of $27,000. We find nothing in the record from which to determine the value of the estate, other than the provisions of the alleged will might indicate.

The first error assigned for reversal of the judgment

is that the trial court, over objection, permitted one of the contestants, while testifying as a witness, to use a written memorandum to refresh his recollection while testifying, and that such memorandum was not made at or about the time of the transaction concerning which testimony was being given, but was made by the witness a day or two previous to the time of his testifying. It is stated in the briefs of the guardian *ad litem* that the witness used this memorandum to refresh his recollection while testifying. This statement, however, is not borne out by the record. There is nothing in the record from which it can be determined that the witness, in fact, used the memorandum in giving his testimony, or referred to it while testifying; nor is the memorandum in the record from which it could be inferred that there was any error in the ruling of the court thereon. In order to predicate error upon the use by a witness of a memorandum to refresh his recollection while testifying, and which was not made at or about the time of the happening of the events concerning which the witness is testifying, the record must disclose that the witness actually used the memorandum, referred thereto and refreshed his recollection therefrom in giving his testimony, and that the memorandum was of such a nature or character as to have been prejudicial to the complaining party. In view of the record presented, no error prejudicial to the complaining party has been shown.

It is contended that the trial court erred in giving to the jury instruction No. 7, wherein the court informed the jury that they might consider the terms and provisions of the will, in connection with the other evidence, on the question of lack of testamentary capacity.

It has long been the rule in will contests, where want of testamentary capacity is relied upon, that the terms of the will itself may be considered by the jury, in connection with all the other evidence, in determining whether the decedent possessed testamentary capacity, and, while the will may not be denied probate because it is unreasonable, inequitable, or unjust, or some of its provisions may be im-

possible of performance, yet such facts are proper to be considered in determining testamentary capacity. In the instant case, at the time the instrument was signed by Mr. Lyell, his wife was still living but very ill, and she, in fact, died a few hours later. At the time, she lay in the room adjoining that in which decedent signed the instrument. No devise or bequest was made to or for the benefit of his wife; nor was her name mentioned in the instrument. Possibly, he may have believed that she could live but a short time and would not survive him. He had lived for more than a half-century with his wife, and, so far as disclosed, on amicable terms. That he would make no provision for his wife and apparently disregard the obligations that he owed to her seems strange and unusual. The record also discloses that at different times, some years previous to the making of the instrument, he had stated to his children what his intentions were as to the disposition of his property, and the disposition made was different from that of his previously expressed intentions. The provision regarding the $8,000 mortgage, devised in trust for the benefit of his son Lucius, his wife and their children, was of such a nature that it is probable, or at least possible, that it could not have been carried into effect. Certainly, the provision could not have been carried out without the cooperation of his son Lucius and his wife. Another significant thing was that, in devising the bulk of his property in trust to an individual, where that trust might, and probably would, extend over a period of 25 to 40 years, he required and made no provision for a bond or any security to be taken from the trustee for the performance of the trust. These things were proper for the jury to consider and, we think, the court properly instructed the jury that they had a right to consider these matters in determining whether decedent possessed testamentary capacity.

The court, by another instruction, informed the jury that a will could not be defeated because its provisions were unjust, unreasonable, or inequitable, provided the testator

had capacity to make the instrument; that it was his right to dispose of his property as he saw fit. Under the circumstances, there was no error in the instruction given.

Complaint is made because the court, in instruction No. 12, did not specifically limit the consideration of the jury to the question of testamentary capacity. In another instruction, the jury were informed that this was the sole question for their determination. The charge, as a whole, must be considered, and, when so considered, it appears that the only question for the jury to determine was that of testamentary capacity.

Complaint is made because the court refused to give a requested instruction, to the effect that the will was proposed for probate by Dafoe, who was named therein as executor, and that it was his duty to propose it for probate. No authorities are cited, nor do we know of any authority which requires the court to instruct the jury as to who proposed the will for probate, nor that it was the duty of any person to propose it. The only question, for the jury to determine was the question of testamentary capacity, and that question was fully and fairly submitted to the jury.

Complaint is made also because the court did not direct a verdict for proponent, and, in that connection, that the verdict is not sustained by the evidence. These alleged errors may be considered together. If there was sufficient evidence of want of testamentary capacity to require the submission of that question to the jury, then, of course, the court should not have withdrawn it from the jury. If there was evidence requiring that question to be submitted to the jury, then the finding of the jury, under proper instructions, is conclusive upon that question. The record is somewhat voluminous, and it would serve no useful purpose to undertake to outline it in detail. We shall, however, point out some of the facts disclosed by the record.

In the instrument it is stated that the decedent was 74 years of age. The evidence shows that a few weeks be-

fore his death he and his wife celebrated their golden wedding anniversary; that one of the children was 47 years of age and the others somewhat younger; from which it appears that decedent was well advanced in years. Up to within a year or so he had been a strong, healthy man, weighing 220 pounds. About a year previous to his death he began to fail physically. He lost greatly in weight and at the time of making the will he was so emaciated that he weighed but about 100 pounds. He had become so physically feeble that he could not care for himself; had to be assisted in getting up from his cot or bed and in going to the bathroom. It appears also that during the later months or weeks of his life he at times became very talkative and would talk continually. At other times he was silent, taciturn, and had little, if anything, to say. Within two or three weeks of his death he seems to have nearly lost his eye-sight, so that he could not see to read, and this affliction came upon him only two or three weeks before his death. He had stomach and throat trouble, the precise nature of which is not stated. He had difficulty in talking. Sometimes in his talk he would ramble from one subject to another; he frequently miscalled the names of members of his family, and would call his own daughter by names other than her own; did not recognize at times near friends and relatives, and on the morning after the will was made, when informed that his wife had passed away, he gave no sign that he heard or was interested in the fact. Previous to his becoming so nearly helpless, in going to his bedroom he would frequently start for the cellar door, instead of for the door of his bedroom. At one time, a few weeks before his death, he insisted upon accompanying one of his relatives to the railway station from the home of his son, where he was living with his wife. He was so feeble that it was necessary for him to stop and rest on the way. He told this relative that he had $8,000 then on his person. She insisted that he ought to put it in the bank, and that he should not carry such a sum about with him. Whether

he had the money on his person as stated, or whether he put it in the bank, is not disclosed. There are many other incidents related by the witnesses which would indicate very strongly that his mind was seriously affected and that he was wandering, at times at least.

On the other hand, the evidence on behalf of proponent would tend to show that on the night that he executed the instrument he gave the details of what he desired put in his will; that after it was prepared and read to him he called attention to discrepancies and to matters that were not as he desired, and that he wanted corrections made, which were done. Taking the evidence on behalf of the proponent, standing alone, it would have been sufficient to require the finding that decedent possessed testamentary capacity; but, on the whole, there was sufficient from which the jury might reasonably infer a want of testamentary capacity, and, while we might have reached a different conclusion than that reached by the jury, that fact alone will not justify us in setting aside the verdict. The jury were the triers of fact. It was for them to weigh the evidence; it was for them to determine which of the witnesses they would believe. We are constrained to hold that there was sufficient evidence to require the submission to the jury of the question of testamentary capacity, and the jury's finding is conclusive upon this court.

Numerous errors are assigned, to the effect that the court erred in permitting witnesses for the contestants to testify to conclusions. We have carefully examined all of the testimony and each of the rulings complained of, and find no prejudicial error committed in that respect. If any criticism should be made of the rulings of the trial court, it seems to us that they were in many respects more favorable to the proponent than to contestants.

Finally, it is urged that the trial court committed error by permitting counsel for contestants in his address to the jury to make, over objections, an impassioned statement of facts, not warranted by the record, and that such statement was prejudicial to the proponent. Objection

seems to have been made and affidavits filed and attached to the motion for a new trial, purporting to show the statement to which exceptions were taken. The affidavits, however, are not incorporated in the bill of exceptions; nor does the record disclose that the affidavits were brought to the attention of the trial court.

It is a well-established rule that this court will not consider affidavits, used in support of a motion for a new trial, unless they are contained in the bill of exceptions.

An examination of the entire record fails to disclose that any error prejudicial to the proponent was committed. The judgment of the district court is therefore

AFFIRMED.

ED DE GRISELLES, ADMINISTRATOR, APPELLEE, V. LOUIS GANS, APPELLANT.

FILED APRIL 27, 1928. No. 25576.

1. **Negligence**: DEATH: PROXIMATE CAUSE. Where an automobile truck, driven west in a public alley at such a rate of speed that it was stopped within a space of three to five feet, collided with an eight-year-old boy, who ran out of an open yard from behind a brick building, chasing an automobile tire, at a point in the alley three feet south of the north line thereof and three to four feet west of the corner of the building, *held*, as a matter of law, that the act of the child was the proximate cause of the collision; *held*, also, that, as regards the speed of the car, negligence of the driver is not established.
2. ———: PROOF. Where two witnesses testified that they did not hear a horn blown, but refused to testify that it was not blown, and a third witness testified that it was not blown, but it did not appear that he was in a position to hear it had it been blown, *held*, that this evidence is insufficient to support a finding that the horn was not sounded, when opposed to the evidence of three credible witnesses who testify positively that it was blown.
3. ———: DRIVERS OF AUTOMOBILES: CARE REQUIRED. Until a driver of an automobile has notice of the presence or likelihood of children near his line of travel, he is bound only to the exercise of reasonable care, and has the right to assume that

others will do likewise; and until he has such notice the rule is the same as respects children and adults.

4. ———: DIRECTION OF VERDICT. Although in a suit for damages based upon negligence the plaintiff may have made a *prima facie* case, upon the conclusion of all the testimony the court may direct a verdict for defendant, if the evidence would be insufficient to support a verdict for plaintiff, and a refusal so to do in such case may be reversible error. *Gandy v. Estate of Bissell*, 81 Neb. 102, criticized.

5. **Evidence** set forth in the opinion, and *held* not sufficient to support the verdict.

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

Blackburn & King, for appellant.

Gray, Brumbaugh & McNeil, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON and HOWELL, JJ., LANDIS and REDICK, District Judges.

REDICK, District Judge.

Action by Ed DeGriselles, individually and as administrator of the estate of Frank DeGriselles, for damages for the loss of services and death of plaintiff's minor son. Frank DeGriselles, a boy about nine years of age, was injured by a truck belonging to defendant and driven by his servant, from which injuries he died some four months after the accident. The case was tried to a jury, and after the evidence for both parties was concluded the defendant moved the court to direct a verdict for the defendant. The motion was overruled and the jury returned a verdict for the plaintiff in the sum of $5,000. Defendant's motion for a new trial was overruled and judgment rendered upon the verdict. Defendant appeals and presents but one ground for the reversal of the judgment, namely, that the evidence is insufficient to establish negligence of defendant.

The grounds of negligence charged against defendant's servant are: "(1) In failing to keep said truck under con-

trol; (2) in failing to blow his horn or give other signal of his approach; (3) in failing to operate said truck in such manner that upon becoming aware of the presence of decedent he could stop said truck; knowing, as he did, the use made of said alley by pedestrians and vehicles; (4) in driving said truck at a rate of speed which under the traffic conditions existing in said alley and known to defendant's driver to so exist was unlawful and dangerous to decedent and other persons using the alley." The above statement of the grounds of negligence is quoted from appellee's brief. The question submitted demands a somewhat detailed examination of the evidence.

The place of the accident was in a public alley 16 feet wide, with brick buildings on either side, the one on the north being 97 feet in length and that on the south 100 feet. At the west end of the building on the south was a doorway 10 feet wide, used as an entrance to the basement and second floor by means of inclines, the building being used as a stable and garage. Immediately to the west of the building on the north was a vacant space measuring 68 feet on the alley, and used as a service yard, and from which wagons and trucks crossed the alley to enter the garage above mentioned. The two buildings were used by the Alamito Dairy Company, and teams and trucks to the number of 52 were accommodated by said garage. The alley was paved with cement and from the east to the west end was on an upgrade of 4.4 per cent. The accident occurred about 3:30 p. m., at which time the surface of the alley was dry. At the time of the accident there was standing in the alley on the south side close to the brick wall and about 50 feet east of the place of the accident a team and wagon which had delivered feed at the garage, which feed was elevated to the second floor by means of an outside hoist.

Defendant's servant, Henry Bartels, was acquainted with the local situation above described, having made deliveries at that point almost daily for four years. On the day in question, as he was about to enter the east end of

the alley, he had to stop his car and back it a short distance to permit another truck coming from the west to emerge onto the street. He choked his engine, and got out and cranked it and then started up the alley in low gear, driving slowly, as he says, at 5 or 6 miles an hour, going to the narrow space between the wagon and the wall of the north building, about 8 or 9 feet, through which he had to pass, and changed to second gear after having passed the wagon.

At this point the testimony for the plaintiff as to the happening of the accident begins and is substantially as follows:

Witness O'Brien testified that he was coming out of the doorway of the garage, having come down the inclined approach just inside the doorway, and had gotten two or three feet into the alley and stepped back because he saw the truck approaching about fifteen feet east of him; no horn was blown; saw the boy knocked down by the truck about three feet south of the north line of the alley and three and one-half to four feet west of the building on the north side of the alley; the right front wheel of the truck hit him and ran up on the left side of the boy just above the hip; the boy's body lay north and south under the truck with his feet a little to the east; the truck backed off the boy. The truck was running in high gear about fifteen miles an hour. On cross-examination he stated that he saw the boy approaching, and the truck approaching from the east and holloed to the truck driver both before and after he hit the boy; the boy was not running. "The boy was not rolling a tire when I saw him." "The driver brought the truck to a stop within three or four feet after he put on the brakes; he could have seen the boy coming from behind that corner for a distance of about five or six feet; the front end of the truck was about four or four and one-half feet west of the wall when it stopped." When the witness' deposition was taken prior to the trial, he stated that the truck was about six or seven feet from the boy when he first saw it,

and also about ten or eleven feet from the witness; that he had first called to the driver after he had just struck the boy; that he could not say whether the boy tried to stop and slid from under his feet. And in the same deposition, in response to the question, "And the time that it took for the boy to get out from behind the garage and under that truck, only about three feet away, was practically instantaneous?" the witness answered, "Yes."

Witness Boye was standing at the east end of the wagon when the boy was hit; he heard no horn blown; thinks he would have heard the horn but could not say positively; "would not say the horn was not blown, but think if it had been I would have heard it."

Witness Thompson testified that he was standing with Boye about 50 feet east of the accident when the truck passed going west through the alley, observed its speed and would estimate it at 12 to 15 miles an hour; was not paying particular attention to the truck; the truck after it backed off the boy was a foot or two beyond the building on the north side; did not remember of hearing a horn blown, was not paying particular attention, it might have blown; did not see the boy before the accident; attention first attracted to boy when saw truck stop—heard a noise or a cry; picked up the boy who was conscious but squirming and holding his hand over his hip on the left side.

This constitutes substantially all of the evidence for plaintiff material to our inquiry.

Defendant's evidence was as follows:

Henry Bartels, defendant's servant, testified that he sounded the horn twice about half-way (25 feet) between the wagon and the corner where the accident happened; that he had not shifted into high gear when the boy came out from behind the building; shifted from low to intermediate just as he had passed the wagon; he was traveling in intermediate gear at approximately five or six miles an hour. The boy was running and had a tire; "he tried to stop himself, and slipped on the cinders on the paving, and slid right in front of my wheel;" the

wheel did not knock him down; witness tried to stop, using both foot and emergency brakes, and stopped in approximately four or five feet; after it came to a stop the truck was standing about one foot west of the corner of the building and right wheel three feet from north wall; had no time to blow his horn again or turn his truck toward the south after seeing the boy, because he was reaching for his brakes; could not say how long it was from time he saw boy coming from behind corner until truck stopped; "It all happened so quick, I don't know how long it did take. It all happened at once."

Emil Bartels, brother of Henry, who happened to be riding with him, testified that the horn was sounded 20 or 25 feet from the corner; traveling in intermediate gear, and as they approached the corner this boy was rolling a tire and came around the corner; he wanted to stop and his feet slipped from under him on some cinders there and he slid under the right front wheel of the truck, and before we could stop, the wheel was on the boy; we were going about five or six miles an hour; his brother put his foot on the brake, grabbed the emergency brake, and the car traveled something like four or five feet before it struck the boy about one or two feet beyond the building. On cross-examination he stated he first saw the boy running out from behind the building just as they were coming to the corner; he had gotten about two or three feet into the alley before the accident; "I saw the tire first; it came ahead of the boy;" shifted to intermediate gear just as we got by the wagon; witness was 23 years old and his brother Henry 26.

Vernard Alexander, a boy of 15 years, working for the Alamito dairy, testified that he had been driving the horse which operated the hoist above mentioned and was just turning him into the chute leading to the basement of the barn on the south side of the alley, and turned around and looked where the truck was coming and saw this boy coming down the alley rolling a tire, "and he came to the alley and he tried to stop on some cinders that had been pushed

out by horses and milk wagons, and he slid on the cinders, and slid under the wheels, and the truck went about a third of the way up on his body and backed off again;" he marked where he was standing in the doorway of the barn, about three feet east of the west side; that he saw a man who might be O'Brien also standing in the doorway.

Harry Shively testified that he was shipping and receiving clerk for the Alamito dairy, working inside and downstairs; that he heard of the accident about two or three minutes after it happened. He did not see it, and when asked how he knew that the accident happened two or three minutes before they called him, answered: "Well, when I heard the horn sound it was almost instantaneous after I heard that that the word came to me to call the doctor." He could not say definitely what automobile had sounded the horn.

The defendant contends that the evidence as outlined above is not sufficient to support the verdict in favor of the plaintiff and that his motion for an instructed verdict should have been sustained. The rule is well established in this jurisdiction that, where reasonable minds would draw different conclusions as to the establishment of certain facts, or from the facts established by the evidence, the case is one for the jury, and, therefore, before we can sustain defendant's contention we must be convinced that all reasonable minds must conclude from the evidence that no actionable negligence of the defendant has been proved.

The first, third and fourth grounds of negligence may be considered together. Can it be said in reason that the driver of the truck did not have it under proper control when he brought it to a stop within three to five feet after the boy appeared around the corner of the building? We think not. There is no evidence in the record as to the distance within which an automoile truck traveling from 12 to 15 miles an hour can be stopped, but it is undisputed that in the present instance it was stopped in from 3 to 5 feet, and if anyone will take the trouble to measure that distance upon the ground and then consider the ordinary

weight of such trucks and the ordinary method of stopping them, he must conclude that the driver of the truck in the present instance had the same under reasonable control, whether he was driving at 12 or 15 miles an hour, or 5 to 7 as testified by defendant's witnesses; at 15 miles an hour a vehicle is traveling 1,320 feet a minute or 22 feet a second; to stop within 6 feet involved less than a third of a second of time during which the operator must apply his brakes upon the sudden appearance of danger. Plaintiff's witness O'Brien testified that the truck was stopped in 3 or 4 feet after the brakes were applied, and that defendant could see the boy for a space of 5 or 6 feet as he came around the corner. The car was stopped after it had passed over about a third of the body of the boy, just above the hip on the left side. The evidence does not disclose that the body of the boy was struck by the car at any other place, and three witnesses for the defendant testified that the boy came running out from behind the building and slipped on some cinders and slid foremost under the front wheel of the car. This evidence is fortified by the position of the boy's body as he lay on his back under the car, being practically at right angles to its course. While one witness testified that the car knocked the boy down, this must be considered merely as a mode of expression, because the physical facts just recited absolutely refute the witness. We are convinced that the manner of the happening of the accident was as described by defendant's witnesses, and is the only reasonable conclusion to be drawn from the evidence. Assuming the rate of speed to have been 12 or 15 miles an hour, it was in no violation of any ordinance on that subject and, in view of the short space in which the vehicle was stopped, the rate of speed was not dangerous, and no inference of actionable negligence may be properly drawn on account of such rate of speed, for the reason, as before stated, the driver had the truck under reasonable control.

In *Thrapp v. Meyers*, 114 Neb. 689, it was held: "A driver of an automobile should have his car under such

reasonable control as will enable him to avoid collision with other vehicles, assuming that the drivers thereof will exercise due care." If in the present case the person killed had been a grown man running out from behind the building into the alley, it would have been the duty of the lower court to direct a verdict for the defendant on the evidence before us as to speed for lack of evidence of negligence or upon the ground of contributory negligence. The plaintiff's decedent, on account of his tender age, is not chargeable with contributory negligence, but in determining the existence of negligence upon the part of the defendant, having no notice of the presence of children, the same rules apply in both cases; and while the boy is not chargeable with negligence, if his act, whether negligent or not, was the proximate cause of his death, there can be no recovery. The rule announced in *Thrapp v. Meyers, supra,* requires the driver to exercise only that degree of care which would be required when others are exercising ordinary care; he is not bound to anticipate that conduct of children, of whose presence he has no knowledge, will be different from that of an ordinarily prudent person. We are of the opinion that none of the three charges of negligence referred to is sustained by sufficient evidence.

This brings us to the second charge—failure to blow the horn. For plaintiff we have three witnesses who testified that they did not hear any horn blown; one of them, O'Brien, saying that the horn did not blow. His entire evidence on the point was as follows: "Q. Was there any horn blown up to the time that you had gotten out into the alley three feet? A. No. Q. Was there any horn blown after that time? A. No." No foundation was laid for his testimony on this point beyond the fact that he stepped into the alley and saw the car 15 (10 or 11) feet east of him, or, as elsewhere stated, 7 feet from where the boy was struck, which would place the car just opposite the witness as he stepped into the alley and retreated to let the car pass. He does not say he would have heard the horn if sounded, or that he was paying any attention to

the sounding of a horn. He had been inside the barn, coming down the incline to the doorway, and if, as defendant's witnesses state, the horn was sounded 20 or 25 feet east of place of accident, the witness might not have heard it. Under these circumstances we think this evidence cannot be considered as a positive statement of the fact, but is merely negative. The attention of the other two witnesses was not attracted to the question until the accident had happened. On the other side, two witnesses, Henry Bartels and his brother, testified that the horn was blown twice about half-way between the wagon and the corner of the building; and a third witness, Harry Shively, testified that he heard a horn sound and almost instantaneously was called upon by some one of the persons present to get a doctor. It is needless to repeat the arguments upon the question of the comparative value of negative and positive testimony or to restate the reasons underlying the almost unanimous decisions of the courts that the testimony of one credible witness to a positive fact may outweigh any amount of merely negative testimony. A discussion as to the value of this class of evidence will be found in *Dodds v. Omaha & C. B. Street R. Co.*, 104 Neb. 692, and *Kepler v. Chicago, St. P., M. & O. R. Co.*, 111 Neb. 273, 281. Assuming that a failure to sound a horn in the instant case might be considered negligence, such failure is not proved, and the finding of the jury, if based upon that charge, is insufficient to support the verdict. Defendant cites a number of analogous cases which are instructive upon the questions discussed herein: *Sund v. Smisek & Hrdlicka*, 105 Neb. 602; *Lovett v. Scott*, 232 Mass. 541; *Sorsby v. Beninghoven*, 82 Or. 345; *Borland v. Lenz*, 196 Ia. 1148.

The case of *Gandy v. Estate of Bissell*, 81 Neb. 102, cited by plaintiff, is not controlling. The first syllabus is in the following language:

"Where the judge of a district court, who has had the advantage of seeing the witnesses and observing their demeanor while testifying, overrules a motion for a directed verdict, and there is sufficient competent evidence in the

record, standing alone, to sustain the verdict returned by the jury, this court will not disturb such a verdict and reverse a judgment rendered thereon, even though the evidence in opposition to the verdict is such, as shown by the record, that a peremptory instruction might have been sustained."

If this language may be construed as holding that a refusal of the trial court to sustain a motion of the plaintiff for a directed verdict is not reversible error where the evidence in opposition to the verdict is such that a ruling granting the motion would have been sustained, we are constrained to withhold our approval thereof. Of course, if there was evidence sufficient to sustain a verdict for either party, a directed verdict would be improper; but if the evidence in opposition to the verdict is such that it would not be error to sustain the motion, and the verdict goes against the moving party, we are unable to perceive why an order overruling it is not reversible error. If this were not the rule, and the trial court refused to direct a verdict for the plaintiff, and the jury rendered a verdict for the defendant, the appellate court would be powerless to reverse the judgment, even though all reasonable minds would agree that the plaintiff was entitled to recover. We are not prepared to adopt such a rule. The case cited, however, was reversed on two other grounds, and the ruling on the point in question has not the force it might have if it was upon a point necessary to the decision of the case. We hold in this case that the evidence, as shown by the record, is entirely insufficient to show that the defendant was in any way negligent, and that the verdict finds no support therein. It follows that the judgment of the district court must be reversed and cause remanded.

REVERSED.

HOWELL, J., dissents.

BIG HORN COLLIERIES COMPANY, APPELLANT, V. PAUL W. ROLAND ET AL., APPELLEES.

FILED APRIL 27, 1928. No. 25723.

1. **Fraudulent Conveyences: ATTACK BY SUBSEQUENT CREDITORS.** A creditor whose debt did not exist at the date of a voluntary conveyance by the debtor cannot attack such conveyance for fraud, unless he pleads and proves that the same was made to defraud subsequent creditors whose debts were in contemplation at the time.
2. ———. A conveyance by a husband to his wife of real estate standing in his name, but purchased with his wife's funds, where the value of the property, regardless of any question of homestead, is less than the wife's investment, is not fraudulent as to creditors of the husband.
3. **Estoppel.** Evidence examined, and *held* insufficient to create an estoppel in pais against the wife.

APPEAL from the district court for Scotts Bluff county: P. J. BARRON, JUDGE. *Affirmed in part, and reversed in part.*

Mothersead & York, for appellant.

Raymond & Fitzgerald, Morrow & Morrow, White & Lyda and *E. H. Westerfield, contra.*

Heard before GOSS, C. J., ROSE, GOOD, DEAN, THOMPSON and HOWELL, JJ., LANDIS and REDICK, District Judges.

REDICK, District Judge.

This is a proceeding in the nature of a creditor's bill to subject certain assets claimed to be the property of the defendant Paul W. Roland to the payment of a judgment rendered in favor of plaintiff on February 27, 1926, against said Roland for the sum of $2,629.69. Paul W. Roland was in the retail coal business at Scottsbluff, and the judgment was for a balance of the account for coal sold to him by plaintiff. Paul and Mabel Roland were husband and wife. The petition alleges that certain real estate in East Minatare, Nebraska, although standing in the name of the de-

fendant Mabel C. Roland, was in truth and in fact the property of Paul W. Roland. This property will be hereinafter referred to as the Minatare property. The plaintiff further alleged that certain lots in Scottsbluff had been purchased by Paul W. Roland with his funds, but the title taken in the name of Mabel C. Roland for the purpose of defrauding, hindering and delaying the creditors of Paul.

The defendants Paul and Mabel Roland filed separate answers, denying all fraudulent intent, and alleging that the Minatare property, consisting of two vacant lots, was given to Paul W. Roland by the Commercial Club on condition that he would erect a hotel thereon, and that subsequently the hotel was erected and furnished with the joint funds of Paul and Mabel, and that the property was conveyed as a gift to Mabel in the year 1916, some seven years prior to any dealings with plaintiff.

The answers further allege that the lots in Scottsbluff were purchased by defendant Mabel C. Roland with her own funds for the sum of $1,150 in 1919, and subsequently a residence was erected thereon with the funds of said Mabel and the proceeds of a loan in the sum of $4,500 from the Nebraska State Building & Loan Association of Fremont, and that the premises, ever since the building of said residence and at the present time, constitute the homestead of said Paul and Mabel C. Roland, who are husband and wife. At the time of the purchase of the Scottsbluff lots the title was taken in the name of Paul, but in February, 1924, Paul conveyed his interest in the same to Mabel in part payment of an indebtedness to her in excess of $5,000 for money loaned.

The plaintiff replied, admitting the conveyances of the properties, and that the Scottsbluff property is occupied as a residence by defendants, but denying the other allegations of the answer.

After the plaintiff had introduced its evidence, leave was granted by the court to amend the petition to set up an estoppel as against the defendant Mabel C. Roland, alleging that to induce the plaintiff to extend credit to said

Paul W. Roland, in the presence of said Mabel, Paul represented that the Minatare property belonged to him, and that Mabel did not deny said statement or claim that the property belonged to her; and that at the time the plaintiff extended credit to Paul the title to the Scottsbluff property stood in the name of Paul, and that said Paul represented to plaintiff, in the presence of Mabel, that he was the owner thereof, which statement was not denied by Mabel, and that plaintiff extended credit to Paul relying upon his statement and the fact that the title was in his name.

There were other parties to the proceedings and appropriate pleadings concerning their interests, but it will not be necessary to set them out in detail as the controversy is wholly between the Rolands and the plaintiff. The district court found that the Minatare property belonged to Mabel and dismissed the action as far as that property was concerned. It found that the Scottsbluff property belonged to Paul, that the same was the homestead of the defendants, that it was of value in excess of the homestead interest, that the plaintiff's judgment was a lien upon said excess, and ordered the property sold and the proceeds to the extent of $2,000 paid to defendants, and any surplus to be applied in payment of the plaintiff's judgment. Plaintiff appeals from that portion of the decree denying him a lien upon the Minatare property, and the defendants file a cross-appeal from that part of the decree subjecting the Scottsbluff property to plaintiff's judgment.

Since the proceedings were commenced, the Minatare property has been sold and the purchasers have been dismissed from the case, and the contest is over the sum of $4,000, a part of the proceeds of said sale in the hands of Mabel C. Roland and her son Aurice in the form of stock in the Occidental Building & Loan Association, which interpleads and asks directions from the court as to the disposition of the stock. The plaintiff is in no position to attack as fraudulent the conveyance of the Minatare property which was dated and recorded in August, 1916, long before the existence of any indebtedness to plaintiff. *Jayne*

v. Hymer, 66 Neb. 785. And therefore, so far as this property is concerned, plaintiff must rely upon an estoppel. It is not claimed that the conveyance to Mabel was made with the intention to defraud future creditors.

The question of estoppel rests upon the testimony of S. W. Smith, the salesman of the plaintiff with whom all dealings with Paul W. Roland were had. He testifies in substance that, when the account with plaintiff was opened, Roland told him that he had a hotel property in Minatare and a residence in Scottsbluff. Mabel was not present at this conversation, and the evidence does not show any knowledge of these representations, if they were made, and, of course, she would not be bound thereby. He further testified that in the latter part of January or first of February, 1924, he had a conversation at Roland's office with him at which Mabel was present, in which he says: "A. Mr. Roland and her and I talked together several times about the payment of the account, and about the indebtedness due the company. * * * I can't give it word for word what was said. We were trying to get some money, but he made the statement that collections were awful hard, and that he had to pay his taxes and all the interest, etc., on his properties; and he also stated at one of these conferences that his property at Minatare was not bringing him in anything and that it was more of a liability than an asset at that time." Mabel said nothing. "He said he had to pay payments on his house and on his property at Minatare, and he also stated that he had to make a payment on a carload of coal that he bought from another company. Q. This was a conversation at which Mrs. Roland was present? A. I believe Mrs. Roland was there." He then testified that Roland showed him the Minatare hotel property in 1925, Mabel not being present. Later he testified that Roland told him the Scottsbluff property cost him $16,000, but that he did not think it was worth now more than $9,000 or $10,000; he thinks this conversation took place in December, 1923, but that Mrs. Roland was not present. When asked if Mrs. Roland took any part

in the conversation with reference to the debt or payment of it, he answered: "I rather believe that she did talk with us about it, but I don't remember what she said. Just the three of us was talking together there. I don't remember what she said about it at that time. I can't recall it exactly."

It will be noted that the only conversation regarding the properties in question at which Mabel was said to be present was in January or February, 1924, and the witness Smith does not seem to be positive that she was present, saying he believed she was. He says she took no part in the conversation, and it does not appear that she was in a position to or did hear the same, except a possible inference from the uncertain fact that she was present. While it appears that she was in the office a number of times when Smith was there, she was often occupied with the telephone or some other matters. The plaintiff made no investigation as to the title to the properties in question until shortly before bringing suit upon the account after it had been closed. It is in no position, therefore, to claim that it relied upon a title as shown by the records. The claim of estoppel must rest entirely upon the representations said to have been made at the conversation of January or February, 1924.

"To sustain an estoppel because of an omission to speak, there must be both the specific opportunity and the apparent duty to speak. The party maintaining silence must have known that some one was relying thereon, and was acting, or about to act, as he would not have done had the truth been told." *Smith v. White,* 62 Neb. 56.

"In order to constitute an equitable estoppel by silence or acquiescence, it must be made to appear that the facts upon which it is sought to make the estoppel operate were known to the parties against whom the estoppel is urged." *City of Lincoln v. McLaughlin,* 79 Neb. 74.

We think this evidence is clearly insufficient to establish an estoppel against Mabel C. Roland. The account was opened in September, 1923, and at the time of the alleged

estoppel Roland was indebted to plaintiff about $2,000, and after that time the indebtedness was paid down to about $900, and then increased to the amount of plaintiff's judgment. In fact, the indebtedness as existing in 1924 was entirely wiped out by the application of subsequent payments to the oldest items of the account. The decisions are not harmonious upon the question whether or not plaintiff's claim of priority is defeated by the facts just noted, and we do not decide the point. The affirmative of the proposition has been held in *Nelson v. Vanden,* 99 Tenn. 224; *Gardner v. Kleinke,* 46 N. J. Eq. 90. *Contra, Spuck v. Logan & Uhl,* 97 Md. 152.

The title to the Scottsbluff property was taken to Paul C. Roland at the time of its purchase in 1919 and was not conveyed by him to Mabel until February 27, 1924, and the question remains whether or not such conveyance was fraudulent as against the plaintiff. The testimony of the Rolands is undisputed that the purchase of these lots was made with the funds of Mabel, derived from rentals of the Minatare property and other separate funds of Mabel; also that the residence built thereon was paid for by the sale of other property in Scottsbluff belonging to Mabel, the sum of $3,600, $1,000 borrowed from C. D. Wildy, president of the American State Bank, and $4,500 borrowed from the Nebraska State Building & Loan Association. If this evidence is credible, it appears that the investment of Mabel in this property was about $10,250, while the highest value placed upon it at the time of the trial was $8,000; and it would therefore follow that Paul had a right to convey the property to her, and creditors have no right to complain. We think this testimony is worthy of belief and that Mabel's ownership of the Scottsbluff property is established. The only facts appearing of record tending to cast any doubt upon our finding are the fact of the title in Paul, that Mabel's funds, as she claims them, were not kept separate and distinct, but apparently were deposited in a joint account at the American State Bank, in the name of Paul, but upon which both parties were authorized to and

did draw, and the further fact that Mabel claims to have loaned her husband during the period May, 1916 to 1925, the sum of $5,000 to $7,000. This claim is not so incredible, however, as at first it might appear, because the Minatare property was first rented in 1916 for five years at $150 a month, and the evidence indicates that rentals during the entire period would average from $1,000 to $1,500 per annum. While these matters are proper for consideration, we do not think they are sufficient to stamp the transaction as fraudulent in the face of the convincing evidence of Mabel's investment in the property conveyed. We conclude that the judgment of the district court as to the Minatare property should be affirmed, and as to the Scottsbluff property, reversed, and it is so ordered. The cause is remanded to the district court, with instructions to dismiss the proceedings.

AFFIRMED IN PART, AND REVERSED IN PART.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. CITIZENS STATE BANK OF CHADRON, APPELLANT: J. W. DALBEY, APPELLEE.

FILED APRIL 27, 1928. No. 25661.

Banks and Banking: GUARANTY FUND. A depositor in a state bank is entitled to the protection of the guaranty fund to the full amount of the deposit, where unknown to the depositor the bank receives the deposit on condition that it redeposit a portion of the funds with another bank.

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

C. M. Skiles and *E. D. Crites*, for appellant.

P. F. Ward, contra.

Heard before GOSS, C. J., ROSE, DEAN, THOMPSON, EBERLY and HOWELL, JJ., REDICK and WHEELER, District Judges.

WHEELER, District Judge.

This action was instituted on behalf of a railway labor

union to establish a claim of $10,500 against the depositors' guaranty fund. The claim arises under the following circumstances:

In 1921 J. W. Dalbey was the secretary and treasurer of the Brotherhood of the Maintenance of Ways Employees and Railway Shop Laborers of the Chicago & Northwestern Railway Company, with large funds under his control. His brother, C. P. Dalbey, was cashier of the Stockman's Bank at Hot Springs, South Dakota. J. W. Dalbey, the union secretary, deposited the union funds in his brother's bank. Subsequently the union officers decided not to deposit more than $10,000 in any one bank. The Dalbey brothers then arranged to give the Citizens State Bank of Chadron, Nebraska, a $10,000 deposit from the union funds. C. P. Dalbey, the cashier of the Stockman's Bank told Mr. Birdsall, the assistant cashier of the Chadron bank that he had arranged to get him a $10,000 deposit from the railway union and that in return he wanted the Chadron bank to redeposit one-half of this $10,000 with the Stockman's Bank. In order to obtain and keep this deposit the Chadron bank agreed to do so and did keep a deposit of $5,000 with the South Dakota bank. This arrangement was not known by J. W. Dalbey, the railway union treasurer, or by any of the union officials. It was merely a scheme concocted between the cashiers of the Stockman's Bank and the Chadron bank to secure for the Stockman's Bank a larger deposit than the railway union intended to place with the Stockman's Bank. The deposit continued at $10,000, except that whenever J. W. Dalby, the union treasurer, came up for reelection he withdrew the deposit and took the funds with him to the union in order to turn them over to his successor. When reelected J. W. Dalbey returned the deposit to the Chadron bank and the Chadron bank redeposited one-half of it with the Stockman's Bank. When the Chadron bank failed the claim was resisted on the ground that only one-half of the claimed deposit actually remained in the Chadron bank and that the deposit was made upon a collateral agreement to redeposit one-half

the fund in the Stockman's Bank. The claim against the guaranty fund was allowed in full by the district judge and we think he was right.

Had knowledge of the transaction been brought home to J. W. Dalbey, or to any of the union officials, the deposit would have been invalidated as a claim against the guaranty fund because of the collateral agreement. Laws 1923, ch. 191, sec. 39. So far as the union knew they had a $10,000 deposit in the Chadron bank. The deposit was actually made in cash and $500 accrued interest was due thereon. Under the Nebraska guaranty law the union is entitled to recover the full amount of the deposit together with accrued interest of $500 from the guaranty fund. The judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM R. KENNEDY ET AL., DEFENDANTS: ELIZABETH KENNEDY, INTERVENER, APPELLANT.

FILED MAY 11, 1928. No. 25639.

Intoxicating Liquors: TRANSPORTATION: FORFEITURE OF AUTOMOBILE. Evidence outlined in opinion *held* insufficient to sustain the forfeiture of an automobile that had been used unlawfully for the transportation of intoxicating liquor, the bootlegger not being the owner of the automobile and not having the owner's consent to use it for any purpose.

APPEAL from the district court for Gage county: WILLIAM J. MOSS, JUDGE. *Reversed, with directions.*

Frank A. Dutton, for appellant.

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

Heard before GOSS, C. J., ROSE, DEAN, THOMPSON, EBERLY and HOWELL, JJ., REDICK and WHEELER, District Judges.

ROSE, J.

This is a controversy over the possession of a Ford coupé

which had been used unlawfully by William R. Kennedy, defendant, for the transportation of intoxicating liquor on a public highway in Gage county. He was arrested and accused of that offense. In the information the coupé was designated with him as a guilty party with a view to forfeiture. Defendant pleaded guilty in the district court and was sentenced to serve a term in the county jail. In the criminal proceeding his wife, Elizabeth Kennedy, intervened, and pleaded that she was the owner of the coupé; that defendant had no interest in it or any right to its posession or use; that he wrongfully took the coupé from her garage without her consent or knowledge in violation of her orders, and that she had no part or interest in the use of the coupé for the transportation of intoxicating liquors; that at the time she did not know it was taken or used unlawfully. Intervener prayed for the restoration of her coupé. The material facts upon which she relied were put in issue by an answer on behalf of the state of Nebraska. The issues were tried to the district court, a jury being waived. As a result of the trial the sheriff was ordered to sell the coupé and turn the proceeds over to the school fund. Intervener superseded the judgment and appealed.

The principal assignment of error is the insufficiency of the evidence to sustain a forfeiture. The evidence shows beyond a reasonable doubt that intervener was the owner of the coupé and that her husband, the convicted defendant in the criminal prosecution, had no title to or interest in it. Intervener and her son so testified and their evidence is uncontradicted. The automobile dealer testified positively that he sold the coupé to intervener; that it was not to be used by intervener's husband; that he would be glad to sell her a car any time; that she bears a very good reputation; that he would not sell her husband a car, and, when questioned from the bench, gave utterance to a suspicion based on hearsay that intervener's husband might be a bootlegger. The salesman also testified that the coupé was sold to intervener. The latter testified that she made the initial pay-

ment with $200 of her son's money, gave her individual note for the remainder, and that she had paid $50—evidence not disputed.

Notwithstanding the uncontradicted evidence by unimpeached witnesses not discredited, it is argued on behalf of the state that the trial court was justified in finding that the coupé was the joint property of intervener and her husband, having been purchased with their mutual earnings in conducting a restaurant. This view is contrary to positive testimony of credible witnesses and depends largely on admissions brought out on cross-examination of intervener who, in answering "yes" to questions, testified in substance: For some years she and her husband had been engaged in the restaurant business, she working part of the time during the day and he at night. They earned what property they have operating the restaurant. The money she spent for the car was earned in that business. This testimony indicates candor and fairness. It does not tend to disprove or to overturn the conclusive evidence of her ownership. It does not imply a partnership in, or approval of, the bootlegging of her husband. It does not indicate that she did not earn and hold her money in her own right or that she was not absolute owner of the coupé or that she permitted her husband to use it for an unlawful purpose.

Conceding, nevertheless, that intervener is the owner, it is insisted that there is evidence of the husband's use of the coupé, and of other cars, with intervener's consent in connection with the business of the restaurant. Evidence of this nature is indicated by the following summary of its import: The husband used his wife's car to deliver meals from the restaurant to prisoners in the county jail. The keys to the coupé were left in a glass in their home where they were accessible to any one knowing where they were. Husband and wife lived in the same home and their relations were friendly. February 24, 1926, the date of the husband's arrest for unlawfully transporting intoxicating liquor, he had been to Lincoln to collect bills for the res-

taurant. Prior to the arrest of the husband he had been seen driving the coupé. The son who worked in the restaurant had a car of his own. Intervener could not drive a car. Is the inference from this evidence sufficient to authorize a forfeiture in view of direct, positive and uncontradicted evidence to the contrary? The answer depends on evidential facts not directly contradicted and in part indicated as follows: Intervener owned the restaurant and her husband and son worked for her, the accounts being kept and the checks being issued in her own name. Meals for prisoners had been delivered generally in other cars. The husband, as shown by evidence already stated, was never permitted to use the coupé and wrongfully took it from the possession of his wife in violation of positive orders. He had been directed by his wife to take the bus to Lincoln to collect bills for her on the day of his arrest. Instead he took the coupé from the garage in the morning before his wife was out of bed and she did not know it was gone until the son reported the fact to her. She had the coupé a short time only and her son was teaching her to drive it. The husband was found in a state of intoxication and was guilty of transporting intoxicating liquor in violation of law. There is nothing in the record to indicate that the son or the intervener had ever had any part in the diabolical traffic of the husband and the father. If the wife, a law-abiding citizen making an honest living in spite of her husband, knowing his propensities, anticipated what happened, she would naturally want to run her business in her own name, to have her own coupé and learn to drive it, to deny her husband the right to use it—these, under all the circumstances, are logical inferences, rather than the giving of consent to the use of her coupé for a purpose that would tempt her husband and bring grief and disaster upon herself and family. These inferences are in harmony with uncontradicted testimony of credible witnesses. The only note to the contrary is found in testimony of a police officer who no doubt conscientiously said he had several times seen the husband driving intervener's coupé. He

frankly admitted, however, that he did not know the driver was a trespasser. When asked on cross-examination if the car might not have belonged to a son, he did not answer; but upon further questioning, he testified: "I would say this was the same one"—giving as a reason he had remarked at the time that the husband "wanted to watch his step or we will have another Ford coupé." He was unable to give the number of the Ford coupé or the license number of it. This testimony, contrary to the direct evidence and the proper inferences from all the circumstances, does not prove consent of intervener to her husband's use of her coupé or overturn the uncontradicted evidence to the contrary.

For the purposes of forfeiture inferences from circumstances may be sufficient to justify a finding that the owner of a car consented to its use by a bootlegger, but in the present case the conclusion is that the evidence is wholly insufficient to sustain the judgment of the district court. For that reason it is reversed, with directions to sustain the petition of intervener and to restore to her the Ford coupé.

REVERSED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. NELIGH STATE BANK, APPELLEE: A. J. SHOLZ ET AL., APPELLANTS.

FILED MAY 11, 1928. No. 25354.

1. **Statutory Provision.** "In any proceeding in connection with the insolvency, liquidation or reorganization of a bank, a judge of the district court shall have jurisdiction in any county in the judicial district for which he was elected to perform any official act in the manner and with the same effect as he might in the county in which the matter arose, or to which it may have been transferred, and he may perform any such act in chambers with the same effect as in open court." Laws 1925, ch. 30, sec. 16.
2. **Evidence** pointed out, discussed in the opinion, and *held* sufficient to sustain the judgment of the trial court.

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

C. H. Hendrickson, J. A. Donohoe and *A. R. Davis,* for appellants.

C. M. Skiles, Fred S. Berry, James E. Brittain and *Lyle E. Jackson, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

DEAN, J.

September 16, 1925, the Neligh State Bank, then insolvent, was taken over by the department of trade and commerce. A few days thereafter the district court for Antelope county appointed R. W. Ley as receiver. The bank maintains that for a time, and while it was yet a going concern, it was the owner of the fee title to the S. ½ of the N. E. ¼ and the S. E. ¼ of section 22, and the N. ½ of the N. E. ¼ of section 27, consisting of 320 acres of land, all in township 24, range 8, west of the sixth p. m., in Antelope county, subject, however, to a $10,000 mortgage loan.

In this suit A. J. Sholz and Martha H. Sholz, his wife, and B. A. Hoskinson were joined as defendants. From the pleadings and the proofs it appears that Sholz caused an instrument to be filed in the county clerk's office of Antelope county, January 28, 1926, which purports to show that he, or his wife as his assignee, had some right, title or interest in the land in suit, and that, pursuant to such alleged interest, it is maintained by the defendants that they entered into a verbal lease with the defendant Hoskinson and placed him in possession of the land. And Hoskinson was in possession when this suit was commenced.

March 2, 1926, the receiver began this suit in the district court for Antelope county. In his petition he maintained that he was entitled to have an order entered herein requiring "A. J. Sholz, Martha H. Sholz, and B. A. Hoskin-

son, and each of them, to appear before Honorable Anson A. Welch, one of the judges of the district court for Antelope county, Nebraska, sitting in chambers at Wayne, Wayne county," March 6, 1926, on an hour named, "to show cause, if any there be, why an order should not be entered herein, requiring the aforesaid parties, and each of them, to surrender possession of said real estate to your petitioner."

Pursuant to notice the parties appeared and upon submission of the evidence the court found for the plaintiff receiver and against the defendants Sholz and Hoskinson. The defendants have appealed.

The record discloses that the receiver, some time before January 28, 1926, under the court's approval and direction, entered into an agreement for the sale of the land in suit to a man named Avery, for a consideration certain and upon terms approved by the court, and that under this agreement Avery, besides the purchase price, assumed payment of the $10,000 mortgage and entered upon possession of the land. The record shows that the defendant Sholz, as a part of his plan to embarrass the petitioner, placed the defendant B. A. Hoskinson in possession of the land under a verbal lease.

Fred Nuttleman, a former tenant, testified on the part of the plaintiff that he resided on the land in suit during the year 1925. His lease is in the record and will presently be noted. His rental began in September, 1925, and ended March 1, 1926. On the cross-examination Nuttleman testified: "By the court: Q. You say you assigned that lease to Hoskinson? A. Yes. By the court: Q. When did you do that? A. I don't know. By the court: Q. Well, as near as you can tell? (No answer.) Q. Did you ever talk with the receiver of the bank or anybody about assigning it to Hoskinson? A. Not at that time. I talked with Mr. Saunders in the past month, but I have no dates. Q. You had no talk with anybody before you made this arrangement with Hoskinson? A. No. sir. By the court: Q. You say this lease for next year is on the same terms as

the written lease you had before? A. Yes; that was supposed to go just the same. By the court: Q. And in this written lease you agree not to assign the lease or assign the premises without written consent, so by what authority did you turn it over to Hoskinson? A. Well, I have no lease. By the court: Q. You hadn't any written authority from anybody to turn it over to Hoskinson? A. No; not from the bank. By the court: Q. Or anybody else? A. No sir."

The Nuttleman lease above referred to is in the usual form and, among others, contains this recital:

"And said second party (Nuttleman) agrees not to assign this lease nor underlet said premises without the written consent of the first party (Neligh State Bank)."

The argument of plaintiff's counsel is that the unauthorized, wrongful, and unlawful possession of the land by Hoskinson, as Sholz' alleged subtenant, will result in the repudiation and rescinding of the contract of sale made by the receiver with Avery, unless the relief prayed for by plaintiff should be granted, namely, that all of the above named parties defendant be required to surrender possession of the premises so unlawfully obtained.

The defendants argue that the court was without jurisdiction to adjudicate this case at chambers in Wayne county, Nebraska. We do not think the argument is sound in view of the following act:

"In any proceeding in connection with the insolvency, liquidation or reorganization of a bank, a judge of the district court shall have jurisdiction in any county in the judicial district for which he was elected to perform any official act in the manner and with the same effect as he might in the county in which the matter arose, or to which it may have been transferred, and he may perform any such act in chambers with the same effect as in open court." Laws 1925, ch. 30, sec. 16.

The possession by Hoskinson was subsequent to the court's appointment of the receiver Ley and was without the color of right or legal authority from the fact that dur-

ing all of the time mentioned herein the receiver, under the direction of the court, was lawfully entitled to the possession of the land, which at the time was in the course of administration by the court.

"The appointment of a receiver pending the litigation does not in any way determine the rights of the parties to the litigation. He is but the arm of the court to take care of and administer the property placed under his charge as receiver as the court may from time to time direct. Property in his hands is in *custodia legis* and the court in the event that it determines that it had no jurisdiction to appoint the receiver still has jurisdiction to restore the property to the owner or person having the legal title to it. He is a person indifferent as between the parties to the litigation and holding the property for the benefit of all of them, but his possession is really that of the court." 1 Tardy's Smith on Receivers, (2d ed.) sec. 26.

The learned trial court rightly held that the Neligh State Bank was entitled to and should have the immediate possession of the real estate without interference by Hoskinson or other of the defendants. The judgment is, therefore, in all things

AFFIRMED.

BURGESS-NASH BUILDING COMPANY, APPELLANT, V. CITY OF OMAHA, APPELLEE.

FILED MAY 11, 1928. No. 25281.

1. **Municipal Corporations: EMINENT DOMAIN: LEVY OF SPECIAL ASSESSMENTS.** That part of section 3610, Comp. St. 1922, in the following language: "Whenever the approved appraisal in such proceedings exceeds the sum of $100,000 and the approved amount which may be assessed as special benefits reported by the committee exceeds 90 per cent. of the amount of the appraisal, then the council is authorized to issue bonds without a vote of the electors for the purpose of paying the difference between the amount of the approved report of the appraisers and the amount which may be taken care of by special assessment, and it is authorized and required to levy special taxes

upon the property specially benefited and to the extent of special benefits for the purpose of paying the remaining balance of the appraisal of damages"—construed, and *held* to authorize the city council, before issuing the bonds therein provided for, to sit as a board of equalization and ascertain and levy the amount of special benefits against property especially benefited which may accrue from the public improvement therein contemplated.

2. **Constitutional Law.** Where the constitutionality of a statute is questioned, courts, as a rule, will adopt such construction as will make the statute constitutional, if its language will permit.

3. **Eminent Domain:** CHANGE IN LAW. Under section 3610, Comp. St. 1922, the city council of a city of the metropolitan class was authorized, where a condemnation proceeding for a public improvement had been instituted under the law as it previously existed, to complete the proceeding under the new law, and to adopt any part of the proceedings which had been carried on under the law as it previously existed, and make use thereof for the purpose of completing the proceeding.

4. ———: APPRAISAL. Under the facts outlined in the petition, the appraisal of damages by a committee of five disinterested freeholders *held* to be a valid exercise of power.

5. **Municipal Corporations:** EMINENT DOMAIN: APPOINTMENT OF APPRAISERS. Pursuant to the provisions of section 3610, Comp. St. 1922, which require the city council to appoint a committee of three of its number to ascertain and report the amount of special benefits which may be levied by reason of a public improvement, and where the council, by resolution, authorizes the mayor to name three of its members as a committee, and such committee accepts the appointment, performs its duties and makes its report, which is thereafter approved and adopted by the council, *held*, that the appointment is, in effect, made by the council and is a sufficient compliance with the statute.

6. **Constitutional Law:** EMINENT DOMAIN: ASSESSMENT OF BENEFITS: DUE PROCESS OF LAW. A statute which authorizes the assessment of special benefits accruing to property by reason of the construction of a public improvement, and which affords to the property owner, at some stage of the proceedings, notice and an opportunity to be heard before the special assessment is levied, and with an opportunity to appeal from the body levying the assessment to the district court, if the property owner feels aggrieved, does not violate the "due process"

clause of the Fourteenth Amendment to the federal Constitution.

APPEAL from the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

John P. Breen and *William H. Herdman,* for appellant.

Dana B. Van Dusen, John F. Moriarty, Thomas J. O'Brien and *Bernard J. Boyle, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

GOOD, J.

This is an action to have special taxes, levied against plaintiff's real estate, adjudged void and to enjoin their collection. A general demurrer to plaintiff's petition was sustained. Plaintiff elected not to further plead. Its action was dismissed, and it has appealed.

The taxes in question were levied for special benefits accruing to plaintiff's real estate by reason of the widening of Harney street between Twentieth and Twenty-fourth streets, in the city of Omaha. In its petition plaintiff set out in detail the proceedings by which the defendant city condemned and appropriated private property for widening of the street and levying of the special taxes, and alleged that the taxes are void for many reasons. We shall consider only those which are necessary to a proper determination of the case.

The condemnation proceedings were begun in 1919 under the law as it then existed. This law was amended in 1921, and the proceedings completed under the later law. Plaintiff alleged that section 57, art. III, ch. 116, Laws 1921, being section 3610, Comp. St. 1922, applicable to the proceedings, is "unconstitutional and void for that the same does not provide a lawful and constitutional method for the payment of property appropriated or attempted to be appropriated by the defendant city under the provisions of this section."

In 1919, section 4330, Rev. St. 1913, regulated condemnation proceedings of the character here involved. Said section provided that whenever it became necessary to appropriate private property for the use of the city for streets, or for other purposes authorized by section 4329, Rev. St. 1913, such appropriation should be declared necessary by ordinance, and the mayor, with the approval of the council, was required to appoint three disinterested freeholders of the city who, after notice to the owners of, and parties interested in, the property to be taken, should assess the damages to the owners of the property and the persons interested therein; that such assessments should be reported to the city council for confirmation, and if the report should be confirmed the damages so assessed should be paid to the property owners, and with a further proviso that, in all cases involving an amount of $50,000 or more, there should be appointed five appraisers, and the assessment, if recommended for approval by the city council and confirmed by the mayor and city council, must be submitted to the electors at a general or special election. In the instant case, the ordinance was passed declaring the necessity for appropriating the property for the purpose of widening Harney street between Twentieth and Twenty-fourth streets, in Omaha. Thereafter the mayor, with the approval of the city council, appointed five disinterested freeholders of the city of Omaha to assess the damages to the owners, respectively, of the property taken by the appropriation declared necessary by the ordinance. The freeholders so appointed made their appraisement and awarded to the owners of the property taken a sum amounting, in the aggregate, to $187,465.16, which was reported to the council. At a later date the city council approved and adopted the report of the appraisers. At this point the matter seems to have been referred to the legal department of the city for examination and report, and thereafter and in October, 1920, the city council rescinded its former approval of the appraisement, and the matter thus stood until after the statute had been changed by the enactment of a

new charter for the city of Omaha, which became effective on the 20th of April, 1921, known as chapter 116, Laws 1921. The council then reapproved the report of the appraisers.

Section 57, art. III, ch. 116, Laws 1921, now appearing as section 3610, Comp. St. 1922, relating to the subject of eminent domain, among other things provides that the city council may acquire, by the exercise of the powers of eminent domain, private property for streets and for the purpose of widening or extending the same; that, whenever it becomes necessary to appropriate property for the purposes provided by the act, the purpose of and necessity for such appropriation shall be declared by ordinance, and thereupon the council shall appoint three disinterested freeholders of the city who, after giving notice to the owners of, or parties interested in, the property to be appropriated, shall appraise and assess the damages occasioned by the taking of such property; that, whenever the purpose of the proceedings is to acquire property for streets or adding to or enlarging, widening or extending them, and the amount of the appraisal does not exceed $100,000, the council may thereupon confirm or reject the same. If the report be confirmed, then provision is made for the payment of the awards by the assessment of special benefits, and for the issuance by the council of bonds for any excess of the appraisement over special benefits. The section further provides:

"If the amount of the appraisal as reported by the appraisers exceeds $100,000, the council shall thereupon approve or reject said report within 120 days after the same is filed, and if said report be approved the council will thereupon appoint a committee of not less than three of its members who shall carefully examine and investigate the proposed improvement for the purpose of determining as nearly as possible the amount of special benefits which would result from the proposed improvement, if carried forward. The committee may procure assistance in such work when deemed necessary to a proper performance

thereof. Immediately upon completion of its duties, the committee shall file its report with the city council stating the total amount in dollars and cents, which in its judgment and within its finding may be assessed as special benefits against the property which would be especially benefited. The city council shall thereupon examine such report, it may approve it as reported, or it may increase or reduce the amount of such report or otherwise alter or modify it, and approve it as so altered, or it may reject such report. If rejected, a new or further report may be called for or the proceedings may be abandoned. If the amount so determined and found and finally approved does not equal or exceed 90 per cent. of the amount of the appraisal as reported and tentatively approved by the council, then such proceedings shall be abandoned, unless and until authority has been obtained from the electors to issue bonds to pay the excess of the costs of the improvements, as determined by the appraisal, over the amount which may be assessed as special benefits against the property specially benefited, as determined by the approved report of the committee."

Then follows provision for submitting the proposition to the electors. The section further provides:

"Whenever the approved appraisal in such proceedings exceeds the sum of $100,000 and the approved amount which may be assessed as special benefits reported by the committee exceeds 90 per cent. of the amount of the appraisal, then the council is authorized to issue bonds without a vote of the electors for the purpose of paying the difference between the amount of the approved report of the appraisers and the *amount which may be taken care of by special assessment,* and it is authorized and required to levy special taxes upon the property specially benefited and to the extent of special benefits for the purpose of paying the remaining balance of the appraisal of damages.

"The foregoing provisions, or any part thereof, in so far as the same may be applicable or may be made applicable to proceedings pending at the time of its enactment or any part of such proceedings, may be availed of, used and ap-

plied in such proceedings, or any part thereof, and such pending proceedings or part thereof to which such provisions may be applicable shall be consummated under the provisions of this act." (Italics ours.)

It will be observed that the statute contemplates three distinct methods of procedure, the first being applicable to cases where the appraisal of damages, occasioned by the taking of property for public use, does not exceed $100,000. The second method is applicable to a situation where the appraisal of damages exceeds $100,000, and where the amount which may be raised by special assessments, as determined by the council's approved report of its committee, does not equal 90 per cent. of the appraisal of damages. The third method of procedure applies where the amount of appraisal of damages exceeds $100,000, and where the council finds that 90 per cent. or more of such appraisal can be raised by special assessments.

Counsel for plaintiff concede that the first method provides an adequate fund and method of paying for the damages for property appropriated, but contend that the second and third methods do not so provide, and that they are therefore unconstitutional and void, in that they may permit the taking of private property for a public use without making just compensation.

In the instant case the committee of the council appointed to ascertain the amount that could be raised by special assessments reported that the sum of $182,335.91 could be so raised, which is more than 90 per cent. of the appraisal of damages. Thereupon, the council approved such report and proceeded to complete the condemnation proceedings in the manner as provided in the third method. Since the second method is not involved in this case, we are not concerned as to whether that method is valid and constitutional. The third method is applicable to and the one followed in the instant case.

Counsel for plaintiff strenuously contend that the statute contemplates the council shall take the report of its committee as to the amount that may be raised by special as-

sessments, and when such report is approved by the council it is then authorized to issue bonds for the difference between the amount so reported and approved and the amount of the appraisal of damages; and it may follow that, when the council, sitting as a board of equalization, equalizes and levies special assessments, the amount so raised may not equal the amount of the approved report of the committee; and if the amount so actually levied for special benefits is less, then an adequate fund has not been provided to pay for the damages for property taken.

We think a very close analysis of the statute will not bear this interpretation. The language of the statute is: "Then the council is authorized to issue bonds without a vote of the electors for the purpose of paying the difference between the amount of the approved report of the appraisers and the amount which may be taken care of by special assessment." It does not fix the amount of bonds as the difference between the approved report of the committee to ascertain the amount of special benefits and the appraisal of damages, but authorizes the council to issue bonds for the difference between the amount of the damages as approved and the amount which may be taken care of by special assessments. This language clearly implies that assessments for benefits should be made before bonds are issued. Nowhere in the statute does it require the issuance of bonds first. The council may first sit as a board of equalization, ascertain and determine precisely the amount that may be assessed for special benefits, and, after having done so, then it may issue bonds for the difference between the amount which may be taken care of by special assessments and the amount of the approved report of the appraisers to ascertain damages. If this is the proper interpretation of the statute, as we believe it to be, then it follows that an adequate fund is provided with which to pay for the property taken for and damaged by the improvement.

If the interpretation of the statute for which plaintiff contends would render it unconstitutional and void, or of

doubtful validity, and the statute is susceptible of another construction which would make it valid and free from doubtful validity, then the latter construction is to be preferred. When the constitutionality of a statute is questioned, it is a rule of the courts and also a rule of construction to adopt such construction as will make the statute constitutional, if its language will permit. *Union Stock Yards Co. v. Nebraska State Railway Commission,* 103 Neb. 224; 25 R. C. L. 999, sec. 242; 25 R. C. L. 1000, sec. 243.

Counsel complain that the amount of damages for property taken was not ascertained by a committee of three disinterested freeholders, as by the present statute provided. It may be observed, however, that under the law as it existed in 1919 the statute authorized the appointment of a committee of five freeholders where the amount involved was more than $50,000, and, according to another portion of section 57, heretofore quoted, the council was at liberty to carry on to completion under the new act a condemnation proceeding brought under the new law as it had previously existed. It follows that the council was justified in taking up the condemnation proceeding at the point to which it had been carried under the old law, and thereafter completing it under the new law. It was not required to abandon the proceeding begun under the old law, but could make use thereof and carry the proceeding to completion under the new law. Under the facts disclosed, we hold that the appraisal by a committee of five freeholders is valid.

Counsel for plaintiff contend that the city council did not appoint a committee of three of its own number to ascertain and report the amount that might be raised by special assessments, as provided by the statute. It appears that the council, instead of directly appointing three of its own members, adopted a resolution by which it authorized the mayor to name three members of the council to act as such committee, and that, pursuant thereto, the mayor designated three members of the council to act as such committee. The mayor did not make the appointment upon

his own initiative, but the council itself took the initiative to secure the appointment of a committee of its number. Instead of naming the committee itself, it requested the mayor to name three of its members. The committee accepted the appointment, performed its duty and reported, and the council adopted and approved its report. In adopting and approving its report, the council, in effect, adopted and approved the appointment of the committee. While we are aware that it is a general rule that, in condemnation proceedings to take private property for public uses, every jurisdictional requirement must be strictly followed, yet we think the manner of appointment of this committee by the council was not a jurisdictional matter. The report of the committee was tentative only. It did not fix a tax upon the plaintiff's or any other person's property. It only formed the basis for the action of the council, and the council was authorized either to modify or alter the report and to approve or reject it as modified or altered. We are of the opinion, however, that the appointment was, in effect, made by the council, and that the proceeding is not invalidated by the manner in which it appointed its committee.

Counsel for plaintiff contend that the tax is void because the condemnation proceeding was not carried to completion under the law as it existed in 1919. As heretofore pointed out, it was not necessary for it so to do. It was authorized to complete the proceeding under the new law.

Plaintiff argues that the special tax in question is void because it was levied without notice to property owners and without an opportunity of a hearing, and that it, therefore, amounts to the taking of plaintiff's property, in violation of the "due process" clause of the Fourteenth Amendment to the federal Constitution. The argument is based upon the assumption that when the city council approved the tentative report made by its committee, wherein it fixed the amount of benefits which, in its judgment, could be raised by special assessments, such approval finally de-

termined the amount of tax that may be levied, in the aggregate, against the property.

This question might be dismissed without consideration because it is not raised by any averments in the petition; nor is it among the errors assigned for a reversal of the judgment. However, it is quite clear from an examination of the statute, heretofore quoted, that the report of such committee does not fix the amount of tax, either in the aggregate or which may be levied and assessed against a particular parcel of property. The amount of the tax is not fixed upon any property; nor is the aggregate determined until the council sits as a board of equalization, at which time the amount of tax levied against any parcel of real estate is determined and the aggregate then finally fixed. Each property owner is given notice of the sitting of the board of equalization and is accorded an opportunity to appear before the board and protest, and, if he feels aggrieved at the action of the board, he is given an opportunity to appeal to the district court. It is not essential that the property owners should be given notice and an opportunity to be heard before the committee of the council which reports tentatively upon the amount of special benefits. It is sufficient, in order to comply with the "due process" clause of the Fourteenth Amendment to the federal Constitution, that at some stage in the proceedings the property owner is given an opportunity to be heard as to the amount of tax that may be levied against his property. The taxes levied in this instance are not vulnerable to the objection presented.

After a careful examination of the record and all questions that have been presented, we are convinced that the judgment of the district court in sustaining the demurrer is right, and it is therefore

AFFIRMED.

IN RE GUARDIANSHIP OF CHARLES STRELOW, INCOMPETENT. FRANK C. SCHULTZ ET AL., APPELLANTS, V. LOUISE FEEKIN ET AL., APPELLEES.

FILED MAY 11, 1928. No. 25696.

1. **Insane Persons: GUARDIANSHIP: APPEAL.** Section 1471, Comp. St. 1922, providing, "in all matters of probate jurisdiction, appeals shall be allowed from any final order, judgment, or decree of the county to the district court by any person against whom any such order, judgment or decree may be made or who may be affected thereby," is applicable to actions involving the appointment of guardians and the administration of their wards' estates, as well as to the administration of estates of deceased persons.
2. ———: ———: ALLOWANCE OF CLAIMS: APPEAL. Under such section, an appeal will lie from an order allowing claims against the estate of an incompetent under guardianship, notwithstanding no answer or objection was filed against such claims and the appeal is had by one whose name does not appear as a party to the action, if by such allowance the party appealing is affected.
3. ———: ———: APPEAL: MOTION TO DISMISS. A motion to dismiss an appeal had under such section, as in this case, should be overruled, unless it is clearly shown by the record that one or more of the conditions of the appeal bond have been breached, or that the appeal has not been perfected within statutory requirements.

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

W. B. Comstock and *M. L. Poteet,* for appellants.

Meier & Meier and *Robert R. Hastings, contra.*

Heard before GOSS, C. J., ROSE, DEAN, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

THOMPSON, J.

Frank C. Schultz, appellant herein, seeks to reverse a judgment of the district court for Lancaster county dismissing an appeal from a judgment rendered by the county court of such county.

The record reflects the following: An application in usual form was lodged with the county court of Lancaster county, praying that a guardian of the person of Charles Strelow be appointed, by reason of his incompetency caused by advanced age; and at the same time in the same court another application was filed asking the appointment of a guardian of his property, for the same reason. After due consideration thereof the court entered findings and judgment in favor of each applicant, and as a part of the judgment appointed Robert R. Hastings of Crete, Nebraska, guardian of the person of such Strelow, and the First Trust Company of Lincoln, a corporation, guardian of his property. Such guardians, after qualifying, entered upon their duties and were administering their respective trusts when Strelow died testate, a resident of such county. In his will he named appellant Schultz as executor and residuary legatee. The will was duly filed for probate in the county court of Lancaster county, and the First Trust Company was appointed special administrator of Strelow's estate, gave bond, and entered upon the discharge of its duties as such. In furtherance and in aid of the due administration of this estate, Hastings and the First Trust Company, who are appellees herein, each filed with such county court a petition and final report of their respective doings in the premises, and prayed that the same be by the court so received and approved. The First Trust Company alleged, among other things, that there had come into its possession moneys belonging to such Strelow in the sum of $22,352.50, also certain lands and a $1,000 Liberty bond; that such trust company had paid out for sundry expenses the sum of $432.18; that it should be compensated for its services as guardian of such Strelow's property; that it had become necessary during the administration of the trust for it to have legal advice and assistance, and that by reason thereof it employed Meier & Meier and the aforesaid Robert R. Hastings as attorneys, and that such attorneys should be awarded reasonable compensation for their services rendered; that there were claims for taxes filed by the county

treasurer of Lancaster county for the years 1922, 1923, and 1924, which should be properly disposed of by the court; and the trust company prayed that such accounting be allowed, that just compensation be made to it as guardian of Strelow's property, as well as to the guardian of his person, and to such attorneys so employed, that the guardians be discharged, and for other relief. Hastings prayed that his accounting be allowed, that he be awarded reasonable compensation for his services as guardian of Strelow's person, and for his discharge. The usual notice of such applications was duly and legally published. On hearing had, judgment was entered approving and allowing the reports of such guardians, directing payment of $400 to the trust company for its services, $800 to Hastings for his services as guardian of Strelow's person, $3,500 to Meier & Meier and Hastings for attorneys' fees, $147.31 to the county treasurer for taxes, $20.80 to pay the balance of court costs, and that the remaining sum of $17,052.21, together with the real estate and the Liberty bond, be turned over to the First Trust Company as the special administrator of the Strelow estate.

Frank C. Schultz, desiring to appeal from such judgment, procured and lodged with the county judge a bond in legal form, and, as a reason for his intervention, stated in such bond, as a preliminary thereto and as a part thereof, as follows:

"Whereas, there was entered in the county court of Lancaster county on or about the 4th day of May, 1926, an order in the matter of the guardianship of Charles Strelow allowing and approving the account of Robert R. Hastings and the First Trust Company as guardian of the person and estate of Charles Strelow, and making certain allowances to Robert R. Hastings, the First Trust Company, a corporation, and Meier & Meier, and to other persons; and, whereas, the undersigned Frank C. Schultz was by the last will and testament of Charles Strelow, now deceased, named as executor and residuary legatee and devisee of the estate of the said Charles Strelow, now deceased; and, whereas, the

First Trust Company was appointed by said county court and became special administrator of said estate of Charles Strelow; and, whereas, the said Robert R. Hastings and Meier & Meier have at all times been acting as attorneys for said special administrator; and, whereas, the interests of the said First Trust Company, Robert R. Hastings and Meier & Meier and others to whom allowances were made in said order above mentioned are antagonistic to the interest of said estate in this proceeding; * * * and, whereas, said Frank C. Schultz is aggrieved by said order and desires and intends to appeal therefrom."

This bond was by the judge of such county court filed and by him in all things duly approved. Appellant thereupon procured the county judge to transmit to the clerk of the district court within legal time a certified transcript of the record and proceedings relative to the matters appealed from. On the receipt thereof by the clerk such appeal was duly docketed in the district court.

Under the record as thus disclosed, certain nieces and a nephew of Charles Strelow, together with Hastings as guardian of his person, the trust company as guardian of his property, and the trust company as special administrator of his estate, and as administrator with will annexed of the estate of Theodore Strelow, deceased, interposed a joint motion in the district court, which, in substance, presents the following reasons why the appeal should be dismissed, to wit: That the judgment is final as to appellant, he not having moved to set the same aside in the county court; that he is not a party to the suit, is without interest therein, and is without authority to prosecute an appeal. This motion came on for hearing, without evidence, was sustained by the court and judgment entered dismissing the appeal. A motion for a new trial was interposed, alleging, in substance, among other things, that the ruling of the court in sustaining the motion and dismissing the appeal was contrary to law; further that such ruling was a denial to appellant of rights vouchsafed to him by chapter 15, art. XV, Comp. St. 1922. This motion was overruled, and

appeal is had to this court, presenting as error the sustaining of the motion to dismiss the appeal.

Section 1471, Comp. St. 1922 (which is a part of the above article) reads as follows: "In all matters of probate jurisdiction, appeals shall be allowed from any final order, judgment, or decree of the county to the district court by any person against whom any such order, judgment or decree may be made or who may be affected thereby." As to whether or not the matters under consideration are controlled by such article depends somewhat upon the proper construction of the words "in all matters of probate jurisdiction." Do these words, as used in such section, apply to a guardianship proceeding as evidenced by this instant case?

In 1 Bouvier's Law Dictionary (Rawle's 3d Rev.) p. 712, we find the following: "Court of Probate. In American Law. A court which has jurisdiction of the probate of wills and the regulation of the management and settlement of decedents' estates, as well as a more or less extensive control of the estates of minors and other persons who are under the especial protection of the law."

In 6 Words & Phrases Judicially Defined, p. 5628, the word "probate" is thus defined: "Probate originally meant merely relating to proof, and afterward relating to the proof of wills. Yet in the American law it is now a general name or term used to include all matters of which probate courts have jurisdiction, which are usually the estates of deceased persons and of persons under guardianship."

That the words "probate jurisdiction" as used in section 1471 heretofore quoted were by the legislature intended to and do include the appointment of guardians and the administration of their wards' estates, as well as the administration of estates of deceased persons, is evidenced by section 1473 of such article XV, wherein it is provided:

"Every party so appealing shall give bond. * * * The bond shall be filed within thirty days from the rendition of such decision. But an executor, administrator, guardian or guardian *ad litem* shall not be required to enter into bond

in order to enable him to an appeal. If it shall appear to the court that such an appeal was taken vexatiously or for delay, the court shall adjudge that the appellant shall pay the cost thereof, including an attorney's fee to the adverse party, the court to fix the amount thereof, and such bond shall be liable therefor in cases where it is required."

We conclude that section 1471 includes, and is applicable to, not only the administration of estates of deceased persons, but the appointment of guardians of minors and incompetents and the administration of their respective estates as well. Hence, as we are convinced that the matters to which we are giving our present consideration are of "probate jurisdiction," we are constrained to hold that the giving and approval of the bond in the county court, and the filing of the transcript in the district court, as evidenced by this record, invested the district court with jurisdiction. This being true, on the action being docketed in the district court, then it became the duty of that court to overrule the motion to dismiss the appeal, and direct the formation of issues so that the questions both of law and fact could be by it in the usual manner determined. Such determination could not be had on a motion to dismiss the appeal, as the record presented a litigable question for the court's consideration (which could only be solved by evidence introduced at such hearing), to wit: Did the appellant have an interest in the estate affected by the allowance of the recommendations of the petitioners, or either thereof; and, if so, did the judgment rendered in the county court prejudicially affect such interest?

As we said in *Gannon v. Phelan,* 64 Neb. 220, 224, in the course of our opinion therein, in construing what is now section 1471 of our Statutes: "The appeal brings the entire case up for review. The rule is now firmly established that, when any party or parties affected by a judgment or order file a sufficient bond, and afterwards file a transcript within the time provided by law, the appellate tribunal is possessed of jurisdiction of the case. * * * Whether the appeal could be properly taken by Thomas Gannon personal-

ly, or by him as administrator, or whether he could appeal in both capacities, were not matters to be determined on a motion to dismiss the appeal."

Under such section 1471, an appeal will lie from an order allowing claims against the estate of an incompetent under guardianship, notwithstanding no answer or objection was filed against such claims and the appeal is had by one whose name does not appear as a party to the action, if by such allowance the party appealing is affected. *Herman v. Beck*, 68 Neb. 566.

A pertinent similarity between the case of *Gannon v. Phelan, supra*, and this instant case is that Thomas Gannon, the appellant therein, as Schultz, appellant herein, was not named as a party to the action in the county court, and neither did he appear at the trial nor move to set aside the judgment, but, simply as one affected by such judgment, appealed therefrom. It might further be observed that the appellees herein, Louise Feekin, Mary Roop, and Robert Strelow, were in the same category as appellant Schultz, in that they were not named as parties to the county court proceedings.

Our holding herein should not be construed to mean that a motion to dismiss an appeal would not be forceful in a case where the record is such as to clearly show that one or more of the conditions of the bond have been breached, or that the appeal has not been perfected within statutory requirements.

As we view this record, it is determined by us that the appellant was prejudicially affected by the judgment rendered in the county court, that he was entitled to appeal therefrom to the district court, and that reversible error was committed by such court in sustaining the motion to dismiss the appeal from the county court.

The judgment of the trial court is therefore reversed and the cause remanded for further proceedings in harmony with this opinion.

REVERSED.

JOHN C. CARL, APPELLANT, V. WILLIAM C. WENTZ, APPELLEE.

FILED MAY 11, 1928. No. 26366.

Guardian and Ward: UNAUTHORIZED ACTS OF GUARDIAN. Evidence examined, and *held* insufficient to sustain the judgment of the district court.

APPEAL from the district court for Hamilton county: LOVEL S. HASTINGS, JUDGE. *Reversed.*

Craft, Edgerton & Fraizer, for appellant.

Thomas & Vail and *C. F. Barth, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

EBERLY, J.

This is an action in tort by John C. Carl, plaintiff and appellant, against William C. Wentz, defendant and appellee. Judgment for defendant. Plaintiff appeals.

Lucy Lord was the mother and duly appointed guardian of plaintiff, a minor. About May 15, 1917, as such guardian, she purchased of the defendant the note and mortgage which furnish the basis of this litigation. She paid therefor the sum of $400 of the moneys of her ward. The defendant on that date duly executed an assignment in writing, transferring the note and mortgage. This assignment, together with the note and mortgage transferred, was delivered to the guardian, who failed to record the assignment, but at all times retained possession of all the instruments. While this assignment was still unrecorded, the defendant, on February 9, 1920, unlawfully executed a release in writing of the mortgage he had theretofore transferred to Lucy Lord, as guardian, and sent it to his son, who caused the same to be recorded on February 13, 1920.

Plaintiff attained his majority on November 11, 1921, and on December 15, 1921, this action was commenced.

Trial appealed from was had to the court without intervention of a jury. At its conclusion the trial court made certain special findings of fact and of law, found generally for the defendant, and entered judgment dismissing plaintiff's action. The special findings of fact thus made and entered were:

"The court further finds that one Lucy Lord, the mother and guardian of the plaintiff, John C. Carl, did, on the 15th day of May, 1917, purchase the mortgage and note in plaintiff's petition described from the W. C. Wentz Company out of the funds in her hands as guardian for said John C. Carl, and that said guardian thereupon received an assignment of the mortgage on the indebtedness secured by it, executed by William C. Wentz, the payee thereof and defendant herein, and that said mortgage note and assignment were delivered to her as guardian for the plaintiff and remained in her possession until she delivered the same to her son and ward, John C. Carl, the plaintiff, when he became of age. The court further finds that on the 9th day of February, 1920, the defendant, William C. Wentz, negligently and wrongfully signed and executed in the state of California a release of said mortgage and delivered the same to Charles W. Wentz in Aurora, Hamilton county, Nebraska, and that the latter wrongfully and fraudulently recorded the same and thereby released of record the mortgage theretofore sold and assigned to said Lucy Lord, guardian of the plaintiff, all without the knowledge and consent of said guardian of the plaintiff. The court further finds that, after the negligent and wrongful release of record by defendant William C. Wentz of said mortgage, a mortgage was given by Charles W. Wentz and wife to the Aurora Building & Loan Association for $3,000 under date January 27, 1920, upon the premises which plaintiff's mortgage had theretofore before said wrongful release been a first lien, and that such mortgage, on account of the wrongful release of the mortgage assigned to plaintiff's guardian, became a legal and

valid lien on said real estate. The court finds the three statements of mechanics' liens mentioned in plaintiff's reply to the amended answer, to wit, A. A. Alden for $145 and interest, Myrl S. Mather for $99.72, and Chas. A. Ronin for $262.70 with interest, had been filed in the office of the county clerk of Hamilton county, Nebraska, after the release by defendant of plaintiff's mortgage, and that said parties were claiming liens thereunder, but that neither at said date or at any time thereafter, within the two-year period limited by law or at all, were the said inchoate claims so claimed, as aforesaid, ever proved up on or perfected or ripened into actual subsisting or valid liens upon said real estate, and that thereafter on the 2d day of July, 1920, said Lucy Lord, as guardian of the plaintiff, recorded her assignment given her by the defendant William C. Wentz, and that said Lucy Lord did, on the 19th day of May, 1921, as guardian of the plaintiff, release of record the lien of the said mortgage then held by her, and that had she not released said mortgage lien the same would have furnished and afforded full and complete security for the note now held by the plaintiff and in her petition described, and the said act of said guardian in releasing her said mortgage lien was the proximate cause of any damage or injury which the plaintiff may have sustained."

The record is without dispute to the effect that the amount unpaid upon plaintiff's note is alleged in his petition, and that the makers are insolvent and have a complete defense in law thereto; that in the bankruptcy proceeding in which this son was a party in interest, and in a bankruptcy court having jurisdiction of the property covered by plaintiff's mortgage, after the execution of the so-called release by the guardian, referred to in the special findings of facts, the property was sold "free and clear of the liens of said mortgage, mechanics' liens and other liens" to an innocent purchaser for the sum of $3,700; that from this sum of $3,700 the mortgage of

$3,000 and all the mechanics' liens referred to in the special findings of the district court were paid in full by the trustee in bankruptcy which practically exhausted this fund thus created.

Facts, though not expressly incorporated in special findings, if conclusively established by the evidence, may, notwithstanding such omission, be considered as found and determined by the trial court. *State v. Allen*, 93 Neb. 826.

Section 8810, Comp. St. 1922, is, in effect, a mandatory requirement that in the trial of a law action by the court without intervention of a jury, the court shall, upon request of either party, in the form of a special finding, state the conclusions of fact found separately from the conclusions of law.

Section 8811, Comp. St. 1922, by necessary effect establishes the rule that, where special findings of fact are inconsistent with the general findings of the court, the former control. This is indeed a general rule.

"The making of findings of fact and conclusions of law is for the protection of both court and parties, the purpose of such findings and conclusions being to dispose of the issues raised by the pleadings, and to make the case easily reviewable by exhibiting the exact grounds upon which the judgment rests. When made, findings of fact are analogous to, and have the force and effect of, a special verdict, and are so considered when passed upon by a reviewing court." 38 Cyc. 1953.

The district court, in effect, finds specially that the release by Lucy Lord, as guardian, of the record of the assignment of mortgage, operated to release the real estate mortgage itself, then held by her as guardian, and was the "proximate cause of the damage or injury which the plaintiff may have sustained." Considering this finding as a conclusion of law, we find the trial court erred. This, in effect, is to hold the plaintiff, then a minor, responsible for the unauthorized and illegal act of his guardian.

It is to be remembered that the tort committed by the defendant, in the execution and recording of the unlawful release of mortgage, was committed against a minor, an incompetent. It affected the guardian only in a representative capacity, and no property or other valuable right was received by the guardian as a consideration of the execution of this release. No property whatever came into the possession of the plaintiff herein as a result of that unwarranted release. It was, in fact, a voluntary act wholly without consideration and wholly unauthorized by any court of competent jurisdiction. It was, therefore, void.

Indeed, it may be said in passing that, if the act be deemed a valid and binding act, it accomplished no more than the restoration of the *status quo* created by Wentz through his fraudulent release, and for the continuance of his own creation he may not complain; for its restoration under the evidence here he can claim no relief or benefit.

"Infant wards cannot be estopped by the unauthorized or illegal acts of a properly constituted guardian. It has also been held that a ward is not estopped to assert any rights to property by reason of any negligence on the part of his guardian." 28 C. J. 1161, sec. 277.

The special findings contained in the record support but one conclusion, and that is that the defendant Wentz wilfully defrauded the plaintiff when the latter was still a minor. As to Wentz, this infant, during minority, was and could be bound neither by estoppel nor by contract. Indeed, during the continuance of that incompetency, the plaintiff possessed no capacity to make the one or to create the other. Equity is deaf when unmitigated fraud is the sole appealing voice.

Wentz' tort created a cause of action against himself in favor of the infant. The law vested this right of compensation in this infant. He could be divested of this right created by this tort under the facts in this case in no manner except by his free and voluntary act, and then only after he had attained his majority. Wentz, in law, was

chargeable with the knowledge of the fact that he wronged an infant when he executed and delivered the unlawful release of mortgage; that the natural and probable results under the circumstances then existing, attending this unlawful act, were: That the release would be recorded; that innocent parties would thereafter deal with the title as relieved from the charge of the mortgage thus released; that rights thus acquired, in view of this recording act, would operate to the prejudice of the infant; that the plaintiff thus wronged was a minor and as such incapable of exercising the rights of self-protection with reference to his property rights until he had attained his majority; such lapse of time between the commission of the wrong and the attainment of majority would naturally operate to increase injury and damage to the minor.

In view of the special findings of fact made by the trial judge, this court finds no difficulty in determining that, whatever may be the rights of third persons who dealt with the title to the land mortgage on the faith of a public record, the record before us now discloses that the mortgage, under consideration, was wrongfully released as between the plaintiff and defendant Wentz; that by reason of such release plaintiff's note, secured by the mortgage, is valueless; and that the rights of plaintiff are wholly unaffected by what was done or what was not done by others during the continuance of his minority. Plaintiff is therefore entitled, on attaining his majority, to demand of the defendant herein full and adequate compensation for all loss or damage sustained by him through and because of the execution, delivery and recording of the release of mortgage.

As it must be conceded that, under the undisputed evidence, the note and mortgage are wholly nonenforceable at the present time, it follows that the defendant Wentz is therefore liable in damages to the plaintiff herein to the extent of the amount unpaid thereon with interest in accordance with their terms.

It follows that the general findings for the defendant and

judgment entered by the district court dismissing plaintiff's action are inconsistent with the special findings of fact set out in this opinion, and are wholly unsustained by the evidence in the record.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED.

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13. Generally, the issuance and delivery of a check or draft does not create an assignment *pro tanto* of the funds against which drawn, nor does it give rise to a cause of action in favor of the payee against the bank on which drawn unless and until accepted or certified by the drawee. *Harrison State Bank v. First Nat. Bank*..... 456

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15. Proceeds of bonds converted by bank officers *held* not protected by the bank guaranty fund. *State v. Clinton State Bank*..... 510

16. Money obtained to replenish bank reserve *held* not protected by the bank guaranty fund. *State v. Security State Bank*..... 521
State v. Security State Bank..... 530

17. The receiver of a failed bank may not set off against a valid claim an accommodation note given by a claimant without consideration. *State v. Security State Bank*.... 521
State v. Security State Bank..... 526
State v. Security State Bank..... 530

18. How far national banks are subject to state laws, stated. *Dovey v. State*..... 533

19. Statute prohibiting bank officials from receiving public money unless security has been given applies to officers

of national as well as those of other banks. *Dovey v. State* 533

20. Statute prohibiting bank officers from receiving public money without giving security *held* not void as to national bank officers as contravening laws of the United States. *Dovey v. State* 533

21. Taxes have priority to rights of depositors and creditors of an insolvent bank. *Farmers State Bank v. Nelson* 541

22. The receiver of an insolvent bank may sue in equity to prevent payment of a deposit to a stockholder until the latter's liability is determined. *State v. Banking House of A. Castetter* 610

23. Before exhaustion of bank's assets, a stockholder cannot be required to submit for adjudication his double liability. *State v. Banking House of A. Castetter* 610

24. Before exhausting assets of a bank, a stockholder may waive the immaturity of his double liability and submit the issue to a court of equity. *State v. Banking House of A. Castetter* 610

25. A third person's conditional or contingent interest in a stockholder's deposit does not necessarily prevent a receiver from setting off the claim for deposits against the stockholder's liability. *State v. Banking House of A. Castetter* 610

26. A charge based on a forgery against a depositor's account does not affect the deposit. *State v. Octavia State Bank* 825

27. Interest on a certificate of deposit as a claim against the guaranty fund should be computed at the contract rate until maturity and after judgment at 7 per cent. *State v. Octavia State Bank* 825

28. A deposit is protected by the guaranty fund, though unknown to the depositor the bank received it on condition that it redeposit a portion in another bank. *State v. Citizens State Bank* 852

29. Receiver's right to land of a bank *held* prior to that of assignee of lease assigned after appointment of receiver. *State v. Neligh State Bank* 858

Bigamy.

An indictment for bigamy need not allege that the former spouse had not been continually and wilfully absent and not heard from for five years next before time of alleged last marriage, which is matter of defense. *Barnts v. State* 363

Bills and Notes.

1. The negotiable instruments act should be construed with the view of carrying out the purpose of securing uniformity and certainty in the laws throughout the country. *Peter v. Finzer* 380
2. Great weight will be given to harmonious decisions of other states in construing the negotiable instruments act. *Peter v. Finzer* 380
3. Extension of time *held* not to release maker of note. *Peter v. Finzer* 380
4. Maker of note *held* primarily liable thereon. *Peter v. Finzer* 380
5. Where the evidence shows want of consideration for signing a note payable to a bank, evidence that signer signed for bank's accommodation is admissible. *Concord State Bank v. Jaeger* 436

Burglary.

In a prosecution for burglary, evidence *held* to sustain conviction. *Regan v. State* 723

Constitutional Law. SEE STATUTES.

1. A party invoking a statute may not question its constitutionality. *La Borde v. Farmers State Bank* 33
   Sommerville v. Board of County Commissioners 282
2. The judicial function is to apply the law in controverted cases, and this involves investigation of evidence as a basis therefor. *Gordon v. Lowry* 359
3. The legislature may not infringe on the judiciary in the matter of investigation of facts having to do with the determining of controverted facts. *Gordon v. Lowry* 359
4. Inquiry as to relevancy of facts in litigation devolves on the judiciary and not the legislature. *Gordon v. Lowry* 359
5. Statute making federal census conclusive as to population of subdivision of state *held* void. *Gordon v. Lowry* 359
6. An act of the legislature is presumed to be constitutional. *State v. Farmers Irrigation District* 373
7. Sec. 2887, Comp. St. 1922, relating to drainage by irrigation districts, *held* constitutional. *State v. Farmers Irrigation District* 373
8. A statute giving the property owner notice and an opportunity to be heard before assessment for a public improvement, with opportunity to appeal to the district court, *held* due process of law. *Burgess-Nash Bldg. Co. v. City of Omaha* 862
9. Courts will adopt such construction of a statute as will

make it constitutional, if possible. *Burgess-Nash Bldg. Co. v. City of Omaha* 862

Contracts.

1. "Excessively intoxicated" defined. *Keedick v. Brogan* 339
2. To avoid a contract because of excessive intoxication, one must rescind within a reasonable time after recovering his senses. *Keedick v. Brogan* 339
3. In a suit to cancel an instrument for incapacity, the burden of proof is on the one alleging it. *Keedick v. Brogan* 339
4. Contract *held* not an absolute or equitable assignment of deposits. *State v. Banking House of A. Castetter* 610
5. Mutuality of contract is not essential where there is a separate valid consideration. *Elson & Co. v. Beselin & Son* 729
6. Dismantling factory of a competing line of merchandise *held* sufficient consideration for contract for an exclusive sales agency. *Elson & Co. v. Beselin & Son* 729

Conversion.

1. The purchaser of a note from strangers to it is not a purchaser in good faith, if he participated in fraud through which they procured it from payee, and such participation may be shown by circumstances surrounding the purchase. *Norton v. Bankers Fire Ins. Co* 499
2. In an action for conversion of a note, where the maker is not a party, and fraud in its inception is not involved, the negotiable instruments law is inapplicable. *Norton v. Bankers Fire Ins. Co* 499

Corporations.

1. In absence of statutory authority or power given by the articles of incorporation paid-up stock cannot be assessed. *Schueth v. Farmers Union Milling & Grain Co* 14
2. Evidence *held* to show sale of wheat was between plaintiff and defendant corporation through its agent and was without collusion. *Sindelar v. Hord Grain Co* 776

Counties and County Officers.

1. A statute requiring four weeks' notice of an election submitting a proposition to the people is mandatory. *Richardson v. Kildow* 648
2. A county which has not accepted in statutory manner provisions of an act authorizing it to establish and maintain a county fair may not levy taxes therefor. *Richardson v. Kildow* 648

Courts.

1. A court sitting in one judicial district may not appoint a receiver in a suit pending in another district. *Hampton v. O'Shea* 230
2. To what extent courts may act on property of a nonresident, stated. *Salyers Auto Co. v. DeVore* 317

Criminal Law.

1. Error cannot be predicated on failure to instruct, without a request therefor, unless a statute or positive rule of law requires an instruction. *Marshall v. State* 45
2. Failure to instruct that variance between the name of the maker, as alleged in an information for forgery, and the one signed to the note is fatal, if not *idem sonans*, is not reversible error, where no request was made for such an instruction. *Marshall v. State* 45
3. Inspection of books and papers or the right to make copies, and exclusion thereof, if inspection is not permitted, is left to the discretion of the trial court. *Marshall v. State* 45
4. Ruling on motion for new trial for misconduct of county attorney, based on conflicting affidavits, will not be set aside unless clearly wrong. *Marshall v. State* 45
5. Where accused went to trial without formal arraignment, *held*, that he waived such right. *Hill v. State* 73
6. Disputed questions of fact and credibility of witnesses are questions for the jury. *Hill v. State* 73
7. A litigant may not take advantage of an error which he invited. *Davis v. State* 90
8. Denial of a continuance because a jury, selected from the regular panel, on a previous day had convicted accused of another offense, *held* not prejudicial error, where each juror selected for the second trial was qualified. *Crawford v. State* 125
9. Instructing in general terms instead of specifically defining acts that would constitute the offense is not ground for reversal, where the jury were not misled nor the defendant prejudiced. *Crawford v. State* 125
10. Accused, pleading not guilty, is clothed with the presumption of innocence which stands as evidence in his favor until the state proves guilt beyond a reasonable doubt; the burden of proof is with the prosecution, and never shifts. *Bourne v. State* 141
11. If the evidence or any material part thereof is doubtful, the doubt must be resolved in favor of the innocence of the accused, as every intendment or inference under the evi-

dence, considered in its entirety, must be construed in his favor. *Bourne v. State* 141
12. The court, as well as attorneys, should endeavor to surround the trial with an atmosphere of fairness, undisturbed by prejudice, passion, or ill will. *Bourne v. State* 141
13. Evidence as to motive for murder *held* insufficient, and refusal of instruction withdrawing such evidence from the jury *held* error. *Bourne v. State* 141
14. The court should, with or without request, instruct as to the law of the case. *Bourne v. State* 141
15. Refusal to instruct that verbal statements or admissions should be received with great caution *held* error. *Bourne v. State* 141
16. In a prosecution for violation of liquor laws, as for a second or third offense, evidence of a previous conviction is not competent, where proceedings in error therein are undertermined. *Nelson v. State* 219
17. A change of venue is discretionary. *Peterson v. State* 268
18. Where, in a prosecution for rape, several acts of sexual intercourse constitute substantially one criminal offense, the state will not be required to elect. *Peterson v. State* 268
19. Where the only error is the imposition of the wrong penalty, the cause will be remanded for a legal sentence. *Myers v. State* 287
20. Where an excessive sentence was imposed, the cause may be remanded for a proper sentence. *Coxbill v. State* 604
21. "Fleeing from justice" implies departure from usual place of abode or from place of commission of an offense, with intent to avoid detection or prosecution. *Colling v. State* 308
22. One whose whereabouts was at all times known *held* not a "fugitive from justice." *Colling v. State* 308
23. The court may in its discretion permit names of additional witnesses to be indorsed on the information after trial has begun. *Barnts v. State* 363
24. Appointment of one of defendant's lawyers to assist in the prosecution *held* improper. *Fitzsimmons v. State* 440
25. Every person accused of crime should have a fair and impartial trial. *Fitzsimmons v. State* 440
26. Testimony of a physician as to sanity of the accused *held* not subject to objection that accused was compelled to give evidence against himself. *Wehenkel v. State* 493
27. When evidence of other acts are admissible, stated. *Wehenkel v. State* 493
28. The burden is on party alleging disqualification of juror in motion for new trial. *McColley v. State* 512
29. Finding of trial court as to qualifications of a juror will

not be set aside except for manifest error or abuse of discretion. *McColley v. State* 512
30. Except as to crimes involving motive, criminal intent, or guilty knowledge, evidence of separate and distinct offenses by accused is not admissible. *Swogger v. State* 563
31. Good character may be shown by general reputation, but not by specific acts. *Swogger v. State* 563
32. Where immaterial and irrelevant evidence was admitted, *held* error to instruct that defendant's credibility could be determined from *all* the testimony. *Swogger v. State* 563
33. The state is bound by answers to questions to accused on immaterial matters on cross-examination. *Swogger v. State* 563
34. Testimony received over objection will be presumed to have been considered by the jury as material. *Swogger v. State* 563
35. Reviewing courts should not hesitate to correct prejudicial violation of rules of evidence. *Swogger v. State* 563
36. A conviction on irrelevant and incompetent evidence set aside. *Kleinschmidt v. State* 577
37. In a prosecution for larceny, showing, by cross-examination of accused, a prior conviction of selling intoxicating liquors, *held* error. *Kleinschmidt v. State* 577
38. The court may select portions from the statute in describing the crime charged if he includes all parts relating to facts in the case on trial. *Hiller v. State* 582
39. Instruction as to reasonable doubt approved. *Hiller v. State* 582
40. In a prosecution for cutting with intent to wound, failure to define assault and assault and battery in the instructions, in absence of request, *held* not error. *McIntyre v. State* 600
41. Two complaints for similar misdemeanors may, in the court's discretion, be tried together, where both offenses could have been included in different counts of a single information. *Coxbill v. State* 604
42. A defendant may not predicate error on an instruction more favorable to him than is required by the law applicable to the offense charged. *Crawford v. State* 629
43. As a general rule, it is error to require accused to answer, on cross-examination, concerning his arrest for and conviction of other misdemeanors. *Crawford v. State* 629
44. District courts have concurrent jurisdiction with magistrates in all criminal cases where the punishment cannot exceed three months' imprisonment and a fine of $100. *Green v. State* 635

45. The purpose of a motion for a new trial is to afford opportunity to correct errors without resort to appeal or petition in error. *Green v. State* 635
46. Alleged errors not referred to in the motion for a new trial will not be considered on appeal. *Green v. State*.... 635
47. A criminal case tried to a jury cannot be reviewed in the supreme court before final judgment entered and a certified transcript of the record filed in the supreme court. *Farrington v. State*..... 712

Customs.

One relying on a special custom must allege and prove it, and that the person sought to be bound thereby had knowledge thereof and contracted in reference thereto. *Harrison State Bank v. First Nat. Bank*..... 456

Death.

Verdict of $6,000 for death of a child *held* excessive. *Ramirez v. Chicago, B. & Q. R. Co*..... 740

Deeds.

1. The statutory rule for construing conveyances of land applies to deeds. *Reuter v. Reuter*..... 428
2. Where granting and restricting clauses in a deed are not inconsistent or illegal, resort to the habendum to ascertain the estate granted the first taker is permissible. *Reuter v. Reuter*..... 428
3. Though the granting clause alone would convey a fee, it may be shown by the whole instrument that a life estate was conveyed. *Reuter v. Reuter*..... 428
4. Deed construed to convey a life estate, with remainder over. *Reuter v. Reuter*..... 428
5. Deed construed to convey to the first taker a life estate only. *Reuter v. Reuter*..... 434
6. If a deed or will conveys an absolute title, an inconsistent clause limiting the title will be disregarded. *Moffitt v. Williams* 785
7. Deed from parents to daughter *held* to convey the fee. *Moffitt v. Williams*..... 785

Dismissal.

1. Proceedings under a writ *ad quod damnum* are included in the statute providing for dismissal of actions. *Blue River Power Co. v. Hronik*..... 405
2. Proceedings *ad quod damnum* may be dismissed by plain-

tiff on the same terms as other actions. *Blue River Power Co. v. Hronik* 405
3. Plaintiff may dismiss his action without prejudice before final submission if it does not prejudice defendant. *Blue River Power Co. v. Hronik* 405
4. On plaintiff's motion to dismiss, the court's discretion is not called into action except on a showing of advantage to plaintiff or prejudice to defendant. *Blue River Power Co. v. Hronik* 405
5. That defendant may be subjected to a second suit and that he has had to employ counsel *held* not to constitute legal prejudice, preventing dismissal on motion of plaintiff. *Blue River Power Co. v. Hronik* 405
6. Legal prejudice which will defeat plaintiff's dismissal is such as deprives defendant of substantive rights or concerns his defense. *Blue River Power Co. v. Hronik* 405
7. Where no substantial right of defendant is affected, it is error to condition dismissal by plaintiff on payment of defendant's counsel fees. *Blue River Power Co. v. Hronik* 405
8. On evidence conclusively showing that plaintiff suing copartner for accounting accepted and cashed a check knowing it was tendered in full settlement, dismissal *held* proper. *Green v. Axtell Lumber Co.* 603

Divorce.

On death of husband within six months after divorce, the wife was restored to marital and property rights in his estate. *In re Estate of Waller* 352

Drains.

1. Where a river is diverted to a new channel by authorized drainage, the duty to maintain it in its new course devolves on adjoining owners, unless the plans and specifications place it on the district. *Idlewild Farm Co. v. Elkhorn River Drainage District* 300
2. An adjoining owner who is estopped by participation in diversion of a stream for drainage *held* bound to maintain it in the new course, though the construction were not negligent. *Idlewild Farm Co. v. Elkhorn River Drainage District* 300
3. A corporation whose president directed the work *held* not entitled to recover for negligent construction or maintenance of a cutoff changing the course of a stream for drainage. *Idlewild Farm Co. v. Elkhorn River Drainage District* 300

Eminent Domain.

1. The council of a metropolitan city which has instituted condemnation proceedings may complete the proceedings under a new law and adopt the proceedings had under the old law. *Burgess-Nash Bldg. Co. v City of Omaha*.... 862
2. Appraisal of damages by a committee of five disinterested free-holders *held* proper. *Burgess-Nash Bldg. Co. v. City of Omaha*.... 862

Equity.

1. Public policy may require relaxation of a rule founded on public policy, as by giving relief to parties *in pari delicto*. *Weaverling v. McLennan*.... 466
2. Where equity assumes to act, it must do complete justice, regardless of whether litigants came into court with unclean hands. *Weaverling v. McLennan*.... 466
3. A wrong done by one person should not be allowed to work injustice to others not connected with or responsible therefor. *In re Estate of Koller*.... 764

Estoppel.

In a suit to set aside a conveyance to a wife, evidence *held* insufficient to create an estoppel in pais against the wife. *Big Horn Collieries Co. v. Roland*.... 846

Evidence.

1. In an action against both master and servant for the servant's negligent acts, declarations by the servant after the accident are admissible against him, though not binding on the master. *Berggren v. Hannan, O'Dell & Van Brunt*.... 18
2. Oral testimony as to the purpose for which a note was executed is admissible in an action on it by the payee. *Spangenberg v. Losey*.... 112
3. The equity rule that the evidence should be clear and convincing to sustain certain issues of fact *held* inapplicable to an issue of fact in a law action triable to a jury. *Blue Valley State Bank v. Milburn*.... 131
4. The population of a state governmental subdivision is not conclusively determined by the federal census. *Gordon v. Lowry*.... 359
5. Evidence *held* not to justify issuance of mandamus to compel irrigation district to drain certain subirrigated lands. *State v. Farmers Irrigation District*.... 373

Execution.

Appraisal of land is not a prerequisite to a sale on execution or an order of sale on foreclosure of a mortgage. *Conservative Savings & Loan Ass'n v. Anderson* 627

Executors and Administrators.

1. An executor may sue in equity on behalf of creditors to recover proceeds of insurance on the life of his testate, transferred in fraud of creditors. *La Borde v. Farmers State Bank* 33
2. Letters testamentary, issued by a court which has jurisdiction, are valid until revoked in a direct attack. *In re Estate of Hoferer* 254
3. Unless a statute so requires, failure of sureties of an executor to make affidavit as to their qualifications will not render letters testamentary void. *In re Estate of Hoferer* 254
4. The county judge, within 40 days after letters testamentary have issued, should make and enter an order limiting time for presenting claims, notwithstanding such letters may be revocable on direct attack for irregularities. *In re Estate of Hoferer* 254
5. A creditor must apply for an order extending time to file a claim against an estate within three months after the expiration of time previously allowed. *In re Estate of Hoferer* 254
6. Misconduct or fraud of a beneficiary preventing filing a claim against an estate *held* not ground for extending time. *In re Estate of Hoferer* 254

Forgery.

1. Affixing to a note a signature intended to be regarded as that of another person is not prevented from being forgery by failure to write the name correctly. *Marshall v. State* 45
2. "H. A. Timnernan," signed to a note, intending it to be taken for "H. A. Timmerman," *held* to constitute forgery. *Marshall v. State* 45
3. Variance in names, to be fatal, must be material to the merits of the case or prejudicial to defendant. *Marshall v. State* 45
4. An information which charges forgery and the fraudulent uttering of an instrument charges but one crime. *Marshall v. State* 45

Fraud.

1. Plaintiff's testimony as to anticipated marriage with defendant's daughter *held* admissible to show reliance on defendant's representations in the sale of his business. *Johnson v. Samuelson* 297
2. Elements which constitute fraud, stated. *Peterson v. Schaberg* 346
3. An instruction stating, in substance, that defendant is not liable for a misstatement of fact made in good faith, *held* erroneous. *Peterson v. Schaberg* 346

Fraudulent Conveyances.

1. Wife *held* not entitled to statutory exemptions from proceeds of life insurance policies transferred to her in fraud of creditors. *La Borde v. Farmers State Bank* 33
2. A creditor cannot attack a conveyance made before his debt arose, for fraud, unless he pleads and proves intent to defraud subsequent creditors whose debts were contemplated. *Big Horn Collieries Co. v. Roland* 846
3. A conveyance by husband to wife of land whose value, regardless of homestead, is less than the wife's investment therein, is not fraudulent as to creditors of the husband. *Big Horn Collieries Co. v. Roland* 846

Garnishment.

1. Judgment against garnishee *held* based on a contingent indebtedness, and erroneous. *Salyers Auto Co. v. DeVore* 317
2. A garnishee's liability must be determined as of date of service of the order of attachment. *Salyers Auto Co. v. DeVore* 317
3. In absence of fraud and collusion, no garnishable debt arises from a contract for personal services and expenses to be paid in advance. *Salyers Auto Co. v. DeVore* 317

Guaranty.

Generally, a guarantor is not in privity with sureties, even on the same obligation, and cannot, when he has paid a debt, claim contribution from a surety. *Rogers v. National Surety Co* 170

Guardian and Ward.

1. A purchaser in good faith may presume that a guardian acts for the ward's benefit, and he need not inquire into the state of the trust and is not responsible for the guardian's faithful application of trust money. *Federal Land Bank v. Tuma* 99

2. Actual knowledge of a guardian who is an officer of a bank will be imputed to the bank, so that the bank cannot, as an innocent purchaser, enforce a mortgage against the estate of the guardian's ward, where no one but an innocent purchaser or owner of a lien could enforce it. *Federal Land Bank v. Tuma* 99
3. Equity will, while protecting innocent purchasers, restore wards as nearly as possible to the position they would have occupied if their guardians had done their duty. *Federal Land Bank v. Tuma* 99
4. Guardian taking deed to hold in trust for wards *held* not liable for conversion. *In re Guardianship of Deutsch* 591
5. Guardian's unauthorized release of mortgage *held* not to prevent recovery by ward. *Carl v. Wentz* 880

Highways.

1. Negligence will not be predicated on location and dimensions of a culvert built by a railroad according to highway plans. *Tomjack v. Chicago & N. W. R. Co* 413
2. An action for death from negligence of a county road contractor *held* not barred by 30-day limitation. *Pratt v. Western Bridge & Construction Co* 553
3. It is not a defense to an action for negligence of a highway contractor that the person injured was driving an unlicensed automobile. *Pratt v. Western Bridge & Construction Co* 553
4. In action for automobilist's death, negligence and contributory negligence *held* to be questions for the jury. *Pratt v. Western Bridge & Construction Co* 553
5. A county is not an insurer of users of highways being repaired, but must use reasonable and ordinary care to maintain highways reasonably safe for travelers exercising reasonable and ordinary care. *Boomer v. Lancaster County* 718

Homestead.

That premises were parents' homestead does not make a contract to give them to a son for care during parents' lifetime void. *Denesia v. Denesia* 789

Homicide.

1. In a prosecution for shooting with intent to wound, an instruction that defendant is presumed to have intended the consequences of his act *held* erroneous, where the theory of the defense, supported by evidence, was that

defendant shot in defense of his wife and home. *Styskal v. State* 8
2. Sentence of life imprisonment affirmed. *Hill v. State*.... 73
3. Information *held* sufficient to charge that poison was administered with intent to take life. *Davis v. State*..... 90
4. Where the statute forbids the use of strychnine in embalming fluid and it is shown that strychnine is not useful therein, experts who performed an autopsy may testify that the victim died of strychnine poisoning, without proving that fluid used in embalming the body did not contain strychnine. *Davis v. State*..... 90
5. It is not necessary to instruct as to manslaughter or murder in the second degree, where the evidence establishes first degree murder or innocence. *Davis v. State* 90
6. In a prosecution for murder by poisoning, the court need not instruct as to attempt to poison, there being no evidence of the lesser offense. *Davis v. State*..... 90
7. Evidence that defendant, while intoxicated, was driving an automobile on the wrong side of the road and collided with another automobile, causing death, may sustain conviction of manslaughter. *Crawford v. State*..... 125
8. An information alleging unlawful operating of an automobile while intoxicated, causing fatal injury, *held* to charge manslaughter. *Crawford v. State*..... 125
9. Ordinarily, in a prosecution for first degree murder, where there is no eye-witness and the evidence is largely circumstantial, the court should instruct as to the law governing murder in the first degree, second degree, and manslaughter. *Bourne v. State*..... 141
10. Failure to instruct as to the law of manslaughter *held* error. *Bourne v. State*..... 141
11. A purpose to kill and malice are essential elements of murder in the second degree, requiring proof beyond a reasonable doubt. *Runyan v. State*..... 191
12. Malice is never implied or presumed as a matter of law, where the circumstances of the killing are testified to by eye-witnesses. *Runyan v. State*..... 191
13. Where the evidence sustained only manslaughter, submitting the issue of murder in the second degree *held* error, though accused was convicted of manslaughter. *Runyan v. State*..... 191
14. Evidence *held* insufficient to sustain conviction of manslaughter by operating an automobile at excessive speed. *Salisbury v. State*..... 273
15. "Unwritten law," meaning the right to avenge a criminal wrong to a female member of one's family, is not a defense in a prosecution for homicide. *Wehenkel v. State* 493

Husband and Wife.

1. The statute enabling married women to sue does not authorize a wife to sue her husband for personal injuries. *Emerson v. Western Seed & Irrigation Co* 180
2. A woman's property acquired after divorce is not liable for necessaries of life purchased by husband during marriage. *Dietz Lumber Co. v. Anderson* 205
3. Verdict for $5,000 for alienation of wife's affections *held* not excessive. *Holst v. Warner* 208
4. Antenuptial agreement *held* inequitable, and that the widow is entitled to a widow's share in husband's estate. *In re Estate of Waller* 352
5. Good faith is required in an antenuptial agreement. *In re Estate of Waller* 352
6. Deposits by a husband on certificates payable to himself or wife *held* a gift to the wife. *In re Estate of Johnson* 686
7. A deposit by a husband payable to himself or wife *held* presumptively with donative intent. *In re Estate of Johnson* 686
8. A judgment for separate maintenance for wife is a lien on the husband's land prior to subsequent lien of a judgment against the husband. *Lynch v. Rohan* 820

Indictment and Information.

1. Verification of information *held* sufficient. *Marshall v. State* 45
2. An information may be filed in vacation. *Marshall v. State* 45
3. Charging as "felonious" an act denounced by statute as a misdemeanor will not constitute a charge of felony. *Myers v. State* 287
4. An information charging merely an unlawful and felonious sale of liquor, as a second offense, *held* referable to statute making it a misdemeanor. *Myers v. State* 287
5. An information need not negative exceptions of a statute not descriptive of the offense. *Barnts v. State* 363
6. Defects which might have been attacked by motion to quash or plea in abatement are waived when defendant pleads not guilty. *Green v. State* 635

Injunction.

Injunction is not a writ of right, and may be withheld in the court's discretion when likely to inflict greater injury than the grievance complained of. *Richardson v. Kildow* 648

Insane Persons.

1. Statute relating to appeals in probate matters *held* applicable to appeals in guardianship matters. *In re Guardianship of Strelow* 873
2. An appeal lies from an order allowing claims against an incompetent ward's estate by one affected by the order whose name does not appear as a party. *In re Guardianship of Strelow* 873
3. A motion to dismiss an appeal from an order in a guardianship matter should be overruled, except on showing of breach of condition of the appeal bond or failure to perfect the appeal. *In re Guardianship of Strelow* 873

Insurance.

1. Change of beneficiary *held* effective, though insured died before his written notice of change reached the insurer. *La Borde v. Farmers State Bank* 33
2. Wife *held* to have burden of proving that change of beneficiary of policies of life insurance from insured's estate to his wife was in good faith. *La Borde v. Farmers State Bank* 33

Intoxicating Liquors.

1. To constitute unlawful transportation of liquor there must be a substantial movement from one place or vicinity to another; mere handing of liquor from a barn to one outside the door is not unlawful transportation. *Nelson v. State* 219
2. Whether movement of liquor is sufficient to constitute transportation must be determined by the facts in the particular case. *Nelson v. State* 219
3. An information for bootlegging must allege, in addition to sale, some element of bootlegging, such as carrying or transporting liquor. *Myers v. State* 287
4. An information charging sale of intoxicating liquor *held* to charge a misdemeanor, and governed by secs. 3238, 3288, Comp. St. 1922. *Dunlap v. State* 313
5. An information charging sale of intoxicating liquor in one count and possession in another charges misdemeanors. *Green v. State* 635
6. Evidence *held* insufficient to sustain judgment of forfeiture of an automobile used for transportation of intoxicating liquor. *State v. Kennedy* 854

Joint Tenancy.

1. Joint tenancy may be created in any personal property

capable of being held in severalty. *In re Estate of Johnson* 686
2. Sec. 8046, Comp. St. 1922, relating to payment of deposits payable to two or more, fixes property rights, unless the contrary appears from the terms of deposit. *In re Estate of Johnson* 686

Judgment.
1. A court in a given action can render only such judgment as is applicable to such class of actions. *Boring v. Dodd* 366
2. Jurisdiction to render judgment in a particular action must be determined by the pleadings and relief sought. *Boring v. Dodd* 366
3. An interested party who participates in the trial is bound by the judgment, though not named as a party, and no relief was prayed against him; these being matters which may be supplied by amendment. *Independent Elevators v. Davis* 397
4. A judgment against a copartnership not named as a party but participating in the trial is not void, and can only be overturned in a direct proceeding. *Independent Elevators v. Davis* 397
5. A judgment purporting to adjudicate matters not within the issues and not presented to the court is erroneous. *Green v. Axtell Lumber Co* 603
6. Litigable matters within the jurisdiction of the court and adjudicated are not open to relitigation in a subsequent action. *State v. Banking House of A. Castetter* 610
7. Judgment sustaining objections to including lands in drainage district without prejudice to subsequent inclusion *held* not to bar subsequent inquiry. *Shepherdson v. Fagin* 806

Jury.
1. One who fails to object to a juror whose *voir dire* shows ground for challenge for cause may not complain after verdict. *Crawford v. State* 125
2. In a misdemeanor case, punishable by fine only, accused may consent to trial by a jury of less than twelve. *Miller v. State* 702

Landlord and Tenant.
1. An ordinance requiring an overhead guard on freight elevators imposes the initial duty of equipment on the owners. *Tralle v. Hartman Furniture & Carpet Co* 418
2. Failure to comply with an ordinance requiring the owners to equip a freight elevator with an overhead guard is negligence. *Tralle v. Hartman Furniture & Carpet Co* 418

3. Failure of the owners to equip a freight elevator with an overhead guard in compliance with an ordinance *held* the proximate cause of death of employee of their lessee's contractor. *Tralle v. Hartman Furniture & Carpet Co*..... 418
4. Employee of lessee's contractor may be entitled to protection of an ordinance requiring the owners to equip a freight elevator with an overhead guard. *Tralle v. Hartman Furniture & Carpet Co*..... 418
5. Leasing a building does not necessarily exempt the owners from civil liability for failure to equip an elevator with an overhead guard required by ordinance. *Tralle v. Hartman Furniture & Carpet Co*..... 418
6. A duty imposed by ordinance to equip a freight elevator with an overhead guard may be nondelegable so as not to relieve the owners from pecuniary liability for failure to perform or to compel lessee to perform. *Tralle v. Hartman Furniture & Carpet Co*..... 418

Libel and Slander.

1. Newspapers are liable for what they publish on the same basis as private individuals. *Fitch v. Daily News Publishing Co*..... 474
2. The headline is a part of a newspaper article and must fairly reflect a truthful report, to be privileged. *Fitch v. Daily News Publishing Co*..... 474
3. Generally, parties are privileged from actions for accusations made in pleadings. *Fitch v. Daily News Publishing Co*..... 474
4. A newspaper is privileged to give a fair report of contents of an instrument on file and the court's action thereon. *Fitch v. Daily News Publishing Co*..... 474
5. Privilege of the press as to court proceedings, stated. *Fitch v. Daily News Publishing Co*..... 474

Liens.

1. Where there is no contract out of which a lien can grow, nor any duty to give a lien on land, no basis therefor exists. *Boring v. Dodd*..... 366
2. Where a party claims a lien but does not plead facts showing a right thereto, the court cannot create the right nor declare a binding lien. *Boring v. Dodd*..... 366

Limitation of Actions.

An action is deemed commenced as to defendant when summons is served on him. *Ramirez v. Chicago, B. & Q. R. Co*..... 740

Mandamus.

1. Mandamus will not issue to compel one to do wrong. *State v. Board of Commissioners* 261
2. Mandamus is discretionary, and will not issue when to do so would compel the doing of a substantial wrong. *State v. Farmers Irrigation District* 373

Manslaughter.

One may be tried and punished under the "manslaughter act," though some of the homicidal acts may constitute violation of the "motor vehicle act." *Crawford v. State* 125

Master and Servant.

1. Where the evidence is sufficient to create a presumption that an automobile causing an injury was being used by an employee in his employer's service with his knowledge and direction, the issue is for the jury. *Berggren v. Hannan, O'Dell & Van Brunt* 18
2. A wife cannot sue her husband's employer for damages caused by the husband's negligence, where the husband is liable to the employer. *Emerson v. Western Seed & Irrigation Co* 180
3. Notice to a compensation claimant is not a condition precedent to approval of attorney's fees by the trial judge. *Arner v. Sioux County* 394
4. Approval of attorney's fees by the judge in compensation cases is a nonjudicial act which may be done anywhere within his district. *Arner v. Sioux County* 394
5. The purpose of the workmen's compensation law is to shift to industry the burden of loss from accidents. *Tralle v. Hartman Furniture & Carpet Co* 418
6. Owners of a leased building may be liable for death of a workman killed through their negligence while in the service of lessee's contractor. *Tralle v. Hartman Furniture & Carpet Co* 418
7. Common-law liability of third persons for negligent injury to an employee is recognized by the workmen's compensation law. *Tralle v. Hartman Furniture & Carpet Co* 418
8. The employers' liability law of Nebraska is not applicable where a non-resident employer hires a resident of this state to perform services in another state. *Watts v. Long* 656
9. An employee performing in another state work incident to the employer's business in Nebraska comes within the the Nebraska employers' liability act. *Watts v. Long* 656

10. One hired in Nebraska to work in Kansas *held* not within the Nebraska employers' liability act. *Watts v. Long*..... 656
11. The employers' liability law of the state in which contracts for paving were being performed *held* to govern rights of the parties as to compensation. *Watts v. Long* 656

Mayhem.

1. Wilfully, unlawfully and purposely disabling any limb or member of any person with intent to maim or disfigure constitutes mayhem. *Hiller v. State*..... 582
2. Referring in instructions to "sulphuric acid" as a poison *held* not error. *Hiller v. State*..... 582

Mortgages.

1. Right of junior lien-holder to recover, on foreclosure of his mortgage, interest paid on a prior mortgage, stated. *United States Trust Co. v. Miller*..... 25
2. A subsequent mortgagee may not add to the amount due him interest paid on a prior mortgage, in absence of authority so to do in his own security; but he is subrogated to the lien of the prior mortgage as to such payments, and to recover them must plead facts showing a right to foreclose that mortgage. *First State Bank v. Niklasson* 713
3. In absence of a condition therefor in the mortgage, a mortgagee may not insure buildings on the mortgaged premises and add the cost thereof to the mortgage indebtedness. *United States Trust Co. v. Miller*..... 25
4. A mortgagee in paying off a prior lien out of proceeds of the loan may not pay a bonus to the prior lien-holder without express authority from the borrower. *United States Trust Co. v. Miller*..... 25
5. A notary public, who is an officer and stockholder of a corporation, is not disqualified to take acknowledgment of a mortgage to the president of the corporation in his individual capacity. *Quesner v. Novotny*..... 84
6. A cashier of a bank, not a stockholder, may take acknowledgment of a mortgage to the bank. *First State Bank v. Niklasson*..... 713
7. Filing claim for mortgage debt against the estate of the mortgagor *held* not to preclude foreclosure of the mortgage. *Quesner v. Novotny*..... 84
8. Receiver's attorney's fees disallowed. *Hampton v. O'Shea* 230
9. Payment by receiver of valid taxes should be reimbursed by mortgagees who purchased at foreclosure sale. *Hampton v. O'Shea*..... 230

10. Payments made in behalf of mortgagees who purchased at foreclosure sale should be reimbursed by mortgagees. *Hampton v. O'Shea* 230
11. A mortgagee whose mortgage is subject to prior mortgages may not obtain cancelation of or priority over them because of dealings between the mortgagor and the prior mortgagee which do not constitute ground for cancelation of the prior mortgages. *Edney v. Jensen* 242
12. Ordinarily, when the owner of a mortgage becomes owner of the fee, the former estate is merged in the latter. *Edney v. Jensen* 242
13. A mortgagee becoming owner of the fee may keep his mortgage alive if essential to his security against an intervening title, and it will be presumed, in absence of circumstances indicating a contrary purpose, that he intended to do that which would be most advantageous. *Edney v. Jensen* 242
14. Ordinarily, it is presumed that a mortgagee intended to keep his mortgage alive if essential to his security against an intervening title; and this presumption applies though he, in ignorance of an intervening title, may have discharged the mortgage and canceled the note. *Edney v. Jensen* 242
15. Where a mortgagee takes title to mortgaged land, the question of merger depends on the mortgagee's intention, and if none is expressed, it will be presumed he intended that which was most advantageous to himself. *First State Bank v. Niklasson* 713
16. In a suit to foreclose a mortgage, evidence *held* to show that defendants were estopped to claim forgiveness of the debt. *Nebraska Wesleyan University v. Thompson* 291
17. Necessary issues to be determined by decree of foreclosure, stated. *Stuart v. Bliss* 305
18. Findings of fact in a foreclosure decree are not reviewable on objections to a deficiency judgment. *Stuart v. Bliss* 305
19. A decree of foreclosure showing liability for deficiency precludes defendant, on an application for a deficiency judgment, from presenting any defense available prior to announcement of the decree. *Stuart v. Bliss* 305
20. Refusal to enter deficiency judgment *held* error. *Stuart v. Bliss* 305
21. Mortgagor *held* to have waived alleged fraud of mortgagee. *Keedick v. Brogan* 339
22. Evidence *held* to show grantor mentally competent to execute mortgage. *Keedick v. Brogan* 339

23. A junior mortgagee is not entitled to have the value of property held as additional security for a prior mortgage debt and released to the debtor credited on the prior lien, in absence of notice to the prior mortgagee. *First State Bank v. Niklasson* 713

Municipal Corporations.

1. The right of an abutting owner to occupy part of a public street for gasoline pumps must yield to public necessity, of which necessity the municipal governing body is the judge; but such body cannot arbitrarily deny the right to one and grant it to another. *City of Pierce v. Schramm* 263
2. Appointment by mayor, on council's authorization, of a committee from council to ascertain and report special benefits from a public improvement, *held* to comply with statute requiring council to appoint. *Burgess-Nash Bldg. Co. v. City of Omaha* 862
3. Statute *held* to authorize the city council, before issuing bonds for opening and widening streets, to sit as a board of equalization and levy special benefits. *Burgess-Nash Bldg. Co. v. City of Omaha* 862

Negligence.

1. Negligence must be proved by the party alleging it, and the burden of proof does not shift. *Knies v. Lang* 387
2. Ordinarily, the owner is required to use only reasonable care to keep a building safe for persons rightfully entering or passing. *Knies v. Lang* 387
3. The doctrine *res ipsa loquitar held* inapplicable to injury of person on street by board blown from building. *Knies v. Lang* 387
4. A passenger failing to warn the driver of an automobile of dangerous condition of road cannot recover for injuries due thereto. *Tomjack v. Chicago & N. W. R. Co.* 413
5. Except with respect to the relation of partnership, principal and agent, master and servant, or the like, the doctrine of imputed negligence does not apply. *Andersen v. Omaha & C. B. Street R. Co.* 487
6. In an action by the father, as administrator, for himself and the mother for death of son, refusal of instruction stating that the action was brought by the father for his own benefit, and if the negligence of the father and defendant were equal, plaintiff could not recover, *held* proper. *Pratt v. Western Bridge & Construction Co.* 553
7. In action for automobilist's death, submission to jury of

question of comparative negligence *held* proper. *Pratt v. Western Bridge & Construction Co.* 553
8. In an action for death, defendant *held* chargeable with actionable negligence. *Baney v. Chicago, B. & Q. R. Co.* 615
9. Refraining from wanton or wilful injury is not always the full measure of liability for failure to protect a child from known and obvious danger on premises to which it resorted without permission. *Ramirez v. Chicago, B. & Q. R. Co.* 740
10. In an action for death of a boy who fell into an unguarded manhole to a sewer, evidence *held* to sustain verdict for plaintiff. *Ramirez v. Chicago, B. & Q. R. Co.* 740
11. Evidence *held* to show, as a matter of law, that a child's act was the proximate cause of his being struck by an automobile. *De Griselles v. Gans* 835
12. In an action for death from being struck by an automobile, evidence *held* insufficient to sustain finding that the horn was not sounded. *De Griselles v. Gans* 835
13. An automobile driver until he has notice of the presence or likelihood of children near his line of travel is bound to exercise only reasonable care; the rule being the same as that respecting adults. *De Griselles v. Gans* 835
14. Although plaintiff suing for damages from negligence makes a *prima facie* case, the court may direct a verdict for defendant, if the evidence would be insufficient to sustain a verdict for plaintiff, and refusal so to do may be reversible error. *De Griselles v. Gans* 835

New Trial.

1. Equity will not grant a new trial because a litigant was deprived of a bill of exceptions, where there is an adequate remedy at law. *Norfolk Packing Co. v. American Ins. Co.* 118
2. In a suit in equity to obtain a new trial of a law action, it must appear that there was a genuine controversy, a determination prejudicially adverse to complainant, that he was by fraud or accident deprived of his right to be heard, and that he was without fault. *Norfolk Packing Co. v. American Ins. Co.* 118
3. The granting of a new trial on equitable grounds at a subsequent term because of destruction of bill of exceptions *held* not erroneous. *Norfolk Packing Co. v. American Ins. Co.* 118
4. Statutory authority to grant a new trial at a subsequent term is concurrent with independent equity jurisdiction. *Norfolk Packing Co. v. American Ins. Co.* 118

5. An unavoidable casualty is not ground for a new trial at a subsequent term, unless it prevents a litigant from prosecuting or defending. *Norfolk Packing Co. v. American Ins. Co.* 118
6. The statute providing for a new trial at a subsequent term because of unavoidable casualty applies only to trials in courts of original jurisdiction. *Norfolk Packing Co. v. American Ins. Co.* 118
7. In passing on motion for new trial, court may consider conflicting and improbable evidence and all facts occurring during trial. *De Matteo v. Lapidus* 549

Parent and Child.

1. Abandonment defined. *Colling v. State* 308
2. While, in awarding custody of an infant of tender years, the court will consider its welfare, yet the surviving parent's right to its custody should not be denied, except for substantial reasons. *Bailey v. Randall* 328
3. Parents whose negligence is the sole cause of injury to their child may not recover damages from innocent third persons. *Ramirez v. Chicago, B. & Q. R. Co.* 740

Partition.

Where all interested parties are before the court in a partition suit, the decree fixing shares, directing partition, and confirming a sale of the land is final, and the parties thereto, in absence of fraud on the face of the proceedings, cannot question the title acquired by a later *bona fide* purchaser thereof. *Federal Land Bank v. Tuma* 99

Partnership.

Where a petition names individuals as copartners and the case proceeds as though the copartnership were a party, the irregularity in not making it a party is waived. *Independent Elevators v. Davis* 397

Payment.

In absence of agreement or instruction, payments on a running account will be applied by law to the earliest items. *State v. Security State Bank* 526
State v. Security State Bank 530

Pleading.

1. One claiming under an exception to a general rule has the burden of alleging and proving facts bringing him

within the exception. *Harrison State Bank v. First Nat. Bank* 456
2. A petition unassailed by motion or demurrer prior to trial will be liberally construed. *Donovan v. Chitwood*.... 683
3. A petition which showed a right to some relief *held* good as against a demurrer *ore tenus*. *Donovan v. Chitwood* 683

Principal and Agent.

1. Accepting orders after continual breach of condition by buyer *held* a waiver thereof. *Elson & Co. v. Beselin & Son* 729
2. Agent *held* entitled to sales for a year to determine whether he had complied with requirement as to amount of sales. *Elson & Co. v. Beselin & Son*..... 729
3. An act of an agent, without actual authority, may be with such apparent authority as to bind the principal. *Sindelar v. Hord Grain Co*..... 776
4. Apparent authority of agent to bind principal cannot be extended or restricted by by-laws or other instructions to the agent, in the absence of actual notice thereof. *Sindelar v. Hord Grain Co*..... 776

Process.

Changing date of an unserved summons does not necessarily invalidate subsequent service. *Ramirez v. Chicago, B. & Q. R. Co*..... 740

Public Lands.

Where an application to lease school lands and rental due are accepted, a valid contract is created. *State v. Board of Commissioners*..... 261

Railroads.

1. Assessments on lot owners for cost of a railroad viaduct over a street *held* void. *Bullock v. City of Lincoln*..... 67
2. Sec. 5524, Comp. St. 1922, requires construction of an overhead crossing over a railroad only where public necessity or convenience would be subserved. *Sarpy County v. Omaha & S. I. R. Co*..... 516
3. The state railway commission may not order construction of an overhead crossing on a contingency which may not happen. *Sarpy County v. Omaha & S. I. R. Co*..... 516

Rape.

1. In a prosecution for rape, the testimony of prosecutrix that she was not previously unchaste need not be corroborated. *Krug v. State*..... 185

2. The prosecutrix need not be corroborated by other witnesses as to the particular act constituting rape; but, if defendant denies the offense, the prosecutrix must be corroborated, as to material facts and circumstances, and guilt must be established beyond a reasonable doubt. *Krug v. State* 185
3. Evidence showing opportunity and disposition to commit the offense and corroborating circumstances proved by other witnesses *held* sufficient corroboration of testimony of prosecutrix. *Krug v. State* 185
4. In a prosecution for rape, the prosecutrix and one to whom she made complaint after the act may testify to the fact and nature of the complaint, but not as to details; and such testimony may be considered in corroboration of prosecutrix as to the main fact. *Krug v. State* 185
5. Corroboration of prosecutrix may consist of circumstances, and is not limited to the principal fact. *Peterson v. State* 268
6. Evidence *held* to sustain conviction for assault with intent to rape. *McColley v. State* 512
7. In a prosecution for statutory rape, reception of evidence of separate and distinct crimes by accused over objection, *held* error. *Swogger v. State* 563

Receiving Stolen Goods.

An information for receiving stolen chickens need not allege that the chickens have value. *Halbert v. State* 1

Sales.

A seller retaining title under a contract authorizing recaption on failure to pay an instalment of the price may peaceably retake possession on default. *Driver v. State* 666

Schools and School Districts.

1. Where a school district has exercised franchises and privileges for a year, its legal organization is conclusively presumed. *State v. School District* 202
2. Subsequent lessee of school lands *held* not entitled to cancelation of prior lease. *State v. Board of Commissioners* 261

Specific Performance.

Evidence *held* to sustain decree for specific performance of contract by parents to give farm to son for care during lifetime. *Denesia v. Denesia* 789

States.

A state senator can receive for his services only the compensation provided by the Constitution. *In re Appeal of Wilkins* 748

Statute of Frauds.

An oral agreement by parents to give a farm to a son for care during their lifetime which is void because not in writing and acknowledged cannot be subsequently orally ratified by the parents. *Denesia v. Denesia* 789

Statutes.

1. Any legislation may be included in an amendatory act which is germane to the subject of the statute or section thereof to be amended. *In re Estate of Austin* 137
2. Ch. 205, Laws 1921, relating to mortgaging trust estates, *held* not broader than its title. *In re Estate of Austin* 137
3. Ch. 104, Laws 1923, giving district courts power to grant licenses to executors, administrators and guardians to mortgage trust estates, *held* not broader than its title. *In re Estate of Austin* 137
4. The constitutional provision that a bill shall contain only one subject, which shall be clearly expressed in the title, is to prevent surreptitious legislation. *State v. Johnson* 249
5. The title of an act relating to public revenue covering the entire subject is comprehensive enough to include legislation both granting and limiting taxing power generally. *State v. Johnson* 249
6. The title of an act relating to public revenue and to administration thereof *held* to cover change of limitation of bonded indebtedness of school districts from 10 per cent. to 2 per cent. of taxable property. *State v. Johnson* 249
7. An independent act covering the entire subject of legislation may change or repeal conflicting provisions in former acts. *State v. Johnson* 249
8. Ch. 149, Laws 1915, pertaining to sale of land on execution, *held* valid. *Conservative Savings & Loan Ass'n v. Anderson* 627
9. Where a legislative act refers to another act for procedure, the latter, *pro tanto*, becomes part of the former. *Richardson v. Kildow* 648

Street Railways.

The distance traveled by a street car after a collision with an automobile before being stopped *held* proper for jury to consider in determining whether its speed was excessive. *Andersen v. Omaha & C. B. Street R. Co* 487

Subrogation.

Generally, one paying a mortgage, with the understanding that he is to have the benefit of the lien, becomes holder of the lien by subrogation. *Prudential Ins. Co. v. Qualset* 706

Taxation.

1. Dry cleaner's solvents *held* taxable as motor vehicle fuels, the word "may" in the statute being construed as the equivalent of "can." *Pantorium v. McLaughlin* 61
2. Lands conveyed by deeds in which grantor retained life estates and lands conveyed by absolute deeds delivered after grantor's death, not intended to take effect previously in possession or enjoyment, may be subjected to succession taxes. *In re Estate of Bronzynski* 196
3. The inheritance tax statute is intended to prevent evasion. *In re Estate of Bronzynski* 196
4. A deed executed to evade the inheritance tax law does not necessarily prevent taxation of the succession. *In re Estate of Bronzynski* 196
5. Whether deeds are made in contemplation of death to avoid succession taxes is a question of fact. *In re Estate of Bronzynski* 196
6. A deed made in good faith is free from a succession tax unless the transfer is subject to such tax. *In re Estate of Bronzynski* 196
7. In determining whether a deed was made in "contemplation of death" to avoid inheritance tax, the condition of grantor's health, surrounding circumstances, and how long he survived the transfer are material subjects of inquiry. *In re Estate of Bronzynski* 196
8. Evidence *held* to show that the deeds were not made in contemplation of death within inheritance tax law. *In re Estate of Bronzynski* 196
9. A transfer of land conveying a present life estate and the estate in remainder *held* free from succession tax. *In re Estate of Bronzynski* 196
10. Taxpayers' appeals from rulings of board of equalization must be preceded by ten days' notice of appeal. *Sommerville v. Board of County Commissioners* 282
11. In a proper case, on application of a taxpayer, equity will enjoin collection of taxes levied for an unauthorized purpose. *Richardson v. Kildow* 648
12. Cattle driven into an adjoining county for feeding *held* taxable in the county in which they are being fed April 1. *Delatour v. Smith* 695

13. Collection of taxes on cattle in county in which they were being fed April 1 may not be enjoined. *Delatour v. Smith* 695
14. In assessing for taxation stock in a domestic corporation, mortgages held by corporation on which the mortgagors agree to pay the taxes should not be deducted. *Kelkenny Realty Co. v. Douglas County* 796

Telegraphs and Telephones.

1. Telephone companies are common carriers. *Farmers & Merchants Telephone Co. v. Orleans Community Club* 633
2. Telephone companies are subject to reasonable orders of the state railway commission. *Farmers & Merchants Telephone Co. v. Orleans Community Club* 633

Trial. SEE APPEAL AND ERROR. CRIMINAL LAW.

1. Ordinarily, the order of proof rests in the discretion of the court. *Berggren v. Hannan, O'Dell & Van Brunt* 18
2. One desiring an instruction to guide the jury in weighing certain features of the evidence must request it at the conclusion of the evidence, and submit in writing the instruction desired. *Berggren v. Hannan, O'Dell & Van Brunt* 18
3. Error cannot be predicated on refusal to instruct as to the law relative to a defense not raised by plea nor supported by evidence. *Holst v. Warner* 208
4. In a proper case, a court has jurisdiction to determine relevant questions of disputed fact and to apply the law thereto. *Gordon v. Lowry* 359
5. Where both parties to a law action ask for a directed verdict, granting one request has the same effect as a verdict; and neither party can predicate error on failure to submit the case to the jury. *Knies v. Lang* 387
6. It is error to submit to the jury an issue not supported by evidence. *Andersen v. Omaha & C. B. Street R. Co.* 487
7. Where there is evidence of defendant's negligence but no evidence of plaintiff's contributory negligence, an instruction on comparative negligence should not be given. *Andersen v. Omaha & C. B. Street R. Co.* 487
8. Instruction as to comparative negligence *held* prejudicially erroneous. *Pratt v. Western Bridge & Construction Co.* 553
9. In an action for breach of contract of an exclusive sales agency, oral testimony by an expert of income, expenses and profits *held* admissible. *Elson & Co. v. Beselin & Son* 729
10. Where reasonable minds would not be warranted in draw-

ing different conclusions from the evidence, direction of verdict is not error. *Sindelar v. Hord Grain Co*..... 776
11. Instructions must be considered as a whole. *In re Estate of Lyell* 827

Usury.
1. The defense of usury is personal to the debtor. *First State Bank v. Niklasson*..... 713
2. A mortgage which requires payment of maximum legal interest and taxes on the mortgagee's interest in the mortgaged premises is usurious. *Quesner v. Novotny*.... 84
Dawson County State Bank v. Temple..... 727
Dwyer v. Weyant..... 485

Warehousemen. SEE AGRICULTURE.
1. Statute *held* to contemplate marketing and storing grain by agencies whose responsibilities are assured by securities. *First Nat. Bank v. Lincoln Grain Co*..... 809
2. Statute providing for storing and marketing grain should be liberally construed. *First Nat. Bank v. Lincoln Grain Co.* 809
3. A grain dealer complying with the statute becomes a public warehouseman, in which capacity the public thereafter deal with him. *First Nat. Bank v. Lincoln Grain Co.* 809
4. A grain company complying with the statute is authorized to issue warehouse receipts, and is responsible as a public warehouseman in warehouse transactions. *First Nat. Bank v. Lincoln Grain Co*..... 809
5. A public warehouseman may issue warehouse receipts on his own grain in storage in his warehouse to secure his own indebtedness. *First Nat. Bank v. Lincoln Grain Co.* 809
6. In an action for conversion of grain, evidence *held* to sustain finding as to completed delivery of wheat for which warehouse receipts were issued. *First Nat. Bank v. Lincoln Grain Co*..... 809
7. Holder of warehouse receipts *held* entitled to possession of grain therein described, and that warehouseman's bond afforded indemnity for damages occasioned by his default. *First Nat. Bank v. Lincoln Grain Co*..... 809

Waters.
1. Subirrigated lands and waters referred to in drainage statute are the lands and waters which are a part of the irrigation system. *State v. Farmers Irrigation District*.... 373
2. Owners of irrigation canal *held* not required to erect a

highway bridge. *State v. Western Irrigation District Ditch Co*..... 736

Wills.

1. Appointment of a guardian *ad litem* for infants interested in probate of a will in the county court or on appeal therefrom is not required. *In re Estate of Bayer*..... 670
2. A will containing unrelated bequests will be sustained as to valid provisions if no injustice is done, and rejected as to invalid provisions. *In re Estate of Koller*..... 764
3. Will *held* valid except as to one bequest. *In re Estate of Koller*..... 764
4. Where the executor proposes a will for probate, the court need not instruct that the will is proposed by such person and that it is his duty to present it. *In re Estate of Lyell* 827
5. Where there is conflicting evidence as to testamentary capacity, the court may not withdraw such question from the jury. *In re Estate of Lyell*..... 827
6. Question of decedent's testamentary capacity *held* properly submitted to the jury. *In re Estate of Lyell*..... 827
7. In determining testamentary capacity, the terms of the will, if unnatural, inequitable, or unreasonable, may be considered. *In re Estate of Lyell*..... 827

Witnesses.

1. Contradictory statements or declarations to impeach a witness, a party to the action, are admissible without calling his attention to the time, place, and party to whom made. *Berggren v. Hannan, O'Dell & Van Brunt*..... 18
2. Exclusion of testimony of character witnesses not shown to be qualified *held* not error. *Hill v. State*..... 73
3. Voluntary communications to a physician not then employed as such and not necessary to professional services are not privileged. *Crawford v. State*..... 125
4. A written statement by witness which contradicts or impeaches his material testimony is admissible, though not delivered to the party for whom it was intended. *Blue Valley State Bank v. Milburn*..... 131
5. A witness may be fully cross-examined in rebuttal of inferences of fact arising from his direct examination. *Blue Valley State Bank v. Milburn*..... 131
6. Permitting counsel to ask a witness whether he had been convicted of an offense below the grade of felony *held* error. *Dunlap v. State*..... 313
7. Accused as witness for himself is subject to the rules

governing cross-examination of other witnesses. *Swogger v. State* 563
8. Rules relating to discrediting or impeaching ordinary witnesses apply to defendants as witnesses for themselves in criminal cases. *Swogger v. State* 563
9. An attorney is incompetent to testify concerning communications by a client, without the client's consent. *In re Estate of Bayer* 670
10. In a proceeding to probate a will, communications by testator to his attorney, though he did not draw or witness the will, *held* inadmissible. *In re Estate of Bayer* 670
11. A witness may be impeached by showing statements out of court concerning material matters contrary to his testimony at the trial, but such impeaching declarations are not substantive evidence of the facts declared when made by one not a party to the action, but merely aid in determining the weight to be given the witness' testimony. *Sindelar v. Hord Grain Co* 776