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WILLIAM MORROW ET AL., APPELLEES, V. FARMERS IRRIGATION DISTRICT, APPELLANT.

FILED JULY 6, 1928. No. 26312.

1. **Waters**: IRRIGATION DISTRICTS: TAXES: REFUND. Section 2878, Comp. St. 1922, providing for refund of taxes paid under protest is a cumulative remedy in cases brought within its terms, and is therefore not excluded by sections 2865 and 2904, Comp. St. 1922, providing for the exclusion of lands from an irrigation district.
2. **Taxation**: ILLEGAL LEVY: REMEDY. The remedy by appeal from the decision of the board of equalization is exclusive as to all questions properly before them, such as the valuation of lands for assessment and the comparison of values of the several tracts; but where certain land is not subject to taxation, the remedy by payment under protest and claim for refund is applicable.
3. **Waters**: IRRIGATION DISTRICTS: TAXATION: SUBIRRIGATED LANDS. A statute provided that taxes levied upon lands by an irrigation district, if paid under protest, should be refunded if it were shown "that the lands could not be benefited by irrigation, * * * by reason of subirrigation." *Held*, that the term "subirrigation" as used in that connection cannot be interpreted to mean only lands subirrigated to the extent that they have become unfit for cultivation, but that the true test is whether or not such lands can be benefited by irrigation; that is, by the application of water to the surface thereof.
4. ——: ——: ——: ——. Lands properly included in an irrigation district when organized, which subsequently, by reason of seepage or percolation through the soil of waters from the canal of the district and the spreading thereof upon surrounding lands, have become subirrigated to such an extent that they cannot be benefited by irrigation, are not subject to taxation by said district for the payment of the operating expenses thereof.
5. **Question not Decided.** Whether said lands may be taxed to pay principal and interest of bonds issued by the district is not presented nor decided.

APPEAL from the district court for Scotts Bluff county: EDWARD F. CARTER, JUDGE. *Affirmed.*

Raymond & Fitzgerald, for appellant.

Morrow & Morrow, contra.

Heard before GOSS, C. J., DEAN, GOOD and EBERLY, JJ., and CHASE, REDICK and WHEELER, District Judges.

REDICK, District Judge.

Action to recover from an irrigation district the amount of an assessment paid under protest. Plaintiff had judgment in the district court, and the district appeals. The facts are not in dispute. The Farmers Irrigation District was duly organized in 1897, embracing in its boundaries the lands now owned by plaintiff, described as the east half of the northeast quarter of section 3, in Scotts Bluff county, and approximately 60,000 acres additional. At and prior to the organization of the district the lands of plaintiff were arid and could at said time be benefited by the application of irrigation water on the surface thereof, and were not capable of producing profitable crops without such irrigation. The canal of defendant was constructed above said land in 1909, and thereafter irrigation water was applied upon the surface of said premises. A few years after the application of the irrigation water upon the lands in the vicinity of said premises and including the same, part of the latter, which was lower than the adjacent land, became wet by reason of the irrigation of adjacent lands by the process of percolation. Plaintiff became the owner of the premises March 1, 1920, at which time the north half thereof required irrigation from defendant's canal, but all of the south half, except about three acres in the southwest corner thereof, was too wet for raising crops, and water stood on the surface of about 25 acres. In 1920 defendant constructed a drain across the east half of the northeast quarter, whereby about 20 acres of the southeast quarter of the northeast quarter was relieved of surface water so that it could be profitably cropped without the application of irrigation water on its surface. In 1923 the drain above mentioned was deepened and another one constructed whereby all the

surface water on the southeast quarter of the northeast quarter was removed, and thereafter, under adequate irrigation, crops could be raised on 23 acres, but 20 acres continued to be too wet for that purpose. Only 3 acres of said 23 acres on which crops could be grown could be benefited by the application of water upon the surface thereof, and the remaining 20 acres could not be benefited, but the application of water upon the surface would be injurious, in the year 1925. The reason why the 20 acres, the assessment of which is in controversy herein, could not be benefited by surface irrigation was that the same had become subirrigated by reason of seepage resulting from the application of water from defendant's canal upon adjacent land in the district to such an extent that sufficient moisture for the raising of crops existed.

In 1925 the district assessed that portion of the northeast quarter which was too wet to raise crops at the nominal value of $1 an acre, and the 23 acres at $50 an acre, which included the 20 acres which had become subirrigated, the tax upon which is the matter in dispute, amounting to $100. Before the levy of the taxes they were equalized by the board of equalization, and all proceedings prior to the levy were regular. The plaintiff did not appear before the board and make any objections to the taxes in question, but paid the same under protest, and filed his claim with the board for refund, which was disallowed. Upon appeal to the district court plaintiff recovered a judgment against the district for the sum of $113.35, to draw interest at 10 per cent. per annum.

Two questions are presented for our consideration: First, whether this is a proper proceeding; and second, whether the 20 acres of subirrigated land are subject to taxation by the district. Of these in their order.

1. The defendant contends, in the first place, that plaintiff should have proceeded by application to the board of the district to exclude therefrom the 20 acres in question, for which proceeding provision is made in the statute;

and, in the second place, that he should have appeared before the board of equalization and made his objections to the assessment, and appealed from an adverse decision to the district court; the contention being that by failure to follow one of these remedies he is precluded from attacking the validity of the assessment. However, in 1903 the law governing irrigation districts was amended and said amendment is now known as section 2878, Comp. St. 1922, whereby it was provided that when any person against whose property assessments have been made shall pay said assessments under protest as provided by the general revenue act, the board was authorized to refund the same, and contained the following proviso:

"Provided, however, that no taxes or assessments shall be ordered refunded unless the person complaining shall file in the office of the secretary of such district a copy of his tax receipt, showing the same paid under protest, together with a sworn affidavit in writing showing one of the following reasons why such tax or assessment should be refunded:

"First. That the land upon which such tax or assessment was levied is not within the boundaries of the district for which such lands were taxed, or assessed.

"Second. That the title to said lands are in the state of Nebraska.

"Third. That the lands could not be benefited by irrigation, either by reason of subirrigation * * * or that the lands are nonsusceptible of irrigation from the canal of the district."

All formal requisites of this section were complied with by plaintiff. No doubt all objections which might properly have been submitted to the board of equalization, such as the valuation of the property and the relative amount thereof as compared with other property in the district, would be foreclosed by failure of plaintiff to appear (*State v. American State Bank*, 114 Neb. 740); but the general revenue act provides for payment under protest and refund in all cases where the property was not

liable to taxation or assessment, which is the claim of plaintiff here. We think the section under consideration was a special provision covering all cases within its terms, is cumulative, and the two other remedies suggested are not exclusive, as applied to the question here presented. We have not overlooked the case of *Sowerwine v. Central Irrigation District*, 85 Neb. 687, in which it was held that for the purpose of excluding lands from the district the statutory procedure is the exclusive remedy, and that a suit in equity will not lie (see, also, *Andrews v. Lillian Irrigation District*, 66 Neb. 461); but the present case is not for that purpose and will not accomplish that result.

2. Were the 20 acres of subirrigated land subject to taxation by the district? The answer depends very largely upon the construction of the third section of the proviso above quoted, to wit: "That the lands could not be benefited by irrigation, either by reason of subirrigation * * * or that the lands are nonsusceptible of irrigation from the canal of the district." This section clearly requires the claimant, as the condition of refund of taxes, to show that the lands could not be benefited by irrigation; and he is confined to two reasons whereby that fact may be established: (1) Because the lands are already supplied with sufficient moisture by subirrigation and do not require the application of water from the irrigation canal; and (2) that the lands are not susceptible of irrigation from the canal of said district. With the second reason we are not concerned. We think the word "susceptible" is used in the sense of capable, and was intended to refer to lands which, for some cause, could not make use of waters from the canal. The first reason furnishes the principal ground of argument. It is conceded that, from arid lands upon which no crops could be raised, the lands in question have been converted into arable lands in consequence of their subirrigation from the waters of the canal of the district and the distribution thereof over adjoining lands, and the district contends that, inasmuch as they have thereby received special benefits from the operations of the dis-

trict, they should pay therefor in the form of special taxes. On general principles of justice this contention is of great force, but as the only authority to levy taxes and assessments comes from the legislature, warrant for such levy must be found in the statute. The object of organizing irrigation districts is to gather the waters arising therein and distribute the same over lands requiring it because of the insufficiency of normal rainfall, and the basis for taxing such lands is found in the special benefits which they so receive. If for any reason growing out of natural causes a particular tract of land does not require additional water to be artificially provided, or is in such a location that water cannot be conducted to it by artificial means, then it cannot be said to be benefited by irrigation.

It would appear to be perfectly plain that by section 3 the legislature intended to provide for these two situations, which can be demonstrated by a permissible reconstruction of said section as follows: "That the lands could not be benefited by irrigation because they are already subirrigated," or "are not susceptible of irrigation." As applied to agriculture, irrigation is defined by Webster as "The supplying of water by canals, ditches, etc.; the operation of causing water to flow over land for nourishing plants;" and to subirrigate is "to irrigate below the surface, as by a system of underground porous pipes."

By the language used the evident intent of the legislature was to distinguish between the terms irrigation and subirrigation, using the word irrigation in its ordinary accepted sense of spreading water upon the surface of the land by artificial means, and subirrigation as a natural process by percolation through the soil. Section 2865, Comp. St. 1922, provides for the apportionment of water to the lands in the district, and continues: "Provided, if the tract of land, or any part thereof, to which such water right attaches shall at any time become subirrigated to the extent that water is no longer of any benefit thereon for irrigation purposes," the owner may make application to have the same excluded from the district by releasing

his water right and having it applied to other lands. Thus the legislature declared its intention that such lands should no longer be charged with the expense of operating the canals when they had no use for the waters thereof. Again, by providing for the recovery by the landowner of taxes paid under protest upon subirrigated lands, the legislature clearly intended that such lands should not be taxable by the district. Whether this is fair, just, or in consonance with sound public policy is a question for the legislature, and not for the courts. An illustration will make it clear that no power exists in the district to tax the lands in question: Suppose the organization of an irrigation district with boundaries fixed by it; the limit of taxation is within the boundaries so established. After the operation of the district for a number of years the lands adjoining the same (by means of the operation by the district of its canals and the spreading of the water upon the surface of the lands in the district, by the process of seepage or percolation) become subirrigated so that they may be properly utilized for the raising of crops, whereas prior to the operations of the district they were arid and incapable of such use; they would undoubtedly receive a special benefit from the waters of the irrigation district, but no one, we think, would claim that the district had authority to levy assessments upon such lands because of such benefits, for the simple reason that the legislature had not authorized them so to do. By the same reasoning, the test being whether the lands may be benefited by irrigation, and the legislature having declared that lands merely subirrigated are not liable to tax, the mere fact that they are within the district is not sufficient to authorize the tax.

The district further contends that the lands in question are subject to assessment to pay the cost of drainage canals, but the present tax was not levied for that purpose. Also, that the subirrigation referred to means only such as arises from natural causes. The causes here operating —seepage and percolation—might well be deemed natural

causes, although contributed to by the district operations, but the statute imposes no such limitation. Further, that the inclusion of the lands in the district at the time it was organized was a final determination that the lands would be benefited by irrigation, citing *Sowerwine v. Central Irrigation District*, 85 Neb. 687. The statute, however, has anticipated and provided for a change in the situation by provisions for excluding subirrigated lands from the district and refund of taxes thereon paid under protest. It is further argued that the word "subirrigation" should be construed as embracing only lands which have become subirrigated to the extent that they are unfit for cultivation. The words of the statute do not permit such qualification of the term; in fact, the only test provided is that they "could not be benefited by irrigation."

We conclude that the judgment of the district court is right and should be affirmed.

AFFIRMED.

HELEN SVOBODA, APPELLEE, V. SNYDER STATE BANK, APPELLANT.

FILED JULY 6, 1928. No. 26488.

1. **Banks and Banking:** INSOLVENCY: GUARANTY FUND COMMISSION: DISSOLUTION. The taking over of the assets of a banking corporation by the department of trade and commerce of this state for the purpose of managing or liquidating such bank does not effect a dissolution of the corporation.
2. ———: ———: ———: ACTION. In such case, the corporation retains its corporate entity and is subject to suit upon its contracts, with this qualification, that by such suits it is not sought to interfere with the possession of the assets of the bank or the distribution thereof.
3. ———: ———: ———: ———. An action against a banking corporation, which has been taken over by the department of trade and commerce, and the business of which as a going concern is being carried on by the guaranty fund commission, to recover a judgment upon a certificate of deposit issued by said bank while so conducted by the commission is not in form or

effect a suit against the state requiring its consent to its institution.

APPEAL from the district court for Dodge county: FREDERICK W. BUTTON, JUDGE. *Affirmed.*

C. M. Skiles and *I. D. Beynon,* for appellant.

Courtright, Sidner, Lee & Gunderson, contra.

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and HOWELL, JJ., and CHASE and REDICK, District Judges.

REDICK, District Judge.

This is an action brought by the plaintiff against the Snyder State Bank of Snyder, Nebraska, to recover upon a certificate of deposit issued by said bank on April 29, 1926, for $500, due in 12 months thereafter, with interest at 4 per cent. per annum, no interest after maturity. The certificate became due April 29, 1927, and was presented for payment and payment refused; whereupon this suit was brought September 1, 1927. The bank appeared by the guaranty fund commission of the state of Nebraska and moved to dismiss the case upon the ground that the action was one against the state of Nebraska, and that the assets of said bank are in possession of the guaranty fund commission. The motion was overruled and an answer presenting substantially the same matter as defense was filed for the bank by the guaranty fund commission. Thereafter plaintiff filed a motion for judgment on the pleadings, which was sustained and judgment rendered for plaintiff in the sum of $547 and costs. The defendant appeals, making seven assignments of error, all of which may be included in the fourth assignment, that the judgment is contrary to law.

No defense was presented to the merits of plaintiff's claim, and the sole question for determination is whether or not the action is in effect one against the state of Nebraska which cannot be maintained without the consent of the state.

It appears from the record that on March 20, 1925, the department of trade and commerce took possession of the bank and all its assets, and turned the same over to the guaranty fund commission of the state for administration and management, under section 8029, Comp. St. 1922, as amended by section 11, ch. 191, Laws 1923, as amended by section 1, ch. 30, Laws 1925. This last act provided: The department of trade and commerce "may forthwith take possession of the property and business of such bank, and place it in charge of the guaranty fund commission, who shall thereafter conduct the affairs of said bank, and who shall retain possession of all money, rights, credits, assets and property of every description belonging to such bank, as against any mesne or final process issued by any court against such bank or corporation whose property has been taken, and may retain such possession for a sufficient time to make an examination of its affairs, and dispose thereof as provided by law. Any attachment lien against such property, acquired within thirty days next preceding the taking of such possession, shall be thereby released and dissolved."

Section 4 of the act of 1925 is as follows: "Upon taking possession of the property and business of any bank, the guaranty fund commission may take charge and control of the property and business of such bank and open it and manage it as a going concern, without regard to its solvency, and through employees perform all duties and acts of the officers and directors of such bank while managing the same, and all salaries and expenses in connection therewith shall be paid by the bank. The operation of the bank by the guaranty fund commission shall in no manner relieve or diminish the obligations of the stockholders under the laws of this state, or in any manner absolve the owners of such stock or the officers or directors of any liability under the civil or criminal laws of the state. If the guaranty fund commission shall determine that it is impossible to preserve such institution as a going concern, then the commission shall proceed to liquidate such

bank as by law provided: Provided, the district court of the district in which such bank is located may, upon application of any judgment creditor after a period of three months from the taking over of said bank by the guaranty fund commission, order the commission to close said bank, and liquidate the same, as provided by law."

When the guaranty fund commission took possession of defendant bank, March 20, 1925, in pursuance of the authority granted by section 4, above quoted, it opened the bank for business, received deposits, paid checks, and conducted the bank as a going concern from that time forward, and managed the same in substitution for the regular officers of the bank. On April 29, 1926, it received from plaintiff the sum of $500 on deposit, and issued its certificate as above stated. No receiver has ever been applied for or appointed to take charge of the assets of the bank and liquidate its affairs. The guaranty fund commission continues to operate it as a going concern in the hope and expectation that it will be able to get the affairs of the bank in such condition that they may turn the same over to its stockholders and directors and thus enable them to continue the business of the bank under the supervision of the state in the same manner as such business was conducted prior to the intervention of the department of trade and commerce. If, after having taken possession, at any time the guaranty fund commission shall determine that it is impossible to preserve such institution as a going concern, then it is required to notify such fact to the attorney general, whose duty it is to apply to the courts for the appointment of a receiver of the bank for the purpose of liquidating its assets and winding up its business. Laws 1925, ch. 30, sec. 5.

A relevant question is: What is the status of the bank during the period for which its business is conducted by the guaranty fund commission as a going concern? Is it dead, dormant, or a living banking institution having all the privileges and subject to all the liabilities of such a concern? The corporation is not dead, because the hold-

ing is practically universal that, though insolvent and in the hands of a receiver, the corporate entity is not destroyed. 14A C. J. 977, sec. 3217. And the mere taking over of possession by the guaranty fund commission is much less effective than the appointment of a receiver, because the commission has no power to liquidate its assets—that has to be accomplished by the appointment of a receiver to whom the commission is required to deliver. It is not dormant, because the corporation still maintains its entity, with all its powers except the management and control of its property, and except, of course, the power to do any act which would interfere with the possession of the receiver, or the commission in the performance of duties enjoined by law. It may hold corporate meetings, elect officers, appoint committees, and perform other acts for the benefit of the corporation, within the limits above noted.

We are driven to the conclusion that, notwithstanding the intervention of the guaranty fund commission, the corporation continues to be a living concern for the transaction of the business of banking. The commission is an agent appointed by the state to take charge of and manage the business of the defendant corporation. But the state has no pecuniary interest in that business. If the bank finally succeeds and makes a profit, the state can claim no part thereof; if it fails, there is no liability upon the state to pay any portion of its losses. The judgment herein is to be paid out of the assets of the bank, not by the state.

It seems, therefore, that, although the commission is appointed by the state and answerable to the state for the faithful performance of its duties, it is in truth and in fact the agent of the corporation, taking the place of its officers and directors as manager of its business. Whether or not the guaranty fund commission, as such, may be sued in respect of the business by it conducted, we need not and do not decide. The suit here is against the corporation. If during the conduct of the business of the

bank it became necessary to sue one of its debtors, no doubt the action would have to be brought by the commission, but it would be brought in the name of the corporation. On the other hand, a suit against the corporation could hardly be brought by the commission, unless perhaps for recovery of its assets, or protection of its right of possession.

If we are right upon the proposition that the corporation still exists as a legal entity, then it has a right to sue and be sued the same as though its affairs were being managed by its officers and directors, with this exception, that, inasmuch as the right to the possession of its assets is declared by law to be in the commission, the right of the corporation as such to sue therefor is suspended. The liability of a corporation upon its contracts stands upon a different basis, and we see no objection to the maintenance of a suit of that character for the purpose of determining the rights of the parties, so long as it is not sought to take away or subject any of the assets of the corporation, or to interfere with the possession thereof by the commission. There is no provision in the statute for filing claims against the bank until after the appointment of a receiver. If suits for adjudication of claims due may not be brought, and the commission sees fit to conduct the bank as a going concern for the period of limitations, action upon claims might be barred.

The judgment in the present case has no tendency to do either of the above things. An execution thereon could not be levied upon the property of the bank in possession or under the control of the commission, and if it operated as a lien upon the real estate of the corporation, it would be subject to the final disposition of the bank's assets by the commission, during the time it is in possession under the statute.

It is argued by defendant that the object of this suit is to gain an advantage over other depositors and preferred creditors of the bank by obtaining a judgment drawing 7 per cent. interest for a longer period of time

than may be obtained by other preferred creditors whose claims are not in judgment. Whether or not, if the bank should finally fail and be liquidated, the claim of the plaintiff against the depositors' guaranty fund would be upon his certificate of deposit or upon his judgment, we need not decide. In the opinion of the writer, any excess in amount of the judgment over the amount properly allowable on the certificate of deposit would not be a charge upon the guaranty fund, but might be allowed as a general claim against the bank. But we have not reached this situation. If the bank is finally turned over to its stockholders, it is perfectly just and right that the plaintiff receive the amount of his claim with 7 per cent. interest from the time it became due. That is no concern of the state or the guaranty fund.

We have above set forth what we consider to be the common sense view of the situation presented by this record, but counsel on both sides, in the preparation of their briefs, have exhibited commendable industry in citing a large number of cases for the assistance of the court, and we have examined many of them and have been guided by them to a considerable extent in arriving at the conclusions set forth in the earlier part of this opinion. We will now refer to some of them which we think applicable to the question before us. The case of the *Metropolitan Savings Bank & Trust Co. v. Farmers State Bank*, 20 Fed. (2d) 775, is almost precisely the same as the instant case on its facts. The action was brought in the district court of the United States for the district of Nebraska, upon a certificate of deposit for $5,000, issued by the Farmers State Bank July 12, 1924, prior to the bank being taken over by the guaranty fund commission of the state of Nebraska (this being the only point of difference), which event occurred April, 1925, at which time, and since, the bank was being operated by the commission as a going concern. Motion to dismiss the action as being one in effect against the state was sustained by Woodrough, J., and appeal taken to the circuit court of appeals, where

it was reversed and remanded, with direction to proceed in the usual course. In an exhaustive and well-written opinion by Molyneaux, D. J., the precise question before us was discussed and decided adversely to the claim of the commission. We will not take the space necessary to analyze that decision, but will only say that in our judgment it is well reasoned and correctly interprets the statutes of this state, which are set out quite fully. The gist of the court's holding is set out in syllabus 3, as follows:

"Corporate existence of corporation is not affected by the appointment of a receiver of its property, and corporation remains subject to actions at law to the same extent as if no receiver had been appointed, except as such actions may be restrained or enjoined in receivership proceedings, and no action can be maintained in any way affecting or embarrassing receiver in the possession of the property of the corporation to which his receivership entitles him."

We quote the following from the opinion:

"The mere fact that an agency of the state is, under the law of the state, placed temporarily in management of the bank in the place of the bank's officers, does not constitute the banking corporation an arm or agency of the state, or entitle it to claim immunity from suit on the theory that it is identical with the state. The action is against the corporation; neither the state nor any department of the state are made a party; nor were they necessary parties, nor proper parties, to the action. The judgment to be rendered in the suit is to be satisfied out of the property of the corporation. The suit is not directly or indirectly an action against the state"—citing authorities.

It is true, as suggested by counsel for defendant, the decisions of the federal courts are not conclusive as binding precedents upon the state courts in the interpretation of state statutes, but the decisions of the United States circuit courts of appeals are entitled to very great

respect and are of great weight as authorities when their reasoning meets with our approval.

The cases cited in support of the conclusion in the *Farmers State Bank* case present a wide range of circumstances upon which the question arose, but in most of them the pivotal question was whether or not the state in its governmental capacity had an interest in the subject-matter of the suit; as was held in *Coal & Coke R. Co. v. Conley & Avis,* 67 W. Va. 129, the interest of the state in the subject-matter of a suit to which it is not a party must be direct, not merely incidental and consequential. As we have attempted to show, the state has no interest in the present action, which involves merely the liability of the bank to its depositor.

The defendant relies upon five cases in which it is held that a suit against a governmental agency is in effect a suit against the state, and cannot be maintained without the state's consent. We think none of these cases are applicable to the present action and are easily distinguishable therefrom. We will examine them briefly. The case of *State v. Mortensen,* 69 Neb. 376, was an action against the members of the board of public lands and buildings in their official capacity to compel the specific performance of a contract to furnish plaintiff a number of convicts to perform labor in plaintiff's factory, and the court held that such a contract was in substance one with the state, and that the court had no jurisdiction. The case of *Lankford v. Schroeder,* 47 Okla. 279, was a suit against the bank commissioner to compel him to pay a debt against a failed bank out of the state guaranty fund, or out of assets of such bank in his hands as such officer. It was held, in effect, a suit against the state. The case of *Lovett v. Lankford,* 47 Okla. 12, was a suit in mandamus to compel the defendants, as members of the banking board, to pay the claim of plaintiff out of the depositors' guaranty fund. It was held to be a suit in effect against the state, and that the discretion of the banking board could not be controlled by mandamus. The case of *Lankford v.*

Platte Iron Works Co., 235 U. S. 461, another case from Oklahoma, was a suit by a depositor in the bank to compel payments from, distribution of, and assessments for the depositors' guaranty fund. It was held, in view of the rulings of the Oklahoma courts that the statute creating the state banking board intended to give the state a definite title to the depositors' guaranty fund, that the suit was one against the state.

If the present action had been brought against the guaranty fund commission, or sought in any way to control the action of the commission with respect to the assets of the bank in its hands, or the distribution of the depositors' guaranty fund, the above cases would have a direct application; but the suit, being one against the banking corporation, cannot affect in any way the administration and distribution of the assets of the bank or the guaranty fund.

The fifth case is *Hertz v. Knudson*, 6 Fed. (2d) 812, which was an action brought by the department of trade and commerce against Hertz and Levine to recover assets in their hands belonging to the Lyon Bonding & Surety Company, an insolvent insurance company in the hands of the department for liquidation. It was held that the suit was one by the state, of which the federal court had no jurisdiction. It will be readily noted that that action was brought by a department of the state, which clearly distinguishes it from the one at bar.

Our conclusion is that the judgment of the district court should be affirmed.

AFFIRMED.

RICHARD STOWE V. STATE OF NEBRASKA.

FILED JULY 10, 1928. No. 26360.

1. **Felony**: INDICTMENT. "A person accused of a felony must be charged by an information or indictment which discloses the 'nature and cause of accusation' preferred against him." *Moline v. State*, 67 Neb. 164.

2. **Criminal Law: INDICTMENT: CONSTITUTIONAL GUARANTY.** Under section 10186, Comp. St. 1922, the court will not ignore "error as to any matter of pleading or procedure" in a criminal action, when thereby the constitutional rights of the accused conferred by section 11, art. I of the Constitution, have been violated by failure to give him proper notice of the "nature and cause of accusation" against him.

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

George H. Merten, for plaintiff in error.

O. S. Spillman, Attorney General, and *Bryce Crawford, Jr., contra.*

Heard before GOSS, C. J., ROSE, DEAN and THOMPSON, JJ., and CHASE and WHEELER, District Judges.

GOSS, C. J.

A jury found the defendant guilty of larceny of "property" valued by it at $75. From a judgment and sentence thereon the defendant brings error proceedings. Various errors are assigned. Only one of them needs discussion.

The information served on the accused and to which, when arraigned, he pleaded not guilty consisted of two counts. Count 1, omitting words not in controversy, charged that the defendant "unlawfully and feloniously did steal, take and carry away $75 in money, of the value of $75, the personal property of the United States National Bank, a corporation;" count 2 charged that the defendant, "then and there being the bailee of certain personal property of the United States National Bank, a corporation, and while said property was so held by him, as such bailee, did then and there unlawfully and feloniously convert said property to his own use."

After the state introduced its evidence and rested, counsel for defendant announced that he would like to take a recess until 2 o'clock to give him time to prepare a motion, and the court, stating that it was near the noon hour, granted the request. When court reconvened the prose-

cutor asked leave to reopen his case and to amend the information by inserting after the words in count 1, "the value of $75," the following clause: "And certain creamery checks signed by the Harding Creamery Company and indorsed by the payees therein named in blank, of the value of $73.76." Over the objection of counsel for defendant the court allowed the amendment. The prosecutor then voluntarily announced that counts 1 and 2 were in a measure similar, and, if required to elect on which count he would stand, he would elect to stand on count 1. Evidently the court understood him to elect that, for in his charge to the jury the court, without further explanation, stated the issues in the first paragraph of his instructions by reciting count 1 as if the amendment previously allowed were in that count, and made no reference to the second count. The trial proceeded without any further arraignment or plea or time to meet the new matter injected into the information by the amendment.

Was the amendment in the circumstances recited such a violation of the constitutional rights of the defendant as to amount to prejudicial error?

Article I of our state Constitution is very properly termed a "Bill of Rights." Section 11 thereof says, so far as it need be quoted here: "In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation, and to have a copy thereof." Pursuant thereto and to carry it into orderly effect, the legislature has provided that "no one shall be, without his assent, arraigned or called on to answer to any indictment until one day shall have elapsed, after receiving in person or by counsel, or having an opportunity to receive a copy of such indictment as aforesaid." Comp. St. 1922, sec. 10104. Informations are governed by the same rule as indictments. Comp. St. 1922, sec. 10086.

The prosecution was begun by complaint in the municipal court. The transcript thereof is in the record. It

shows that counts 1 and 2 both charged the stealing of $75 in money from the bank, one directly, and the other as bailee. Thus the defendant never had any preliminary hearing on the charge of larceny of anything but money. The second count of the information upon which he was arraigned in the district court, heretofore quoted, is an indefinite charge of larceny as bailee of certain personal property of the bank. Taken with what was charged in the same count in the complaint in the court below it could not have given him notice of the charge included in the amendment to the first count of the information to the effect that he was accused of stealing the creamery checks there described; for checks are not money, though when good they may often be exchanged for money. For the purpose of preparation for trial it might often be that one charged with larceny would be at as distinct a disadvantage when sought to be convicted by proofs of stealing checks on an indictment for stealing money as would one when sought to be convicted by proofs of stealing a steer on an indictment for stealing a horse.

The defendant was, in the end, tried and convicted on the first count, as that was the only count submitted to the jury. The verdict says: "We the jury * * * do find the said defendant guilty of larceny and find the value of the property stolen to be seventy-five dollars as charged in the information." There is nothing in the verdict to show the nature of "the property stolen," whether money or other property or both. The proofs do not appear to us to indicate the possibility of the jury finding that more than $25 in money had been stolen. This analysis of the verdict shows that the jury cannot be said to have reached their verdict on count 1 of the information as originally drawn. The jury must have been influenced by the amendment.

The defendant, therefore, was not charged in the information in such fashion as to disclose the "nature and cause of accusation" against him and on which his conviction must rest, if at all. "A person accused of a felony must be charged by an information or indictment which

discloses the 'nature and cause of accusation' preferred against him." *Moline v. State*, 67 Neb. 164. In the course of that opinion the court said, page 171: "The object of the constitutional guaranty is doubtless for the purpose of having the accused informed of the precise offense for which he must answer, and thus enable him to meet and defend against that particular accusation, when judicially called upon to do so."

It is sought by the state to avoid the effect of the record made by defendant by the application of our statute that prevents us from setting aside a judgment in any criminal case "for error as to any matter of pleading or procedure," if after examination of the entire cause we shall consider that no substantial miscarriage of justice has actually occurred. Comp. St. 1922, sec. 10186. We do not regard this as a mere error as to a matter of procedure, but rather as a violation of the constitutional right of the defendant. That right the legislature never intended to take away by the section sought to be invoked. Under section 10186, Comp. St. 1922, the court will not ignore "error as to any matter of pleading or procedure" in a criminal action, when thereby the constitutional rights of the accused conferred by section 11, art. I of the Constitution, have been violated by failure to give him proper notice of the "nature and cause of accusation" against him.

The conclusion which we have reached renders it unnecessary to discuss other matters assigned. The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

WHEELER, District Judge, dissents.

JACOB C. ROTH, APPELLEE, V. CHARLES BLOMQUIST, APPELLANT.

FILED JULY 10, 1928. No. 25974.

Negligence: OPERATING AUTOMOBILE IN NIGHTTIME. As a general rule it is negligence as a matter of law for a motorist to drive

an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his lamps.

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

John W. Yeager and *J. C. Cook,* for appellant.

Gray, Brumbaugh & McNeil contra.

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

ROSE, J.

Jacob C. Roth, plaintiff, brought this action to recover from Charles Blomquist, defendant, $11,400 in damages for alleged negligence. While plaintiff in a Ford coupé was driving westward with his wife on the Lincoln Highway in Valley after dark on the evening of November 17, 1924, he ran into a wagon in which Thomas Corbett, a farm-hand in the employ of defendant, was driving a team of horses northward at a farm crossing. Plaintiff and his wife were injured and his coupé was damaged. The negligence imputed to defendant is that his employee, without any light on the team or wagon, knowing, or chargeable with notice, of plaintiff's approach, drove the team from the south across the highway directly in front of the coupé at an unlighted private crossing not apparent to plaintiff or known by him to exist, thus causing the collision. The answer of defendant contains a denial of the negligence charged in the petition and also a plea that the collision and the resulting injuries were caused by plaintiff's negligence. Defendant's charges of negligence were put in issue by a reply to the answer. Upon a trial of the issues the jury rendered a verdict in favor of plaintiff for $4,975. From a judgment therefor defendant appealed.

Insufficiency of the evidence to sustain the verdict is urged as a ground of reversal. The collision occurred on

a straight, level, unobstructed, paved highway. The pavement was 18 feet wide and the roadway was 4 feet or more in width on each side. Defendant farmed land on both sides. His farm buildings were north of the highway near the east line of Valley. A sign by the roadside warned motorists approaching the village from the east that the municipal speed limit was 15 miles an hour. There was a farm crossing from the south to defendant's barn. In the afternoon of November 17, 1924, Corbett had been husking corn in a field south of the highway, using a team of horses hitched to a wagon with high sideboards. He had unloaded the wagon at a crib south of the highway and had started to the barn in the empty wagon. He approached the farm crossing after lights on passing cars had become necessary.

In his own behalf plaintiff testified in substance: The lamps on his car threw the light 40 or 50 feet ahead; first saw the team and wagon when probably 20 or 25 feet from them; was not going over 25 miles an hour—about that rate; horses had traveled half the distance across the highway before he saw them; rear of horses about center of highway at the time of the impact; thought most of the team was then practically across the pavement; nothing to obstruct his view; lights of other cars did not interfere.

In attempting to make his case plaintiff was bound by his own testimony, which shows conclusively in connection with evidential facts not disputed that he could not stop within the distance that his lamps threw light ahead of his car upon discovering the team and wagon. A general rule of law has been stated thus:

"It is the duty of a chauffeur traveling by night to have such a headlight as will enable him to see in advance the face of the highway and to discover grade crossings, or other obstacles in his path, in time for his own safety, and to keep such control of his car as will enable him to stop and avoid obstructions that fall within his vision." Berry, Automobiles (5th ed.) sec. 177. See, also, Huddy, Automobiles (8th ed.) sec. 396, and 1 Blashfield, Cyclo-

pedia of Automobile Law, ch. 16, sec. 17, p. 350, and cases cited in the texts.

This general rule is supported by sound reasons and the overwhelming weight of authority. When applicable to the facts a violation is of itself negligence precluding a recovery in favor of the motorist for resulting injuries to himself or to his property. Without such a rule the hazards at farm and highway crossings and at other places on the lines of public travel would be unnecessarily and alarmingly increased. There are at night instances in which persons in charge of domestic animals or other property suddenly or temporarily, in absence of negligence, obstruct a highway without opportunity to give drivers of approaching automobiles instant notice. A farmer in the exercise of due care may return from his own field at dusk with a team and wagon and cross a highway to his barn. In doing so he is not required by statute to carry a warning light. In the present instance the farm-hand did nothing to prevent the application of the rule quoted. His team was nearly across the pavement at the time of the impact. Had the coupé been approaching at a reasonable speed under the circumstances he would have crossed in safety. Before driving onto the pavement he looked toward the approaching car when he had a right to believe he had time to cross. Plaintiff did not make a case and there should have been a peremptory instruction in favor of defendant.

There are recognized exceptions to the general rule or instances to which it does not apply, among them an unbarricaded, unknown, open, unlighted ditch across a highway that could only be seen at close range and not anticipated *(Tutsch v. Omaha Structural Steel Works,* 110 Neb. 585); corner of a platform with a narrow edge extending from a drag line over a street car track and discernible only in close proximity to the obstruction *(Day v. Metropolitan Utilities District,* 115 Neb. 711); an obstruction consisting of a pile of gravel similar in color to

the surface of the highway (*Frickel v. Lancaster County*, 115 Neb. 506).

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

REVERSED AND DISMISSED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. FARMERS STATE BANK OF WOLBACH: I. A. KIRK, RECEIVER, APPELLEE: JAMES T. BIGELOW, CLAIMANT, APPELLANT.

FILED JULY 10, 1928. No. 26102.

1. **Banks and Banking**: GUARANTY FUND: DEPOSITS. "Ordinarily, where a stockholder of a state bank, with knowledge that the bank is insolvent or in an unsafe condition, at the instance and request of the bank officials obtains and places in or to the credit of the bank money, to enable the bank to meet a pressing obligation, and where the money is not placed in or at the command of the bank, for the use, safe-keeping or convenience of the stockholder, in the ordinary and usual course of business, such transaction does not constitute a good-faith deposit, within the meaning of the guaranty fund law, and is not protected by the depositors' guaranty fund." *State v. Atlas Bank*, 114 Neb. 646.
2. ———: ———: ———. "In order to create a deposit which will be protected by the guaranty law, as the term 'deposit' is understood in section 8033, Comp. St. 1922, it is necessary that money or its equivalent shall in intention and effect be placed in or at the command of the bank under circumstances which do not transgress specific limitations of the bank guaranty law." *State v. Farmers State Bank*, 111 Neb. 117.

APPEAL from the district court for Greeley county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

T. T. Bell and *Prince & Prince*, for appellant.

C. M. Skiles and *Lanigan & Lanigan, contra.*

Heard before GOSS, C. J., ROSE, DEAN, THOMPSON and HOWELL, JJ., and BEGLEY and REDICK, District Judges.

DEAN, J.

Some time in February, 1925, the Farmers State Bank of Wolbach, hereinafter called the bank, closed its doors and soon thereafter came into the hands of I. A. Kirk, as receiver. In the present action James T. Bigelow, the claimant, seeks to recover from the receiver approximately $33,484, which he contends was placed by him in the bank, from time to time, as money deposited, and that it therefore comes within the meaning and the protection of the depositors' guaranty law. The claimant also seeks to recover lawful interest thereon until paid. In his petition he pleaded 15 separate causes of action. Two of these were allowed by the district court as valid claims against the depositors' guaranty fund. One of these is in the sum of $600 and the other is in the sum of $573, both claims so allowed aggregating $1,173. The receiver joins in a statement with counsel for the guaranty fund wherein it is agreed that the two claims so allowed by the court are "not contested." It follows that the claims so allowed will not be further noticed here. All of the remaining 13 certificates of deposit, whereon the claimant seeks to recover approximately $32,311, were disallowed as claims against the depositors' guaranty fund, but were allowed as general claims against the bank. From the above noted disallowance of payment of a very large part of his claim from the bank guaranty fund the claimant has appealed.

Aside from the two claims which were allowed, as noted above, the main question now before us is this: Did the remainder of the money which was placed in the bank in question here by the claimant constitute a loan of money to the bank, or did it constitute a deposit within the meaning of the bank guaranty law? The record is replete with evidence which was submitted, both by the claimant and by his nephew, M. T. Kernodle, the latter being cashier of the bank when it closed its doors, all of which goes to show that the so-called deposit does not come within the protection of the depositors' guaranty fund. The record contains more than 100 letters which passed between the

claimant and the cashier in respect of the conduct of the bank's business, and these letters likewise support the proposition that the moneys placed in the bank from time to time by the claimant, or at his direction, were not deposits, but were loans made by claimant to the bank to tide it over the straitened circumstances into which it had fallen. The letters, and other of the evidence, all go to show that the claimant was deeply interested in the bank in a financial way and that he was the owner of a large block of bank stock, namely, upwards of 80 shares.

Following are excerpts from some of the letters that passed between claimant and the cashier of the bank and which claimant wrote:

"Dear Tommy: I have your letter and note what you say and must confess that it is another surprise, as I took it from your last letter that you could get a little more money from Omaha and did not think you would need more. I had presumed that with the hogs and cattle you told me were there for sale, it would pull you through. I hardly see how I can come down there, as I have not the money to spend, and can see no good in it, as I have about gone my limit as I told you when you were here. I have sold all my bonds having sent in the last yesterday at $87 per hundred in order to meet some interest that I have to pay July 1, and as I have borrowed heretofore all I cared to, I am at the limit. I may be able to squeeze out a couple of thousand more, but if you have to close up and burst me up in business also, why we might as well stop now."

"Dear Tommy: I received your letter and also note what you said in your conversation. I am sending under separate cover a letter to the bank with draft and you can leave the letter where your assistant can see it. Of course some of it is hot air. Money is tight here and I am hard up. Had to borrow 20M yesterday. Therefore get along with as little as you can, but if you need help let me know."

Under date of August 21, 1921, a letter was written by

the cashier to claimant Bigelow, wherein among other things this is said:

"Dear Uncle: I received your letter and glad to hear from you, and would have been glad if (you) had come down had it been so you could. * * * This has been the hardest year that I ever put in trying to do something and could not make but very little progress or rather the progress that I wanted to. * * * I know I am going to have to have a little money but don't think it will have to be very much for I just will not loan any. I wish we would not have to have more for I regret it just as much as any one can but still I cannot help it. I have tried to make every effort count since a year ago but conditions have been so different from anything I ever saw that it was impossible to do what you wanted to do. Our reserve is off about $3,000 to $4,000 the last month which puts us below the requirements so I want to ask you to help us."

Under date of April 14, 1915, the cashier wrote to claimant and, among other things, this appears:

"Dear Uncle: We are going to have a meeting today and get matters settled some way. It looks now as if there is only one way. Smith went after Thompson for talking to you when you were here without having him present. So under such conditions it is very important that we get rid of such unsettled conditions. It is possible that I might want $5,000 the same as the amount you have already helped me with. I will not want it unless it is absolutely necessary. Our reserve has gone down quite a little in past few days and if Smith goes out it is natural that he will hurt all he can and take all that he has in here, which is about $7,000."

Other letters of like import passed between claimant and the cashier, all of which, in addition to the oral evidence, go to show that the claimant was vitally interested in the management of the bank from an early date until it closed its doors.

Section 24, ch. 30, Laws 1925, among other things, 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."

The following citations of authority support the conclusion which we have reached in the present case. In *State v. Atlas Bank,* 114 Neb. 646, we held:

"Ordinarily, where a stockholder of a state bank, with knowledge that the bank is insolvent or in an unsafe condition, at the instance and request of the bank officials obtains and places in or to the credit of the bank money, to enable the bank to meet a pressing obligation, and where the money is not placed in or at the command of the bank, for the use, safe-keeping or convenience of the stockholder, in the ordinary and usual course of business, such transaction does not constitute a good-faith deposit, within the meaning of the guaranty fund law, and is not protected by the depositors' guaranty fund."

See, also, *State v. Atlas Bank,* 114 Neb. 650; *Iams v. Farmers State Bank,* 101 Neb. 778.

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

In *First Nat. Bank v. Hirning,* 48 S. Dak. 417, the court held: "One loaning money to bank with full knowledge that bank is unsafe, to enable its officers to increase depleted reserve, or for some other use of bank, and not for safe-keeping or convenience to him as depositor, though form of transaction appears as deposit, is not 'depositor' entitled to participate in guaranty fund."

In view of the facts in the present case and the law applicable thereto we hold that the money placed in the bank by the claimant, except the sum of $1,173, to which reference is made herein, does not constitute a deposit within the meaning of the bank guaranty law, but was merely a loan of money to the bank and is not protected by the bank guaranty law. Comp. St. 1922, sec. 8033.

We conclude that the judgment of the district court is right and must be and hereby is in all things

AFFIRMED.

ARTHUR H. JOHNSON ET AL., APPELLANTS, V. PLATTE COUNTY ET AL, APPELLEES.

FILED JULY 10, 1928. No. 26075.

Drains: COUNTY SUPERVISORS: SECRET MEETING: ESTABLISHMENT OF DRAINS. Proceedings of county supervisors, to establish and construct a drainage ditch, which are in substantial respects conducted secretly and behind closed doors, to the exclusion of the public and interested parties, are in violation of section 972, Comp. St. 1922, which provides: "The board of supervisors shall sit with open doors, and all persons may attend their meetings"—and, in a proper case, the supervisors will be enjoined from constructing a ditch ordered under such proceedings.

APPEAL from the district court for Platte county: LOUIS LIGHTNER, JUDGE. *Reversed, with directions.*

McElfresh & Walker, for appellants.

Reeder & Reeder, George W. Wertz, Emil F. Luckey and *B. F. Farrell, contra.*

Heard before GOSS, C. J., ROSE, THOMPSON and HOWELL, JJ., and BEGLEY and REDICK, District Judges.

HOWELL, J.

This is an appeal from a decree of the district court for Platte county, denying plaintiffs, appellants, an injunc-

tion asked against Platte county and its supervisors and the commissioners of Colfax county, against levying assessments on plaintiffs' lands to cover cost and expenses of constructing a proposed drainage ditch, and from taking other proceedings looking to paying out and letting contracts for such ditch to extend into both counties.

As we see the case, the chief cause of complaint is the failure of the supervisors to "sit with open doors," as provided in section 972, Comp. St. 1922, which reads: "The board of supervisors shall sit with open doors, and all persons may attend their meetings."

A number of petitions were filed for a ditch. We will deal only with the petition called "last petition," finally acted on, filed March 10, 1926.

A view was made of the route proposed, after which the boards met in joint session. Certain objections were filed by the appellants. The boards, over objections, voted to go into executive session, which was done, to consider the routes of ditches. Appellants and others who were interested were excluded from the room for half an hour, after which time the boards allowed appellants and the public to reenter the room. The boards at once adopted a resolution in favor of the so-called "long route" based upon the first and last petitions, although appellants sought, without avail, to offer further evidence before the resolution was adopted. The motion to go into executive session, as shown by the record, was "for the purpose of discussing the proposed drainage ditch routes now on file."

Engineers were then employed, who filed reports assessing the lands and otherwise going forward with the scheme. This suit was commenced and all activities ceased. The words of the motion follow: "Motion, Supervisor Schaecher, seconded by Supervisor Bender, that we now go into executive session for the purpose of discussing the proposed drainage ditch routes now on file. Motion carried."

It is quite clear that, at that time, the boards had not reached a conclusion. Whatever transpired in the "executive session" fitted them, in their own minds, to make the

final decision necessary to override the protests of appellants. It matters little what transpired in that secret session. They, and they only, could know. Had the doors been open, all those present would have known. The public and all others were excluded for the declared purpose. It was deliberate and not incidental.

The legislature intended to put an end to just such actions by striking at secret conclaves.

Counsel for appellees concede "such meetings must be open to the public." They state the "sole purpose was to afford the members an opportunity for relaxation into a round table discussion of the several proposed routes." The motion states otherwise. The language of counsel and of the motion are admissions that the "open doors" provision of the statute was violated in both letter and spirit. Appellees' brief says: "After the doors were opened, * * * the public filed in." It appears, just before the doors were closed on the meeting, the public filed out by order of the boards, over the protest of appellants. The meeting was on in full sweep. The boards did not retire; they sat where they were and excluded every other person. There they sat, behind closed doors, and functioned; there they sat, with open doors, and functioned. They held the forum as a body, while the public filed out, wondering, no doubt, what was going on.

Such proceedings cannot be said to measure up to the wholesome and uninjurious requirements of the statute. It is not deemed necessary to follow the other contentions of the parties. What has been said necessarily leads to a reversal of the decree of the trial court, with instructions to enter a decree permanently enjoining defendants, as prayed by plaintiffs.

REVERSED.

OTTO F. MORELAND, ADMINISTRATOR, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY ET AL., APPELLANTS.

FILED JULY 10, 1928. No. 26068.

1. **Railroads: CROSSINGS: DUTY OF TRAVELER.** "It is the duty of a traveler on a highway, when approaching a railroad crossing, to look and listen for the approach of trains. He must look, where, by looking, he could see, and listen, where, by listening, he could hear; and if he fails without reasonable excuse to exercise such precautions he is guilty of negligence." *Askey v. Chicago, B. & Q. R. Co.*, 101 Neb. 266.
2. ———: ———: ———: **NEGLIGENCE.** Under the evidence in this case, *held* that a freight train standing on a side track 100 feet west of a crossing is not such a diverting circumstance that would excuse a traveler on a highway from looking toward the east within 80 feet of the crossing for an approaching passenger train. And failure to do so constitutes negligence on the part of such traveler.
3. ———: **COLLISION AT CROSSING: NEGLIGENCE.** Where it is undisputed that a traveler on a highway failed to exercise reasonable precaution, by not looking at a reasonable point where he could have seen an approaching train, his negligence will defeat a recovery for a collision with a train at a crossing, even though no signal by the locomotive bell or whistle was given.
4. **Evidence** examined and set out in the opinion and *held* insufficient to sustain a verdict and judgment in favor of plaintiff.

APPEAL from the district court for Cherry county: EARL L. MEYER, JUDGE. *Reversed and dismissed.*

Wymer Dressler, Robert D. Neely and *Hugo J. Lutz*, for appellants.

James C. Quigley, Peterson & Devoe, and *Good, Richardson & Good, contra.*

Heard before GOSS, C. J., ROSE, THOMPSON, EBERLY and HOWELL, JJ., and BEGLEY and BROADY, District Judges.

BROADY, District Judge.

This case grows out of a collision at a highway crossing between a passenger train and an automobile which

resulted in the death of Hubert Roy Moreland. The plaintiff, as administrator of the estate of the deceased, brings the action against the railroad company, and claims negligence on the part of the railroad company in (1) that the train was, at the time, running at a high rate of speed in violation of an ordinance of the village within which the accident happened, and (2) that the railroad was negligent in that it failed to give any warning of the approaching train by either blowing the whistle or ringing the bell as required by law. The railroad company denies any negligence on its part, and claims that the deceased and the driver of the automobile, in which decedent was riding, were negligent in going upon the crossing without looking and listening within 100 feet of the crossing; and at the conclusion of the evidence moved for a directed verdict in favor of the defendants. This motion was overruled, and the case submitted to a jury, which returned a verdict in favor of the plaintiff in the sum of $33,000.

The accident occurred within the limits and on the outskirts of Crookston, a small village in Cherry county. The railroad runs approximately east and west and is the main line of the Northwestern from Council Bluffs, Iowa, to South Dakota and Wyoming. Moreland and Donald Ogilvie were partners in a general insurance agency, and, as such, jointly owned the automobile, bore the expenses equally and divided the income of the business in equal shares, and on the date of the accident were engaged in this business, and traveling in a Ford coupé. Ogilvie was driving the car and sitting on the left side, Moreland on the right side, of the seat. They were coming from the west paralleling the railroad, and at a point approximately a quarter of a mile south of Crookston turned north and approached the village at right angles to the railroad track. From this point both could and did see the railroad tracks. Both were familiar with the crossing, as they had traveled this road on previous occasions. As the automobile turned to the north towards town, the road descends somewhat and crosses a bridge across a small creek. Immediately

to the right of the bridge were small trees and growing brush, which at the time were bare of foliage, as the accident occurred early in March. The bridge was 239 feet south of the railroad crossing, and from this point there was a clear and unobstructed view of the railroad for a distance of approximately 1,000 feet east, where the track runs through a cut in an embankment or small hillside. There is a clear, unobstructed view of the tracks from the crossing to this cut. To the left of the crossing, approaching from the south, is an unobstructed view of the track for some 300 feet, where the section-house in which the track-worker lives is located. Beyond that, to the west, are the usual railroad station, or depot, elevators and other buildings usually found around railroad yards in a small town. The highway was of a deep sand surface, and at a point approximately 100 feet south of the crossing is up-grade to the track level. The last 35 or 40 feet the road ascends rather abruptly.

Ogilvie said that just after crossing the bridge, 200 feet south of the track, he looked in both directions and could see no train approaching from the east, but did see a freight train with engine attached headed east, standing approximately 100 feet west of the highway crossing. Ogilvie did not again look to the east, but kept his attention directed to the freight train to ascertain whether or not it was going to start moving. He said the engine, though standing still, was emitting steam in considerable quantities, and he thought it was about to start. The freight was standing on a side track, waiting for the passenger coming from the east to pass. The track was elevated above the level of the highway, and Ogilvie said he could not see whether the freight was on the main track or side track. Ogilvie says that he did not look east after a point 100 feet south of the crossing, but gave his attention to the freight train and to the driving of the car through the sandy roadway, and the up-grade approaching the tracks, but says that he kept listening for any warning of an approaching train, of a whistle or sounding of a

bell, and heard none. He says that Moreland, the deceased, was also listening for any approaching train, and, at a point between 80 and 100 feet south of the crossing, looked east, at least twice, and said to Ogilvie, "Everything is clear on my side," and from then on both kept looking at the freight train and did not look to the east.

On cross-examination Ogilvie said that his watching of the freight did not, however, prevent his looking to the east at any time, and that he could have stopped the car almost instantly, as it was traveling only from four to six miles an hour. He also said that, at a point something over 100 feet south of the track, he had practically stopped the automobile and then ran in low gear. As the rear end of the automobile passed over the track it was struck by a passenger train coming from the east. The automobile was demolished and Moreland fatally injured and died shortly thereafter. Ogilvie, apparently, was uninjured.

Plaintiff contends that the position of the freight train, standing to the left of the crossing, was such a circumstance as to direct and divert the attention of the occupants of the automobile and excuse their not looking to the right after they had left a point between 80 to 100 feet south of the crossing, and claims that the passenger train was coming at a high rate of speed in violation of the city ordinance, which limited the operation of railroad trains within the village to 10 miles an hour; and also claims that the failure of the engineer to sound the warning whistle or bell was the proximate cause of the accident. The ordinance of the village does limit the operation of trains within its territory to not exceed 10 miles an hour. The defendants claim that this ordinance is void, being an unreasonable restriction in the necessary operation of such trains; claims that both the whistle and the bell were sounded and ringing continuously from the point of the cut in the embankment, or 1,000 feet east of the crossing. The engineer says that he sounded the whistle at the mile post east of the station and that he kept the whistle blowing from that point until the accident happened. Several

other witnesses stated that they heard the whistle, but differed as to the number and kind of sounds made by the whistle. Some of these witnesses were in the depot 300 or 400 feet west of the crossing. Others were residents of the village and were at different points from the tracks. The fireman corroborates the engineer both as to the question of whistling and ringing the bell. Both say that the engineer had set the mechanism which rang the bell by air and that the bell was ringing continuously prior to and until after the accident. Both the engineer and fireman say that, after the accident and after the train had stopped, the engineer directed the fireman to shut off the air from the bell cord, and that the bell was ringing until that time. This is corroborated by at least one other witness. Ogilvie says that he and Moreland were both listening and did not hear either the bell or whistle. To quote Ogilvie's direct testimony as to his listening after he crossed the bridge, he said: "We were both listening at all times for a train from the east as well as the west." But he did not look, and a mere glance to the east would have disclosed the coming train. It is the duty of one approaching a railroad crossing to look as well as listen. Several witnesses called by the plaintiff testified that they did not hear either the whistle or bell, and some of them said that they were in a position so that they could have heard the bell or whistle had either of them sounded. It is the duty of a railroad train in approaching a crossing to give warning of its approach by blowing the whistle and sounding the bell continuously from a point 80 rods from a crossing. *Campbell v. Union P. R. Co.*, 100 Neb. 375. The evidence upon the question of warning is conflicting, and upon that question, standing alone, it would be a question for the jury.

It must be taken as undisputed that the train was at the time running in excess of 30 miles an hour, at least. The engineer says that at the time the accident happened he was running from 30 to 35 miles an hour, and that he had partially set the brakes, some distance east of the cross-

ing, preparatory to stopping at the station. Ogilvie said, and it is undisputed, that after he crossed the bridge and was approaching the track he was running the automobile about 5 miles an hour, and that as he approached the incline, or upward grade over the right of way, he increased his speed a little, due to the incline and the heavy sand roadway. The day was clear and dry with no wind blowing and the road dry and in good condition other than it was up-grade approaching the track and a heavy sand surface.

The engineer, on the right or north side of the engine cab, did not see the automobile approaching from the south. The fireman sitting on the left, or south side of the cab, saw the automobile approaching, but says it was running slowly, and he thought the driver saw the train and was stopping, but that when starting up the incline to the track the automobile speeded up somewhat. He then feared a collision and called to warn the engineer, but that because of the noise of the blowing whistle and ringing bell the engineer could not hear him, and that he, the fireman, then started across the cab to warn the engineer. At that moment the accident occurred. The engineer said that he could have stopped the train within 400 or 500 feet, and when it did stop the engine was almost even with the depot, and that he, the engineer, ran back to the injured Moreland, whom he asked if he did not see the train, and that Moreland said: "Yes; but it was too late." A woman who had run out of the depot said that Moreland made the same statement to her.

The principal question is whether or not Moreland was himself guilty of negligence which was either the cause of or which contributed to the accident and which would bar recovery even though the defendant was negligent. This question must be determined under the comparative negligence statute of this state, which is that, even though the defendant was negligent, the plaintiff could not recover if he himself were guilty of more than slight negligence as compared to any negligence of the defendant, or if the

defendant was guilty of less than gross negligence as compared with the negligence of plaintiff's decedent. We concede that the question of contributory negligence is for the jury, unless it cannot be said that reasonable minds would differ on this question.

The plaintiff contends that the presence of the freight train was a diverting circumstance sufficient to excuse the occupants of the automobile from looking at a point closer to the crossing than they did look, and that the question of contributory negligence, if any, was a question for the jury, and by their verdict the jury determined that question in favor of the plaintiff.

"It is the duty of a traveler on a highway, when approaching a railroad crossing, to look and listen for the approach of trains. He must look, where, by looking, he could see, and listen, where, by listening, he could hear; and if he fails without reasonable excuse to exercise such precautions he is guilty of negligence." *Askey v. Chicago, B. & Q. R. Co.*, 101 Neb. 266; *Morris v. Chicago, B. & Q. R. Co.*, 101 Neb. 479; *Haffke v. Missouri P. R. Co.*, 110 Neb. 125.

"Failure of the railroad company to ring the bell or blow the whistle as the train approached the crossing, even though it may have been negligent, would not make the railroad company liable for the death of the automobile driver in a collision at the crossing, if he recklessly failed and neglected to have his car under control and by looking and listening at the proper time and place could have seen the approaching train in time to stop before reaching the track, but recklessly failed and neglected to do so, whereby there was a collision." *Askey v. Chicago, B. & Q. R. Co.*, 101 Neb. 266.

The *Morris* case, *supra*, holds that the plaintiff could not recover if he himself were negligent, even though no signal by bell or whistle was given by the appproaching train. In the *Haffke* case, *supra*, it is held that, where it shows beyond a reasonable dispute that the plaintiff's negligence was more than slight as compared with the neg-

ligence of the defendant, it is the province of the court to direct a verdict for the defendant. See, also, *Tyson v. Missouri P. R. Co.*, 113 Neb. 504.

In the *Haffke* case the court say: "We think it may well be conceded that the evidence with respect to the negligence of the defendant is sufficient to have that issue submitted to the jury, but the question upon which the case must turn is whether the plaintiff was guilty of such contributory negligence as to defeat recovery." In sustaining a directed verdict for the company in that case, the court say: "A mere glance occupying but a fraction of a second would have sufficed to warn him (plaintiff) of the approaching train."

Moreland and Ogilvie were unquestionably engaged in a joint enterprise so that the negligence of either one would be attributable to the other. We think it was the duty of both Ogilvie and Moreland to look eastward at a point closer to the crossing than 80 or 100 feet, as testified was the point at which either last looked. Had either done so, they could not have helped but see this approaching train and could have stopped the automobile within 3 or 4 feet at the most. At a point 50 feet from the crossing one could have seen the track and approaching train for a distance of over 1,000 feet. We do not think any reasonable mind could differ upon this question.

Plaintiff insists that the fact of the standing freight train and the locomotive headed toward the crossing 100 feet away constituted a "diverting circumstance" sufficient to justify both Ogilvie, the driver of the car, and Moreland giving it all their attention, thus excusing their failure to look to the east after passing a point 80 feet from the crossing. As was said in *Hall v. Union P. R. Co.*, 113 Neb. 9: "There may be circumstances which will excuse his (plaintiff's) failure *for a brief period* to look *in every such direction*, and if he suffers injury thereby, his negligence, if any, is ordinarily a question of fact for the determination of a jury." Where, however, such circumstances do exist, it is the duty of such traveler to exert greater

care before crossing the track, unless prevented by some fault of the railroad company. He should use alertness and vigilance before he has taken a position exposing himself to peril or has come within the zone of danger, so that his precaution may be effective. The diverting circumstances must be a condition of reasonably eminent danger to himself and occurring at a point which to ignore could fairly be said to expose him to a perilous position from that cause alone. It cannot be held that an object or condition which arouses curiosity, not dangerous, would excuse caution to guard against another obviously dangerous situation. If the freight train had been moving it would have been sheer recklessness to attempt to cross ahead of it. If it was standing still there could be no danger in crossing. It was standing still and Moreland and Ogilvie both knew it. A mere glance to the right by either, at any point within 50 feet of the crossing, would have disclosed the oncoming train. Both Ogilvie and Moreland were negligent in a degree far more than slight, and even conceding the passenger train was exceeding its speed limit and not sounding the whistle or bell, the contributory negligence of the plaintiff equalled, if not exceeded, any negligence of defendant.

We are not unmindful that members of a court may not, from the very nature of their position, view the circumstances of a particular case as would persons engaged in other avocations, and for that reason are loath to say that a state of facts is not sufficient to support the findings of the jury. But when the undisputed circumstances are too clear and one-sided to say otherwise, it becomes the duty of the court to say, as a matter of law, that there is no negligence, or that the plaintiff was guilty of contributory negligence of more than a slight degree. That is the situation in this case. It is the duty of this court to reverse the decision in this case.

The physical conditions surrounding the scene of this terrible accident are fixed and permanent and are conclusive, and under the plaintiff's own evidence he could not

recover. Therefore, the judgment is reversed and the case dismissed.

REVERSED AND DISMISSED.

HELEN E. SALSBURY ET AL., APPELLANTS, V. CITY OF LINCOLN ET AL., APPELLEES.

FILED JULY 10, 1928. No. 26277.

1. **Municipal Corporations**: CHARTERS. Where a city has adopted its own charter under section 2, art. XI of the Constitution, the provisions of such charter will govern, as to matters of local municipal concern, over the legislative charter existing prior thereto. *Sandell v. City of Omaha*, 115 Neb. 861.
2. ———: STREET IMPROVEMENTS. The matter of improving the streets, alleys and highways within the corporate limits of a municipality is a subject strictly of municipal concern.
3. ———: LEGISLATION: COURTS. Courts will not review or inquire into the legislative acts of municipal boards concerning matters within their power, as to whether they act expediently, wisely, or necessarily. Such are matters of purely legislative function, and not of judicial concern.
4. **Pleading**: DEMURRER. A general demurrer does not admit conclusions of the pleader, but only facts that are well pleaded.

APPEAL from the district court for Lancaster county: MASON WHEELER, JUDGE. *Affirmed.*

Allen & Requartte and *W. M. Elmen*, for appellants.

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

Heard before GOSS, C. J., ROSE, DEAN, GOOD and THOMPSON, JJ., and CHASE and REDICK, District Judges.

CHASE, District Judge.

This is a suit in equity to restrain the city of Lincoln and its city commissioners from entering into a contract for the paving of the streets in paving district No. 765 in said city. To the petition a general demurrer was inter-

posed which was sustained by the trial court, whereupon the plaintiff elected to stand on the petition and the court entered judgment dismissing the suit. The action of the trial court therein is now presented in this court for review.

The record is brief, consisting only of the petition, demurrer and judgment. The petition is very lengthy, consisting of fifteen paragraphs, also consisting of exhibit A, being the ordinance declaring for the paving of said district; exhibit B, being a plat of the streets and highways upon which said proposed paving is to be laid; exhibit C, the plaintiff's objections before the city council to the letting of said contract; exhibit C-1, being the plaintiffs' protest filed with the city council against the creation of said paving district; exhibit D, being a petition to eliminate from said paving district the property owned by the plaintiffs; and exhibit E, being the resolution of the city council ordering said district paved.

From a careful reading of the petition and exhibits we reach the conclusion that the consideration of three propositions involved will successfully dispose of the entire case: *First,* the question as to which shall prevail where there is an inconsistency—the home rule charter of the city of Lincoln, or the legislative charter which existed prior to the adoption of the home rule charter. *Second,* as to whether or not courts can and will inquire into the legislative expediency and discretion of a city council acting within its authority as to matters of municipal legislation. *Third,* the effect of a general demurrer as to the admission of facts and conclusions appearing in the petition and the exhibits annexed thereto.

By this suit the plaintiffs seek by injunction to prevent the city council of Lincoln from establishing paving district No. 765 within the corporate limits of said city, and the paving of the streets within said districts. The record admits that the city of Lincoln is a city coming within the provisions of section 2, art. XI of the Constitution, which gives authority to cities of over 5,000 inhabitants to

frame a charter for its own government consistent with and subject to the Constitution and laws of the state of Nebraska. This section of the Constitution in express terms provides that, when a city charter is adopted under its provisions, it shall then become the charter of the city adopting the same for the regulation and government thereof "and supersede any existing charter and all amendments thereof." This provision of the Constitution is self-executing. It is apparent that the framers thereof intended that a city having the required population could, independent of any legislative action, draft and adopt a charter under this provision, and when once adopted according to its provisions such charter shall be the law for the general regulation and control of all of its local municipal affairs. The plaintiffs contend that the general statutes of the state require city councils in establishing paving districts to include only intersecting streets, while the charter of the city of Lincoln, subsequently adopted under section 2, art. XI of the Constitution, permits the municipal authorities to include two or more connecting or intersecting streets; that in the creation of the paving district herein complained of there are no intersecting streets, and that the action of the city council is without authority because of that fact.

The rule adopted by this court concerning an inconsistency between legislative enactment and municipal charters is too well established to justify longer discussion. "The purpose of the constitutional provision (Const., sec. 2, art. XI) is to render cities independent of state legislation as to all subjects which are of strictly municipal concern; therefore, as to such matters general laws applicable to cities yield to the charter." *Consumers Coal Co. v. City of Lincoln*, 109 Neb. 51. See, also, *Sandell v. City of Omaha*, 115 Neb. 861; *Schroeder v. Zehrung*, 108 Neb. 573.

The plaintiffs based their right for injunctive relief upon the passage of an ordinance creating a paving district and the proposal on the part of the city council to enter into a contract for the paving of the streets and highways

within said district. The matter of improving the streets, alleys and highways within the corporate limits of a municipality is one strictly of municipal concern and the municipal authorities in regard to such improvement are only required to act in conformity with the provisions of the charter under which such city has its legal existence, and under the charter of the city of Lincoln its municipal officers are authorized to pave and improve connecting streets as well as intersecting streets.

The plaintiffs contend further that the city council has included property in said paving district as a mere subterfuge to force paving upon the plaintiffs and that to do so will have the effect of confiscating the property of the plaintiffs and force upon them unwarranted burdens of taxation. It is a well-established doctrine that courts will not inquire into or endeavor to control the legislative discretion of city councils in establishing the boundaries of paving districts, nor will they inquire into the motives of legislative bodies, when acting within legal and constitutional limits, nor determine matters concerning the expediency or necessity for such legislation. The acts of legislative bodies, whether state or municipal, if performed within the prescribed limits, are not subject to revision or control by the courts on the ground of inexpediency, injustice or impropriety. Such are purely functions of legislative power. Neither will the courts take cognizance over matters involving the wisdom or necessity for the enactment of legislation. The legislative body may alone determine whether a certain piece of legislation is needed or advisable for the general government of the people from whom its power emanates. The concern of the courts is as to the limits of the power, and not the manner or method by which the power is sought to be exercised, if kept within the prescribed limits. Therefore, judicial inquiry is strictly one of power, and not of expediency. To do otherwise would amount to an unwarranted encroachment by the judicial branch of the government upon the powers of the

legislative branch and thus tend to destroy the necessary coordination existing between these two separate branches. The principle was adopted by this court in *Omaha & C. B. Street R. Co. v. City of Omaha,* 114 Neb. 483; *Enders v. Friday,* 78 Neb. 510; *Village of Bellevue v. Bellevue Imp. Co.,* 65 Neb. 52. This court in the quite recent case of *Whitla v. Connor,* 114 Neb. 526, adopted this general principle, wherein it held: "The action of the village board in ordering sidewalk placed, and providing that cost thereof shall be assessed upon the abutting lot, is a legislative determination that the improvement is expedient and proper, and that such property will be benefited by reason thereof, and such determination cannot be denied its effect in a judicial proceeding, in a case where it was within the board's power to so act. And one challenging its authority carries the burden of alleging and proving the invalidating facts." In the event that the proposed improvement would not benefit plaintiff's property or become an injury thereto, these are matters that can be properly considered by the assessing board in levying special assessments, and the plaintiffs have an adequate remedy at law by which to determine the justice of such assessments.

The plaintiffs contend further that the trial court was unwarranted in sustaining the demurrer for the reason that it is alleged in the petition that said district is not created according to law, and that it appears by exhibit C, which is attached to and made a part of the petition, that there is an allegation that the ordinance was not read, approved or passed as required by law; that no sufficient publication thereof had been made; that no sufficient petition for installation of said paving had been filed, and no sufficient advertisement for bids had been had; that the demurrer of defendants admits such above statements to be facts.

The position of the plaintiffs in this regard is untenable. A demurrer does not admit conclusions. The rule is that a general demurrer admits only facts, and then only such facts as are well pleaded. *Markey v. School District,* 58 Neb. 479. In the above case the plaintiffs sought to

recover under a contract with the school district for the sale of school supplies. By the petition it appears that the school district board was without authority to enter into said contract. The petition, in addition, alleged that said contract had been subsequently ratified by the voters without stating in fact as to how it had become ratified. The petition was assailed by general demurrer, and plaintiff contended that the demurrer admitted ratification of the contract. The court held that the allegations concerning ratification were a mere conclusion, and not admitted by demurrer.

Again, the court held, in the case of *State v. Ramsey,* 50 Neb. 166, that an allegation in the petition that "on the 12th day of June, 1896, these relators filed a supersedeas bond as required by law" was a mere conclusion, and not admitted by the demurrer. So, in the present case, the allegations concerning the passage and publication of the ordinance, the sufficiency of the petition, the advertisement for bids, all contained in exhibit C, are mere conclusions of the pleader, and not statements of fact, which are admitted by the demurrer.

The question argued, as to which will control where there is an inconsistency between the pleading itself and the exhibits thereto attached, is not necessary for determination because the statements in the exibits which create the inconsistency are mere conclusions and cannot be considered as facts out of which any inconsistency can arise, hence to discuss the question further would presuppose the existence of a fact which does not exist.

For the reasons heretofore stated, the judgment is

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1928.

WILLIAM M. J. WEGNER v. STATE OF NEBRASKA.

FILED OCTOBER 8, 1928. No. 26341.

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

William M. Ely, for plaintiff in error.

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

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

PER CURIAM.

Plaintiff in error was convicted of the offense of practicing medicine without first having obtained a certificate of qualifications, or license so to do, from the state board of health of the department of public welfare of the state, and prosecutes error to this court to review the record of his conviction.

The errors assigned are: That the information is insufficient to charge an offense; that the evidence is insufficient to sustain a conviction; and errors in the giving and refusing of instructions.

A majority of the judges of the court are of the opinion that all of the questions presented for review are controlled and determined by the rulings of this court in *Harvey v. State,* 96 Neb. 786, and *Carpenter v. State,* 106 Neb. 742. Each of the rulings of the district court, of which com-

plaint is made, is sustained by the rulings in the above cited cases.

No prejudicial error appears, and the judgment of the district court is therefore

AFFIRMED.

DEAN and HOWELL, JJ., do not agree that the record presented brings the instant case within the rules announced in the cases cited in the majority opinion, and therefore dissent.

JOHN HEISER ET AL., APPELLEES, V. EMMA BREHM ET AL., CROSS-APPELLANTS: HENRY HEISER, APPELLANT.

FILED OCTOBER 8, 1928. No. 26132.

1. **Deeds:** CONSTRUCTION. Under section 5594, Comp. St. 1922, in the construction of every instrument conveying real estate, it is the duty of courts of justice to carry into effect the true intent of the parties so far as such intent can be collected from the whole instrument and so far as such intent is consistent with the rules of law.
2. **Partition** will not lie in violation of restrictions imposed by the grantor in the terms of the trust created by him.
3. **Partition:** TRUST ESTATES. Where a trust deed grants active trust powers to the trustee, his successors and assigns, for the use of beneficiaries named in the trust deed, with power to pay the rents and profits of the land to the beneficiaries and to sell and convey the land at such time and on such terms as his judgment and discretion deem expedient, where the trustee accepts the trust and dies before carrying out in full the terms of the trust, it is error for a court to order a partition of the land at the instance of some of the beneficiaries and over the objection of other beneficiaries who pray that a successor in trust be appointed to carry out the provisions of such trust deed.

APPEAL from the district court for Lancaster county: MASON WHEELER, JUDGE. *Reversed, with directions.*

Henry Meier, Guardian ad litem, for appellant.

Meier & Meier, for Emma Brehm et al., cross-appellants.

Wilmer B. Comstock and *T. F. A. Williams, contra.*

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

GOSS, C. J.

This is an action in equity. The plaintiffs, as beneficiaries under a trust deed, secured a decree ordering partition of the farm land in Lancaster county described in the trust deed. Henry Heiser, an incompetent, one of the defendants, resisted partition and appeals.

The interests of all of the parties arise from Peter Heiser, their father, who died on April 26, 1926. On September 30, 1919, he made a will, which was probated after his death, by the terms of which he gave the home in Lincoln and $10,000 to his daughter, Christine, and the rest of his estate in equal shares to his eight children, Conrad, John, Henry, Nick, Katherine, Emma, Lizzie and Christine. Some years later, under date of June 18, 1925, he executed and delivered to his son, Conrad Heiser, as trustee, and his successors and assigns, a trust deed to the 160-acre farm in question for the use and benefit of his eight children. The trust deed gives Conrad Heiser as trustee complete and absolute control and supervision of the farm, with directions to receive the rents and profits and to pay them over annually to the beneficiaries, less the taxes and expenses; it grants to the trustee the power to sell the land for the best sum and upon the best terms he is able to obtain when in his judgment he deems it expedient to sell; it empowers the trustee to execute whatever instruments are necessary to consummate the sale and to convey an absolute fee simple title to his grantee; and it directs the trustee to divide the net proceeds, share and share alike, among the eight beneficiaries.

Without having completed the trust, and while still seised of the title to the land, Conrad Heiser died, on or about June 2, 1926, leaving a widow and four children, who are parties to the suit. All of the persons legally interested

are parties, all are over 21 years of age, and all are competent except Henry Heiser, who is represented by his guardian and by a guardian *ad litem*.

In the petition it was alleged that by deed dated June 18, 1925, Peter Heiser conveyed the land in fee simple to his eight children as tenants in common; that one of them, Conrad Heiser, has departed this life, leaving his widow and children to take his undivided one-eighth; and plaintiffs pray for equitable partition of the land among the parties or for partition sale by a referee. By answers and cross-petitions certain of the defendants set up the deed of June 18, 1925, alleging that it created an active express trust, that thereunder Conrad Heiser received rents, profits and income from the land and died before he had accounted to the beneficiaries; that after Conrad's death the plaintiffs in this action received rents and profits from said real estate and neither they nor Conrad Heiser's heirs have ever accounted for such income; wherefore the defendants prayed that the prayer of the petitioners be disallowed and that a suitable trustee be appointed by the court to carry out the trust under the direction of the court. By answer and cross-petition the daughter Christine Heiser, whose $10,000 bequest in her father's will would be affected by his later trust deed, alleged that the trust deed to Conrad was personal and ceased on his death, and that such real estate should become a part of the estate of Peter Heiser, to be distributed under his will. Issues were fully joined. On the trial the court found that the parties were the owners in fee simple, each being the owner of a definite undivided interest in the land. The court appointed a referee, ordered partition and directed a report thereof to be made at that term of court.

There is no particular variance in the facts alleged and the facts proved. The position of appellees as stated in their brief is that the only question involved in this appeal is whether the beneficiaries named in the trust deed are entitled to have partition of the land described therein. The position of the appellants goes a little further by tak-

ing the stand that the district court had no power to decree partition, but that, under the prayer of appellants and under the facts as alleged and proved, the court should have appointed a successor in trust with directions to carry out the terms of the trust.

The appellees argue that it does not matter in what way, whether by partition or by the appointment of a successor trustee, the land is sold and the proceeds divided among the heirs; that either method will result in the carrying out of the intent of Peter Heiser as expressed in the trust deed. The appellants, however, take the position, in effect, that statutory partition may result in a division of the real estate among the interested parties rather than in a sale of the land and a distribution of the proceeds; and that the latter course, and that alone, was the true purpose and intent of Peter Heiser when he made the trust deed.

The court in this suit found that the parties were the owners in fee simple of the land, found their respective shares therein, ordered these shares confirmed, and ordered partition of the land and appointed a referee to make partition of the land into the requisite number of shares and to report the same at the present term of court. Under sections 9249 and 9251, Comp. St. 1922, if the referee should report to the court that physical division of the land among the parties according to their interests cannot be made without prejudice, then the court shall enter an order directing a sale of the entire premises. The effect of these provisions of the statute makes it uncertain whether the land will be divided physically among the beneficiaries or will be sold in bulk.

It seems clear from the terms of the trust deed that it was the intent of Peter Heiser that the trustee should sell the land and distribute the proceeds of the sale, including the net rents and profits, among the beneficiaries. It seems equally clear that his intent was that the trust should not lapse, for he referred in the deed to "Conrad Heiser and to his successors and assigns." Section 5591, Comp. St. 1922, says: "Every conveyance of real estate shall pass

all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used." Section 5594, Comp. St. 1922, provides: "In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true intent of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law." It was provided in the trust deed that the trustee should use his "judgment and discretion" as to the time of sale, that when in his judgment and discretion he deems it expedient to sell the land "he shall sell the same for the best sum and upon the best terms he is able to obtain." It seems to us contrary to the express intent of Peter Heiser, the grantor, that it was ever contemplated by him that a court should order involuntary partition or public and statutory sale of the land he deliberately put in trust and clothed his trustee and successors with full power to sell at private sale when and on terms deemed expedient by such trustee. This intent we gather from the whole instrument, and, under section 5594, heretofore quoted, we must follow it unless it is not "consistent with the rules of law."

Section 9238, Comp. St. 1922, provides: "All tenants in common, or joint tenants of any estate in land may be compelled to make or suffer partition of such estate or estates in the manner hereinafter prescribed." In *Wicker v. Moore*, 79 Neb. 755, we held that partition will not lie in violation of restrictions imposed by the grantor in the terms of the trust created by him. In that case we declared: "And it has been expressly held that, where the will shows that the testator did not contemplate a division of the trust property, it should not be divided. *Outcalt v. Appleby*, 36 N. J. Eq. 73; *Blake v. Blake*, 118 N. Car. 575." Under our statute requiring intent to be derived from a deed, cases involving construction of wills devising real estate are applicable to construction of deeds. *Arthur v.*

Arthur, 115 Neb. 781, 786. We have held that only a joint tenant or tenant in common of real estate can maintain an action for its partition. *Phillips v. Dorris*, 56 Neb. 293; *Hurste v. Hotaling*, 20 Neb. 178, 182; *Barr v. Lamaster*, 48 Neb. 114.

The trial court held that each of the parties to the suit was the owner of an undivided interest in said lands. In this we think he erred, for even if, on the death of the trustee, Conrad Heiser, the legal title would not be held in abeyance, but would temporarily vest somewhere—whether in the heirs of Conrad Heiser or in the beneficiaries under the trust deed, we do not find it necessary to decide here—such title would be defeated by the paramount title proved by the trust deed on the trial in the district court. We base this upon the general principles of law relating to the intent of the grantor and upon section 9275, Comp. St. 1922, which says: "The judgment of partition shall be presumptive evidence of title in all cases, and as between the parties themselves it is conclusive evidence thereof, subject, however, to be defeated by proof of a title paramount to, or independent of, that under which the parties held as joint tenants or tenants in common." The question of title of the successful parties below was resisted by the appellants. The purpose of the appeal is to determine whether the trial court was right in that regard. We think that it erred in finding that the parties were tenants, either joint or in common, of the lands, if that was the effect of his judgment that they each held an undivided interest as owners of the land, and that, in the face of the paramount title evidenced by the trust deed, it erred in ordering a partition of the land. We are of the opinion that, where a trust deed grants active trust powers to the trustee, his successors and assigns, for the use of beneficiaries named in the trust deed, with power to pay the rents and profits of the land to the beneficiaries and to sell and convey the land at such time and on such terms as his judgment and discretion deem expedient, where the trustee accepts the trust and dies before carrying out in full the terms of the trust,

it is error for a court to order a partition of the land at the instance of some of the beneficiaries and over the objection of other beneficiaries who pray that a successor in trust be appointed to carry out the provisions of such trust deed. In this case the court should have granted the prayer of the cross-petitioners and should have appointed a successor in trust to Conrad Heiser with directions to carry out the terms of the trust deed. Such a judgment would have insured the carrying out of the true and plain intent of Peter Heiser when he executed and delivered the trust deed, intending that Conrad Heiser or his successors would care for and dispose of this land in accordance with the grantor's plans.

For the reasons stated, the judgment of the district court is reversed, with instructions to grant the prayer of the appellants and to appoint a successor in trust under the deed, with directions to secure an accounting of the profits from the land and otherwise to carry out the terms of the trust as defined in the deed.

REVERSED.

FRANK J. CLEARY, RECEIVER, APPELLANT, V. FIDELITY & DEPOSIT COMPANY OF MARYLAND, APPELLEE.

FILED OCTOBER 8, 1928. No. 26573.

1. **Banks and Banking**: GUARANTY FUND: DEPOSIT OF COUNTY FUNDS. When a county treasurer makes a deposit of public funds in a state bank, the latter is liable to him for the amount of the deposit; and, if the deposit is made under circumstances which do not transgress the provisions of the guaranty fund law, then, on the failure of the bank, he is entitled to have the claim for the deposit adjudged preferred and payable from the depositors' guaranty fund.
2. ———: ———: LIABILITY. The depositors' guaranty fund is solely a creature of statute. Ordinarily, it can be augmented, replenished or reimbursed, and can be drawn upon for the payment of claims, or disbursed, only to the extent and in the manner provided by statute.
3. ———: ———: SUBROGATION. The only statutory subroga-

tion authorized to augment or replenish the depositors' guaranty fund is that provided by section 8035, Comp. St. 1922, and the subrogation therein provided is limited to the assets of the bank.

4. ———: ———: DEPOSIT OF COUNTY FUNDS. "Where a county treasurer deposits public funds in a state bank in excess of 50 per cent. of the paid-up capital stock of said bank, the entire deposit is within the protection of the depositors' guaranty fund." *State v. People's State Bank*, 111 Neb. 136.

5. ———: ———: ALLOWANCE OF CLAIM: RES JUDICATA. Where a county treasurer has presented to the district court a claim against a failed state bank and procures allowance of the claim as preferred and adjudged payable from the depositors' guaranty fund, and the judgment of the district court is not appealed from, the right of such treasurer to have his claim paid out of the guaranty fund has become *res judicata*.

6. ———: ———: LIABILITY. Where a county treasurer deposits public funds in a state bank in excess of 50 per cent. of its capital stock, but under circumstances which do not transgress the provisions of the guaranty fund law, and the bank fails, while the treasurer may be liable upon his official bond, such liability is secondary to that of the depositors' guaranty fund. Under such circumstances, as between the surety on the treasurer's bond and the guaranty fund, the latter is primarily liable.

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

Tibbets, Lambe & Hewitt, Butler & James and *Schaper & Runyan*, for appellant.

Gaines, McGilton, Van Orsdel & Gaines, contra.

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

GOOD, J.

This action is brought by the receiver of the Berwyn State Bank against the surety on the official bond of a former county treasurer of Custer county, to recover, for the use and benefit of the depositors' guaranty fund, the sum of $44,500, and interest thereon, which amount, pur-

suant to a judgment of the district court for Custer county, had been paid from the guaranty fund to the county treasurer, to reimburse him for public funds on deposit in the Berwyn State Bank at the time it failed, in December, 1922.

Plaintiff asserts the right to recover on two grounds: (1) That the guaranty fund commission is entitled to be subrogated to the rights of Custer county against the county treasurer and the surety on his official bond; (2) that the depositors' guaranty fund was injured by the treasurer's illegal use of county funds to bolster up a bank in which he was a stockholder, and that the treasurer and the surety on his official bond are liable for such injury. The county treasurer was named as a defendant, but he was neither served with process nor made appearance in this action. The defendant surety on the treasurer's official bond answered denying liability. A trial of the issues presented by the pleadings resulted in judgment for defendant, and plaintiff has appealed.

Plaintiff contends that the judgment should be reversed because it is not supported by the evidence and is contrary to law. It is contended that the treasurer was a wrongdoer, in this, that he deposited the public funds in his custody in a bank in which he was a stockholder, for the purpose of bolstering up the bank and to enable him and his friends to borrow funds from the bank; that the treasurer was a wrongdoer in depositing public funds in the bank in excess of 50 per cent. of its capital stock and without the bank having been designated by the county board as a depository of public funds; and that it follows that the treasurer and the surety on his official bond became liable to the county for any of the public funds lost by reason of the wrongful act of the treasurer. It is further contended that the treasurer and the surety on his official bond were primarily liable to the county for any loss of public funds; that the depositors' guaranty fund was liable only secondarily, and that, the guaranty fund having made good the loss to the county, it is entitled to be

subrogated to the rights of the county and recover against the treasurer and the surety on his official bond.

If the facts are as contended by plaintiff, does it necessarily follow that he may recover in this action? It may not be out of place to consider the relationship and the liability of the surety on the treasurer's bond and the guaranty fund with respect to the deposit in question. When a county treasurer makes a deposit of public funds in a state bank, the latter is liable to him for the amount of the deposit; and, if the deposit is made under circumstances which do not transgress the provisions of the guaranty fund law, then, on the failure of the bank, he is entitled to have the claim for the deposit adjudged preferred and payable from the depositors' guaranty fund.

In the body of the opinion in *State v. Security State Bank*, 116 Neb. 223, 229, it was said: "That is, under the statute the guaranty fund is an independent entity, and only those who bring their right of recovery within the statutory limitations are entitled to share therein." The language there used was not meant or intended to hold that the depositors' guaranty fund was an artificial person, such as could sue or be sued. Such fund is solely a creature of statute. Ordinarily, it can be augmented, replenished or reimbursed, and can be drawn upon for the payment of claims, or disbursed, only to the extent and in the manner provided by statute. The guaranty fund commission is a governmental agency which administers the fund. The only statutory subrogation authorized to augment or replenish the fund is that contained in section 8035, Comp. St. 1922, and the subrogation therein provided is limited to the assets of the bank.

In the case of *State v. People's State Bank*, 111 Neb. 136, which involved the liability of the guaranty fund for a deposit, made by the same treasurer, in excess of 50 per cent. of the bank's capital stock, it was held: "Where a county treasurer deposits public funds in a state bank in excess of 50 per cent. of the paid-up capital stock of said bank, the entire deposit is within the protection of the de-

positors' guaranty fund." The ruling in that case has been followed in subsequent cases. We are thus committed to the doctrine that, where a county treasurer, in violation of a statute, deposits public funds in a state bank in excess of 50 per cent. of its capital stock, such deposit is within the protection of the guaranty fund. In the present case the deposit was within the protection of the guaranty fund. In fact, it was so adjudged by the district court, and the guaranty fund commission caused the claim to be paid from the guaranty fund. That payment forms the very basis of this action. That judgment of the district court was unappealed from. The question of the right of the treasurer to have his claim paid out of the guaranty fund became *res judicata.*

But, what of the liability of the treasurer's bond? The surety on the bond was liable to the county if the treasurer failed to account for or pay over to the county any funds that properly came into his possession as county treasurer. It is possible that, had the county treasurer been unable to collect upon the deposit, the county might have collected from the surety on the treasurer's bond; but such surety would not be liable to the county if the treasurer collected and returned the money to the county. The liability of the surety on the treasurer's bond was a secondary liability. As between the surety on the treasurer's bond and the bank in which the deposit was made, the latter was primarily liable. If the bank was liable and the deposit was within the protection of the guaranty fund, the latter would be a guarantor and liable primarily as between it and the surety on the treasurer's bond. If the treasurer had failed to pay over money to the county, and the county had sued and collected from the surety on his official bond, the latter would be subrogated to the rights of the county, as against the treasurer, to the deposit in the bank, and if the surety on the bond had paid the amount of the deposit to the county treasurer, it would, in equity, be subrogated to the rights of the treasur-

er to recover from the bank, and also from the guaranty fund as a guarantor of the deposit.

In *Rogers v. National Surety Co.*, 116 Neb. 170, this court held: "The depositors' guaranty fund is a creation of statute, possessing such rights and subject to such liabilities as the legislature has provided; the liabilities thus imposed thereon are analogous to that of a 'guarantor' as distinguished from a 'surety.'" In that case it was further held: "Section 8035, Comp. St. 1922, construed, and *held* to limit by express terms the subrogation therein provided for the benefit of the depositors' guaranty fund, upon payment made to the creditors, to 'all the right of the creditors thus paid to participate in the assets of such bank.'" It thus appears that the right of the guaranty fund to subrogation is limited by statute to the right of the creditor to participate in the assets of such bank. It is apparent that the liability of the treasurer's surety was not an asset of the bank and does not come within the statutory provision awarding subrogation to the guaranty fund.

It was held by this court in *State v. Kilgore State Bank*, 112 Neb. 856: "The surety on a bond given by a state bank to secure a deposit of Indian money, such as is required by federal law, will ordinarily be subrogated to the rights of the depositor of such money—the United States by its proper agents—when no equity intervenes to bar such subrogation and when the surety has paid the depositor the amount due on such deposit." The situation in that case would be somewhat analogous to this if the surety on the treasurer's bond had paid the amount of the deposit to the county and had then sued to recover from the bank and the depositors' guaranty fund. According to the decision just cited, the judgment would have gone for the surety on the bond, as against the guaranty fund. If plaintiff's contention be sound, then we would have this anomalous situation: That the county treasurer could sue and recover from the guaranty fund the amount of his deposit in the bank, and, upon payment to him from the guaranty fund, the guaranty fund commission could, by proc-

ess of subrogation, turn around and sue and recover back the money so paid to the treasurer. The proposition seems absurd. This court declines to hold that the law requires such an absurdity.

We are of the opinion that the judgment of the district court is in strict accord with the former rulings of this court and is the only one that could have been properly entered. We find no error, and the judgment is therefore

AFFIRMED.

ROSE, J., dissents.

A. C. PALMER, APPELLEE, V. SAUNDERS COUNTY, APPELLANT.

FILED OCTOBER 8, 1928. No. 26442.

1. **Master and Servant:** WORKMEN'S COMPENSATION: RECOVERY. Where an employee receives an accidental injury arising out of and in the course of his employment, and his employer becomes possessed of knowledge thereof at the time or within a few days thereafter, and the injured employee makes claim of his employer for compensation within two months of the date of the injury, and lodges his claim for compensation with the commissioner within seven months from the time the injury was received, his right of recovery is not barred under sections 3056 and 3061, Comp. St. 1922.
2. ———: ———: ACTION: REVIVOR. Sections 3045, 3046, and 3067, Comp. St. 1922, construed, and *held*, that an action to recover compensation instituted by an injured employee and pending at the time of his death may be revived on motion by any one or more of those wholly or partially dependent upon him for support on giving bond as required, or by the administrator of his estate without bond. In such case, the pleadings should name the dependents and contain facts sufficient to bring such applicant or applicants for revivor within the above referred to sections, and the final judgment rendered at the conclusion of the trial should be within the facts pleaded and the law applicable thereto.

APPEAL from the district court for Saunders county: HARRY D. LANDIS, JUDGE. *Reversed, with directions.*

Slama & Donato, for appellant.

E. S. Schiefelbein, contra.

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

THOMPSON, J.

A. C. Palmer, an employee of Saunders county, lodged a claim for compensation with the commissioner on December 31, 1926, for an alleged accidental injury received by him on June 17, 1926, arising out of and in the course of his employment while operating the county's road maintainer on a public highway. At the time of such injury he was 59 years of age and was, and had been, receiving as wages the sum of $25 a week. Such claim was approved and an award entered of $15 a week for temporary total disability from July 5, 1926, until disability ended, and further ordered payment of medical and hospital expenses, but without determining the amount of either. From this award the county appealed to the district court. After the issues were duly joined, and the case had proceeded to trial, and his and other testimony taken, to wit, on October 20, 1927, Palmer died leaving surviving his wife, appellee herein, and their two minor children, aged 10 and 16 years respectively, each and all being members of his household and wholly dependent upon him for support. On the application of such wife, the county consenting, the action was revived in her name, however without bond, without mention of such children, and without amendment of pleadings; trial proceeded to judgment, which was one affirming the award of the commissioner and fixing the amount of the medical and hospital expenses recoverable at $530.70, and in addition thereto allowed attorney fees in the sum of $250, and $768 as a penalty for waiting time; to reverse which the county appeals. The claimed errors, which we deem it necessary to determine, will be indicated as considered.

The entire record has received our most careful consideration, and from it we conclude that the challenge that the employee failed to serve or make claim on the county,

as required by law, is without merit, as the county, by and through its officers, had knowledge of the accident at the time or within a few days, and the employee notified the county of his claim for compensation within two months thereafter. Thus, section 3056, Comp. St. 1922, did not deny him recovery; and, as his petition was filed with the commissioner within one year after the alleged cause of action arose, neither did section 3061, Comp. St. 1922, deny such recovery.

It is further contended on the part of appellant that the judgment is contrary to law. The law applicable to the situation hereinbefore disclosed, so far as material to our present consideration, is as follows: Section 3046, Comp. St. 1922, provides, in substance, that the death of an injured employee, entitled to disability compensation, ends such disability; "but the employer shall thereupon be liable for the following death benefit in lieu of any further disability indemnity: If the injury so received by such employee was the cause of his death and such deceased employee leaves dependents as hereinbefore specified wholly or partially dependent on him for support, the death benefit shall be a sum sufficient, when added to the indemnity which shall at the time of death have been paid or become payable under the provisions of this article to such deceased employee, to make the total compensation for the injury and death equal to the full amount which such dependents would have been entitled to receive under the provisions of the next preceding section, in case the accident had resulted in immediate death; and such benefits shall be payable in the same manner and subject to the same terms and conditions in all respects, as payments made under the provisions of said next preceding section. No deduction shall be made for the amount which may have been paid for medical and hospital services and medicines or for the expenses of burial." The section referred to in the above quoted section is section 3045, which reads in part as follows: "If death results from injuries and the deceased employee leaves one or more dependents wholly dependent upon his earnings for support at the time of the

accident causing the injury, the compensation, subject to the provisions of the next following section (section 3046), shall be sixty-six and two-thirds per centum of the wages received at the time of the injury, but the compensation shall not be more than fifteen dollars per week or less than six dollars per week. * * * This compensation shall be paid during dependency, not exceeding three hundred and fifty weeks from the date of the accident causing such injury." As to the procedure in such case we have section 3067, Comp. St. 1922, which provides: "In case of death, where no executor or administrator is qualified, the said court shall, by order, direct payment to be made to such persons as would be appointed administrator of the estate of such decedent, upon like terms as to bond for the proper application of compensation payments as are required of administrators." Section 1293, Comp. St. 1922, as amended by chapter 73, Laws 1925, gives to the widow a preferential right of appointment as administratrix of the estate of her deceased husband.

As we have seen, the application for revivor was made by the widow, which, under the statutes above quoted, was proper. Yet she failed to mention the other dependents, as under this record she should have done. She did not tender, and neither did the court require her to give, a bond safeguarding the rights of the two minors; further, the judgment rendered is indefinite as to the length of time the weekly payments should continue; and this notwithstanding under the statutes such a bond is required, and such payments are limited to a period not to exceed 350 weeks. A fairly liberal construction of the above statutes, under the record before us, warrants the conclusion that, upon the death of the employee (husband and father), an administrator of his estate could have been appointed who, after qualifying, could have had the action revived in his name, as such, without giving an additional bond, or the dependent widow upon giving the required bond, or, on her failure to apply, either of such dependent children through their proper guardian might have, or either two or the three together could have, made the motion,

and, on compliance with the statute, had the action revived. However, in either case the pleadings should name the dependents and contain facts sufficient to bring such applicants for revivor within the statutes quoted. That is, the pleadings should contain all essential jurisdictional facts, as well as all facts necessary to reflect the true situation, and the final judgment rendered at the conclusion of the trial should be within the facts pleaded and the law applicable thereto. Neither the procedure nor the final judgment rendered in the instant case meets the above indicated statutory requirements. Hence, such judgment is contrary to law. The above conclusions as to who may revive the action in case of death of the injured employee are in harmony with our holding in *Coster v. Thompson Hotel Co.*, 102 Neb. 585.

This renders it unnecessary to further consider the evidence, or the other claimed errors presented. However, it may be well to state that we find that the issues as well as the evidence of the claimant, appellee, rendered the testimony sought to be elicited by questions 1008 and 1009, propounded by appellant, acutely material and competent, and prejudicial error was committed by the trial court in sustaining objections thereto. In this conclusion we are sustained by section 8841, Comp. St. 1922, as amended by chapter 74, Laws 1925.

The judgment of the trial court is reversed and the cause remanded for retrial, with directions to permit substitution or amendment of pleadings in conformity with this opinion.

REVERSED.

GOTTLIEB STORZ, TRUSTEE, APPELLEE, V. HENRY S. CLARKE, JR.: MYRTA E. CLARKE, APPELLANT: BURDETTE KELLEY, RECEIVER, CROSS-APPELLANT.

FILED OCTOBER 8, 1928. No. 25915.

1. **Homestead:** CONVEYANCE. A homestead of a married person cannot be conveyed or incumbered unless the instrument by

which it is conveyed or encumbered is executed and acknowledged by both husband and wife.

2. ———: ———: VALIDITY: ESTOPPEL. Upon the facts stated in the opinion, it is *held* that Myrta E. Clarke was in no manner estopped to contest the validity of the instrument in suit, and that as to, and the extent of, the homestead interest of herself and husband embraced in the premises therein described such instrument was void.

3. **Vendor and Purchaser:** HOMESTEAD: POSSESSION: NOTICE. At the time the instrument in suit was delivered, the record title to the premises involved and described therein was in the name of Henry S. Clarke, Jr. The premises were occupied as the home of Clarke and wife. The plaintiff and those represented by him accepted the conveyance in good faith, relying on the record title, and in ignorance of an unrecorded deed conveying the premises from Clarke to his wife. *Held,* under these circumstances, the fact that Myrta E. Clarke, the wife, was, together with her husband, in joint occupancy of the premises as a family home did not impart to the plaintiff and his associates notice of the fact that she claimed any title to the property or any interest therein other than right of homestead, and such rights as would vest in her by virtue of her husband's ownership, as evidenced by the record title.

4. **Homestead:** EXTENT: INVALID MORTGAGE. The statutory homestead, as between mortgagors and mortgagee of a real estate mortgage invalid as to homestead interests of the mortgagors included therein, is unlimited as to value and is properly described as a "quantity of land not exceeding 160 acres, not included in any incorporated town, city or village, or a quantity of land, not exceeding in amount two lots, being within an incorporated town, city or village."

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

Morsman & Maxwell, for appellant.

Keller & Keller, for cross-appellant.

Smith, Schall, Wright & Sheehan, contra.

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

EBERLY, J.

This is an action in equity commenced in the district court for Douglas county, Nebraska, by Gottlieb Storz,

trustee, plaintiff, against Henry S. Clarke, Jr., and Myrta E. Clarke, husband and wife, and other defendants named. The purpose of the proceeding was to foreclose as a mortgage a certain warranty deed purporting to have been executed by the Clarkes and to convey to plaintiff trustee lots 13, 14, 15 and 16, in block 13, West End addition to the city of Omaha, Nebraska, and also that part of the alley vacated between lot 13 and lots 14, 15 and 16, which, together with other securities, were delivered, accompanied by a letter signed by Henry S. Clarke, Jr., alone, and which set forth that the securities accompanying the letter were to be by such trustee "held in trust for the benefit and use of B. F. Marshall, G. Storz, E. F. Folda, E. P. Meyers, O. H. Barmettler and A. W. Gordon, to protect against any loss that may accrue to them by reason of a guaranty," etc. It is alleged in the petition that this instrument, though in the form of a warranty deed, was delivered to the plaintiff as security for any payments which plaintiff and certain associates named in the petition might be compelled to make because of the execution by them of a certain guaranty in writing described therein as being for the benefit of Henry S. Clarke, Jr., and others. The amount of such payments which the beneficiaries named in this instrument were compelled to make, which were admitted by all parties, was also set forth in the petition as follows: "That * * * this plaintiff and those for whom he held said deed in trust as security * * * paid, and caused to be paid, were required to pay and did pay * * * the sum of $52,728.79, in full payment, * * * which amount was included" in said guaranty. In addition thereto there is contained in this pleading the usual allegations and prayer.

It seems the Clarkes answered separately; that one Burdette Kelley, as receiver of the First National Bank of Torrington, Wyoming, said to be claiming under a judgment rendered against defendant Myrta E. Clarke for $19,540 on May 27, 1926, intervened.

Certain cross-petitions and answers by other defendants, not necessary to the discussion of the questions con-

trolling in this case, were filed, and plaintiff joined issues by filing the necessary replies.

Trial was had to the court, and at the conclusion of this hearing a decree was entered which, so far as necessary to be considered here, may be summarized as follows: Determined the amount expended by plaintiff and associates as necessitated by the terms of the written guaranty which had been executed by them for which the instrument in suit was given to secure, and that no part of such sum had been repaid; that the instrument in suit, though in the form of a deed, was given as security and should be treated as a mortgage; that the real estate involved in suit was, at the time of the execution and delivery of plaintiff's deed, occupied by Henry S. Clarke, Jr., and his wife, with their family, as a homestead; that the record title to said property was in the name of Henry S. Clarke, Jr., but that prior thereto and on or about November 12, 1920, said Henry S. Clarke, Jr., executed and delivered to Myrta E. Clarke, his wife, a deed conveying to her said premises, but which deed was unrecorded at the time of execution and delivery of the deed to Gottlieb Storz, and was not recorded until December 1, 1924; that the guarantors in whose behalf the plaintiff sues had no knowledge of the existence of the deed from Henry S. Clarke, Jr., to Myrta E. Clarke, until after the deed filed by Henry S. Clarke, Jr., and Myrta E. Clarke to plaintiff had been accepted by him and recorded.

The district court further found that, at the time Myrta E. Clarke signed the deed in controversy here, it was in blank except as to the printed portion thereof; that she did not give Henry S. Clarke, Jr., authority to fill in the blanks above her signature, but that she knew and understood a mortgage was to be executed by Henry S. Clarke, Jr., and herself, and delivered to Gottlieb Storz, trustee, as security for any loss that the guarantors might sustain on account of the guaranty herein mentioned; that Henry S. Clarke, Jr., subsequently filled out the blank form by writing in a description of the property, signed the same,

and his acknowledgment was taken thereto by a notary public in his office, but that said deed was not acknowledged before the notary public by Myrta E. Clarke; also that when said deed was delivered to Gottlieb Storz by Henry S. Clarke, Jr., it did not contain the name of the grantee, but that accompanying the deed was written authority, signed by said Henry S. Clarke, Jr., alone, authorizing Gottlieb Storz to write in his name as grantee in such deed, which was complied with; that said instrument did not in any manner affect a $2,000 homestead interest in the premises vested in Myrta E. Clarke, but that the Clarkes are estopped from in any manner otherwise challenging the legality of the deed (except as to homestead), and that the plaintiff is entitled by reason thereof to have a first lien on the premises for the amount of payments made pursuant to the terms of the guaranty, but subject to a $2,000 homestead in said property belonging to the defendants Clarke. The priority of the liens claimed by the other defendants are determined, and the decree of foreclosure was entered as above indicated. Myrta E. Clarke appeals. Receiver Kelley now appears here as a cross-appellant.

As an appeal in equity the case here is for trial *de novo*. Preliminary to the consideration of the questions before us, and as a background in connection with the disputed questions of fact and law to be hereafter considered, it may be said in passing: That the record in this case discloses that this litigation finds its source in the Corn Exchange National Bank of Omaha, Nebraska; that during its active career this institution was popularly known as a "cattle bank," which signifies that it was largely devoted to financing western cattlemen; that Henry S. Clarke, Jr., entered its service as one of the managing officers in the spring of 1912, and previous to this time this institution had never declared a dividend upon its stock; that at the time Clarke entered its service he was part owner of, and exercised practical control of, six state and national banks situated in the "cattle country" in western Nebras-

ka and Wyoming, known as the "Clarke banks." These banks were also largely interested in financing the cattle industry.

It was largely because of these connections that Clarke's services were secured by the Omaha institution. After Clarke became connected with the Corn Exchange National Bank the Clarke banks, it appears, were operated as "feeders" for that institution. The new relation proved lucrative to both. In addition to this line of banks, other like connections were made with similar institutions. Under the new system the deposits of the Omaha institution were increased; it commenced the payment of dividends which, as time passed, were substantially increased and for many years its earnings aggregated in the neighborhood of 20 per cent. per annum. This business involved carrying and handling large lines of paper from the western banks, for under the new policy the Omaha institution secured the patronage of many other financial institutions in addition to the Clarke banks.

The method of transacting this business was peculiar to the industry in some respects. It would seem that the cattle industry, as then carried on, required financial accommodation in excess of those possible to furnish by the Clarke banks and other western institutions under the limitations imposed by the banking laws. As a result of the situation the evidences of indebtedness were taken by these western banks in two forms: One, in an ordinary note payable to the order of the bank's corporate name and which, when received by the Omaha institution, necessarily bore the corporate indorsement as such; the other was taken payable to the individual names of the officers of such feeder institution, and when turned over to the central institution at Omaha bore the individual indorsement of the payee named therein. It appears, however, that all of this paper properly represented the business of the "feeder banks." The latter received the proceeds derived from the paper thus discounted and sold, and reaped the profits thereby. The transaction in the second

form was, in truth, a loan of individual credit by the bank officer in his individual capacity to the corporate institution that such person represented in the transaction. Likewise, as the corporate bank had received the proceeds and reaped the profits it was under moral obligation to pay, in the event such indorsee was called upon to fulfil the terms of his contract. It is quite plain that this obligation of the bank involved to pay would not be subject to question so long as the bank itself was a solvent institution, and the officer who had loaned his credit in the form of an individual indorsement was one of the controlling powers in the institution involved.

There is no question raised as to the fact that the records of the Corn Exchange National Bank were accurate, properly kept, and reflect a true situation of its affairs.

The course of business hereinbefore outlined had existed for years. During this time the plaintiff herein and his associates represented by him, as trustee, were directors of this institution. The record in evidence discloses their express approval of the several notes thus received by the Corn Exchange National Bank.

The business grew to such volume that in September, 1924, the Corn Exchange National Bank had in its note case approximately one million dollars in notes which originated in the territory of the Clarke banks, and which were, by the Corn Exchange National Bank, received from them in the course of business above outlined.

In the fall of 1924 the results of the continued deflation in the cattle industry, commencing in 1920, culminating in the failure of a large number of banks in Nebraska and Wyoming and elsewhere, were such as to cause serious concern to the managing officers of the Corn Exchange National Bank. The reduction of live stock prices had rendered debtors, theretofore unquestioned, insolvent, caused the solvency of others to be a matter of doubt, and created a condition whereby many obligations, whose makers were actually solvent, were temporarily uncollectable. The best judgment of those interested was that an

extended period of time was required in order that such assets might be collected. In view of the relation that existed between the Clarke banks and the Corn Exchange National Bank, it was almost vital to the latter that the former be maintained as going, solvent, institutions.

A careful survey of the conditions of the loans of the Clarke banks was made, at the conclusion of which it was determined that the creation of a revolving fund of $300,000 for use during a period of not less than three years, to be used in the removing and handling of questioned assets in the latter institutions, would enable this string of banks to successfully weather the crisis.

There appears to be a conflict in the evidence as to whether it was intended that this fund, when raised, should be used for the direct relief of the Corn Exchange National Bank or not. But in view of the course of business whereby the million dollars in notes, then in its note case, would have to be cared for by those from whom it received them, it makes but little difference whether the Corn Exchange National Bank was to be a direct beneficiary or not. Had the fund been administered even in accord with the claims of the trustee herein, it would have resulted in manifest benefits to the stockholders of the Corn Exchange National Bank.

At all events, and as a result of a number of conferences at different places, and in the presence of different parties, an agreement was finally made between Henry S. Clarke, Jr., his wife and others, pursuant to which Gottlieb Storz and those associated with him executed a written guaranty to the Continental & Commercial National Bank of Chicago in the sum of $300,000, and the latter institution thereupon loaned to one Eaton, upon promissory notes indorsed by Clarke with recourse and executed by Eaton, and who was officiating as trustee of the fund as a first installment, the sum of $100,000. The agreement which was made preliminary to the execution of the written guaranty it appears was part in writing and in part oral. Excluding the evidence in the record which was ad-

mitted as not binding on Mrs. Clarke, it fairly appears that, during the negotiations which resulted in the execution of the guaranty, Mrs. Clarke was informed that if she would execute a deed or mortgage on her home which she was then occupying as such, and of which she was the owner in fee by virtue of an unrecorded deed to Gottlieb Storz, the latter and those associated with him would guarantee, and by this means secure, a loan of $300,000 to be used as a revolving fund for the maximum period of three years for the purpose of removing from the assets of the Clarke banks questioned assets, and handling the same to the best advantage.

On the faith of this representation and upon the faith of the oral agreement made in her presence to that effect, at her home in September, 1924, Myrta E. Clarke signed her name, in the presence of her husband only, to a Huffman General Supply House, form No. 100, warranty deed. At the time she affixed her signature to this paper, it was naught but a form; none of the blanks had been filled out, nor any of them ever filled out in her presence or pursuant to her written authority. She never appeared before any notary public and acknowledged the execution of this paper as an instrument or a deed. Subsequently her husband proceeded to the offices of the Corn Exchange National Bank some distance from the home. There, in the absence of his wife, and without her presence at any time before the notary, and without any actual acknowledgment by her to the completed instrument, and without any written authority whatever from her, he filled out a portion of the blanks and signed the same. Then, stepping into a cage occupied by the assistant cashier of the institution, who was also a notary, the latter at his sole request then filled out the certificate of acknowledgment, reciting falsely therein that "Henry S. Clarke, Jr., and Myrta E. Clarke, husband and wife, came before" him and acknowledged the same to be their voluntary act and deed. As to Mrs. Clarke this certificate is false in every respect. The property affected by its terms was admittedly a homestead.

"The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." Section 2819, Comp. St. 1922.

It is thought sections 2451, 2550, Comp. St. 1922, are also applicable to the situation presented.

The only conclusion possible, in view of the undisputed facts and the terms of our statutes, is that the instrument before us is void as to the homestead. This conclusion is supported by many well-considered cases in this jurisdiction. *Anderson v. Cusack,* 115 Neb. 643; *Wilson v. Wilson,* 83 Neb. 562; *Lichty v. Beale,* 75 Neb. 770; *Meek v. Lange,* 65 Neb. 783; *Anderson v. Schertz,* 94 Neb. 390.

But it is insisted that the present case is one involving the doctrine of estoppel; that Mrs. Clarke is estopped by her act of signing a blank page, in view of the fact that it permitted completing, over her signature, what purported to be a valid instrument binding upon her.

It is not to be forgotten, however, that the facts in this record in no manner sustain the conclusion that Mrs. Clarke was guilty of fraud in the present transaction. The legal principle that fraud is never to be presumed, but must be clearly proved to entitle a party to relief on that ground, is so well established and so fundamental as to require the citation of no authorities to support it. Then, too, it must be conceded that it affirmatively appears that, at most, Mrs. Clarke's dereliction may be summed up as "culpable negligence" in entrusting to her husband a blank with her name affixed thereto. But even if this be true, it does not follow that, as the sole or proximate result of the culpable negligence in question, Storz and his associates were deceived, and therefore the basis of the doctrine of estoppel, as applied in the ordinary case, might be established. Had this deed in question been fully completed in its execution and all of its details so that when tendered to Storz it appeared a completed instrument, and that he relied upon it as such, the conclusion might be otherwise. However, when this instrument, on a blank sup-

plied for use to the trade as a general warranty deed, came into his hands as an instrument intended to accord security only, and not only lacking "grantee," but without "consideration," then a blank (Comp. St. 1922, secs. 5662, 5663) with description incomplete, with no terms of defeasance, or terms identifying and limiting the liability to be secured thereby, appearing therein, with actual knowledge on his part that the subject-matter was a homestead, with the only authority for its completion a letter signed, purporting to be signed, and authorized by the husband only, it would seem that the basis for the contention that estoppel is applicable in the case in behalf of plaintiff wholly disappears. It is thought that the very appearance presented by the deed itself at that time fully disclosed to him that Mrs. Clarke had been indeed guilty of "culpable negligence in connection therewith," hence he could not be misled thereby. At all events, he never relied upon a completed instrument delivered by the Clarkes, but his reliance, under the facts in the case, must be deemed to have been based upon the authority conferred upon him to complete the instrument thus placed in his possession. This necessitated the exercise of the powers of agency. The subject-matter of the transaction was one in which Storz had an individual interest. He knew the parties and the peculiar nature of the subject of the transaction, a homestead, and that in the completion of the instrument he was necessarily acting for both parties interested therein. He thus occupied, of necessity, with reference to Mrs. Clarke, the position of an agent dealing with his principal with reference to matters in which his individual interest conflicted with that of his principal. The knowledge of this fact is imputable to his associates for whom he subsequently became trustee. They, with him, were the joint beneficiaries of his act. The situation revealed in the record, at least, imposed upon Storz the duty of absolute good faith, and to conform strictly to the limitations imposed by his actual authority. *Drury v. Foster*, 2 Wall. (U. S.) 24.

"An assumption of authority to act as agent for another of itself challenges inquiry. Like a railroad crossing, it should be in itself a sign of danger and suggest the duty to 'stop, look and listen.' It is therefore declared to be a fundamental rule, never to be lost sight of and not easily to be overestimated, that persons dealing with an assumed agent, whether the assumed agency be a general or special one, are bound at their peril, if they would hold the principal, to ascertain not only the fact of the agency but the nature and extent of the authority, and in case either is controverted, the burden of proof is upon them to establish it." 1 Mechem, Agency (2d ed.) 527, sec. 743.

Has the plaintiff established that the nature and extent of authority he received as to Mrs. Clarke justified the filling up of the blanks in the printed form at the time and in the manner it was done? At that moment, through no fault of Mrs. Clarke, the guaranty itself, to secure the $300,000 revolving fund, had been prematurely terminated by the voluntary acts of certain guarantors, and at that time the plan of aiding the Clarke banks wholly abandoned.

Thus, the consideration which, in fact, constituted the condition upon which Mrs. Clarke had orally agreed to secure by use of her home the guarantors against loss because of having executed the guaranty necessary to secure the $300,000 fund for the period of three years had wholly failed. Through this premature termination of this guaranty, and the premature abandonment of the plan of aiding the Clarke banks, all possibility of substantial value accruing therefrom to the Clarkes had utterly vanished. In short, the guarantors had not kept faith and had not complied with the promise to the surety.

True, certain of the guarantors in their evidence deny that the 3-year period formed any part of their prior agreement as the matter was discussed with and by them. But Mr. Gordon, who was a director of the Corn Exchange National Bank and one of the guarantors, testifies that the agreement among the six guarantors, indeed made

prior to the signing of the deed in blank by Mrs. Clarke, and indeed prior to the written guaranty to the Chicago bank, was that their engagement involved a maximum of three years' time, and a maximum amount of $300,000, and that there was no time fixed that the guaranty should run or be kept good except as to the maximum of three years.

Nothing had been done toward completing the instrument now sued on by or in behalf of Storz until after all of the events just referred to had transpired. A demand or request was then made upon Henry S. Clarke, Jr., and upon the attorney of Myrta E. Clarke to complete this instrument. This demand was met with refusal on the part of both. After this refusal thus made, under Storz' direction the instrument in suit is further partly completed and based on this incomplete instrument upon which Storz as trustee, is now maintaining the present action for the benefit of all the signers of the guaranty to the Chicago bank including Gordon. This action is admittedly in the form permitted by statute. It is, in effect, an attempted enforcement of an alleged obligation in favor of the six guarantors as joint promisees.

In view of the form of the action brought and the substantial nature of the obligations sought to be enforced, it would seem that it must be considered as an action brought in favor of the guarantors jointly.

It would seem, therefore, that the knowledge of the original contract and of the situation possessed by any one of the joint obligees or promisees is imputable to all. 22 C. J. 351, sec. 404; *Baker v. Union Stock Yards Nat. Bank*, 63 Neb. 801; *Stephenson v. Perry*, 112 Neb. 294; *Southern Life Ins. Co. v. Wilkinson*, 53 Ga. 535; *Parker v. State*, 8 Blackf. (Ind.) 321; *Shirk v. Brookfield*, 79 N. Y. Supp. 225.

In view of the total absence of the element of fraud, so far as related to Mrs. Clarke, the entire lack of actual authority to complete the deed when it was actually done by Storz, as trustee, and in view of the notice which the

surrounding circumstances, as well as the relation of the parties, imputed to Storz, as trustee, we feel there is no basis for the estoppel claimed.

It follows, therefore, that, so far as homestead rights and interest are vested in her as the wife of Henry S. Clarke, Jr., the same are wholly unaffected by the instrument in suit. *Betts v. Sims*, 25 Neb. 166; *Whitlock v. Gosson*, 35 Neb. 829; *Davis v. Thomas*, 66 Neb. 26; *Anderson v. Cusack*, 115 Neb. 643.

We have carefully considered the authorities cited in the able brief on behalf of the appellee, but in view of the facts disclosed in the present record we do not find them in point. Among others, *Pitman v. Mann*, 71 Neb. 257, is cited, but the opinion in this case contains language which, of itself, excludes the application of the doctrine announced in this case to the case at hand. In that opinion Ames, C., says in part: "The statute avoiding a conveyance or incumbrance of the homestead of a married person, without the signature of both husband and wife, was enacted with the evident purpose of protecting both of the parties to the marriage, and those persons composing their families and dependent upon them. During the lifetime of any of such persons it may be that a husband or wife, who alone has executed such an instrument, may successfully defend against it without the concurrence of his or her consort or the dependents of either; and it may even be that such a defense would be entertained if made by a sole survivor of the family, who had executed the instrument without fraud or concealment with respect to the homestead character of the lands, but neither of these questions is involved in this inquiry, or intended to be decided."

It follows then that, as applied to the statutory homestead, the instrument in suit is void.

At the time this instrument was delivered, however, it appears that the record title to the premises described therein was in the name of Henry S. Clarke, Jr. True, Myrta E. Clarke was, by virtue of an unrecorded deed,

the true owner thereof. The plaintiff and those represented by him, however, dealt with the situation in good faith relying on the record title and in ignorance of the unrecorded deed. Under these circumstances the fact that Myrta E. Clarke was, together with her husband, in joint occupancy of the premises as a family home did not impart notice to Mr. Storz and his associates of the fact that she claimed any title to the property or any right therein other than right of homestead, or such rights as would vest in her by virtue of her husband's ownership. *Kirby v. Tallmadge*, 160 U. S. 379; *Townsend v. Little*, 109 U. S. 504; *Thomas v. Kennedy*, 24 Ia. 397; *Rendleman v. Rendleman*, 118 Ill. 257; *Garbutt & Donovan v. Mayo*, 128 Ga. 269; *Rankin v. Coar*, 46 N. J. Eq., 566; *Atwood v. Bearss*, 47 Mich. 72; 5 Thompson, Real Property, 334, sec. 4249.

In its decree the district court determined that the instrument in suit was binding upon Henry S. Clarke, Jr., and he, not having appealed, is concluded by that determination. Mrs. Clarke in her appeal presents solely the question of homestead rights, and we will now address ourselves to the limits and extent of the homestead as determined and defined by our statutes.

This court is committed to the doctrine that, as between the mortgagor and mortgagee, the homestead means something more than, and different from, the $2,000 exemption which the statute allows the homestead claimant as against the claims of creditors. It means the actual home of the family including the lands and buildings constituting the same, and the possession and ownership of all of which may be successfully defended by either husband or wife during the marriage state against independent acts of either, and against joint acts of either or both. *Anderson v. Cusack*, 115 Neb. 643; *Anderson v. Schertz*, 94 Neb. 390; *Davis v. Merson*, 103 Neb. 397; *Meisner v. Hill*, 92 Neb. 435.

While it may be said that *Meisner v. Hill, supra*, left the extent of the homestead as between others than credi-

tors and debtors a matter of doubt, yet the invariable course of decisions of this tribunal since *Meisner v. Hill, supra,* was announced has been to limit the physical extent of the homestead as between others than judgment creditors and debtors to a "quantity of land not exceeding 160 acres * * * not included in any incorporated town, city or village, or, * * * a quantity of * * * land, not exceeding in amount two lots, being within an incorporated town, city or village." This, as a fact, is accorded express recognition in *Campbell v. Gallentine,* 115 Neb. 789.

In the present case the premises are made up of lots 13, 14, 15 and 16, including a vacated alley adjacent to and between lot 13 and the other lots mentioned. Upon vacation the land comprised in the vacated alley accreted in equal portions to the adjacent lots. The dwelling house is situated on lots 14 and 15. The barn and garage in connection therewith are situated on parts of lots 13 and 16.

The application of the principles hereinbefore announced to the situation results in a finding that lots 14 and 15, and the south half of the vacated alley adjacent thereto, constitute the statutory homestead of the Clarkes. As to these premises last described the instrument in writing, which forms the basis of plaintiff's petition, is absolutely void, and Mrs. Clarke is entitled to a decree quieting the title of lots 14 and 15 and part of alley pertaining thereto against the same.

On the other hand, the remainder of the tract, viz., lots 13 and 16 and part of the vacated alley forming no part of the statutory homestead are subject to the decree entered in the district court for Douglas county, Nebraska, with the priorities as therein determined, but without deduction as to homestead rights of the Clarkes, and, that as against all judgment creditors in suit the rights of the Clarkes in said homestead are limited to the sum of $2,000.

The judgment of the district court is therefore reversed

and the cause remanded, with directions to enter a decree in accordance with this opinion.

REVERSED.

CHARLES H. BAKER, APPELLEE, V. FRANK FARNSWORTH ET AL.: GERTRUDE D. REED, APPELLANT.

REPORTED OCTOBER 8, 1928. No. 25394.

1. **Attorney and Client: PROFESSIONAL ETHICS.** Where A and B are adversely interested in the subject-matter of a pending action between them, an attorney, after having served A, will not be permitted to represent B in the pending litigation between A and B, where the same adverse interests are involved.
2. ———: ———. A litigant in a suit in equity will not be permitted to secure the fruits of a decree in his favor, obtained for him by an attorney whom he knows to have previously represented his adversary, over objection of adversary, in the subject-matter before the court.
3. ———: ———: APPEAL: REVERSAL. A decree in equity secured, over objection, by an attorney for the successful litigant with knowledge of a prior employment of the same attorney by his adversary, where the subjects involved are the same or inseparably related, will be set aside and the cause remanded for trial without considering other claimed errors going to the merits of the case.
4. ———: ———. Public policy forbids an attorney from representing a party to litigation, over objection, where the subjects involved are the same or inseparably related, against an adversary whom the attorney previously served.

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

Gertrude D. Reed and *S. E. Torgeson,* for appellant.

Ballard & Anderson, contra.

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

HOWELL, J.

This is a real estate mortgage foreclosure suit on ap-

peal. In 1919 one Farnsworth mortgaged lots to one Van Lanningham for $1,500, the mortgage being duly recorded. Van Lanningham shortly afterward, it is claimed, sold the note secured by the mortgage to Charles H. Baker, the plaintiff and appellee. No assignment of the mortgage appeared on record. Appellant, Miss Reed, owned a judgment against Farnsworth procured by assignment.

In 1923, Miss Reed employed W. J. Ballard, who appears in this case as attorney for appellee, to bring about an execution sale of the lots on the Reed judgment. The lots were bid in by Ballard as appellant's attorney, for her, for $25. The sale was confirmed February 4, 1924, and the sheriff's deed was delivered to appellant about that time. Early in 1925 appellee, Baker, employed Ballard to foreclose his mortgage. The necessary petition was filed in April, 1925, making the mortgagor, mortgagee, Farnsworth and wife, and appellant defendants, all of whom defaulted except appellant. Appellant's answer challenged the validity of the mortgage, charged that it was a sham and that it had been duly released of record by Van Lanningham in June, 1923, several months prior to the sale of the lots on her judgment.

Appellee, to meet that defense, contended that the appellant procured the release to the mortgage from Van Lanningham after he had assigned it and the note secured thereby to appellee with knowledge on the part of appellant of the previous assignment. Notice of the assignment of the mortgage and note was attempted to be proved in two ways: (a) Personal notice given to appellant by appellee, his brother, and a friend, or agent. (b) That prior to the execution sale appellee notified Ballard, then attorney for appellant, of the mortgage assignment, and that such notice became constructive knowledge of appellant.

Appellant denied both. The evidence, if it does not preponderate in favor of appellant, leaves the giving of personal notice in doubt. Upon the question of constructive notice, the evidence, admissions in the brief and in oral

arguments before this court show that appellee and his witnesses testified they told Ballard of the assignment of the mortgage to Baker before the execution sale; Ballard, in fact, did not inform appellant, his then client, of any such notification, but on the contrary he referred appellant to a stranger when she inquired of him concerning the title to the lots, and, apparently, purposely refused to tell his client anything; that Ballard and Baker, his agents and friends, were all acquainted and on good terms before the sale and at all times since, and if appellant did not have personal notice from appellee and his agents, the only knowledge appellant did have of the note and mortgage was constructive, through Ballard. But for the mortgage Miss Reed would have had clear title to the lots.

Before the trial commenced in the district court appellant vigorously protested against Ballard acting against her and for her adversary in a matter so closely connected with the title to the lots and its procurement for her by Ballard as her attorney. No witness, other than Baker, his agents and friends, testified concerning notice to Ballard of the assignment of the mortgage to Baker. Ballard did not testify for either the plaintiff or defendant, but put himself in the front line of battle in making proof of a very material fact against his former client, which, if not true, he alone could deny; and which he was, by reason of his then employment by Baker, greatly interested in allowing to pass by as true. Of course appellant could not have been expected to call a witness whose unfaithfulness had been previously demonstrated. If he had knowledge of the assignment of the mortgage, his duty was to tell his client at the time that knowledge was obtained. If he did not have such knowledge, the only honorable thing for him to do was to deny it. In either case he sought to prove his own wrong, to be right, in order to perpetuate his wrong, to the injury of his former client in a matter pertinent to the results he was then seeking. If that were all, perhaps, but only perhaps, his last client should not be made to suffer. Appellee does not have the excuse that

the only notice he had of the perfidy of his attorney toward the matter in hand was constructive. He was present at the trial when the true relations between Ballard and his first client were disclosed, and then knew that he (appellee) was asking the aid of the attorney to do an inexcusably unprofessional thing.

Whether appellee took the view that a continuing retainer would effectually close the mouth of Ballard, as a witness for appellant, against a denial by him of his knowledge need only be suggested, without asserting it to be true.

In *Fitzsimmons v. State*, 116 Neb. 440, opinion by Dean, J., this court held that two lawyers intimately and closely associated, by a limited partnership, could not appear, one for the prosecution and the other for the defense, in a criminal case. For that reason alone a conviction of Fitzsimmons of the crime of shooting with intent to kill was set aside. This court will not review a case of this sort, as a court of chancery, further than to reverse a decree procured by such indicated methods. The trial court should have excluded Ballard from the case. Lawyers should not expect the approval of courts and society of conduct which so reflects on a great profession, as well as upon the courts, as to justify public distrust already too much abroad. The decree of the district court is reversed and remanded at the cost of the appellee in both courts.

REVERSED.

N. M. SOMMERVILLE, APPELLANT, V. BOARD OF COUNTY COMMISSIONERS OF DOUGLAS COUNTY ET AL., APPELLEES.

FILED OCTOBER 19, 1928. No. 25643.

1. **Taxation**: APPEAL. Original opinion reported in 116 Neb. 282, amplified by a construction of sections 865, 866, and 5975, Comp. St. 1922, governing appeals from actions of county boards of equalization, and approved as thus amplified.
2. **Pleading.** One whose authority to prosecute an action is limited by statute must plead facts which bring him within such statutory limitations.

3. Taxation: EQUALIZATION: APPEAL. "Whenever the legislature provides for an appeal to a court from a decision of a board of equalization, that court, no matter what may be its grade, is one of limited jurisdiction for said purpose, and must keep strictly within the letter of the statute defining its power." *Reimers v. Merrick County*, 82 Neb. 639.

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

Brown & Dibble, for appellant.

W. W. Slabaugh, Henry J. Beal, James H. Adams and *Gaines, Van Orsdel & Gaines, contra.*

Edwin F. Myers, amicus curiæ.

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

PER CURIAM.

This case will be found reported in 116 Neb. 282. After the opinion was adopted, a motion for a rehearing was filed by appellant, and the case was set for argument on the motion before the court, which was had. A careful review of the record, in the light of able arguments of counsel both oral and by way of printed briefs, impresses us that the original opinion correctly reflects the facts and applies the law thereto, and it is adhered to. However, as the questions involved are of a public nature, in order that the law as thus announced may be more readily understood, it might be helpful to call attention to certain statutory provisions explanatory of that part of the opinion wherein we stated: "Attention is called to the fact that plaintiff did not give notice of appeal within ten days as provided by section 866, Comp. St. 1922. This is a jurisdictional requirement, and a failure to comply with the statute defeats the appeal. Taxpayers' appeals are usually impressed with a public interest, and earlier notice of an intent to contest the decisions of the boards of equalization in these cases is required, presumably for the purpose

of affording the boards an opportunity to rectify their action. The right to appeal is a statutory one, and the record must conform to the statute where the requirements are mandatory."

Section 5975, Comp. St. 1922, provides in part, as follows: "Appeals may be taken from any action of the county board of equalization to the district court within twenty days after its adjournment, in the same manner as appeals are now taken from the action of the county board in the allowance or disallowance of claims against the county."

Turning then to sections 865 and 866, Comp. St. 1922, which are applicable to cases involving the allowance or disallowance of claims against the county, we find the following requirements:

Section 865 provides among other things: "And when the claim of any person against the county is disallowed, in whole or in part, by the county board, such person may appeal from the decision of the board to the district court of the same county, by causing a written notice to be served on the county clerk, within twenty days after making such decision and executing a bond to such county, with sufficient security, to be approved by the county clerk, conditioned for the faithful prosecution of such appeal, and the payment of all costs that shall be adjudged against the appellant. Upon the disallowance of any claim, it shall be the duty of the county clerk to notify the claimant, his agent or attorney, in writing, of the fact, within five days after such disallowance."

Section 866 provides: "Any taxpayer may likewise appeal from the allowance of any claim against the county by serving a like notice within ten days and giving a bond similar to that provided for in the preceding section."

Thus it will be seen that two kinds of notices are provided for, to wit: Under section 865, a claimant (a party having a direct interest in the matter) must serve notice of appeal within twenty days after the board's decision; while under section 866, a taxpayer (a party having an

indirect interest in the matter) must serve notice of appeal within ten days after the board's decision. As we have seen, Sommerville, the appellant herein, is a taxpayer, having no direct interest in the matter before the board, yet clothed with an indirect interest as such taxpayer, and therefore he was required to serve notice of appeal within ten days from the decision sought to be appealed from, which he did not do. Thus considering section 865 and section 866, we are constrained to conclude that whether such notice shall be one served within twenty days, or one served within ten days, depends upon whether the challenge is made by one having a direct interest as the owner of a claim, or by one having an indirect interest as a taxpayer.

One whose authority to prosecute an action is limited by statute must plead facts which bring him within such statutory limitations. Then, as we said in the course of the opinion in *Reimers v. Merrick County*, 82 Neb. 639: "Whenever the legislature provides for an appeal to a court from a decision of a board of equalization, that court, no matter what may be its grade, is one of limited jurisdiction for said purpose, and must keep strictly within the letter of the statute defining its power."

In this case Sommerville pleaded that his interest in the matters involved was that of a taxpayer, yet he failed to allege that he had, within ten days, given the required notice of his intention to prosecute an appeal from the action of the board of equalization complained of, a necessary jurisdictional fact, and neither does the record disclose that such notice was given in the ten days. Hence, the trial court did not err in sustaining the demurrers to the petition.

In harmony with the original opinion, and the views herein expressed, the judgment of the trial court is

AFFIRMED.

W. B. MEYER ET AL., APPELLEES, V. CITY OF ALMA ET AL., APPELLANTS.

FILED OCTOBER 19, 1928. No. 26119.

1. **Constitutional Provision.** Section 21, art. I of the state Constitution, provides: "The property of no person shall be taken or damaged for public use without just compensation therefor."
2. **Eminent Domain.** Before the land of an owner can be taken or damaged for public use, the value of the property to be taken or of the damages to be done shall be ascertained and provision made for payment thereof.
3. **Equity.** Equity and good conscience will not permit a person to stand by and see acts done involving risk and expense by others, and then permit him to enforce his constitutional rights by means of injunction in a court of equity, when he has an adequate remedy at law.

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

O. E. Shelburn and *J. F. Miller,* for appellants.

Clarence A. Davis and *Wilber S. Aten, contra.*

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

GOSS, C. J.

The district court issued a mandatory injunction against the defendants to abate what it termed a nuisance in the form of a ditch on the public highway in front of the property of the plaintiffs. Defendants appealed.

The road in question is a part of the public highway and has existed for many years as a highway. It runs east and west on the section line between sections 28 and 29 on the north and sections 32 and 33 just north of the main part of Alma. A portion of the highway at least was referred to by one witness as Seventh street. For the most part it may be inferred from the evidence that the highway marks the northern boundary of the city. The city authorities were desirous to get the advantage of a paved highway to connect with the pavement of the

city. The highway was a part of what is commonly called the "Golden Rod Highway." The county authorities joined with the state and federal authorities to improve this road as a part of a state and federal aided highway known as project 71-E. Pursuant to plans and specifications prepared by the department of public works a contract was let to the Yant Construction Company of Omaha to grade and pave the road. The city of Alma, the county of Harlan and the department of public works of the state of Nebraska were parties to the contract. The city of Alma, it appears from the evidence, had a private agreement, not set forth in terms in the evidence, to pay to the county a portion of the cost of the project. Under the contract the original highway was regraded and the traveled way widened so as to accommodate a pavement 18 feet wide and an unpaved portion of the highway 10 feet immediately north of the pavement. Thirteen feet of this pavement was laid south of the section line and five feet of the pavement was laid north of that line. In order to furnish the dirt, a ditch or borrow pit was made just north of the improved highway or north of the north shoulder of the traveled part of the highway. This ditch thus created was 14 to 18 feet wide and in some places three or four feet deep. It is this ditch which caused the complaint of the plaintiffs. They complain that it is so deep that it carries water farther west than it was wont to go before the improvement was undertaken, that it will result in taking and damaging their land north of the limits of the highway and that it has rendered their lands and homes inaccessible by reason of the ditch created between the portion of the highway graded and paved for travel and the south fronts of the lands of the plaintiffs. There was some testimony that one of the bridges erected as a part of the project to connect the land of one of the plaintiffs with the grade was weakened so that threshing apparatus did not have safe access to his property. To this it might be answered that the injunction forbade the defendants to repair it.

There is evidence on behalf of the Yant Construction Company that it was through with the grading, paving and other work and had received its pay before this suit was brought. The damage, if any was done, occurred, or, if it is a continuing damage, it began, before action was taken by the plaintiffs. It is true that one of the witnesses for defendants said it was the purpose to smooth up the ditch by doing some back sloping before considering it a finished job. In a general way, it may be remarked that the plaintiffs stood by, saw the grading of the road, the excavation of the ditch to furnish dirt for such grading, and witnessed the laying of the pavement upon this important project in front of their lands and homes without a protest. They accepted and used bridges across the ditches to their respective homes.

It is true that section 21, art. I of the state Constitution, provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." It is also well established in our decisions that, before the land of an owner can be taken or damaged for public use, the value of the property to be taken or of the damages to be done shall be ascertained and provision made for payment thereof. But where, as in this case, the plaintiffs, with full knowledge of what was being done, delayed and neglected to assert their constitutional rights until the defendants had placed themselves in a position where they were unable to extricate themselves without greater injury and damage than the plaintiffs would suffer, the hard and fast remedy by injunction ought not to be enforced in favor of the plaintiffs. Equity and good conscience will not permit a person to stand by and see acts done involving risk and expense by others and then permit him to enforce his constitutional rights by means of injunction in a court of equity when he has an adequate remedy at law. *Enterprise Irrigation District v. Tri-State Land Co.*, 92 Neb. 121; *Fremont Ferry & Bridge Co. v. Dodge County*, 6 Neb. 18; *Clark v. Cambridge & Arapahoe Irrigation & Improvement Co.*, 45 Neb. 798; *City of Chad-*

ron v. Card, 107 Neb. 376; *New York City v. Pine,* 185 U. S. 93; 14 R. C. L. 362, sec. 63. The inconvenience to the public and the unnecessary expense to the city of Alma and the county of Harlan, if the injunction should be allowed to stand, outweigh the right of the plaintiffs to insist upon a choice of remedies. By their conduct they have waived such choice.

We are of the opinion that the trial court erred in entering a decree of injunction under the pleadings and proofs and that it should have dismissed the petition for injunction without prejudice to the rights of the plaintiffs to pursue their remedy at law for such damages, if any, as they have suffered by the alleged taking of their property or the damaging thereof by the construction of the road and ditch.

The judgment of the district court is reversed and the cause is remanded, with directions to enter a judgment in harmony with the opinion as above expressed.

REVERSED.

CONRAD KUXHAUS V. STATE OF NEBRASKA.

FILED OCTOBER 19, 1928. No. 26494.

1. **Criminal Law:** EVIDENCE UNLAWFULLY OBTAINED: ADMISSIBILITY. Where articles pertinent to the issues are offered in evidence, they will not be excluded because they have been obtained in an irregular or illegal manner.
2. ———: WITNESSES: COMPETENCY. One who has had experience with mash for many years is competent to testify that a mixture of rye, water and other ingredients is in a state of fermentation and is mash.
3. ———: "MASH." "Considering the purpose and intention of the law, the word 'mash' in section 3252, Comp. St. 1922, is held to include any mixture of grain or malt with water or other liquid in such a manner as to evidence that fermentation was intended to be produced as a stage in the process of manufacturing intoxicating liquor." *Blevins v. State,* 109 Neb. 183.
4. **Intoxicating Liquors:** FINDINGS: SUFFICIENCY OF EVIDENCE. Evidence, outlined in the opinion, *held* sufficient to warrant a finding that defendant had in his possession mash and part of

the necessary equipment for the manufacture of intoxicating liquor and for the purpose of manufacturing such liquor.

5. ———: ———: ———. To constitute the offense of possession of mash and equipment for making intoxicating liquors, being used in the process of manufacturing intoxicating liquors, it is not necessary to a conviction that intoxicating liquors shall have been completely manufactured. The only requirement of the statute to complete the offense is that defendant have in his possession mash that is being used in the process of manufacturing intoxicating liquors. It is not essential that the process shall have been completed.

ERROR to the district court for Scotts Bluff county: EDWARD F. CARTER, JUDGE. *Affirmed.*

Morrow & Morrow, for plaintiff in error.

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

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

GOOD, J.

Conrad Kuxhaus, hereinafter referred to as defendant, prosecutes error, to review his conviction of the offense of having in his possession mash, in a state of fermentation, being used in the manufacture of intoxicating liquors, and for possession of equipment for the manufacture of such liquors.

From the record it appears that, in the performance of his duty, the sheriff of the county visited the home of the defendant for the purpose of serving a notice upon him. On knocking, he was invited into the home. While there, he observed the odor of fermenting grain and observed near the stove a 20-gallon jar covered with a blanket. He made inquiry as to what was contained therein, removed the cover and discovered 10 to 15 gallons of rye, some orange peel, lemon peel, and other ingredients, in a state of fermentation. By consent of the person in the house, he obtained a pail or jar and took a sample of the mixture. Later he examined the out-buildings, and found a pressure

cooker in a coal house, some 25 feet distant from the kitchen. Attached to the pressure cooker, in the place of the steam whistle or poppet valve, was a hollow metal elbow, which was screwed into the top of the cooker; the other end of the elbow threaded, so that, by means of a coupling, a coil could be readily attached thereto. The defendant was not in his home at the time. So far as appears, the sheriff, without protest from those in the house, took the sample and the pressure cooker, and later arrested the defendant. The sample of the mixture, taken from the jar, and the pressure cooker, with the elbow attachment, were received in evidence over objection by defendant that they were not competent because obtained by an unlawful search and seizure, and in violation of state and federal constitutional provisions.

We doubt very seriously whether the circumstances under which the sheriff obtained possession of the exhibits in question are sufficient to show that they were obtained in an unlawful manner. It appears that the sheriff was in the home of the defendant on a lawful mission, and, while in the home, saw and observed the fermenting mixture. There was sufficient to indicate to the sheriff that the mixture was being prepared and used in the process of manufacturing intoxicating liquors. Under such circumstances, we think it was not an unlawful act for him to take possession of and preserve the mixture, to be used as evidence. Suppose that while on a lawful mission he had entered the defendant's house, without force and by invitation of those present in the house, and had found the defendant in the commission of any other crime, would it be contended that it was not the sheriff's duty to arrest the defendant? And if, at the time, the defendant was in possession of deadly weapons, or other articles, which he was using in the commission of the crime, could it be seriously questioned that it was the duty of the officer to take possession of such articles and preserve them for introduction in evidence? We scarcely think so. But, whether the exhibits in question were obtained

by unlawful means, is wholly immaterial under repeated decisions of this court.

The admissibility of evidence so procured has frequently arisen in this jurisdiction. In *Billings v. State,* 109 Neb. 596, the authorities were reviewed, and it was there held: "Where articles or information are offered in evidence, which are pertinent to the issue, the court will not exclude them because they have been obtained in an irregular or illegal manner." The rule there announced has been followed in *Bush v. State,* 112 Neb. 384, and *Walker v. State,* 113 Neb. 19. While it may be conceded that the rule is different in the federal courts and in a number of the state jurisdictions, we do not feel at liberty to depart from the rule so long established in this jurisdiction.

Defendant contends that the evidence is insufficient to support the verdict, even if the exhibits were properly received in evidence. It is argued that the sheriff was not competent to testify that the mixture of rye, water and other ingredients in the jar was mash. The record discloses that the sheriff was, and for a number of years had been, familiar with mash. It was sufficient to qualify him to testify. In any event, the defendant, when on the stand as a witness in his own behalf, testified that the jar contained rye, water and other ingredients; that the rye had been soaking for three weeks or longer, was sour and smelled. From this, any intelligent person would properly infer that fermentation had begun.

In *Blevins v. State,* 109 Neb. 183, it was held: "Considering the purpose and intention of the law, the word 'mash' in section 3252, Comp. St. 1922, is held to include any mixture of grain or malt with water or other liquid in such a manner as to evidence that fermentation was intended to be produced as a stage in the process of manufacturing intoxicating liquor." In *Sommers v. State,* 112 Neb. 311, it was held: "The word 'mash,' as used in the prohibitory statute, includes any mixtures of grain, either whole, cracked or crushed, or malt, mixed with water or other liquid so as to produce fermentation." Under the

rule thus established in this court, the evidence of defendant alone was sufficient to show that the mixture in the jar was "mash," within the meaning of the prohibitory statute.

It is further urged by the defendant that, even if the mixture was mash, the evidence was insufficient to show that it was in defendant's possession for the purpose of manufacturing intoxicating liquor. From the record it appears, by defendant's own testimony, that the mixture had been kept in the house, near the stove, for a period of three weeks or longer; that he claimed it was intended for hog feed and that he had been feeding his hogs therefrom daily for a period of three weeks or more; yet the evidence shows that the jar was two-thirds, possibly three-fourths, full at the time of the sheriff's visit. It is quite evident that if intended for hog feed and defendant had been feeding his hogs from it for three weeks, he must have been using it in very small quantities. Moreover, the sheriff testified that there was either sugar or molasses in the mixture, and, when defendant was interrogated on the witness-stand as to whether there was any sugar therein, he gave an evasive answer, saying that he could not afford to buy sugar for the hogs, but he did not deny that there was sugar or molasses in the mixture.

It is further contended that the pressure cooker was not a still or a part of a still. The pressure cooker was, in fact, an aluminum vessel, with clamps with which to screw down the lid, so as to be air-tight. The vessel had a capacity of eight or ten quarts. In the lid were three openings, into one of which was fitted a pressure gauge, which would show the amount of steam pressure. In the second hole was a pet cock, evidently for the purpose of letting out the steam before removing the lid. The third was ordinarily fitted with a poppet valve so that when the steam pressure became too strong the poppet valve would open and allow part of the steam to escape. The poppet valve had been removed and in its place was an elbow, threaded at each of its openings, one of which would

screw into the opening in the lid of the cooker, and the other threaded so that, by means of a coupling, a coil could be readily attached thereto. No other part of the cooker was produced, nor was there any indication that the elbow was used for any part of the implement as a pressure cooker. The explanation given by defendant was that, when using the cooker for preserving fruits, they placed the elbow in the opening so as to allow the steam to escape; but removing the poppet valve would allow the steam to escape as readily. In any event, it would not appear necessary, if an elbow were used, that both ends should be threaded. Another significant thing, which no doubt attracted the jury's attention, is that, while the elbow, poppet valve and the pet cock were all of brass, there was a distinct difference in the finish of the elbow and that of the poppet valve and pet cock, which were regular parts of the pressure cooker. This would lead to the inference that the elbow was not a part of the original equipment of the cooker. Another significant thing was the location of the cooker. Ordinarily, it would be kept in the kitchen; it was found in the coal shed, 25 feet distant therefrom, and covered over with some sort of a cover. Defendant said it was to keep the coal dust out, but no doubt the jury drew the conclusion that it was kept in the coal house and separated from the mash so that suspicion would be diverted. Under the circumstances indicated, we are of the opinion that the evidence was sufficient to warrant the jury in finding that the defendant had in his possession mash and a part of the necessary equipment for manufacturing intoxicating liquor.

Defendant urges that, unless the evidence warrants the finding that the mash was being used in the process of manufacturing intoxicating liquor, it will not support a conviction under section 3252, Comp. St. 1922, on which the prosecution was founded. That part of the section, applicable to the case before us, is as follows: "Any person who shall manufacture intoxicating liquor in violation of this chapter or who shall have possession of any still or

any part thereof or of any other equipment for making intoxicating liquor or who shall have in his possession any mash or other material being used in the process of manufacturing intoxicating liquor, * * * shall, upon conviction," etc.

As we have indicated, the evidence was sufficient to justify the jury in finding that the mash was in the possession of defendant for the purpose of manufacturing intoxicating liquor. In fact, the fermentation was one part of the process of the manufacture.

Counsel for defendant argue that it is necessary to a conviction under the present statute that intoxicating liquor shall have been completely manufactured. The only requirement of the statute to complete the offense is that defendant have in his possession mash that is being used in the *process of manufacturing* intoxicating liquor. It is not essential that the process shall have been completed.

Defendant complains of the failure of the court to give certain requested instructions. We have examined the charge given by the court and find that every essential element of the offense was covered by the instructions given by the court on its own motion, and that no error was committed in refusing to give those requested.

The record is free from prejudicial error. The judgment is therefore

AFFIRMED.

WILLIAM NOONAN V. STATE OF NEBRASKA.

FILED OCTOBER 19, 1928. No. 26328.

1. **Rape**: IDENTIFICATION OF ACCUSED: CORROBORATION. The Nebraska rule requiring certain corroboration of the prosecutrix in prosecutions for rape and assault with intent to commit rape does not extend to, or include, the question of the identity of the accused, and in such cases the unsupported testimony of the prosecutrix may be sufficient to identify the guilty party if the commission of the offense has first been established.
2. **Evidence** examined and *held* ample to sustain the verdict of the jury.

3. Jury: SELECTION: QUALIFICATION OF SHERIFF. A sheriff who is not the prosecuting witness nor the sole witness in a criminal case, but whose evidence is affirmatively shown by the record to be corroborative merely, is not, by the fact that he is called as a witness and his name, as such, is indorsed upon the information charging the offense being tried, disqualified thereby from performing the duties of his office; nor do these facts render a panel of jurors selected and summoned by him, under direction of the district court as provided by section 9078, Comp. St. 1922, vulnerable to challenge.
4. ———: ———. Action of trial court in disposing of certain challenges to jurors on their *voir dire* examination examined and approved.

ERROR to the district court for Cuming county: ANSON A. WELCH, JUDGE. *Affirmed.*

O'Sullivan & Southard and *Hunker & Gross,* for plaintiff in error.

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

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

EBERLY, J.

William Noonan, hereafter called the defendant, was convicted in the district court for Cuming county, Nebraska, of a felonious assault upon Gladys Ford with intent to commit rape, made on September 19, 1927. He was sentenced to be imprisoned in the penitentiary of this state at hard labor for five years. To reverse this conviction and sentence he appeals to this court.

Numerous assignments of error are made in the briefs, which may be summarized as relating to (1) the sufficiency of the evidence to sustain the conviction; (2) refusal of the district court to quash the second jury panel selected and summoned under the provisions of section 9078, Comp. St. 1922, on the ground that the sheriff who selected and summoned the same was disqualified on account of inter-

est; (3) error of the court in overruling certain challenges to the competency of certain jurors; (4) error of the court in restricting cross-examination, especially with reference to certain photographs presented by the defense as part of the cross-examination of the prosecutrix.

The first question for consideration is the claimed insufficiency of the evidence connecting the defendant with the crime. It is contended that the evidence lacks the necessary corroboration of the prosecutrix required in prosecutions of rape and kindred offenses, and it is challenged because of its inherent weakness.

There can be no question that the *corpus delicti*, the actual commission by some one of the particular crime charged, is established in this case by ample evidence. Indeed, this is not questioned by defendant. His counsel, in their briefs, state: "It is admitted that an assault with intent to commit rape was made upon Gladys Ford on September 19, 1927, at about 4:45 p. m. at the place charged. The only dispute in the case is as to the identity of her assailant." Argument in behalf of the defendant then proceeds on the basis that the positive identification by the prosecutrix of the defendant as the assailant on the witness-stand at the trial must, as a matter of law, be corroborated by evidence other than her own before his own positive testimony in his own behalf to the contrary is overcome; in other words, that the prosecutrix in cases of assault with intent to commit rape must be corroborated in the same manner and to the same degree as to the identity of the accused as is required to establish the *corpus delicti*.

The district judge, at the trial of the case, gave the usual instructions as to the necessity of the corroboration of the prosecutrix. The following excerpt from instruction No. 9 given by the district court indicates their general tenor: "It is not essential that she be corroborated by direct evidence of the particular fact or facts constituting the crime. * * * She must, however, be corroborated as to material facts and circumstances which tend to sup-

port her testimony and from which, together with her testimony as to the particular act constituting the crime, the inference of guilt may be drawn."

It is to be remembered that Nebraska has no statute providing that a defendant cannot be convicted of rape or of an assault with intent to commit rape unless the prosecutrix be corroborated by evidence other than her own tending to connect the defendant with the commission of the offense. The present rule on that subject is the result of judicial decision and not of legislative enactment.

In *Garrison v. People,* 6 Neb. 274, we held that it was not error for the court to refuse to instruct the jury that they could not convict the defendant upon the unsupported testimony of the prosecutrix.

In *Mathews v. State,* 19 Neb. 330, the attention of the profession was drawn to the fact that in *Garrison v. People, supra,* a bill of exceptions of the evidence had not been preserved, and that it was not intended in that case to hold that a conviction of rape would be sustained upon the testimony of the prosecutrix, if her sworn statements were disputed by other testimony, and "there were no marks upon her person or clothing showing a recent struggle, or no complaint as soon after the occurrence as an opportunity offered." The rule thus announced has been the basis of our procedure in prosecutions of rape and kindred offenses since the date of the opinion last referred to, and has been consistently adhered to in a line of well-considered cases. It must be admitted, however, that this rule is not in accord with the rule at common law, that in most jurisdictions it is not necessary, as a matter of law, to corroborate the testimony of the prosecutrix. In other words, the general rule, in the absence of statute, appears to be that the uncorroborated testimony of the prosecutrix is sufficient to carry the case to the jury, and it has been held that the rule is the same in cases of assault with intent to commit rape. It should be said, however, that this rule of corroboration,

even as thus restricted, does not bear the unanimous approval of the members of this court as now constituted. See dissenting opinion by Rose, J., in *Swogger v. State*, 116 Neb. 563, 569.

We are now asked, in effect, to extend the principle announced first in *Mathews v. State, supra*, to the extent of requiring corroboration, as a matter of law, of the prosecutrix' evidence as to the identity of her assailant. Three cases are cited to sustain the contention of the defendant, *Dunn v. State*, 58 Neb. 807; *Mott v. State*, 83 Neb. 226; *Boling v. State*, 91 Neb. 599. But in none of these cases was the exact question presented upon which the present case must be determined. The gists of these decisions are simply a restatement of the general rule first announced in *Mathews v. State, supra*, and the expressions used by the court in the various opinions are not applied to the specific question of proof of identity of the accused.

The precise question, however, before us was discussed by this court in *Henderson v. State*, 85 Neb. 444, and in which *Mott v. State, supra*, cited by defendant, is distinguished. It was there insisted by the defendant charged with rape that, as a matter of law, he could not be convicted "unless the prosecutrix be corroborated by other evidence tending to connect the defendant with the commission of the offense." Iowa cases were cited in support of this proposition. Root, J., in delivering the opinion of the court, disposed of this contention in the following language:

"Counsel for defendant cite Iowa decisions, but they have reference to a statute which provides that a defendant cannot be convicted of rape unless the prosecutrix 'be corroborated by other evidence tending to connect the defendant with the commission of the offense.' In the application of that statute, the courts of our sister state hold that the prosecutrix cannot by her own testimony furnish that corroboration. Proving that the prosecutrix has been ravished and establishing that a defendant is the guilty man are very different propositions, and evidence

tending to corroborate one fact does not necessarily nor logically confirm the other. We recognize the distinction and, in the absence of a statute on the subject, hold that the unsupported testimony of the prosecutrix may be sufficient to identify the guilty party if the commission of the offense has first been established. *Younger v. State,* 80 Neb. 201."

In *Younger v. State,* 80 Neb. 201, Letton, J., in delivering the opinion of the court, in substance indicates that evidence corroborating the testimony of the prosecutrix as to the identity of the accused charged with rape by force and violence, and where the assault was evident, as a matter of law, is wholly unnecessary. At least, no greater evidence should be required than in a "violent assault of another nature." The reasoning upon which the two decisions last referred to are based is convincing.

A woman becomes a victim of an assault made with intent to commit murder, to rob, or to commit great bodily harm. In these cases the law accords to her evidence the same weight, the same force and effect, in the prosecution of the offense as it accords the men, under like circumstances and conditions. It does not require in such cases corroboration which the Nebraska rule exacts in cases where rape is involved.

The theory of the Nebraska rule is, that the nature of rape is such that evidence to establish the same may be easily fabricated and hard to disprove, and, therefore, a technical corroboration, as a matter of law, is required. Where, however, the offense charged has been fully, completely and admittedly established beyond a reasonable doubt, the dangers which the Nebraska rule seeks to avoid are past, no occasion for fabrication then arises, and no reason, therefore, exists for the extension of the principle involved.

It follows, therefore, that, where the *corpus delicti* involved in a charge of assault with intent to commit rape, robbery, murder, or with intent to do great bodily harm has been fully established, the weight of evidence neces-

sary to connect the accused with the offense should be identical; that, under these conditions, a woman's evidence is entitled to receive the same consideration from our tribunals as that to which the evidence of a man under like circumstances is entitled. It follows that the contention as to the necessity of corroboration of the prosecutrix' evidence in this case, connecting the defendant with the offense, is disapproved.

We have carefully read the evidence in the record, as set forth in the briefs of the parties, relating to the connection of the accused with the offense charged. The unqualified identification of the accused by the prosecutrix, in the light of the surrounding circumstances and the other facts detailed in the evidence, is such that there is ample proof to sustain the verdict of the jury on this question.

Complaint is made as to the action of the district court in overruling defendant's motion to quash the special panel of the jurors from which the jury which tried the defendant was drawn. It is charged that the sheriff who, under the direction of the court, selected and summoned this special panel was disqualified on the grounds of interest, he being a material witness for the state in the case. It may be said in passing that the record discloses that, though the sheriff testified in behalf of the state at the preliminary hearing, he was not called in the district court as a witness by the state in making its case in chief, and though called by the state on rebuttal was not permitted to testify. He was not the prosecuting witness and, so far as the record discloses, his evidence was wholly corroborative in its nature, and pertained solely to facts which it was his official duty to ascertain, to "ferret out," and to know.

Eliminating all consideration of questions arising from the manner of presentation, and on the basis that the questions sought to be raised were properly presented, should the defendant's contention be sustained?

Section 4989, Comp. St. 1922, among other provisions,

prescribes in part: "It shall be the duty of the sheriff * * * to ferret out crime, to apprehend and arrest all criminals, and in so far as it is within his power, to secure evidence of all crimes committed in his county, * * * and to perform all other duties pertaining to the office of sheriff or enjoined upon him by law."

Section 9078, Comp. St. 1922, under the facts in the instant case, concededly applicable to the selection of jurors, expressly authorizes the district court: "Whenever at any general or special term * * * for any cause there is no panel of * * * petit jurors, or the panel is not complete, said court may order the sheriff * * * to summon without delay good and lawful men, having the qualifications of jurors, and each person summoned shall forthwith appear before the court, and if competent, shall serve on the * * * petit jury * * * unless such person may be excused from serving or lawfully challenged."

The provisions of section 4989, *supra*, above quoted, were enacted in 1917. The portions of section 9078, above quoted, were at that time upon the statute books of the state. The legislators must, therefore, be presumed to have been familiar with the provisions last referred to, and the enactments must be construed together.

It may therefore fairly be said that the authors of this legislation apparently deemed that the proper and complete performance of the duties enjoined by section 4989, *supra*, was not in any manner incompatible with the proper and full performance of the duties required by the provisions of the section 9078 quoted. Indeed, the conclusion that such must be deemed the legislative intent is strengthened by the fact that in the act last adopted, in point of time, it was expressly enjoined that it should be the duty of the sheriff, in addition to other duties expressly enumerated in section 4989, *supra*, to perform "all other duties pertaining to the office of sheriff or enjoined upon him by law."

We do not overlook the incidents set forth in the affidavits in behalf of defendant, forming part of the bill of exceptions, and which are in the nature of an attack on the

sheriff. But as to these, in view of the counter affidavits, there appears a fair conflict of the evidence which presented the matters of fact for the determination of the trial court. The trial court considered this evidence and determined the issues involved, and we do not find that error was committed. It is not thought that the mere fact that the sheriff, in the proper performance of the duties of his office, enjoined by statute, in ferreting out crime, in endeavoring to apprehend and arrest all criminals, and in endeavoring to secure evidence of all crimes committed in his county, becomes possessed of information that renders him a material witness, is thereby necessarily disqualified from further performance of the duties of his office. Such official conduct does not necessarily impeach his impartiality, as applied to his performance of official duty in selecting "good and lawful men, having the qualifications of jurors." Besides, in the instant case, the sheriff does not appear in the light of the principal, or the sole, or the prosecuting witness.

In *Policky v. State,* 113 Neb. 858, cited by defendant, the sheriff was not only the prosecuting witness but the principal and only witness against the defendant as to the essentials of the crime charged. Two trials had to juries drawn from regular panels had occurred. The third trial to a jury, selected by the sheriff under the provisions of section 9078, *supra,* resulted in a conviction from which that appeal was prosecuted. Each of the first two trials was followed by a disagreement. In view of the developments in the case, as disclosed by that record, it supported a fair inference that the prosecution had become, in fact, a contest between the sheriff involved and the accused. The case was thus of an exceptional character and contained features wholly absent from the present record.

In *Nelson v. State,* 115 Neb. 26, cited by defendant, the record disclosed, by offers of proof and otherwise, that a charge had been made on behalf of the defendant in his attack upon the jury panel that the officers selecting the

same were members of a society then actually engaged in actively prosecuting the defendant, and had individually contributed money to hire detectives for the purpose of convicting the defendant. As to the charge thus made, the record indicated that the trial court had apparently denied the defendant an opportunity to prove and establish the same. Thus it will be seen that the instant case is not within either the reason of the rule on which the cases cited were based, nor, indeed, within the letter of these opinions, as expressed by this court.

We have carefully considered the assignments of error based upon the rulings of the district court during the *voir dire* examination of the jurors who were impaneled and tried this case. We do not find that any substantial error was committed. This is particularly true as to Clarence Fesler whose evidence is copied in full by the defendant in his brief. It would unduly extend this opinion to set forth the evidence upon which the defendant bases his objections to the competency of this juryman. It must be said, however, that it fairly appears that Fesler knew the prosecutrix and her mother; that the prosecutrix was a close friend of his daughter; that he knew the sheriff, and he had known the county attorney for 15 years; that he had never talked about this case with witnesses or persons who knew the facts; that he had formed no opinion as to the merits of the case; that there was nothing said by any parties interested to him that would make him either for or against the defendant; that he had no feeling of bias or prejudice in the matter. Indeed, his attitude may be set forth and may fairly appear from the following question and answer thereto: "If you were selected as a juror, you think you could carry out the instructions of the court if the court told you, among other things, that the burden was on the state and that there was a presumption of innocence in favor of the man on trial, and that presumption continued as evidence in his favor until he was proved guilty by evidence beyond a reasonable doubt? You would accord to William Noonan

the benefit of every rule of law and presumption of law the judge told you he was entitled to? A. I would."

Giving due consideration to this evidence as an entirety, and having due regard to the personal presence and observation of the trial judge, we cannot say that, in overruling defendant's challenge to this juror for cause, any error was committed by the trial court.

During the course of the trial the defendant, as part of the cross-examination of the prosecutrix, sought to require her to identify photographs of the defendant submitted to her in company with, and as part of, a collection of photographs of young men all of similar build, all dressed in like garments, and of disguise in a like manner. The trial court excluded the proposed cross-examination, and the defendant alleges error, but cites no authorities sustaining his contention. Also, we are unable to find any that are in point. In principle, the rule applied by the trial court was proper. There is no evidence in the record that the identification of the accused by the prosecutrix was in any manner aided by or based upon any photograph. Her evidence in chief in no manner refers to any photograph of the defendant. The identification of the accused by her was based upon a close (save a masking handkerchief) and wholly unobstructed view of the accused in broad daylight, and it necessarily not only involved general build, general appearance of form and features, but also peculiarities of shifting eyes, color of eyes, color and texture of hair, and identity of voice. Many of these elements were necessarily eliminated in the proposed testimony of photograph inspection. The requirement proposed, therefore, was manifestly unfair, and undoubtedly was not proper cross-examination.

It follows that no substantial error appears in the record before us, and the conviction and sentence of the district court is, in all things,

AFFIRMED.

FERL FLANAGAN ET AL. V. STATE OF NEBRASKA.

FILED OCTOBER 19, 1928. No. 26385.

1. **Larceny**: INSTRUCTIONS. Instruction given by the district court on evidential effect of proof of unexplained possession of property, alleged to have been stolen, shortly after the theft thereof, examined and approved.
2. **Criminal Law**: WITNESSES: PRECAUTIONARY INSTRUCTION. The rule announced in *Preuit v. People*, 5 Neb. 377, that, "where informers, detectives, or other persons employed to hunt up testimony against the accused, are called to testify against him, he is entitled to an instruction to the jury that in weighing their testimony greater care should be exercised than in the case of witnesses who are wholly disinterested," will not ordinarily apply to a county attorney, a sheriff or his deputy, or to private persons not detectives or employed as such, but whose acts are prompted solely by consideration of public good, and who are uninfluenced therein by any pecuniary or financial interest in the result of the prosecution then pending or contemplated. *Keezer v. State*, 90 Neb. 238; *McMartin v. State*, 95 Neb. 292, reaffirmed.
3. **Evidence** examined and *held* ample to sustain the conviction of both defendants.

ERROR to the district court for Furnas county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

Edward J. Lambe and *Bartos, Bartos & Placek*, for plaintiffs in error.

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

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

EBERLY, J.

The defendants, Ferl Flanagan and James Burruss, were jointly charged with cattle stealing in the district court for Furnas county, Nebraska. To this charge both entered pleas of "not guilty." A trial of the issues by a jury resulted in a verdict of "guilty as charged." Both defendants were then sentenced to be confined in the state

penitentiary for a term of four years. From this conviction and sentence, each now presents a separate appeal.

The first error assigned in their behalf is that the district court erred in the giving of instruction No. 10 of the instructions given by that court on its own motion. This instruction covers the subject of the evidential effect of proof of unexplained possession of property, alleged to have been stolen, shortly after the theft thereof. It is conceded that the instruction in itself is a correct statement of the abstract principles involved, but it is claimed that it becomes erroneous because inapplicable to the evidence of the record.

It is to be remembered that the issues herein tried and determined were pleas of "not guilty" to an information charging a joint offense. Recent unexplained possession of stolen property described in the information was not only established as against Burruss by the witnesses for the state, but Burruss admits the theft of that property by himself, and admits that, on the night of the crime, he conveyed it out of the state of Nebraska. Though Burruss admitted the commission of the crime, his plea of "not guilty" remained unchanged, and it was essential that the jury convict him, if at all, upon due consideration of all the evidence of the record. As to Burruss, at least, it must be conceded there was ample evidence before the court to justify the giving of the instruction complained of. The instruction complained of was limited, by its terms, as applicable only to such defendant whose unexplained possession of the stolen property was established "by evidence beyond a reasonable doubt." Therefore Flanagan could not have been prejudiced thereby.

The defendants next contend that the district court erred in refusing to give instruction No. 11 requested by the defendants to the effect that—"A person who, at the instance of the authorities interests himself in securing evidence on behalf of the prosecution, or who is sent by the prosecuting authorities to ingratiate himself into the confidence of the accused persons and to secure from them

admissions or confessions of guilt, is to be considered in all respects the same as a detective, and in weighing the testimony of such persons, greater care should be exercised than in the case of entirely disinterested and impartial witnesses because of the natural and unavoidable tendency and bias of the mind of such persons to construe everything as evidence against the accused, and to disregard everything which does not tend to support a preconceived opinion of the matter in which such person is engaged." The record discloses that the witnesses to whose testimony it was sought to apply the instruction requested included the sheriff of Furnas county, a deputy sheriff, the sheriff and county attorney of Wichita county, Kansas, as well as the son and brother of the complaining witness and certain farmers residing in the vicinity where the crime was committed. It was conceded in the argument that none of these parties could be properly classed as "detectives," although the fact that the crime committed had enlisted their active interest must be admitted.

In lieu of the instruction requested, the court, on its own motion, instructed the jury that—"In determining the credibility and weight to be given to the testimony of witnesses, you may take into consideration their interest, if any, in the result of this case, their conduct and demeanor while testifying, their opportunities for seeing and knowing the things about which they testify, and the reasonableness or unreasonableness of their story." Instruction No. 14.

The defendants cite as sustaining their contention *Preuit v. People*, 5 Neb. 377; *Kastner v. State*, 58 Neb. 767; *Sandage v. State*, 61 Neb. 240; *Fruide v. State*, 66 Neb. 244.

It would seem, however, that the witnesses in the present case, to whom it is sought to apply the rule set forth in defendants' instruction No. 11, are neither within the spirit nor letter of this rule, in view of the attitude of this court thereon, as evidenced by its later pronouncements.

In *Keezer v. State*, 90 Neb. 238, involving a situation

similar to what we have in the instant case, Root, J., said: "Counsel for the accused finally complain that the court did not give his requested instruction that the jury should scrutinize with greater care the testimony of witnesses engaged in hunting up evidence than the testimony of the other witnesses. The witnesses to whom this instruction was intended to apply are the county attorney, the sheriff and the deputy sheriff of Cass county. In *Preuit v. People,* 5 Neb. 377, the rule was announced that, 'where informers, detectives, or other persons employed to hunt up testimony against the accused, are called to testify against him, he is entitled to an instruction to the jury that in weighing their testimony greater care should be exercised than in the case of witnesses who are wholly disinterested.' This decision was followed in *Heldt v. State,* 20 Neb. 492, and in *Sandage v. State,* 61 Neb. 240. This is an exception to the general rule that the credibility of witnesses is solely for the jury to determine, and that the court should not attempt to influence the jury by discrediting the testimony of any witness, and does not find universal support in the decisions of other courts, nor in the books written upon this subject. Rapalje, Law of Witnesses, sec. 189; Underhill, Criminal Evidence (2d ed.) sec. 280*a,* and authorities there cited. The county attorney, the sheriff and the deputy sheriff are not spies, informers or detectives dependent upon a conviction for a pecuniary reward, and in the circumstances of this case we shall not extend the rule to include them within its ban." The position thus stated was reaffirmed in *McMartin v. State,* 95 Neb. 292.

It is the duty of good citizenship to uphold the law and aid in its enforcement. To do this the detection and punishment of crimes is a necessary incident. A well-considered public policy would indicate that, in the absence of affirmative evidence of the presence of a pecuniary or financial interest on part of a citizen in, or affected by, the results of a contemplated or pending prosecution, his commendable response to the demands of a public duty in the in-

vestigation of a criminal transaction should not necessarily result in discrediting his evidence in a court of justice. In the cases last cited, it is plainly indicated that it is the announced policy of this court to not extend the scope of the rule under consideration.

We therefore conclude that, in view of the fact that the rule announced in the instruction tendered by defendants and sought to be applied to sheriffs, county attorney, and certain citizens, none of whom were properly within the designation "detective," and as to none of whom does the record disclose any pecuniary or financial interest to be affected by the results of the prosecution, the action of the district court in refusing the same, in view of the instruction given by the court on its own motion, is approved.

It is contended that the evidence is insufficient to sustain the conviction of Flanagan. The theory of the state presented at the trial was that the larceny of the cattle was committed by Burruss and Flanagan. Burruss, though entering a plea of "not guilty," was sworn as a witness, admitted his guilt, and claimed that he acted alone. Flanagan also testified in his own behalf and denied that he had anything to do with the larceny.

It would unduly extend this opinion to set forth in detail the evidence contained in the record, but a careful examination of the evidence of a circumstantial nature produced by the state, and comparing it with the opposing evidence of the interested parties in the litigation, convinces us that the verdict of the jury on this conflicting evidence is amply supported and should not be disturbed on appeal.

We cannot say, as a matter of law, that the circumstantial evidence against Flanagan on the question in issue is so lacking in probative force that the jury should not be permitted to declare that they were convinced beyond a reasonable doubt of the truth of the charge against him. We regard this as true, even though it be considered a case in which reasonable minds, even if trained in law and the determination of questions of fact, might differ upon the

question of reasonable doubt involved. The close association of the two defendants immediately prior to the transaction involved, their relationship, their appearance at the scene of the crime on the day preceding the night the property was stolen, the improbability of the story of Burruss as he related it upon the witness-stand, when viewed in the light of the surrounding circumstances and admitted facts, and especially in the light of his apparent motive in taking the witness-stand as a witness, were such that the jury who heard all witnesses, saw the defendants and observed their demeanor on the witness-stand, were fully justified in determining the issues of fact involved in the manner which their verdict establishes. It follows that the contentions of the defendants on this point cannot be sustained.

The judgment of the district court is

AFFIRMED.

HELEN JOHNSON, APPELLANT, V. EVA KERN ET AL., APPELLEES.

FILED NOVEMBER 7, 1928. No. 26243.

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

Craft, Edgerton & Fraizer, Beeler, Crosbey & Baskins and *J. P. Voorhees*, for appellant.

H. M. Sullivan, T. F. Hamer and *Halligan, Beatty & Halligan, contra.*

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

PER CURIAM.

Affirmed on authority of *Peterson v. Bauer*, 83 Neb. 405, and *Wiseman v. Guernsey*, 107 Neb. 647.

It appears from the evidence, as an entirety, that neither the articles of adoption nor the contract upon which

plaintiff relies as the foundation of her cause of action was established by proof clear, convincing and satisfactory.

AFFIRMED.

The following opinion on motion for rehearing was filed April 19, 1929. *Judgment affirmed.*

Evidence *held* to support denial of plaintiff's petition.

Heard before GOSS, C. J., GOOD, THOMPSON, EBERLY and DAY, JJ., and HASTINGS and REDICK, District Judges.

EBERLY, J.

Action in equity for a specific performance of an alleged verbal contract by Marinda Hovey, also known as Minnie Kern, that she "would adopt plaintiff as her own child," giving to plaintiff all the rights of inheritance by law, and that plaintiff as the adopted child of Marinda Hovey "should inherit the property of said Marinda Hovey, the same as if she were the daughter of the blood of said Marinda Hovey," and that certain real estate described be decreed to be held in trust for plaintiff on account of such agreement. Defendants joined issue. Trial to the court resulted in a general finding and certain special findings against plaintiff, including a finding that there was no "agreement or obligation on the part of the said Marinda Hovey to, in any manner whatsoever, convey or leave to the plaintiff any portion of the property of which said Marinda Hovey died seised," and that no agreement of any kind, either verbal or written, was established to have ever been made between said Marinda Hovey and any other persons, by which the said Marinda Hovey obligated herself to convey to plaintiff any portion of her estate. From this judgment plaintiff appeals.

At a former hearing by this court a judgment of affirmance was entered. *Johnson v. Kern, ante,* p. 536.

Argument was allowed on a motion for rehearing and we have been favored by additional brief and additional oral argument.

The direct evidence of plaintiff's mother in the record

is to the effect that, on a date not fixed, Marinda Hovey, then ordinarily known as Minnie Kern, in a house of prostitution in Sioux City, Iowa, wherein the mother, Maude McCauley, was then an inmate, and in which the plaintiff, then a little child, was kept, and of which Marinda Hovey was then the proprietress, orally agreed with the plaintiff's mother that plaintiff, then a child of three or more years, should be adopted by her, Marinda Hovey, given a good education, and should be made Marinda Hovey's sole heir; that the next morning in this house of prostitution in the presence of Mrs. Thurston, then the police matron of Sioux City, Iowa, this conversation was repeated in substance, and the plaintiff's mother and Marinda Hovey mutually executed "adoption papers" which Mrs. Thurston had prepared and brought with her; that the mother of plaintiff signed these documents, according to her testimony, without reading the same, but evidently assuming that they were made in accordance with the oral understanding.

These adoption papers, if actually made, were never recorded and there is no evidence in the record which discloses in any manner the terms which these papers actually contained.

The evidence of the mother is also in effect positive and without qualification that all negotiations and conversations between the plaintiff's mother and Marinda Hovey on the subject of the adoption, including the execution of the final and only papers of adoption, took place at one or more of the following places, viz., at the depot in Sioux City, Iowa, and in a "taxi" *en route* to 301 Pearl street on the night of plaintiff's first arrival at Sioux City, or at 301 Pearl street, the house of prostitution, during a few days immediately following plaintiff's first arrival. The testimony of this witness emphasizes the statement of her reluctance to give up her child and of the sudden evident infatuation of Marinda Hovey for plaintiff and her insistence that plaintiff's mother relinquish her offspring to this proprietress of the house of illfame.

Thus, we have a right claim based on negotiations as-

serted to have been had at a certain though, as to exact date, an indefinite time, and at a certain place, with definite parties present, inspired by particular motives, and for the accomplishment of a definite purpose.

The record contains other evidence offered in behalf of plaintiff, some of which corroborates in part the testimony of the mother of the plaintiff and much of which conflicts at least in material portions with this evidence, in the important particulars of place, motives, purpose and substance.

The evidence in behalf of the defendants, both direct and circumstantial, if believed, fairly tends to refute and is certainly wholly inconsistent with the claims of the plaintiff and with the statements of her witnesses.

In addition to this conflicting evidence there were probate proceedings had in the estate of Marinda Hovey, after the latter's death in the spring of 1904, and also proceedings had in the district court for Woodbury county, at Sioux City, Iowa, relative to the appointment of a guardian for plaintiff immediately following Marinda Hovey's death. Marinda Hovey, at the time of her decease, owned and possessed real and personal estate situated in Woodbury county, Iowa, which plaintiff now claims was then of the value of $50,000 or $60,000. Her husband, Edward C. Hovey, was, upon his own petition, duly appointed administrator of this estate by the district court for Woodbury county, Iowa, and administration was had therein as provided for by the laws of Iowa. In due time the proceedings were completed and Edward C. Hovey, as administrator, filed his final report, which was subscribed by him and sworn to before Joseph W. Hallam, notary public, and which was duly approved by the district court for Woodbury county, Iowa, on April 22, 1905. This final report contains these allegations, among others:

"That the only heirs at law of said Marinda Hovey, deceased, are this administrator (Edward C. Hovey), who was her husband, and Wm. Kern and Marinda Kern, his

wife, who are the father and mother of the said Marinda Hovey, deceased, there being no other heirs.

"That the above named heirs have all agreed among themselves as to the disposition of the proceeds of said estate and the taxes upon the real property have been paid.

"That the personal property has been disposed of and either converted into money or divided among the heirs as agreed to by them, and most of the real estate has been sold under such agreement, and that which has not been sold will be held by said heirs in common, as provided by law."

It appears from the public records of the recorder's office of Woodbury county, Iowa, that the real estate thus inherited by Edward C. Hovey and William Kern and his wife was in 1904 and 1905 conveyed and transferred by warranty deeds. Some of these conveyances were made to third parties, William Kern and wife and Edward C. Hovey, as widower, joining as grantors. At least one of these warranty deeds was a conveyance of an undivided one-half interest in certain real estate described therein made by William Kern and wife to Edward C. Hovey. This deed was executed and acknowledged in the presence of Joseph W. Hallam, as notary public. In the guardianship proceedings the petition signed and sworn to by William Kern before the same Joseph W. Hallam, notary public, on the 20th day of April, 1904, sets forth that "Agnes McCauley" has been abandoned by her parents who are nonresidents of Iowa, and is now in the care and custody of plaintiff, and that "your petitioner states that said minor has no property." The bond given was in the sum of $200 and executed by William Kern and Edward C. Hovey. Under the date of April 22, 1905, there appears a report signed and sworn to by William Kern before Joseph W. Hallam, notary public, which was filed in said proceedings, and avers that "said Agnes McCauley has no property of any kind whatever." Edward C. Hovey was killed in a railway accident May, 1913. Joseph W.

Hallam or J. W. Hallam, as his name also appears, was the personal attorney of Marinda Hovey, and shortly before her death had been consulted and retained by her to bring a divorce action, and from the evidence presumably was well acquainted with her affairs.

It also appears, as admitted in the record, that William Kern, Sr., purchased the Nebraska 800-acre ranch in 1905, paying $6,000 in cash and assuming a mortgage of $2,000, taking the title in his own name. The evidence of the defendants is to the effect that William Kern, Sr., made a preliminary payment of $100 with the purpose of having his sons examine the land thus purchased before completing the transaction. The oral understanding between the father and sons at that time was that, if the land suited the sons, the sons were to break out the sod, farm and cultivate it, make necessary improvements thereon, and pay a share of the income to the father during his lifetime, and, upon his death, should become each the owner of his own share therein.

Without unduly extending this opinion by recital of the evidence, it may be said that the evidence of the defendants, if believed, fairly establishes the making of this oral agreement and substantially complies with the same; thus, for example, in addition to labor performed, Richard Kern, a son of William Kern, Sr., testified that he expended $1,800 in cash in improvements made by him on this land; and, also, the testimony of William Kern, Jr., another son, is that he contributed over $2,000 for the same purpose.

On October 24, 1912, William Kern executed his last will devising the 800-acre ranch, subject to a life estate in his wife, to his children as therein provided. He died October 26, 1912, and during the same year this will was duly admitted to probate.

It also appears that the children of William Kern at the request of their mother conveyed their distributive shares received under that instrument in the real estate of their mother, Marinda Kern. The mother then departed this life at Calloway, Nebraska, on June 27, 1925, leav-

ing a last will and testament bearing date November 10, 1923, which in effect devised the land in controversy to her children, "share and share alike, as tenants in common."

This will of Marinda Kern was duly admitted to probate on the 23d day of July, 1925. The devisees in the will last named constitute the defendants in this case. Plaintiff asserts as against them that the share in the estate of Marinda Hovey to which she was entitled under the terms of the parol agreement before referred to was unlawfully appropriated and converted into money by William Kern, Sr., and his wife, and invested in the real estate in controversy, which constituted, in view of the source of the money invested therein, a trust property to which she is entitled.

It is admitted on behalf of the plaintiff that the adoption papers which were claimed to have been executed for her benefit cannot be produced and were never recorded. It is also to be noted that all of the events referred to in the record relating to the alleged adoption and the oral agreement pursuant to which it was made took place in Iowa; this contract, if ever made, was thus made in Iowa, to be performed in that state, and then related to property which had its situs wholly within the state of Iowa. It is quite obvious therefore that the laws of Iowa are controlling as to all questions of substantive law presented by the record before us, and it may also be said that due proof of the laws of Iowa pertaining to this subject appears in this record.

It further appears that the provisions of the Iowa statute applicable to many of the questions here discussed have been lately construed by the supreme court of that state in *Morris v. Trotter*, 202 Ia. 232. In that case it is said:

"Adoption is statutory. It is not known to the common law. By section 10500, Code of 1924, it is only upon the execution, acknowledgment, and *filing for record of an instrument in writing*, conforming to certain requirements of the preceding sections, that the rights between parent

and child by adoption, including the right of inheritance, shall be the same as between the parents and a child born in lawful wedlock. *Long v. Hewitt,* 44 Ia. 363; *Tyler v. Reynolds,* 53 Ia. 146; *Gill v. Sullivan,* 55 Ia. 341; *Shearer v. Weaver,* 56 Ia. 578; *Bresser v. Saarman,* 112 Ia. 720; *In re Estate of Lamb v. Morrow,* 140 Ia. 89; *Riley v. McKinney,* 167 Ia. 508; *Horner v. Maxwell,* 171 Ia. 660; *Webb v. McIntosh,* 178 Ia. 156; *Young v. McClannahan,* 187 Ia. 1184. See, also, *In re Estate of Taggart,* 190 Cal. 493, 27 A. L. R. 1360; *Fiske v. Lawton,* 124 Minn. 85; *Hood v. McGehee,* 189 Fed. 205."

"In *Webb v. McIntosh, supra,* we said: 'This did not become effective as an adoption, because of the articles being signed by the mayor of an incorporated town, instead of the clerk of courts, as then exacted by section 3251 of the Code; and, as the instrument purports to confer no rights upon the child save as a consequence of her adoption, she is not entitled to specific performance. In other words, the courts will not enforce specific performance of an agreement to adopt. That can only be effected by compliance with the statutes of the state.' The principle so announced is controlling here."

And in the same case that court also declared: "While we have frequently held that adoption may not be accomplished save by an observance of statutory requirements, we have also held that the right to property may be acquired under contractual provisions of a writing that falls short of a statutory instrument of adoption, or even under a parol contract, clearly established, where there had been part performance. *Chehak v. Battles,* 133 Ia. 107; *Stiles v. Breed,* 151 Ia. 86; *Anderson v. Blakesly,* 155 Ia. 430; *Young v. McClannahan,* 187 Ia. 1184; *Daily v. Minnick,* 117 Ia. 563."

It is to be remembered that the evidence offered by plaintiff wholly fails to disclose the terms of the adoption papers which plaintiff claims were executed, and it is conceded that they were never recorded as provided by the Iowa statute. It follows therefore, even if adoption pa-

pers were actually executed as claimed by plaintiff, that fact alone affords her no basis of relief.

On this subject the supreme court of Iowa has further declared the law of that jurisdiction to be that nothing in the chapter relating to adoption requires that anything shall be stated in the adoption papers provided for concerning property rights; that if the instrument of adoption be prepared in strict conformity with the statute, with a view to recording, and with the sole object of effecting adoption, it is not to be considered a contract within the meaning of the term, but rather to be regarded as a compliance in form with statutory provisions. Nor do these statutes undertake to authorize and regulate contracts. They are intended rather to give the right of inheritance which does not arise from contract but from law. *Jordan v. Abney,* 97 Tex. 296. In the instant case, owing to the failure to record, the purpose of executing the instrument was thereby defeated and it rendered nugatory. In view of the fact that the regulation of property rights forms no necessary part of its purpose, the instrument of adoption cannot be specifically enforced when not recorded as required by section 3252 of the Iowa Code. *Webb v. McIntosh,* 178 Ia. 156.

In view of this situation we are relegated in the consideration of this case to the sole controlling question of whether or not the evidence in the record establishes as a fact that plaintiff has "acquired rights of property" under a parol contract, clearly established, and of which there had been a part performance, without reference to and wholly uninfluenced by the alleged execution of adoption papers. The trial court, upon due consideration of the testimony contained in the record, much of which was given before it by witnesses in person held: "That no agreement of any kind either verbal or written in form is shown by the evidence to have ever been made between said Marinda Hovey and any other person by which the said Marinda Hovey obligated herself to convey to the plaintiff any portion of her estate."

A careful consideration of all the evidence in the record convinces us that in its finding the trial court is right, and that the plaintiff has wholly failed to clearly establish the existence of a parol contract upon which she relies, and that the action of the trial court in dismissing her petition should be affirmed. In arriving at this conclusion we have not overlooked the evidence offered by the plaintiff as to the claimed oral statements of William Kern, Sr., as to the source of the money invested by him in the lands in suit and as to the alleged rights of plaintiff therein. It may be conceded that the general rule is that declarations by a party in disparagement of his title to property of which he is then in possession claiming to be the owner or otherwise interested therein are competent evidence, but it is also true that "the weight to be given to evidence of admissions may depend upon various matters affecting its accuracy; as, for example, the liability to mistake what has been said, resulting either from the frailty of human memory, the natural inability to detail what has been said by another precisely as it was said, and the liability to purposely distort, color or mistake what was said," and, "consequently the rule is that evidence of admissions, particularly mere verbal admissions, should be received with caution." 1 Ency. of Evidence, pp. 610, 611; 22 C. J. 289, sec. 318.

Particularly is this true when the declaration testified to is sought to be applied or used in the establishment of a controverted fact as to which it affirmatively appears that the declarant has no personal knowledge. In the instant case the declarations of William Kern, Sr., as testified to by plaintiff's witnesses, are sought to be used as the basis of an inference that the transactions between Marinda Hovey and plaintiff's mother were as testified to by the latter; yet the evidence of plaintiff's mother wholly fails to disclose the presence of William Kern, Sr., at the time and place of the transactions referred to in her testimony; and in no manner connects this declarant with such transactions, and, in fact, the evidence as an entirety

substantially negatives his presence thereat. While these declarations thus testified to are, in view of the declarant's relation to the title involved, admissible in evidence, and might indeed be worthy of serious consideration on the subject of the identification of the funds invested in the Lincoln county land, as funds derived from property inherited by the declarant from Marinda Hovey's estate, that, if true, being a fact which would reasonably be within his personal knowledge, they would seem to be entitled to but little weight so far as tending to establish the actual existence of the parol contract of adoption, as testified to by plaintiff's mother. For it is certain that as to the last named transaction the declarant was not present and could have no personal knowledge thereof whatever, and, in fact, as to which he would not be even a competent witness.

But there is a further and additional element involved in this question. William Kern, Sr., the alleged source of most, if not all, of the admissions upon which plaintiff relies to sustain her case had been dead 15 years at the time of this trial in the district court, and almost 10 years had elapsed since the plaintiff had attained her majority and had been fully advised of the facts of the situation. No concealment in the matter by William Kern, Sr., is claimed. "Courts of justice lend a very unwilling ear to statements of what dead men have said." *Lea v. Polk County Copper Co.*, 21 How. (U. S.) 493. "Unsupported testimony of a single person as to a conversation between himself and a deceased person is regarded as the weakest of all kinds of evidence." *Lippert v. Pacific Sugar Corporation*, 33 Cal. App. 198. Where statements were made in loose, casual or random conversation the supreme court of Iowa has announced the conclusion that: "No species of testimony is more dangerous, or received with greater caution." *Cooper v. Skeel*, 14 Ia. 578, 581. As applicable to the subject of proof of admissions of declarants, Corpus Juris, after a discussion of the obvious weakness of this class of testimony, in general, continues as follows: "Ex-

posed to all the infirmities just mentioned and to the further objection that it is impossible, in most cases, to convict the witness of perjury if his testimony is wilfully false, testimony as to the oral statements of deceased persons is therefore regarded as the weakest kind of evidence and subjected to the closest scrutiny." 22 C. J. 291, sec. 319. In principle our own authorities are in substantial accord with the rule thus expressed. *Overlander v. Ware,* 102 Neb. 216; *Williams v. Miles,* 68 Neb. 463; *Clark v. Turner,* 50 Neb. 290.

In this connection the following circumstances have been judicially noticed as tending to impair the credibility of testimony to oral declarations and admissions: That the alleged testimony is inconsistent with the true facts in the case; that the statement is not in harmony with the conduct of the witness or of the declarant; that the witness was not interested in the subject-matter of the conversation and had no reason for giving special attention to it; that the alleged statement was made in the presence of witness alone; that the statement was made many years before, and that the witness is of bad and doubtful character. 22 C. J. 292, sec. 321.

A careful examination of the record in this case justifies the conclusion that it is quite apparent that one or more of the circumstances above enumerated are found in connection with each item of testimony with reference to the "admissions" of William Kern, Sr., upon which the plaintiff relies in this case. Especially is it true that as to each of these admissions it must be conceded that they are utterly inconsistent and out of harmony with the life history of this deceased as preserved in numerous written records embracing many transactions occurring at widely separated intervals and in varied connections.

Therefore, considering the case a trial *de novo* and giving due attention to all the direct evidence and the facts and circumstances appearing in the record, we are impressed with the thought that plaintiff has failed to substantiate her claim as to the making of the alleged parol

contract between plaintiff's mother and Marinda Hovey, upon which plaintiff's rights must be based; nor can her cause of action, in view of the circumstances detailed in the evidence, be sustained by the admissions of William Kern, Sr., and others upon which the plaintiff relies.

It follows that this court is in full accord with the judgment of the district court denying plaintiff relief and directing the dismissal of her petition, which action is therefore hereby

AFFIRMED.

HASTINGS, District Judge, dissents.

EDWARD A. BECK V. STATE OF NEBRASKA.

FILED NOVEMBER 7, 1928. No. 26425.

ERROR to the district court for Adams county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed as modified.*

J. E. Willits, for plaintiff in error.

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

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

PER CURIAM.

Plaintiff in error, hereinafter designated as defendant, was convicted in the district court for Adams county of unlawful possession of intoxicating liquor, and sentence imposed ordering him confined in the county jail for a period of 60 days. He prosecutes error, and assigns as reasons for reversal, among others, that the judgment is not supported by the evidence, and, further, that the sentence is excessive.

From an examination of the record, we are convinced that the evidence is sufficient to support the verdict of the jury. However, under the peculiar circumstances of this case, we feel that the judgment sentencing defendant to confinement in the county jail for a period of 60 days is

excessive, and that the ends of justice will be subserved by the imposition of a fine.

It is therefore considered by this court that the defendant, Edward A. Beck, pay a fine of $100 and costs of suit, and stand committed and be imprisoned in the county jail of Adams county until such fine and costs are paid. As thus modified, the judgment of the trial court is affirmed.

AFFIRMED AS MODIFIED.

MAX M. OPPFELT V. STATE OF NEBRASKA.

FILED NOVEMBER 7, 1928. No. 26574.

Recognizance: INVALIDITY. A recognizance given to effect an appeal by a defendant, who has been convicted of a misdemeanor in the county court, which is conditioned for his appearance "at the next term of the district court," and which fails to require the defendant to abide the judgment of the district court and not depart therefrom without leave, as required by chapter 113, Laws 1923, is invalid and confers no jurisdiction on the district court.

ERROR to the district court for York county: LOVEL S. HASTINGS, JUDGE. *Affirmed.*

A. P. Sprague, for plaintiff in error.

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

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

PER CURIAM.

Plaintiff in error was convicted in the county court of a violation of the liquor statute. He attempted to appeal to the district court and gave a recognizance, conditioned to appear "at the next term of the district court," but the recognizance did not require him to abide the judgment of the district court and not depart therefrom without leave, as required by chapter 113, Laws 1923. The dis-

trict court dismissed the appeal because of the insufficiency of the recognizance, and defendant brings error to this court.

The record brings the case within the rule announced in *Killian v. State,* 114 Neb. 4, as follows: "A recognizance, given to effect an appeal by a defendant who has been convicted of a misdemeanor in the county court, and which is conditioned for his appearance at the district court on the first day of the next term, instead of forthwith, as the statute requires, is invalid and confers no jurisdiction on the district court."

Counsel for plaintiff in error rely upon *Abbott v. State, ante,* p. 350, wherein it was held: "Where a defendant in a criminal case gave an appeal bond conditioned for his appearance on the first day of the next term of the district court instead of forthwith, but the first day of the next term was the first day upon which the district court sat, and was the first opportunity given defendant for such appearance, and he did appear upon said date without objection being made thereto until after seven terms of court had intervened, *held,* upon objection made to jurisdiction of district court on the ground of invalidity of the bond, that said bond was a substantial compliance with the requirements of section 9999, Comp. St. 1922, as amended by chapter 113, Laws 1923."

The record does not show that the instant case comes within the rule above announced. There the recognizance was conditioned for defendant's appearance on the first day of the next term of the district court, which was, in fact, the first day on which he could appear. It was therefore equivalent to requiring him to appear "forthwith." In the present case, the recognizance was not for appearance on the first day of the next term of court, but for his appearance *at the next term,* which might be at any time during the term. Moreover, he failed to comply with the statute requiring him to abide the judgment of the district court and not depart therefrom without leave, as required by chapter 113, Laws 1923.

The district court did not err in dismissing the appeal. The judgment is

AFFIRMED.

IN RE ESTATE OF L. A. HANSEN.
J. A. BALLANTYNE ET AL., APPELLEES, V. THOMAS A. HANSEN ET AL., APPELLANTS.

FILED NOVEMBER 7, 1928. No. 26063.

1. Appeal: EXECUTOR'S ACCOUNT: FINAL ORDER. An order of the county court approving items of the accounts of an executor will not be regarded as final, if at the same time it does not discharge the executor but requires of him further collections and a further report and continues the proceedings to a future date for a further decree upon the filing of such supplemental report.
2. ———: OBJECTION TO JURISDICTION. An objection to the jurisdiction over the subject-matter may be raised at any stage of the proceedings. It may be raised for the first time on appeal.

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

Lyle E. Jackson, Williams & Kryger and *J. A. Donohoe*, for appellants.

Mapes, McDuffee & Mapes, contra.

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

GOSS, C. J.

This is an appeal by the executors from a judgment of the district court. The cause had been appealed by certain creditors of the estate from the county court to the district court. The executors had ineffectually moved in the district court to dismiss the appeal from the county court. The matters in controversy were thereupon tried on the merits. On appeal here they were so argued, but

the executors also raised the question of the jurisdiction of the district court to consider the appeal. They base their objection to the jurisdiction on the ground that the order of the county court was not a final order and was not appealable.

We think it unnecessary to state the facts further save as they serve to illuminate the making of the order in the county court.

An order barring claims was entered October 14, 1922. On June 5, 1923, the executors filed a detailed report of the receipts and expenditures to that date, showing, among other things, the payment of interest on mortgages on real estate, the payment of taxes, and payments made to the widow on account of her allowance. On November 23, 1925, the executors filed another report of their receipts and disbursements and petitioned the county court for a final settlement. This was set for hearing on December 21 and notice thereof was published. J. A. Ballantyne and Security Bank of Meadow Grove filed detailed objections to the report of the executors, as did also the Tilden National Bank, challenging expenditures of certain items shown in the report. Issues were joined by a reply to the objections filed by the executors. The matter was not tried by the county court until the 21st day of February, 1926, was taken under advisement by the court until the 19th of March following, whereupon the county court made the journal entry (under consideration here) with detailed findings of fact as to the contested items, and then concluded with an order relating to the estate. This order is particularly important in the consideration of the case now before us. The entire order portion in the journal entry last above referred to is as follows:

"It is therefore considered, ordered and adjudged that this estate be not closed until certain supplemental proceedings be had as follows, to wit: First, that the executors collect from Horace Marshall the sum of $247.00, and, if necessary, shall commence suit in the district court of Antelope county, Nebraska, to recover the same. Second, they shall

upon ten days' notice, by posting five typewritten notices in the City of O'Neill, Nebraska, sell at public auction at O'Neill, Nebraska, the said Oakland Sedan and report the same to this court. Third, that they shall account for and pay into the estate's funds the sum of $44.25, costs in the district court proceedings; that subject to the above modifications the report of the executors is hereby approved; and this estate proceeding is continued to the 26th day of May, 1926, at 10 o'clock a. m. for further decree after receiving the supplemental report herein required of said executors."

It is not deemed advisable to discuss the particular items of the accounts of the executors which were revised by the district court because of the question of jurisdiction of the district court to hear the appeal from the county court. This question, if not raised by the motion to dismiss the appeal from the county court, was raised in the brief and argument of appellants here. This suggests a consideration of our statutes relating to reviews and final orders.

Section 1471, Comp. St. 1922, 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."

Section 9127, Comp. St. 1922, says: "A judgment rendered, or final order made, by a county court, justice of the peace or any other tribunal, board or officer exercising judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated or modified by the district court."

Section 9128 defines a final order in the following words: "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in

an action after judgment, is a 'final order' which may be vacated, modified or reversed, as provided in this chapter and chapter 19."

In *In re Estate of Wilson*, 97 Neb. 780, it was held: "Orders of the probate court adjusting or correcting accounts of an administrator, made while he is acting as such administrator, are interlocutory and not final until his discharge as administrator and final settlement of his accounts upon such discharge." In the course of that opinion this language was used: "We have observed no final order of the court discharging the administrator, and while he was serving as administrator orders of the court upon his accounts as such administrator were interlocutory only and not final orders. *Bachelor v. Schmela*, 49 Neb. 37. The county court, therefore, had complete jurisdiction over the accounts of the administrator until his final discharge." Later a rehearing was ordered in that case and the opinion thereon is found in 98 Neb. 852. The case was reaffirmed as modified, the modification being unimportant here. The syllabus says: "Although notice has been given of final settlement of an estate in probate, and orders are made thereon determining the heirs and fixing their interests and adjusting certain uncontested items of the administrator's account, orders so adjusting items of the account will not be regarded as final, if the administrator is not discharged, and additional collections and disbursements by him are required and a further report necessary."

An inspection of the whole journal entry from the county court in the case before us shows that it contains no findings of heirship and no determination of matters usually decreed on the settlement of final account and distribution of an estate, but that it deals entirely with the accounts theretofore filed, the items thereof and the objections of the creditors named. That part of the entry which we have quoted as containing all of the order and judgment shows on its face that the executors are required yet to do

certain specified things in the way of selling personal property, bringing a suit, if necessary, against one of the creditors who was erroneously overpaid, and by themselves paying into the estate a certain item of costs. The order expressly continues the proceedings to a later date for further decree. It is true that it provides "that subject to the above modifications the report of the executors is hereby approved" but that does not make the order final, for the reason that, so long as the county court retained jurisdiction and held the estate open for further decree, the order approving the report of the executors was subject to change and modification. The order in no sense meets the requirements of the statutes and of *In re Estate of Wilson,* 98 Neb. 852. It was interlocutory and, to paraphrase the language in the case just cited, the county court, therefore, had complete jurisdiction over the accounts of the executors until the court should make an order for their final discharge. It follows that, if the county court had complete jurisdiction over these accounts, the order appealed from was interlocutory and the district court did not obtain jurisdiction of the appeal.

As applied to the history of the instant case, we may state the rule to be that an order of the county court approving items of the accounts of an executor will not be regarded as final, if at the same time it does not discharge the executor but requires of him further collections and a further report and continues the proceedings to a future date for a further decree upon the filing of such supplemental report.

It may be claimed by the appellees here that the motion to dismiss the appeal in the district court was ineptly framed to cover that point. Even assuming that to be true, it may be stated as fundamental that, where a judicial tribunal has no jurisdiction of the subject-matter, its proceedings are void. An objection to the jurisdiction over the subject-matter may be raised at any stage of the proceedings. It may be raised for the first time on appeal.

7 R. C. L. 1042. The jurisdiction of the district court over the suject-matter could arise only on appeal from a final order in the county court. Under the statutes and our holdings the order sought to be appealed from was not a final order. The district court had no jurisdiction to consider the merits and should have declined so to do. Its review of the action of the county court and its judgment in the premises was void.

The judgment of the district court is reversed, with instructions to dismiss the appeal from the county court and to require such dismissal to be certified to the county court.

REVERSED.

BURTON GORTON V. STATE OF NEBRASKA.

FILED NOVEMBER 7, 1928. No. 26314.

1. **Indictment**: EMBEZZLEMENT: TIME. Time is not necessarily an element of embezzlement and may not affect the proceedings in a prosecution for that offense, though the exact date on which it was committed is inaccurately stated in the information.
2. **Embezzlement**: SUFFICIENCY OF EVIDENCE. Under a charge of embezzlement on a day named, evidence of a continuous series of accused's previous conversions in different amounts at different times may support a verdict for the aggregate sum as a single embezzlement.
3. ———: VARIANCE. Under an information charging the embezzlement of a specific sum of money at various times between two dates named, checks by which accused procured such money may be admissible in evidence, though a bill of particulars furnished by the prosecution gave the date of each check as the date of a conversion in the series instead of a subsequent date on which the money was received and converted, there being no material variance between the bill of particulars and the proofs in that respect.
4. **Criminal Law**: MOTION FOR NONSUIT. Where competent evidence is sufficient to sustain a conviction in a criminal prosecution, an order overruling a motion for an involuntary nonsuit is not erroneous.
5. **Embezzlement**: CHECKS: ADMISSIBILITY. Checks may be ad-

missible in evidence in connection with other proof that accused used them to procure money he was charged with embezzling.

6. ———: INSTRUCTIONS. Where instructions as a whole make "felonious intent" essential to a conviction under a proper charge of embezzlement, a single instruction is not necessarily erroneous to the prejudice of accused merely because "fraudulently converted" is used in a single instance instead of the former expression.

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

D. W. Livingston, John M. Dierks and *A. P. Moran,* for plaintiff in error.

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

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

ROSE, J.

In a prosecution by the state in the district court for Otoe county, Burton Gorton, defendant, was accused of embezzling at various times from August 1, 1924, to April 4, 1927, $54,926.52 belonging to the Dunbar Grain Company, a corporation of which he was manager. Upon a motion by defendant the state was required by the court to furnish a bill of particulars showing separately the items aggregating the amount of the embezzlement charged and the date of each item. The county attorney furnished a list of 88 items amounting to $54,926.52 and varying in amounts from $11.65 to $5,614.72, with dates beginning August 27, 1924, and ending March 23, 1927. When arraigned defendant pleaded not guilty. Upon a trial of the case the jury rendered a verdict of guilty as charged in the information and fixed the amount of the embezzlement at $1,900. A motion for a new trial was overruled and the district court imposed a sentence requiring defendant to serve a term of not less than one year nor more than two years in the state

penitentiary. As plaintiff in error defendant has presented for review the record of his conviction.

The principal argument of defendant is directed to the proposition that there was error in the overruling of a motion to direct an involuntary nonsuit on the ground that the evidence, when confined to the bill of particulars, was insufficient to sustain a verdict of guilty. In discussing this point defendant invokes the rule of law that competent proof of a felony is limited to the alleged unlawful acts specified in the bill of particulars furnished by the prosecution. He earnestly insists that the proofs of embezzlement, if any, do not correspond to the items enumerated in the bill of particulars. The evidence was sufficient to justify the jury in finding the following facts beyond a reasonable doubt:

The Dunbar Grain Company was a corporation engaged in buying and selling grain and in operating an elevator at Dunbar. From the beginning defendant was the manager. In that capacity he had charge of the corporate business and property. He was authorized to buy grain from farmers in the vicinity of the elevator and to store, sell and deliver it. It was his duty to check against the account of the Dunbar Grain Company in the Dunbar State Bank in paying for grain purchased at the elevator. It was also his duty to keep books of accounts showing the corporate transactions of his principal. Occupying the Dunbar Grain Company's office in the elevator, he was engaged in the duties of manager until the board of directors met to consider the condition of affairs April 6, 1927. At short intervals from August 27, 1924, until March 23, 1927, defendant drew checks against the account of his principal in the Dunbar State Bank and used the proceeds to speculate in options on the board of trade through the Duff Grain Company of Nebraska City, a corporation with which he kept an account in his own name. Neither the Dunbar Grain Company nor its board of directors authorized the use of corporate funds for the purpose of dealing in options

on the board of trade. They did not know that defendant as manager had used money of the corporation for that purpose until he called them together and disclosed the facts April 6, 1927. The money so used was taken by defendant without their consent. There was abundant evidence of the facts narrated.

It was in the situation outlined that the county attorney filed the information accusing defendant of embezzling $54,926.52 on various dates beginning August 27, 1924, and ending March 23, 1927. The items in the bill of particulars correspond generally to the amounts and dates of the checks through which defendant procured the money of his principal and used it on the board of trade. Most of such checks were drawn on the Dunbar State Bank against the account of the Dunbar Grain Company. They were payable to the Duff Grain Company and the drawer was the Dunbar Grain Company, by Burton Gorton, manager. The checks were indorsed by the Duff Grain Company, credited by it to the personal account of defendant and subsequently marked "paid." In most instances a check was cashed on the day following its date or a little later. Over objections the checks were admitted in evidence.

The contention of defendant seems to be that a particular act of embezzlement, if committed, did not occur before the proceeds of the corresponding check were credited to his personal account with the Duff Grain Company—a date subsequent to that of the check as stated in the bill of particulars. Reasoning from that premise he argues that the check was not admissible in evidence because, as he contends, it was outside of, and did not correspond to, any item in the bill of particulars. The position thus taken is untenable.

Time is not necessarily an element of embezzlement and may not affect the proceedings in a prosecution for that offense, though the date is imperfectly stated in the complaint. Comp. St. 1922, sec. 10074; *Rema v. State,* 52 Neb. 375. In both the information and the bill of particu-

lars the date of the last act of conversion is shown. Under a charge of embezzlement on a day named, evidence of a continuous series of accused's previous conversions in different amounts may support a verdict for the aggregate sum as a single embezzlement. *Bolln v. State,* 51 Neb. 581; *Chamberlain v. State,* 80 Neb. 812. The first step in each act of embezzlement in the series charged was the issuance of a check and its date was correctly stated in the bill of particulars. Defendant was thus advised in advance of his initial move in each particular transaction involved in the entire charge against him. All the checks were drawn by him in the name of his principal. The entries showing their issuance were made by him in the accounts of the Dunbar Grain Company. The bill of particulars identified his first step in each felonious transaction by giving the date of the check instead of the date on which it was cashed—a day or so later. Defendant, therefore, was not without notice of the charge to be met by him, nor was he misled or prejudiced in his defense by the bill of particulars. There was no material variance between the date of the check and the date of the completed act of embezzlement as charged and as shown by the evidence. Proved items in the bill of particulars far exceed in amount the verdict of the jury. The checks were the means by which defendant procured from the Dunbar Grain Company the money found by the jury, upon sufficient competent evidence, to have been embezzled. The checks were admissible also to show the manner in which defendant transacted the business of his principal. *Chamberlain v. State,* 80 Neb. 812. In addition, the record contains evidence that defendant voluntarily admitted he "played the board of trade" through the Duff Grain Company and that he was short in his corporate accounts about $14,000 when deposed as manager. The checks were properly admitted in evidence and the trial court did not err in overruling the motion by defendant to direct a verdict in his favor.

In further argument defendant also advanced the proposition that the charge of embezzling money cannot be

proved by evidence that checks were embezzled. In this particular there was no variance between the information and the proofs. The embezzlement of checks was not in issue. It is well-settled criminal law that checks may be admissible in evidence in connection with other proof that accused used them to procure money he was charged with embezzling. That defendant thus procured money from his principal and embezzled it is shown beyond a reasonable doubt as found by the jury. The point is not well taken.

Other assignments of error are based on the proposition that the trial court erred in giving instructions in a form that permitted the jury to return a verdict of guilty without finding the "felonious intent" essential to a conviction for embezzlement. The specific point is that the term "fraudulently converted" was used instead of "felonious intent." The trial court first instructed the jury that the information contained the charge that defendant "did unlawfully and feloniously and fraudulently take, embezzle, make way with and convert to his own use" the money of the Dunbar Grain Company, stating the amount. In the later instruction criticised the term "fraudulently converted," as applied to the money taken, was supplemented or modified by the clause "as charged in the information." Felonious intent was inferable from circumstances, from evidence of irregularities in the accounts kept by defendant, from his taking and converting to his own use money of his principal, and from his attitude upon the disclosure of his shortage. The instructions as a whole made felonious intent essential to a verdict of guilty. The assignments of error under this head are therefore overruled.

Other assignments have been considered without finding any error prejudicial to defendant. He had a fair and impartial trial and his sentence was merciful.

AFFIRMED.

FIRST STATE BANK OF HERRICK, APPELLEE, V. G. HARLEY CONANT, APPELLANT.

FILED NOVEMBER 7, 1928. No. 25989.

1. **Bills and Notes**: SIGNING RENEWAL: CONSIDERATION. Where A, the maker of a valid promissory note, procures B to become a comaker of a renewal note, whereby time of payment is extended, such extension of time constitutes a valid consideration for the signature of B.
2. **Evidence**: STATUTES OF SISTER STATE: PRESUMPTION. In the absence of pleading and proof to the contrary, the statutes of a sister state are presumed to be the same as those of this state.
3. **Banks and Banking**: INSOLVENCY: SOUTH DAKOTA STATUTE: SUPERINTENDENT AS TRUSTEE. Under the statutes of South Dakota, as pleaded and set out in the opinion, when the superintendent of banks of that state takes over the property and business of a state bank, he acts as a trustee for the bank, its creditors and stockholders. Under such circumstances, the bank and the stockholders are beneficiaries of the statutory trust so created.
4. ———: ———: ———. Under the statutes of South Dakota, as pleaded and set out in the opinion, a state bank does not cease to exist when the state superintendent of banks takes over the property and business of the bank, but such bank continues as a legal entity until it is finally liquidated.
5. ———: ———: ———: RIGHT OF ACTION. Under the statutes of South Dakota, as pleaded and set out in the opinion, the superintendent of banks of that state, when he takes possession and control of the business and property of a state bank, is authorized to sue and collect obligations due the bank, and he may sue in the name of the bank, of which he is trustee.
6. ———: ———: ———: ———: PARTIES. Under the statutes of South Dakota, as pleaded and set out in the opinion, when the property and business of a state bank is taken over by the superintendent of banks, and an action is brought upon a promissory note in which the bank is named as payee, the bank is the real party in interest and the proper party plaintiff in such action.

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

Weaver & Giller, for appellant.

Congdon, Finlayson & Burke, contra.

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

GOOD, J.

On a prior submission of this cause to division No. 1 of the supreme court commission, an opinion was prepared and adopted, reversing the judgment of the district court. The cause is now before us on rehearing.

Plaintiff brought this action upon a promissory note, in which it was named as payee, against one of two co-makers. To the answer of defendant plaintiff interposed a general demurrer, which was sustained, and, defendant refusing to further plead, judgment was rendered for plaintiff in the amount of the note and interest. The defendant appealed.

The only question presented for determination is whether or not the answer states a defense to the action. In his answer defendant admits the execution of the note, and, for a defense, alleges that the plaintiff bank suspended business on March 28, 1924, a year previous to the execution of the note in suit, and that plaintiff has since been in the hands of the superintendent of banks of South Dakota, with Joseph H. Schmid, examiner, in charge, and further alleges that the indebtedness represented by the note arose March 26, 1923, and was represented by a note to the First State Bank of Herrick, signed by one G. C. Conant; that said note was renewed and the renewal note fell due March 26, 1924, two days before the bank suspended business; that upon request of the plaintiff the maker of the note, G. C. Conant, secured the signature of the defendant upon said note, and that no consideration was given to the defendant for signing said note. It is further alleged that sections 8925, 8927, 8928, and 8938, of the South Dakota Revised Code of 1919, provide, in substance, as follows:

"If the superintendent of the bank (superintendent of banks) shall have reasons to conclude that a bank is in an

unsound or unsafe condition to transact the business for which it is organized, or that it is unsafe or inexpedient for it to continue in business, he may forthwith take possession of the property and business of such bank and retain possession until such bank shall resume business or its affairs be finally liquidated, and upon taking possession of the property and business of any bank, such superintendent shall be authorized to collect all moneys and debts due to such bank, and it may upon order of the court sell or compound bad or doubtful debts and sell any and all real and personal property of such bank."

Defendent further avers that thereupon the superintendent of the banks of South Dakota became the owner and holder of the debt represented by the note sued upon herein, and had no authority whatever to accept and receive the note sued upon, and thereby extend the time of payment of said debt until December 1, 1925. Defendant denies specifically that plaintiff was the owner and holder of the note in controversy and the real party in interest. He further alleges that defendant was an accommodation signer of said note, having signed the same without any consideration, and that he is not liable thereon.

The answer clearly indicates that there was a valid obligation of G. C. Conant owing to the bank in 1923, and that it was renewed in 1924; that on a second renewal of the note the maker procured the defendant to sign the note with him, and that time of payment was extended. Clearly, the extension of time was a consideration for the defendant signing the note. It was not necessary that the consideration should move directly to the defendant. It was sufficient that his comaker received an advantage and benefit in having the time for payment of his obligation extended. Thereafter, defendant and his comaker again renewed the note while it was in the possession and under the control of the superintendent of banks of the state of South Dakota. The facts set forth in the answer are insufficient to show that defendant signed the note without consideration or that he is an accommodation maker.

Under the negotiable instruments act, the maker of a negotiable promissory note engages that he will pay it according to its tenor and admits the existence of the payee and his then capacity to indorse. In the absence of pleading and proof to the contrary, the statutes of South Dakota are presumed to be the same as those of Nebraska, and, under the negotiable instruments act of this state, the defendant is not in a position to deny the capacity of the payee of the note to extend the time of a former note by taking a new note, signed by the same parties.

The real question, and the one principally relied upon by the defendant, is the right to maintain this action in the name of the bank when the bank is in the hands of the superintendent of banks of South Dakota and subject to his control, on the theory that plaintiff is not the real party in interest.

From so much of the statute of South Dakota as is pleaded, it would appear that, when the superintendent of banks of South Dakota shall have reason to conclude that a bank is in an unsound or unsafe condition to transact the business for which it is organized, or that it is unsafe or inexpedient for it to continue in business, he may take possession of the property and business of such bank and retain possession until such bank shall resume business or its affairs be finally liquidated, and, upon taking possession of the property and business of any bank, the superintendent is authorized to collect all money and debts due such bank.

From the provisions thus pleaded, it appears that the superintendent of banks takes over the property and business of the bank and acts as a trustee for the creditors of the bank and for the bank and its stockholders. If the business of the bank is placed in a safe and sound condition, possession and management thereof may be returned to the officers and stockholders. If it is not placed in such condition, it may be liquidated, and, if liquidated after the payment of all just obligations of the bank, undoubtedly the surplus, if any, would be returned to the

stockholders. The stockholders of the bank are, therefore, among the beneficiaries of the trust created by statute.

The bank does not cease to exist when possession is taken by the superintendent of banks, but continues as a legal entity unless and until it is finally liquidated. If the officers and stockholders restore the bank to a safe and sound condition, the management of its affairs and the assets would be returned to the bank. The bank itself is therefore a beneficiary of the trust. The assets and bills receivable which were taken over by and remained in possession of the superintendent of banks were presumably payable to the bank. By statute he is authorized to collect, and when he collects any of the debts due the bank he is collecting for the bank. The assets, reduced to money, will be returned to the bank or paid to its creditors, as the case may be. When the superintendent of banks extended the time and took a renewal note, it was likewise for the benefit of the bank, or for the benefit of the creditors of the bank, as the facts may ultimately determine. The bank was the beneficiary of, and entitled to, the note, or the proceeds thereof, subject only to the payment of the debts and obligations of the bank. When the superintendent of banks took possession and charge of the bank and its business, the right of the officers of the bank to manage its affairs was, for the time, suspended, and such right became vested in the superintendent of banks. While the statute authorized him to sue and collect, it did not require that he should sue in his own name. He might sue in the name of the bank, which he represented, in lieu of its officers.

The national banking act contains provisions very similar to those of the South Dakota statute set out in the answer. Whether a receiver of a national bank should sue in his own name or in the name of the bank which he represents, to collect obligations due the bank, has been frequently before the United States supreme court.

In *Kennedy v. Gibson*, 75 U. S. 498, it was held that the receiver of a national bank is the statutory assignee of a

banking association and is the proper party to institute all suits; that they may be brought both at law and in equity and in his name, or in the name of the association, he representing both the creditors and the association. This ruling was followed in *Bank of Bethel v. Pahquioque Bank,* 81 U. S. 833, *First Nat. Bank of the Metropolis v. Kennedy,* 84 U. S. 19, and *Central Nat. Bank v. Connecticut Mutual Life Ins. Co.,* 104 U. S. 54.

The supreme court of Alabama, in *Montgomery Bank & Trust Co. v. Walker,* 181 Ala. 368, held that the superintendent of banks, in charge of an insolvent bank, is, in reality, a receiver of such bank and has power to sue in the name of the bank. And in *McWhirter v. First State Bank,* 182 S. W. (Tex. Civ. App.) 682, the supreme court of Texas held that an action to realize assets may be maintained in the name of the bank which is in the hands of a special agent, appointed by the commission of banking to wind up its affairs. Moreover, this court has on several occasions held that "The equitable owner of a negotiable promissory note in his possession may maintain an action thereon in his own name." *Hartzell v. McClurg,* 54 Neb. 316; *Greeley State Bank v. Line,* 50 Neb. 434. These decisions have been cited with approval in *Leavitt v. Bell,* 55 Neb. 57, and *Smith v. Potter,* 92 Neb. 39. In *Bon Homme County Bank v. Dakota Nat. Bank,* 50 S. Dak. 191, the supreme court of South Dakota held that the receiver of a bank represents the bank and its creditors; that, in an action brought in the name of the bank by the receiver, the defendant may assert his defenses against the receiver. The opinion approved the bringing of an action in the name of the bank, although it was in the hands of the state superintendent of banks.

Since the superintendent of banks is acting for the bank, he is authorized to maintain an action in the name of the bank. It will be observed that the answer nowhere alleges that the action is brought without authority from the superintendent of banks of South Dakota. In fact, when it is alleged that the bank is in the possession

and under the control of the superintendent of banks, and the statute making it his duty to collect, the presumption is that he has directed and authorized the instant action.

Section 8525, Comp, St. 1922, provides: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 26 (8528)." Section 8528, in part, provides: "A person with whom or in whose name a contract is made for the benefit of another * * * may bring an action without joining with him the person for whose benefit it is prosecuted."

If, as contended by the defendant, the superintendent of banks of South Dakota is to be regarded as holding a legal title to the note in controversy and to be the real party in interest, it would seem that the contract, or note, was made after the title had vested in the superintendent; that it was made in the name of the plaintiff bank, and that the transaction would fall within the provisions of section 8528, Comp. St. 1922.

In 1 Joyce, Defenses to Commercial Paper (2d. ed.) 826, sec. 609, it is said: "The party to whom a note is made payable being *prima facie* the owner, it is held that his right to maintain an action cannot be questioned, except the defendant pleads payment or offset against the party who he alleges is the true owner of the note. So it is no defense to an action on a note that it was given to the payee, in lieu of three other notes, given to the husband of the payee. The widow might be acting as executrix in her own wrong, or might be the heir; in either case the notes surrendered would be satisfied"—citing *Riley v. Loughry*, 22 Ill. 97.

In the instant case it will be observed that no valid defense to the note was pleaded. From what has been said it is evident that the judgment rendered in favor of the bank will be subject to the control of the superintendent of banks, and that a satisfaction of that judgment will be a satisfaction of the note and relieve the defendant of any further liability thereon. No doubt, the action could be maintained in the name of the superintendent of banks.

However, we are of the view that the bank, being the beneficial owner of the note, is the real party in interest and that the action, therefore, was properly maintained in its name.

No prejudicial error is disclosed. The opinion of the commission heretofore adopted and the judgment rendered thereon are vacated and set aside, and the judgment of the district court is

AFFIRMED.

J. W. ROGERS, RECEIVER, APPELLEE, V. H. H. SELLECK ET AL.: NILS LINDQUIST, APPELLANT.

FILED NOVEMBER 10, 1928. No. 26342.

1. **Banks and Banking**: LIABILITY OF STOCKHOLDERS: CONSTITUTIONAL PROVISIONS. The constitutional provision imposing upon bank stockholders a double liability to creditors in the event of insolvency and the constitutional provision that, in all cases of claims against corporations, the exact amount justly due shall be ascertained and the corporate property exhausted before enforcement of such liability must be considered together. Const., art. XII, secs. 4, 7.
2. ———: ———: ENFORCEMENT. The terms of the constitutional provision imposing upon stockholders of a state bank a double liability are by construction embodied in the contracts of subscription for bank stock but cannot be enforced until the exact amount justly due in all cases of claims against the bank has been ascertained and the corporate property exhausted.
3. ———: ———. The double liability imposed by the Constitution upon stockholders of a state bank inures to the benefit of unpaid creditors of the bank, and not to the bank in its corporate capacity.
4. ———: ———: ENFORCEMENT. In effect the constitutional provision imposing a double liability upon stockholders of a state bank requires them, in connection with their subscription for stock, to make contributions to a trust fund for the benefit of unpaid creditors in the event of insolvency, and the action to enforce their obligations must be prosecuted by one creditor for the benefit of all or by the receiver.
5. **Equity**. In actions at law, a course of litigation permitting unnecessary trials, repeated appeals, discouraging delays and

wasteful costs and expenses should be avoided where a single suit based on recognized principles of equity jurisdiction would prevent such consequences.

6. ———: MULTIPLICITY OF SUITS. The preventing of a multiplicity of suits in connection with other grounds of equitable cognizance may justify a court of equity in entertaining jurisdiction.

7. **Banks and Banking**: LIABILITY OF STOCKHOLDERS: REMEDY. The remedy for the enforcement of the entire double liability imposed by the Constitution upon stockholders of a state bank in the event of insolvency is a suit in equity by a creditor for the benefit of all the creditors, or by the receiver, against all the stockholders. Dicta to the contrary in *Burke v. Scheer*, 89 Neb. 80, and in *Dickinson v. Kline*, 96 Neb. 435, disapproved.

APPEAL from the district court for Morrill county: EDWARD F. CARTER, JUDGE. *Affirmed.*

Paul H. Eaton and *R. O. Canaday*, for appellant.

C. M. Skiles and *I. D. Beynon, contra.*

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

ROSE, J.

This is a receiver's suit in equity for the benefit of all the creditors of an insolvent state bank against all the stockholders to recover in money and to distribute the entire par value of the stock or the double liability imposed by the state Constitution and by the contracts of subscription.

The insolvent was the Broadwater Bank, a corporation organized under the laws of Nebraska to transact a commercial banking business in Morrill county. The capital stock, paid in full, consisted of 250 shares, each of the par value of $100, or $25,000 in all. There were 15 stockholders and the individual ownership of shares varied from 1 to 141. Upon insolvency of the bank J. W. Rogers was appointed receiver to wind up its affairs. In the proceeding for that purpose it was decreed that the exact amount justly due from the bank to its creditors was $194,116.42;

that all corporate property was converted into money and exhausted; that the proceeds were applied on the indebtedness, leaving unpaid $141,220.17 in liabilities incurred by the bank while defendants were stockholders. The receiver was directed by the court to bring this suit and did so, alleging in detail the foregoing facts, pleading the double liability imposed by the Constitution, naming the stockholders and indicating the share or shares of each, setting forth multiplicity of actions at law in connection with other grounds of equitable jurisdiction, averring there was no adequate remedy at law, and praying for an order on each defendant to perform his obligation, for judgment in the event of default, for distribution of the collected fund among the creditors and for general equitable relief.

Nils Lindquist, a defendant and a stockholder owning one share of the par value of $100, the full amount of his alleged double liability, demurred to the petition in equity herein on the grounds that he is improperly joined with other defendants; that the court is without equitable jurisdiction, and that the remedy of plaintiff, if any, is an action at law against each stockholder.

The demurrer was overruled. Lindquist refused to plead further and judgment was rendered against him for $100. From that judgment he has appealed.

Does the petition of the receiver state facts sufficient to constitute a cause of action cognizable in a court of equity? In resisting the 100-dollar claim, based on the liability imposed by the Constitution and assumed in the contract of subscription, is Lindquist, the owner of one share of the insolvent bank's capital stock, entitled as a matter of right to a jury trial in a technical action at law wherein he alone is defendant? These are difficult questions presented by the appeal with argument and citation of authorities on both sides. The nature of the liability created by the Constitution and the remedy of the unpaid creditors of the insolvent bank are subjects of inquiry. According to the allegations of the petition the stockholders are accountable

in a proceeding of some kind under the following provision of the Constitution:

"Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder." Const., art. XII, sec. 7.

Another provision of the Constitution is in this form:

"In all cases of claims against corporations and joint stock associations, the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted the original subscribers thereof shall be individually liable to the extent of their unpaid subscription, and the liability for the unpaid subscription shall follow the stock." Const., art. XII, sec. 4.

The sections quoted must be considered together. *Hastings v. Barnd,* 55 Neb. 93; *State v. German Savings Bank,* 50 Neb. 734; *Bodie v. Pollock,* 110 Neb. 844; *State v. Farmers State Bank,* 113 Neb. 497. The terms of the constitutional provisions are by construction embodied in the contracts of subscription for bank stock and the liability imposed upon and assumed by the stockholders is contractual, but cannot be enforced until the exact amount justly due in all cases of claims has been ascertained and the corporate property exhausted. *Bourne v. Baer,* 107 Neb. 255; *State v. Banking House of A. Castetter,* 116 Neb. 610. The double liability inures to the benefit of unpaid creditors, and not to the bank in its corporate capacity. *Hamilton Nat. Bank v. American Loan & Trust Co.,* 66 Neb. 67. In effect the constitutional provision imposing a double liability upon bank stockholders in a state bank requires them, in connection with the subscriptions for stock, to make contributions to a trust fund for the benefit of unpaid creditors in the event of insolvency, and the action to enforce their obligations must be prosecuted by one creditor for the benefit of all or by the receiver. *Pickering v.*

Hastings, 56 Neb. 201; *Van Pelt v. Gardner*, 54 Neb. 701; *German Nat. Bank v. Farmers & Merchants Bank*, 54 Neb. 593; *Hastings v. Barnd*, 55 Neb. 93. In enforcing the contractual obligations the receiver, acting under directions of the court, is a proper party to bring the necessary action, whatever its nature. *State v. Farmers State Bank*, 113 Neb. 497.

It is conceded by counsel for Lindquist that a suit in equity for the benefit of all the creditors against all the stockholders would be a proper remedy, if the par value of the stock or the maximum liability imposed by the Constitution exceeded the unpaid indebtedness of the bank. What is thus conceded is in harmony with a recognized rule of equity jurisdiction. It is confidently asserted, nevertheless, that an action at law against the individual stockholder is the exclusive remedy where judgment for the maximum liability or for the entire par value of the stock is sought, as in the present case. Is the nature of the remedy changed from equity to law merely because a recovery for the full par value of the stock is sought instead of a less amount? On that question the utterances of this court are not harmonious and there seems to be a diversity of opinion elsewhere.

Lindquist insists that his obligation is several, not joint; that there is no community of interest in law or fact between him and other stockholders joined as defendants; that, sued as an individual for a specific sum of money, he has a right to a jury trial where he alone is defendant; that all the stockholders cannot be joined in equity to prevent a multiplicity of suits. There is a view of these propositions in which the remedy and the convenience of the unpaid creditors seem to be overlooked.

The stockholders united in a common purpose to procure from the state a charter to conduct a commercial bank with permission to deal with the public in an enterprise affected with a public interest. It required the joint action of all subscribers for stock to accomplish that pur-

pose. They gave to their banking corporation joint credit to the extent of the subscriptions. In addition to the $25,000 paid for the capital stock the stockholders assumed a contractual obligation imposed by the Constitution in the nature of a seconary liability or guaranty for the payment of $25,000 to the creditors in the event of insolvency and the exhausting of the corporate assets, if the bank's indebtedness in that sum should remain unpaid. In view of the facts alleged in the petition and admitted by the demurrer, the secondary obligation or double liability is as binding as the primary agreement to pay for the stock in the first instance.

There is more to plaintiff's case than the invoking of equity to prevent a multiplicity of suits. Enforcement of the liability imposed upon all the stockholders for the purpose of creating a common trust fund for the protection of all the creditors and for distribution among them, each to receive only a partial payment on his claim, are questions for determination in this suit.

If each stockholder in the present case has a right to a separate jury trial, the creditors, or the receiver for them, will be required to bring fifteen suits, three within the jurisdiction of a justice of the peace; seven others within the jurisdiction of the county court; five others within the jurisdiction of the district court. In connection with the constitutional provisions Lindquist bound himself by contract to contribute $100 to the trust fund. In a separate action at law for that sum the forum of original jurisdiction would be the court of a justice of the peace. From judgment on a verdict there Lindquist would have the right of appeal to the district court. Another jury trial would follow in the usual course of procedure. In the event of a second adverse verdict he could appeal to the supreme court. Other stockholders would have a right to pursue the same course. Owing to costs, expenses and delays, such litigation, to a great extent at least, would be unprofitable to both creditors and stockholders, would make per-

formance of the contractual liability difficult and expensive, if not useless, and thus defeat the purpose to create the trust fund under which the stockholders jointly procured the charter for the bank and obtained corporate credit.

In a court of equity the trust fund to which the creditors are entitled could be speedily collected and disbursed in a single suit without depriving a stockholder of the opportunity to plead and prove any defense available to him in either law or equity.

In solving the question of jurisdiction the convenience and the rights of the stockholders are not the only factors. The rights and conveniences of creditors should have equal consideration. A course of litigation permitting unnecessary trials, repeated appeals, discouraging delays and wasteful costs and expenses should be avoided where a single suit based on recognized principles of equity jurisdiction would prevent such consequences.

The rights of the creditors and the liabilities of the stockholders had a common source in the conditions imposed by the Constitution and in the contractual obligations assumed thereunder. Except in amount the claims of the different creditors in the present suit in equity are alike, requiring the same proofs. The law and the facts essential to defenses are also of a similar nature in some respects at least and may be the same. In advance the stockholders were joint participants in the banking enterprise requiring the adoption of a method for the raising, collecting and disbursing of a trust fund to protect the creditors in the event of the bank's insolvency. On the day of reckoning they should not be permitted to scatter and waste the trust fund in separately defending actions at law. Each stockholder should be interested in the performance of his own contract and in like performance by other stockholders upon whom all creditors of the bank confidingly relied. Business rectitude and justice should inspire a community of interest among the stockholders.

Jurisdiction in equity has been sanctioned by text-writers to prevent a multiplicity of suits. 1 Pomeroy, Equity

Jurisprudence (4th ed.) secs. 245-251; 10 R. C. L. 283, sec. 28. In the present instance, however, there are, in addition to that ground, other equitable considerations already mentioned. In discussing the double liability imposed by the Constitution this court once said:

"Quite early in the history of this country there were frequently inserted in the charters of corporations provisions fixing the individual liability of stockholders in certain contingencies. When there were presented cases in which it was sought to render effective these special provisions, the courts differed among themselves as to the nature of this liability, the character of the fund arising from it, the persons entitled to sue, and the manner in which the action should be brought. These four matters of difference, on examination, will be found to depend on one question, and that is whether this liability is to be deemed to have been created for the purpose of raising a trust fund for the payment of the debts of the corporation, or whether it created the relation of debtor and creditor directly between a creditor of the corporation and one of its stockholders. If the fund derived from this liability should be deemed a trust fund of the nature suggested, it naturally resulted that an equitable action was recognized as proper, with its concomitants of parties, beneficiaries, and relief." *Farmers Loan & Trust Co. v. Funk*, 49 Neb. 353.

Referring to that case it was said by a unanimous court in a later opinion:

"It was expressly decided that the liability of a stockholder in a banking corporation under the provisions of section 7, article XI, of the Constitution, is for the creation of a trust fund for the benefit of all creditors, and an action to enforce such liability must be prosecuted by one creditor of the corporation for the benefit of all, or by the receiver when one has been appointed. That was an action at law by a creditor of the State Bank of Ainsworth against one of the stockholders thereof to collect an amount equal to the par value of his stock, and it was ruled that the action could

not be maintained. The action should be for the benefit of all the creditors of the corporation against all the stockholders within the jurisdiction of the court. *Van Pelt v. Gardner,* 54 Neb. 701; *German Nat. Bank v. Farmers & Merchants Bank,* 54 Neb. 593. These decisions are directly in point, and, if adhered to, must control the disposition of the case under consideration. There is a conflict in the adjudications of other courts on the subject, but the rule announced by this court in the foregoing cases is the most just and equitable one, and, being sustained by the better reason as well as authority, will not be now departed from." *Pickering v. Hastings,* 56 Neb. 201.

The syllabus in the latter case is as follows:

"It is the settled doctrine of this court that the liability of a stockholder in a banking corporation, under the provisions of section 7, article XI, of the Constitution, is for the creation of a fund for the benefit of all creditors, and an action to enforce such liability must be prosecuted for the benefit of all the creditors of the corporation against all the stockholders within the jurisdiction of the court." *Pickering v. Hastings,* 56 Neb. 201.

The remedy for enforcement of the double liability imposed by the Constitution was also considered in *German Nat. Bank v. Farmers & Merchants Bank,* 54 Neb. 593, and it was therein distinctly held by a unanimous court that the proper proceeding was a suit in equity for the benefit of all the creditors against all the stockholders, the opinion quoting with approval from a Massachusetts case *(Harris v. Dorchester,* 23 Pick. (Mass.) 112) the following language relating to similar liabilities imposed by the legislature of that state in one section of a statute:

"The evils and inconveniences of attempting to enforce this section by suits at common law would be incalculable; and such remedy would be inadequate, vexatious, and mischievous. The only proper means of giving effect to this provision is by a process in equity, and this, of all cases which can arise, seems to call most loudly for chancery

jurisdiction. To a bill in equity all persons, however numerous, might be made parties, and all the relative and conflicting claims of the many creditors and stockholders settled and their proportionate rights to recover, and liabilities to contribute, adjusted in a single suit. We are all, therefore, of opinion that this case comes within the equity jurisdiction of the court and that an action at law will not lie."

What was once judicially declared to be "the settled doctrine of this court" seems to be somewhat unsettled by two later cases upon which Lindquist relies in the present case. One is *Burke v. Scheer,* 89 Neb. 80, a case involving the collection of assessments from members of a mutual hail insurance company to pay losses. A provision of the act under which the company operated prescribed a remedy by suits at law to enforce payment of assessments. The court so held. Without referring to former decisions holding that the remedy to enforce the maximum liability of stockholders of a state bank is a suit in equity, the opinion in *Burke v. Scheer,* 89 Neb. 80, contains dicta of a different import. What was not necessary to a decision in that case was followed in *Dickinson v. Kline,* 96 Neb. 435. In the latter case the insolvent was not a banking corporation and the action was one for the recovery of unpaid subscriptions for stock. Under the facts it was held that the proper remedy was a suit in equity and the rulings relating to the remedy were summarized in the syllabus as follows:

"The proceedings against the stockholders of an insolvent corporation by or in behalf of the creditors of the corporation to recover the full amount for which each stockholder is liable as fixed by his contract must be an action at law in which defendant is entitled to trial by jury. When the amount for which each stockholder is liable is unknown, but must be determined in the action, and depends upon equities to be adjusted among creditors or stockholders, or both, the action must be in equity." *Dickinson v. Kline,* 96 Neb. 435.

In the opinion there is no direct reference to the constitutional provision relating to the double liability of stockholders in banking corporations nor to former decisions holding that the remedy to enforce that liability to the full extent of the par value of the stock is a suit in equity. In so far as *Burke v. Scheer,* 89 Neb. 80, and *Dickinson v. Kline,* 96 Neb. 435, are at variance with the earlier cases cited herein, the dicta are disapproved.

Another recent case cited in oral argument was *Hill v. May,* 115 Neb. 690. The controlling question therein decided is not involved in the present inquiry. The opinion properly holds that a suit on a promissory note given by a stockholder for an assessment of stock to restore the reserve or the solvency of a bank was an action at law.

Upon a consideration of the whole controversy the earlier cases cited are followed and the conclusion is that the proper remedy to enforce the maximum liability imposed by the Constitution upon stockholders of an insolvent state bank is a suit in equity against all of them for the benefit of all the creditors. This is the view taken by the district court and the judgment below is

AFFIRMED.

STATE, EX REL. ROY STEPHENS, RELATOR, V. FRANK MARSH, SECRETARY OF STATE, RESPONDENT.

FILED NOVEMBER 10, 1928. No. 26783.

1. **Political Parties:** FORMATION. Where, pursuant to the provisions of section 2125, Comp. St. 1922, there is attempted to be formed a new political party for placing in nomination candidates that may be voted for by the electors of the entire state, it is essential that there be held a mass convention, in which not less than 500 electors of the state shall be present and participating; that such mass convention shall adopt a party name; that electors to the number of 500 or more shall sign a petition or agreement to form such new party and support its nominees at the next election, and that such petition or agreement shall be signed either at the time of or subsequent to the holding of the mass convention.

2. Elections: NEW POLITICAL PARTY: CERTIFICATE OF NOMINATION: OBJECTIONS: DUTY OF SECRETARY OF STATE. Where a certificate of nomination, regular on its face and accompanied by an agreement or petition, purporting to be signed by 500 or more electors of the state, placing in nomination candidates of a new political party for state offices, is filed with the secretary of state, and, within the time prescribed by law, objections to such certificate of nomination are filed with that official, he is authorized to investigate not only matters of form, but to determine from extrinsic evidence whether or not a convention, such as is required by law, was, in fact, held to form such new party and place candidates in nomination.

3. ———: ———: ———: PETITION: REJECTION. Where there is presented to the secretary of state a certificate of nomination, regular in form, purporting to show the nomination of candidates for state office by a new political party, and which is accompanied by a petition or agreement, purporting to be signed by less than 500 electors of the state, agreeing to the formation of such new party and to support its nominees at the next election, the secretary of state should decline to accept and file such certificate, because the accompanying agreement or petition is not signed by 500 or more electors of the state.

Original proceeding in mandamus by the State, on the relation of Roy Stephens, against Frank Marsh, Secretary of State. *Petition dismissed.*

J. A. Brown and *I. E. Ferguson,* for relator.

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

GOOD, J.

This is a statutory proceeding before a justice of the supreme court, wherein the relator, Roy Stephens, claiming to be the chairman of the state central committee of the workers' party, seeks a summary order against the respondent, the secretary of state, requiring him to accept and file certificate of nominations and additional petition of qualified voters, and to certify the nominees of said workers' party as candidates, to be voted upon by the electors of the state at the election on November 6, 1928.

The proceeding is instituted pursuant to the provisions of section 3, ch. 108, Laws 1925, which, in so far as applicable, is as follows:

"All certificates of nomination or nomination statements, which are in apparent conformity with the provisions of this article, shall be deemed to be valid, unless objections thereto shall be duly made in writing within ten days after the filing of the same. In case such objection is made, notice thereof shall forthwith be mailed to all candidates who may be affected thereby, addressed to them at their respective places of residence as given in the certificate of nomination * * * on file in that office. * * * The officer with whom the original certificate was filed * * * shall, in the first instance, pass upon the validity of such objection, and his decision shall be final, unless an order shall be made in the matter by the county court, or by a judge of the district court, or by a justice of the supreme court at chambers, on or before the second Wednesday preceding the election. Such order may be made summarily upon application of any party interested, * * * and upon such notice as the court or judge may require. The decision of the secretary of state, or the order of the judge or supreme court justice, shall be binding on all other county, municipal or other officers with whom certificates of nomination are filed."

The proceeding is strictly statutory and is somewhat akin to a mandamus proceeding.

In his petition relator avers that he is a qualified elector of the state, chairman of the state central committee of the workers' party, a new political party of this state, duly organized in accordance with the laws of the state. He further avers that on the 19th of August, 1928, in the city of Omaha, a convention, composed of more than 500 qualified electors, was held for the purpose of organizing a new political party, adopting a party name and nominating candidates for various public offices, to be voted upon at the general election in November, 1928; that said convention resolved to form a political party, adopted the name

"The Workers' Party," and made nominations for president and vice-president of the United States, for governor of the state of Nebraska, for congress for the second district, and for the various state offices; that on August 20, 1928, a certificate was filed with the respondent, showing the holding of such convention, the forming of a new party, the adoption of a party name, and the nomination of candidates for the various offices mentioned, and that at the same time there was filed with respondent a list of 683 signatures of persons who described themselves as electors of the state, and that they agreed to associate themselves together, to form the workers' party, to affiliate therewith, and to support its nominees at the general election, to be held in November, 1928; that said certificate and agreement were in all respects in conformity with the statutes of the state, and that it then became the duty of respondent to accept said certificate and petition as valid, unless objection should be made in writing within ten days, and that no notice was given to respondent of the filing of any objections until the 24th day of September, 1928; that on said date a hearing was held by the respondent at which, it appeared, there was a written protest filed against the placing of the candidates of the workers' party upon the ballot, but that said protest did not go to the ground that either the convention, or the certificate of nomination filed, was insufficient or defective, but that nevertheless respondent made an investigation, and on the 28th of September determined that the workers' party was not properly organized; that the petition or agreement of qualified voters, filed with the respondent, was defective, in that it did not contain sufficient signatures of registered voters, and that the workers' party was not duly organized and its nominees were not entitled to a place upon the official ballot. In the petition it is further alleged that on the 28th day of September, 1928, a convention of more than 500 qualified electors of the workers' party was held at the Sun Theater in the city of Omaha, and again resolved to organize a political party, to be known as the workers' party, and

nominated as candidates the same persons who had been nominated at the so-called convention on August 19; that thereafter certificates of nomination were prepared, together with an agreement signed by 432 electors, agreeing to form the workers' party, to support its principles and its nominees, and such certificate and agreement were, on October 5, 1928, tendered to the respondent for filing; but that respondent refused to accept or file the same.

To this petition an answer was filed by respondent in which it is admitted that relator is a qualified elector of the state. The answer admits the filing of the certificate of nomination, purporting to show that a convention of over 500 electors of the state had been held for the purpose of forming a new party, to be known as the workers' party, and nominating a ticket; admits that objections were filed against the placing of the names of the nominees on the official ballot; admits that he, respondent, held a hearing to determine whether the candidates of the so-called workers' party should be placed upon the official ballot, and that he found that the workers' party was not legally organized and that the nominees were not entitled to a place upon the official ballot; and denies the other allegations of the petition. Further answering, he alleges that there were not 500 electors present at the so-called convention on August 19, 1928; denies that 500 electors signed the petition or agreement filed with the certificate of nomination on August 20, and denies that a mass convention was held on the 28th day of September, or that 500 qualified electors were present at the meeting held at that time and place, or that any legal convention was held, or that the workers' party was ever legally organized.

Section 2125, Comp. St. 1922, provides: "In order to form a new party there shall be present at a mass convention electors to the number of at least five hundred in a state convention." Section 2126, Comp. St. 1922, requires that such convention shall adopt a party name, and electors to the number of 500 shall sign an agreement to

form such new party and support its nominees at the next election, such certificate and agreement to be filed with the secretary of state.

Upon the hearing of this matter evidence was adduced on behalf of both parties. The evidence of relator tends to prove that more than 500 were present at the so-called convention held on August 19, 1928, while the evidence on behalf of respondent tends to show that not more than 200 persons were present. The evidence is in conflict. The evidence further shows that some of those persons were children. It is not disclosed how many of the persons were electors. So far as the evidence discloses only two are positively shown to be electors; nor is it shown how many persons participated or attempted to participate in the deliberations of the convention. It is a matter of common knowledge that many persons, other than those belonging to a political party, frequently attend such conventions as interested spectators. No record was made of the persons attending, or of those participating in the alleged convention; nor was there any showing that more than two or three of them were electors. Section 2125, Comp. St. 1922, requires a convention of 500 electors. Relator utterly fails to show that a valid convention was held.

Relator argues, however, that that question is not open for determination at this time; that the secretary of state was authorized only to conduct a hearing when a protest was filed which named the grounds on which the protest was based; that such protest was in the nature of a pleading, and that the secretary of state was not authorized to investigate or determine any objection not set forth in the written protest. The protest filed was within the time prescribed by statute, and was informal in its nature. However, it was therein suggested to the secretary of state that the protestant doubted whether a legal convention had been held and requested the respondent to investigate and determine the question. The statute nowhere makes any provision as to the nature of the protest, but provides

that if a protest is filed it is the duty of the secretary of state to conduct the hearing.

A very similar question was before the supreme court of Nebraska in *State v. Allen,* 43 Neb. 651, wherein it was held: "It is provided by said act that all certificates of nomination which are in apparent conformity therewith shall be deemed valid unless objection is made thereto; that in case objections are made candidates shall be notified and the officer with whom the certificate is filed shall pass on such objections, and his decision will be final unless a further order is made by the county court, a judge of the district court, or a justice of the supreme court. *Held,* that such officer, in the consideration of objections, is not confined to mere formal matters relating to the certificate of nomination, but may determine from extrinsic evidence whether the candidates therein named were in fact nominated by the convention or assemblage of voters or delegates claiming to represent a party which cast the requisite number of votes at the last election." In the course of the opinion it was said (p. 660): "What was the duty of the respondent in regard to the so-called 'Sturdevant ticket'? It is by section 9 of the Australian ballot law provided that the secretary of state shall immediately, upon the expiration of the time for filing certificates of nomination with him, certify such nominations to the several county clerks. By section 11 it is provided: 'All certificates of nomination which are in apparent conformity with the provisions of this act shall be deemed valid unless objections thereto shall be duly made in writing within three days after the filing of the same. In case such objection is made, notice thereof shall forthwith be mailed to all candidates who may be affected thereby. * * * The officer with whom the original certificate was filed shall, in the first instance, pass upon the validity of such objection, and his decision shall be final unless an order shall be made in the matter by the county court, or by a judge of the district court, or by a justice of the supreme court.' It is claimed on behalf of the respondent that he is, by the pro-

vision quoted, required to determine all objections which may be interposed to any certificate, both formal and substantial. On the other hand, it is contended that his jurisdiction extends to matters of form only, and that in no event can he look beyond the certificate itself for the purpose of inquiring into the regularity of the nomination. The reluctance of courts to decide between rival factions of political organizations is proverbial, and is illustrated by the following, among the many cases in point: * * * In the case at bar the claim of the relators rests upon the certificate alone. If they were placed in nomination by a convention, or even by a faction of the democratic party, that fact does not appear from the record. We are fully in sympathy with the sentiment to which expression is given in the cases cited, and are not unmindful of the abuses liable to follow from the entrusting of such extraordinary power to a mere ministerial officer and usually political partisan. But are we not, according to the doctrine of those cases, merely 'escaping the perils of Charybdis to perish in Scylla'? However strongly we may condemn the doctrine that to the secretary of state, or other officer exercising similar functions, is intrusted the power to determine questions of the character under consideration, equally to be deplored is an interpretation which limits his inquiry to matters of form only and requires him to recognize every paper having the semblance of a certificate of nomination regardless of the source from which it emanates, or whether or not such nominations were in fact made in this manner or by the agencies authorized by law.

"Briefly stated, our conclusion is that, while it is not the province of the secretary of state under our system to decide between rival factions of a party where each faction has made nominations, he should, in case of objection, ascertain from the record, or from extrinsic evidence, whether such candidates or either of them were in fact placed in nomination by a convention or assemblage of voters or delegates claiming to represent such party."

The courts of this state are therefore committed to the doctrine that it is within the province of the secretary of state, when a protest is filed, to investigate not only matters of form, but to determine whether or not a convention, such as is required by law, was, in fact, held to form a new party and place candidates in nomination. This the secretary of state did, and rightfully determined that a legal convention was not held on August 20, 1928, and that the certificate of nomination, purporting to be made at such convention, was invalid and did not entitle the nominees to be certified as such and placed upon the official ballot.

It is urged by relator that it was the duty of the secretary of state to accept the certificate of nomination and the agreement, purporting to be signed by 432 electors, tendered to him on October 5, and to use the petition or agreement, with the names of 683 persons, which had been filed on August 20, as a part of the nomination papers of the convention, held on September 28.

The contention is not valid for the following reasons: The preponderance of the evidence shows that at the convention held on September 28 there were less than 500 present, and there is no showing as to how many of those present participated in the deliberations, or how many were, in fact, electors. It does not appear, therefore, that any valid convention was held on the 28th day of September, and, although the certificate tendered was in due form, it was not accompanied by an agreement signed by 500 electors, as provided by statute. Unless the petition or agreement, which was filed on the 20th of August, should be considered as a part of the nomination papers tendered for filing on October 5, the respondent was justified in refusing to accept the nomination papers tendered on the 5th of October. That the list of persons signing the agreement on the 20th of August cannot be considered in connection with the nomination papers filed October 5 seems clear. The statute certainly would not contemplate that any body of electors would agree to support the nominees

of a party several weeks in advance of the formation of such party, before they could know who the nominees would be and before they could know what principles the party would enunciate or support. If such a petition could be prepared and signed four or five weeks before the organization of the party, it might be done as many months or even years before the organization of such party.

We think the statute, fairly and liberally construed, contemplates that the agreement or petition, to be signed by the voters, agreeing to form a new party and support its nominees, must be signed at the time the mass convention is held, or subsequent thereto. The agreement may be formulated and signed at the same time that the convention is held, or at any time subsequent thereto, but it cannot precede the holding of a convention. The certificate and agreement, which were tendered to the secretary of state on the 5th of October, 1928, did not comply with the law because the agreement or petition lacked the signatures of 500 electors. The respondent was, therefore, justified in refusing to accept or file the same.

We conclude that relator is not entitled to the relief demanded or any part thereof, and it is therefore considered and adjudged that his petition be dismissed and that he pay the costs of this proceeding.

PETITION DISMISSED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, PLAINTIFF, V. WILLIAM T. WALLACE ET AL., DEFENDANTS.

FILED NOVEMBER 10, 1928. No. 26349.

1. Animals: TUBERCULOSIS ACT: CONSTITUTIONALITY. Section 10, art. II, ch. 12, Laws 1927, relating to the testing of cattle for tuberculosis, examined, and *held*: (a) Applicable to the entire state; (b) not arbitrary or unreasonable; (c) not in violation of section 18, art. III of Constitution of Nebraska, or section 1 of the Fourteenth amendment to the Constitution of the United States.
2. **Case Followed.** *State v. Heldt*, 115 Neb. 435, followed.

3. **Record** examined, report of referee approved, and injunction granted.

Original action by the State, on the relation of the Attorney General, against William T. Wallace and another for an injunction. *Injunction granted.*

O. S. Spillman, Attorney General, and *Peterson & Devoe,* for plaintiff.

Cook & Cook, for defendants.

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

THOMPSON, J.

This is an original action instituted in this court by the plaintiff seeking to restrain and enjoin the defendants, as and for the purposes hereinafter indicated. A restraining order, on notice duly given, was issued and served. Thereafter an answer was filed by the defendants. Later, by agreement of the parties in open court, the restraining order was slightly modified, and, as modified, continued; and Honorable Harry L. Norval of Seward was appointed as referee to take evidence and report findings of fact and conclusions of law, which he did. The issues, as well as the further proceedings had before such referee, are evidenced by his report, which is now before us, and is in the words and figures following:

"Report of Referee.

"This is a direct action brought in this court by the state of Nebraska, on the relation of the attorney general, against the defendants William T. Wallace and J. B. Montgomery, to restrain and enjoin them from obstructing or preventing, by force or otherwise, the department of agriculture of the state of Nebraska, and its authorized agents, inspectors and employees from entering the premises, pastures and enclosures wherein defendants' cattle may be, in Dawson county, Nebraska, for the purpose of inspecting and applying the tuberculin test to said cattle.

and to enjoin the defendants from moving, or causing their breeding cattle to be moved from Dawson county, to other counties, without having them tuberculin tested, and from interfering in any manner with said department of agriculture, its agents or employees, from carrying out a plan of tuberculosis eradication in Dawson county, Nebraska.

"The state predicates its right to apply the tuberculin test to the breeding cattle of the defendants on the provisions of chapter 12, of the Session Laws of Nebraska for the year 1927, and on section 10, of article 2, of said chapter 12.

"Section 10, above referred to, provides as follows: 'Where any county has been declared an area for the inspection, examination and testing of cattle for tuberculosis under the provisions of any preexisting legislation of this state, or where, prior to the passage of this act, a systematic inspection, examination and testing of cattle for tuberculosis has been undertaken in any county on a cooperative basis by the United States bureau of animal industry and the Nebraska department of agriculture, and more than five thousand cattle have been tested in such county prior to the passage of this act, the inspection, examination and testing of cattle for tuberculosis in such county or counties may be continued by the department under the provisions of this act without petition or hearing in all respects as if such petition had been filed and hearing had and the county declared an area hereunder.'

"The defendants' contentions, as set forth in their brief submitted, are as follows:

"1. That the facts as established by the evidence do not entitle plaintiff to an injunction, assuming that section 10, art. 2, chapter 12, Laws of 1927, is valid, and assuming that Dawson county has been shown by the evidence to be within the class specified by said section 10.

"2. That the evidence does not establish that prior to the passage of chapter 12, Laws of 1927, a systematic inspection, examination and testing of cattle for tuberculosis

had been undertaken in Dawson county, on a cooperative basis by the United States bureau of animal industry and the Nebraska department of agriculture, and more than 5,000 cattle tested thereunder prior to the passage of said chapter 12.

"3. That section 10, art. 2, ch. 12, Laws of 1927, is in violation of section 18, art. 2, Constitution of Nebraska, and of section 1, Fourteenth amendment, Constitution of the United States, and is void, and that article 2, ch. 12, Laws of 1927, is not in force in Dawson county.

"Findings of Fact.

"The evidence discloses that prior to the passage of the 1927 act referred to, and in January, 1925, there was on file in the office of the department of agriculture of Nebraska petitions signed by 64 per cent. of the owners of breeding cattle of Dawson county, representing 80 per cent. of the cattle owned in said county, and that, prior to the passage of said act of 1927, a systematic inspection, examination and testing of the cattle in said county for tuberculosis was carried on, on a cooperative basis, by the United States bureau of animal industry and the department of agriculture of Nebraska, and that 51,757 cattle in said county were so tuberculin tested; that reports were made of the result of the tests; one filed with the United States bureau of animal industry, and the other with the department of agriculture of the state of Nebraska, and that owners of cattle in Dawson county received indemnities prior to the passage of the act of 1927, by both the state and federal government, for cattle disposed of by the two departments, which were found to be infected with tuberculosis. Rules and regulations for the eradication of the disease, which had first been adopted by the United States bureau of animal industry, were adopted and followed by the department of agriculture of Nebraska.

"After the legislative act of 1927 became effective, the department of agriculture of the state of Nebraska promulgated rules and regulations to enforce and effectuate the general purpose and provisions of the act, which were

admitted by the parties to have been properly posted as required by law, and on the 27th day of July, 1927, the state department of agriculture entered an order, which was approved by the governor, declaring Dawson county to be an area for the inspection, examination and testing of breeding cattle for tuberculosis. The state department of agriculture likewise caused a notice to be published in a legal weekly newspaper in Dawson county, Nebraska, in which notice was given that the inspection, examination and testing of cattle for tuberculosis in said county, would commence on, or as early after October 31, 1927, as possible.

"The testimony discloses that veterinarians operating as such under authority from the state department of agriculture conversed with the defendants in November, 1927, and requested of them that they be permitted to test the dairy and breeding cattle of the defendants for tuberculosis, and that the defendants each specifically refused to permit them to do so. The defendants admit that they refused to permit them to make the test, and that they now continue in such refusal.

"The defendants' cattle were kept in pastures in Dawson county, Nebraska, and, at about the time this action was instituted, a portion of the cattle were removed to different pastures within the county, which necessitated their being taken through other grazing lands in which other breeding and dairy cattle were kept.

"Conclusions of Law.

"There is ample evidence in the record to sustain the proposition that the defendants have refused to permit the state department of agriculture, and its agents, to make an inspection, examination and test of defendants' cattle for tuberculosis, as alleged.

"The authority of the state department of agriculture to make such an inspection, examination and to test the dairy and breeding cattle of the defendants for tuberculosis in Dawson county depends, first, on two propositions,

either of which is authority for the department to proceed in that respect:

"The state department may make such inspection, examination and test under the provisions of section 10, article 2, of the Laws of Nebraska for 1927, where any county has been declared an area for the inspection, examination and testing of cattle for tuberculosis under the provisions of any legislative act existing prior to the act of 1927.

"Under said section 10, it may also make such inspection, examination and test in other instances where, prior to the passage of the act of 1927, a systematic inspection, examination and testing of cattle for tuberculosis has been undertaken in any county on a cooperative basis by the United States bureau of animal industry and the Nebraska department of agriculture, and more than 5,000 cattle have been tested in such county prior to the passage of the 1927 act.

"The requisite jurisdictional steps required to be taken before the department of agriculture proceeded were complied with. Before the passage of the act of 1927, a systematic inspection, examination and testing of cattle for tuberculosis was extensively undertaken in Dawson county, under a cooperative basis between the state and federal departments, and some 51,000 tests actually made therein.

"The validity of the statute providing for the inspection and testing of cattle to determine the presence of tuberculosis in cattle, and the destruction of such animals where the disease is found prevalent, is a proper exercise of the police power of the state in the interest of the public health, and as a protection of the live stock industry. The statute in question is not violative of any constitutional provision. Under section 10, article 2, of chapter 12, of the Laws of 1927, the legislature provided for the making of such inspection and test in any county which had been declared an area for the making of such inspection under preexisting legislation, and also in other instances where inspection had been previously made in a systematic man-

ner on a cooperative basis by the state and federal departments of agriculture, and a specified number of cattle had been tested. The statute applies to the entire state, and is not special in its nature. In counties coming under either of the provisions of said section, the department of agriculture was vested with jurisdiction to continue such inspection.

"If, as defendants contend, the section in question is special legislation, still it is within the power of the legislature to enact such special legislation covering the matters involved in this suit, where, in its judgment, the subject or matters sought to be remedied could not be properly remedied by a general law, and where the legislature has a reasonable basis for the enactment of the special law.

"While the legislature cannot arbitrarily and unreasonably make classifications by legislation, it has the right to make reasonable classifications where the law will operate equally to all within the same class. The legislature selected a means of accomplishing the eradication of tuberculosis by the establishment of areas in which such eradication work should be carried on at public expense. Its effect was to place some thirty-eight counties into an equal number of special inspection districts, some of which had been declared such areas under preexisting legislation, and others where a designated amount of inspection had been made on a cooperative basis by the state and federal government. The operation of the law to other counties or districts to be created was left to the local option of the breeding cattle owners of the several counties, and inspection could be made when petitions signed by the requisite number of cattle owners have been filed, and proper proceedings and hearings had thereunder.

"The legislature is not prohibited under the Constitution from passing local or special laws, on the subject under consideration, unless it is prohibited by the provisions of section 18, article 3, of the Constitution of Nebraska, which provides: 'In all other cases where a gen-

eral law can be made applicable, no special law shall be enacted.'

"It is for the legislature to determine whether the purpose for which it legislated could be properly accomplished by a general law. It does not appear that the determination of the legislature was arbitrary or unreasonable, or that it was without a sufficient basis to justify the enactment in every respect. In view of the different conditions existing in the numerous counties in which tuberculin tests had been made, and the conditions in other remaining counties of the state, the general law could not have been made applicable, which would have probably reached the situation as it existed prior to the enactment of the 1927 act, in all of the counties of the state.

"Thousands of dollars of public money had been expended by both state and federal government to eradicate tuberculosis in some thirty-eight counties before the act of 1927. These counties were in an entirely different situation from the remaining counties. If the benefits of the work then accomplished prior to the enactment of the 1927 law was to be protected, it was necessary that the legislature place those counties in a different classification from the other counties in the state. A general law, which would have operated alike in all counties, and had granted to each county local option requiring cattle to be tested anew in the same manner, would have resulted in a destruction of the benefits which had accrued up until that time in the counties where extensive tests and large expenditures had been made.

"But it is apparent that, under section 10, the legislature merely defines when and under what conditions the department of agriculture is vested with jurisdiction to commence or continue its work of eradication.

"The state appears to have fully established its case and is entitled to the relief prayed for, and the defendants and each of them should be enjoined from in any manner obstructing, or preventing the state department of agriculture, or any of its officers, agents or inspectors from en-

tering the premises where defendants' cattle may be in Dawson county, for the purpose of applying the tuberculin test to their said cattle, and from carrying out and enforcing the laws of the state of Nebraska, relating thereto, including the rules and regulations relating to said eradication promulgated by said state department.

"Harry L. Norval, Referee."

The challenges to this report are substantially those urged before the referee and by him considered, and are as indicated by such report; and largely involve the provisions of section 10, art. II, ch. 12, Laws 1927, heretofore quoted.

The facts as found by the referee are amply supported by the pleadings, and sustained by the evidence introduced, and such findings, are approved. Further, it is found that the conclusions of law contained in such report are correct, and they are affirmed. In this holding we are but following the rule announced in the recent case of *State v. Heldt*, 115 Neb. 435, in which an able and exhaustive opinion was written by the late, lamented member of this court, Judge George A. Day. This opinion covered the entire act in question as it existed then, and, by favorable chance, as it exists now in so far as it relates to the matters reflected by this record, as the material amendments made to the act by the legislature of 1927 which affect this suit were, apparently, practically all inspired by suggestions contained in such opinion. The only serious weakness that Judge Day found in the act was as to section 9 thereof, and this weakness consisted in the fact that the title of the 1925 act, then under consideration, was not broad enough to include such section 9. This fault was remedied by the act of 1927. He also, in such opinion, conserved the best interests of the state by impliedly at least suggesting a means of safeguarding the benefits of moneys and services theretofore expended or rendered by the state in any county, which, as we conclude, inspired the enactment of section 10 hereinbefore quoted.

As we are satisfied with the report of the referee as to

conclusions of law and fact, also with the reasons leading up to each thereof, further discussion would serve no useful purpose. The motion to confirm the report of the referee is sustained, and the objections filed to such report are overruled.

The restraining order and injunction, as modified, and now in force, is made perpetual, and costs of suit are taxed to the defendants.

INJUNCTION GRANTED.

ARTHUR LINDLEY V. STATE OF NEBRASKA.

FILED NOVEMBER 10, 1928. No. 26444.

1. **Criminal Law**: PLEA OF NOT GUILTY: EFFECT. Ordinarily, a plea of not guilty waives all matters which might have been raised by motion to quash or plea in abatement, and before the defendant can urge such a motion or plea he must withdraw his plea of not guilty. However, in this case, the record being without a complaint, and the defendant's plea of not guilty having been inadvertently lodged, no issue was raised by reason thereof, hence it was not necessary that such plea be withdrawn before interposing a challenge to the right of the court to proceed.
2. ———: TRIAL: LOST COMPLAINT. Where the original complaint in a misdemeanor case appealed to the district court is lost, or is not at the command of the court or either party, it is error for such court, over timely and proper objections interposed by defendant, to proceed with the trial, until such complaint is before it, or a new complaint covering the same offense is substituted on application of the state.

ERROR to the district court for Saunders county: HARRY D. LANDIS, JUDGE. *Reversed.*

H. A. Bryant, for plaintiff in error.

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

Heard before GOSS, C. J., THOMPSON and EBERLY, JJ., and REDICK and STALMASTER, District Judges.

THOMPSON, J.

Plaintiff in error, Arthur Lindley, hereinafter designated

as defendant, was prosecuted and convicted for violations of the liquor law. The action was instituted on complaint of the county attorney of Saunders county in the justice court of H. Reader, and change of venue taken to the justice court of H. J. Woodworth, where trial was had and defendant found guilty on each of the three counts charged in the complaint, to wit: (a) The unlawful transportation of intoxicating liquor for the purpose of sale; (b) the unlawful sale of intoxicating liquor; and (c) the unlawful possession of intoxicating liquor, as a second offense. Appeal was taken to the district court, where defendant appeared in open court, waived the reading of the complaint, and pleaded not guilty to each count. Trial was had and defendant again convicted, and he prosecutes error to this court.

We will first consider claimed errors of law occurring in the trial of the case in the district court. The record discloses that the original complaint was not before such court, or at the command of either party for the purpose of the trial. This fact was discovered before the impaneling of the jury, and the following objection was interposed on the part of defendant: "At this time, and before the calling of the jury, the defendant objects to any further proceedings herein for the reason there is no complaint or information filed in this court against the defendant." The objection was overruled, and defendant compelled to proceed to trial on a purported copy of a complaint, which copy formed a part of the justice's transcript.

Ordinarily, a plea of not guilty waives all matters which might have been raised by motion to quash or plea in abatement, and before the defendant can urge such a motion or plea he must withdraw his plea of not guilty, as held by us in *Green v. State*, 116 Neb. 635, wherein will be found the statute there applicable, as well as our previous holdings on the subject. In those cases there was a complaint or information on file, and thus an issue was joined by reason of the interposition of the plea of not guilty. Not so in this case; the record being without a complaint and the plea

of not guilty having been, as we find, inadvertently lodged, no issue was raised by reason thereof. Such plea was without force or effect, and withdrawal thereof was unnecessary.

This brings us to the challenge, did the trial court commit reversible error in forcing the defendant to trial on the record as it then stood? Section 9999, Comp. St. 1922 (being section 324 of the Criminal Code, Gen. St. 1873), as amended by chapter 113, Laws 1923, provides the manner in which such appeals may be taken, and is, so far as here material, in substance, that the recognizance must be entered into within ten days after the rendition of such judgment, which recognizance must be conditioned for defendant's appearance forthwith, at the district court of the county, and from day to day thereafter to answer the complaint against him. The magistrate from whose judgment the appeal is taken shall make return of the proceedings had before him, and shall certify the complaint and the warrant together with the recognizance to the district court. Section 10001, Comp. St. 1922 (being section 325 of the Criminal Code, Gen. St. 1873), provides: "The district court shall hear and determine any cause brought by appeal from a magistrate upon the original complaint, unless such complaint shall be found insufficient or defective, in which event the court, at any stage of the proceedings, shall order a new complaint to be filed therein, and the case shall proceed thereon the same as if the original complaint had not been set aside." We have repeatedly held that the statutes governing such appeals were mandatory, and thus as to the rights of appeal on the part of the defendant they should be strictly construed. Thus, where the statute provides that a recognizance shall be entered into by sureties, if only one is provided the appeal must be dismissed. *Whetstone v. State,* 109 Neb. 655, and cases cited. In *Kazda v. State,* 52 Neb. 499, we held a recognizance invalid which failed to designate the court before which the defendant is to appear. In the case of *In re Newton,* 39 Neb. 757, under section 324 of the Criminal Code, herein-

before referred to, we held the recognizance must be entered into within 24 hours after rendition of judgment.

Applying these holdings to the case at bar, we have seen the law requires that the recognizance shall provide for defendant's appearance in the district court to answer the complaint; that is, the original complaint. However, as we view this record, our holding in *Bays v. State*, 6 Neb. 167, is controlling. In that case the facts were very similar to those involved here. The original complaint was lost. The prosecuting attorney made this manifest to the court, and on motion filed asked leave to file a substituted complaint charging the same offense as that designated in the original, and, over objections of the defendant, was permitted to do so. The case proceeded to trial and judgment. Defendant prosecuted error, and in the course of our opinion we said: "We think our statute, although it does not in direct terms provide for this particular contingency, clearly recognizes the practice here adopted" (quoting section 325 of the Criminal Code, now section 10001, Comp. St. 1922). Then, we further said in such *Bays* case: "It is evident that, under this provision, no matter how utterly deficient the complaint sent up by a magistrate may be, even if totally wanting in the essential requisites to show the offense intended to be charged, the prosecution will not be thwarted, but 'the court shall order a new complaint to be filed,' upon which the trial must proceed. This section establishes a positive rule of practice by which the courts are of course bound whenever the original complaint is found to be defective. And it does more than this; it furnishes a safe guide to the courts in matters of practice whenever a contingency shall arise, which, although not within the letter, is clearly within the spirit of the statute. In the practice of the courts contingencies not unfrequently arise which the legislature has not anticipated by any suitable provision. These must be met by some general or special rule of court suited to the exigency, and which shall protect suitors in all their legal rights. It seems to us that there is quite as much neces-

sity and reason for the substitution of a new complaint when the original is *lost* as there is when found to be merely defective in form or in substance."

The rule as thus announced is plain, practical, and efficient, and is adhered to.

It is therefore determined by us that the objection to the court proceeding with the trial without the original complaint, or a heretofore indicated substitute thereof before it, was proper, timely interposed, and should have been sustained; and in overruling such objection prejudical error was committed.

The challenge that the verdict does not respond to the issues need not be given consideration, further than to suggest that the form of such verdict is one not to be commended.

This renders it unnecessary to consider the other claimed errors presented.

The judgment of the trial court is reversed and the cause remanded for further proceedings, with leave given the state to produce the original complaint if it can be found; if not, to prepare and file a new complaint covering the same offense.

REVERSED.

LEWIS FORD DENISON V. STATE OF NEBRASKA.

FILED NOVEMBER 10, 1928. No. 26375.

1. **Evidence** examined, and *held* sufficient to sustain the verdict of manslaughter.
2. **Homicide**: INFORMATION: DEGREE OF HOMICIDE: QUESTION FOR JURY. Where an information charges the crime of murder in the first degree, murder in the second degree and manslaughter are included in the charge, the degree ordinarily being for the jury; and where the evidence and circumstances of the killing are such that different inferences may properly be drawn therefrom as to the degree, the court should submit the different degrees to the jury for them to draw the inference.
3. **Criminal Law**: RES GESTÆ: EXCLUSION OF DECLARATION. Where a participant in a transaction makes a declaration

claimed to be a part of the *res gestæ*, but the words spoken are of such character that the meaning of the speaker cannot be fairly gathered therefrom, it is not error for the court in the exercise of a sound legal discretion to exclude such declaration from the evidence.

4. ———: TRIAL: REMARKS OF COURT. Remarks of the court upon a trial for murder considered and found not to constitute prejudicial error.

ERROR to the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

H. M. Sullivan, Ed. P. McDermott, and *Pratt, Hamer & Tye,* for plaintiff in error.

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

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

REDICK, District Judge.

The defendant, Lewis Ford Denison, was charged in the information with the crime of murder in the first degree; he was convicted of manslaughter and sentenced to the penitentiary for a term of seven years, and prosecutes error to this court.

The occasion and circumstances of the tragedy are, to say the least, unusual, and will be briefly stated as furnishing a background for the discussion which follows. The place of the homicide was on a public road near the farm house of one Gabriel Shada, a brother of John Shada, the victim thereof. The Shadas were Syrians, who will be so designated to distinguish them from the crowd of Kearney boys and young men later referred to. On the morning of August 28, 1927, a large number of Syrians had assembled at St. George's Church at Kearney, Nebraska, attending divine service, at which time a baby of John Shada, deceased, was to be baptized. It seems to be a custom among Syrians to celebrate such an occasion by a gathering of the friends and relatives of the father for social

and friendly intercourse, and they were present in large numbers, some from Michigan and some from Iowa, and from different points in the state of Nebraska. The day was also the birthday of John Shada, deceased. At the church, notice was given that all present were invited to the farm of Gabriel Shada, about six and one-half miles east of Kearney, to celebrate the occasion, and in the early afternoon were gathered at the farm some 125 or 150 people, nearly all Syrians; dinner was served and various games were played, the whole affair being in the nature of a large picnic. Among them were John, Gabriel and Charles Shada, with their wives, families and a large number of others who were called as witnesses. John lived at Lexington near Kearney, Charles at Kearney, and Gabriel at his farm.

During the middle of the afternoon, between 3 and 4 o'clock, a crowd of 8 to 10 young men and boys from Kearney came out to Gabriel Shada's farm, apparently for the purpose of "baiting" the Syrians. At any rate there ensued a fight in which the Kearney boys were defeated and returned to town leaving one of their number, Ernest Noble, at the farm, an incident to which reference will be made later. The defendant was not present at this occurrence. Upon the return of the crowd to Kearney a large crowd, variously estimated from 50 to 75 in number of young men and youths was assembled, and headed by a truck in which 8 to 10 were loaded, and followed by about 15 automobiles carrying the others, started for the Shada farm, arriving about 500 or 600 feet west of the gate thereof between 5 and 5:30 p. m., where the cavalcade stopped in a line upon the south side of the traveled road. Before reaching this last destination, and perhaps an eighth or a quarter of a mile west thereof, three automobiles loaded with Syrians returning home were met by the crowd; the the cavalcade was stopped, and many of the men got out upon the road three different times and stopped the automobiles coming west, in each case calling the occupants dagoes and opprobrious names, and, in at least two in-

stances, striking and abusing occupants of the cars; the cars containing men, women and children. None of them were seriously injured and they were shortly permitted to proceed on their way.

When the Kearney cars were stopped at the point above indicated, practically all of the occupants got out and began gathering sticks and clubs and other similar weapons and advanced toward the Shada farm in an uneven line stretching across the road. The approach of the cars from Kearney was noticed by a number of children playing in the road and they ran into the farm, giving the alarm that a big crowd was coming. Thereupon Gabriel Shada, who testified that he told all the others to stay back, walked out onto the road and approached the crowd from Kearney with one or both hands lifted up, and when within 15 or 20 feet of them, as he testifies, he said to them, "Boys, what are you doing here? I don't want no trouble," and thereupon one or more of the Kearney boys jumped at Gabriel and struck him a severe blow on the side of the face, and he turned around toward his own people. John, the deceased, followed Gabriel out onto the road at a short distance, about 15 feet, and a little to the left of Gabriel, facing south and apparently going across the road toward a crowd of Kearneyites assembled on the south side of the road and a little west of John. While John was in that position, facing south, and almost immediately after Gabriel had been struck, a shot was fired from the west, the bullet entering John's neck below the ear and about an inch or an inch and a half back of the angle of the jaw-bone. John put his hand to his face, turned to the right, and started back toward his friends, who by this time had gathered in some numbers in the road. He was taken by his wife and friends to an automobile and thence to Kearney to a hospital, where he died that night as the result of the wound.

Prior to the firing of the shot there had been a number of minor fracases, during which at least two of the Syrians had been struck with clubs, one of them being knocked into the ditch by the side of the road, and there was consider-

able yelling and holloing on the part of the Kearneyites. There was some evidence by the witnesses for the state that two, two or three, or three or four shots were fired, coming from the west, but, if so, only one caused any damage. Some of the defendant's witnesses testified that two or three shots came from the east, and some of them identified Sam Shada as the party who fired them, but all of those witnesses who positively identified Sam Shada testified that he fired in the air and that no one was hurt. The evidence warrants the inference, if more than one shot was fired, that there was a slight pause between the shot which killed John and later ones. At any rate the evidence and circumstances point overwhelmingly to the conclusion that the fatal bullet came from the west or from the north and west at a point occupied by the Kearneyites, and where the evidence shows without contradiction there were no Syrians. Immediately upon the firing of the shot or shots, the Kearney crowd turned and ran back to their cars, and the Syrians, men and women, came into the road in considerable numbers, and the trouble was over.

1. The vital question is: Who fired the shot that killed John Shada? The state did not charge and the case was not tried upon the theory that defendant was a member of a mob or riot during the occurrence of which Shada was killed, but directly charged the defendant with firing the fatal shot, and defendant's first assignment of error is that the evidence is insufficient to support the verdict. It will, therefore, be necessary to briefly review the evidence upon which the state relies, with which we now proceed.

Charles Shada, uncle of deceased, testifies that he saw Gabriel and John go out into the road, and that he followed them, walking down the north side of the traveled portion, westerly; that he was some 20 or 30 feet back of Gabriel, and saw him lift up his hands, but could not hear what he said; that he saw John walking across the road facing the south; that he had known defendant Denison about 20 years, since he was a baby, and had seen him a number of times that summer in Kearney, where witness lived; that

when he got within 15 or 20 feet of Gabriel he saw defendant to the north and a little west of John—"8, 15 or 10 feet from John"—with a revolver in his hand, pointed toward John's ear; that he immediately shouted, "Don't shoot, Denison, I know you;" that immediately thereafter he saw defendant fire the revolver, and that John was in the center of the road facing south when the shot was fired. The bullet entered the right side of the neck below the ear near the angle of the jaw-bone, and its course was a little to the right and upward. These facts corroborate the witness as to the location of the parties, completely demolishing the theory of the defense that John was shot by one of his own people.

Charles Shada is corroborated by his wife, Mary, who testified that she knew Denison, that he was not very far west from Charley, that she saw a little gun in his hand and saw him shoot, that John was in the road not far from Denison, looking south, and that she saw blood in John's mouth.

Reverend Yanney, pastor of St. George's church, heard a shot from the west and a little south from where he was standing in the yard by the road, heard three or four shots close together, but did not see any gun or who shot.

George Shada testified that he was struck and fell into the ditch on the north side of the road, and heard shots from the south and west of him. Nicholas Shada testified that he was going west on the north side of the road and heard Charley say, "Don't shoot, Denison, I know you"—heard three shots from the west close together—thought they were from the same gun—shots were fired just as Charley finished—saw George Shada in the ditch.

George Simon testified that he heard Charley call Denison by name and say, "Denison, I know you, don't shoot," but did not see Denison in the crowd; that just before John was shot he was facing south of west, mostly south.

Amen Shada, son of Gabriel, saw Gabriel going west down the road followed by John who was a little southwest of Gabriel, facing south, when he was hit; heard Gabriel

say, "Don't shoot," then heard two or three shots from the west, from the northwest of John.

Denison was identified by witnesses both for the state and defendant as wearing a leather jacket. Rosie Miller, testified that she was in the first car stopped by the Kearney crowd west of Gabriel Shada's place, and that a number of boys jumped onto the running-board of her car, among them one wearing a brown leather jacket, who had a pistol in his hand; she did not know defendant Denison at the time, but subsequently positively identified him as the boy with the leather jacket, picking him out from eight or ten young men who had been arrested and placed in the jail at Kearney. She is corroborated to some extent by her mother, who was with her in the car, as to the transaction on the road. There was considerable other testimony tending to corroborate the state's witnesses on various minor points. There was no direct effort to impeach any of the witnesses called for the state, but they were thoroughly cross-examined by able counsel and some inconsistencies between their evidence upon the trial and at other times were developed. The defendant introduced a large number of witnesses from the crowd that went out from Kearney who gave a description of the events as they saw them, but the only testimony tending to rebut the direct and positive evidence of the state was by several witnesses to the effect that they heard shots coming from the east; that, at the time the shot which killed John was fired, Denison was fighting or wrestling with some one in the ditch at the north side of the road. Two witnesses swore that Charles Shada made statements to the effect that one Nutter was the person who fired the fatal shot, and some contradictory statements of Charles were developed on cross-examination. The defendant himself did not take the witness-stand and we are therefore deprived of any possible benefit which we might have received from a statement of his version of the affair.

The bill of exceptions in this case covers more than 1,500 typewritten pages. It has been most carefully read and

studied with particular reference to this assignment of error, and we have reached the conclusion that the evidence given upon the part of the state, if believed by the jury, was amply sufficient to sustain the verdict. That evidence is practically without direct dispute as to the main facts necessary to sustain a conviction. Its weight and sufficiency and the proper inferences to be drawn from it were for the jury. If the evidence may be deemed conflicting upon the pivotal points in the case, nevertheless, where the evidence of the state, if believed by the jury, is sufficient to sustain the verdict, this court will not interfere. *Wheeler v. State,* 79 Neb. 491; *Denker v. State,* 106 Neb. 779; *Ingoldsby v. State,* 110 Neb. 495.

2. The second assignment of error is that the court erred in submitting to the jury the question of defendant's guilt of manslaughter. Section 10155, Comp. St. 1922, provides: "In all trials for murder the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder in the first or second degree, or manslaughter." But counsel for defendant correctly contends that this statute does not require the submission of a degree or grade of homicide which has no support in the evidence. The contention of defendant on this point is that the evidence introduced by the state in this case admits of only one of two conclusions, namely, that defendant was guilty of murder in the first degree, or murder in the second degree, and that, therefore, if the jury were not convinced beyond a reasonable doubt of his guilt of one of those offenses, he was entitled to an acquittal. The statutes of this state define manslaughter as follows: "Whoever shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter." Comp. St. 1922, sec. 9546.

Counsel insists that under no view of the evidence in this case would the jury be justified in finding either that the defendant shot John Shada upon a sudden quarrel, or un-

intentionally, while in the commission of an unlawful act. These alternatives will be discussed in their order.

(a) The evidence tends to establish that immediately prior to the shooting several conflicts between individuals of the opposing sides had taken place; that the defendant himself had struck one of the Syrians (identified as George Shada) with a club, knocking him into the ditch on the north side of the road, and with such force as to break the club in two, the portion of which remaining in his hand he then threw to the ground. Then some one on defendant's side struck Gabriel Shada a severe blow, from the effect of which he was dazed and unable to see. Then followed in quick succession the fatal shot. These occurrences took place in less time than it takes to record them—they were incidents of a fight then being carried on between the opposing parties. The jury might well be unwilling, under these circumstances, to find that the defendant acted with deliberate and premeditated malice and was therefore guilty of murder in the first degree; again, they might be unwilling to find that he acted with malice and therefore guilty of murder in the second degree. The state was required to prove malice in order to convict defendent of second degree murder. There is no presumption of malice in this case where all the circumstances of the killing are testified to by eye-witnesses. *Davis v. State,* 90 Neb. 361. To convict of murder in the second degree it is not sufficient merely to prove that the killing was intentional; it must also have been malicious. On the other hand, there is little, if any, question but that a verdict finding defendant guilty of either one of the higher crimes would be sustained by the evidence in this case. The verdict of the jury implies that defendant's act was neither premeditated nor malicious. They do find, however, that defendant killed John Shada, without justification or excuse, because none was offered. Defendant's counsel insists or implies from his argument that it was the duty of the court to analyze and weigh the testimony as to the manner in which the tragedy occurred and determine as a matter of

law that the defendant was not guilty of the crime of manslaughter, notwithstanding the fact that it was well established that under some circumstances the defendant fired the fatal shot. We think this would be placing too great a burden upon the court by requiring it to perform duties and determine facts from the evidence which the defendant had the right to have submitted to the jury. The jury are to say what facts are proved and what are the proper inferences to be drawn from those facts, and in view of the evidence and nature of the conflict at the time the shot was fired, they had a right to conclude, if so convinced by the evidence, that the defendant killed Shada upon a sudden quarrel.

(b) But defendant's main contention is that there was no evidence which would warrant the jury in convicting the defendant of involuntary manslaughter, that is, of shooting the deceased unintentionally while in the commission of an unlawful act. That the defendant was in the commission of an unlawful act at the time of the shooting is proved beyond question. The testimony of witnesses for the defendant is practically unanimous that the crowd was formed for the purpose of going out to the Shada farm, six miles distant, for the purpose of fighting and "licking" the Syrians. In pursuance of their unlawful intention they stopped on the highway three automobiles loaded with Syrians, assaulted and abused them; and within a short distance of the Shada farm stopped their cars, got out and began gathering sticks and weapons of all sorts for purposes of attack. That this was an unlawful assembly is beyond question. It was a mob and a riot in which the evidence seems to point to the defendant as a ring-leader. It needs no argument to show that at the time of the shooting the defendant was in the commission of an unlawful act within the meaning of those words as used in the statute defining manslaughter. But counsel insists that to convict under this alternative the killing must have been unintentional. Here again he seeks to put upon the trial court the burden of determining as a matter of law what

was the intention of defendant when he fired the shot while in the commission of an unlawful act. The intention with which an act is done is one of the most difficult questions of fact which is ever submitted to a court or jury. Neither can enter the mind of the actor and select from the innumerable thoughts and motives which control conduct the one which actuated him in doing a certain thing. So difficult is it to determine the intent that in many instances the law has declared presumptions thereof to aid in the discovery of the truth. In the final analysis the intention of a party must be discovered by the drawing of proper inferences from his conduct. This is the province of the jury, aided, in some cases, by legal presumptions. The evidence tends to prove that defendant pointed his gun at the deceased and fired. This is the testimony of Charles Shada who stood at one angle of a triangle formed by himself, John Shada, and defendant. He says he was about 20 feet east of defendant, who stood from 8 to 15 feet north and a little west of deceased who was standing about the center of the road, which would place him about 20 to 30 feet south and west of the witness. The witness was, therefore, to the side and at an angle from defendant, and though he attempted to do so, was in no position to determine the precise direction in which the revolver was pointed. Counsel in effect argues that the trial court should have accepted the statements of this witness as absolutely and mathematically true, and that, therefore, it is indisputably established that defendant intended to kill John Shada, and that permitting the jury to find an unintentional killing was an error. We cannot accept this proposition. It is not suggested that defendant knew John Shada or had any quarrel with him, nor is any other fact proved which would give rise to an inference that defendant intended to kill the deceased. The only inference is such as may properly arise from the fact that Shada was struck by the bullet from a gun pointed in his direction. We are not prepared to say as a matter of law that other inferences may not be drawn from the circumstances proved. Per-

haps he intended to shoot Gabriel Shada who was closest to him and had just spoken to him, but his aim was poor, or, upon losing the stick, his first weapon, he had pulled out his gun and fired promiscuously at the crowd. The tragedy occurred during a fight, within the space of a very few minutes when all was confusion and clamor. Under these circumstances to substitute the judgment of the court for that of the jury, as to the quality and characteristics of the acts of the parties, would deprive defendant of a substantial right. The inferences to be drawn from the facts and circumstances shown in the evidence are peculiarly within the province of the jury. We have not the slightest doubt that it was the duty of the court to submit to the jury the different degrees of homicide, and that, if he had not, the defendant would now be alleging error in this court for his failure so to do. Having concluded that no error was committed in submitting the question of manslaughter, it will not be necessary to discuss the question of the prejudicial character of such error had it been made.

3. The third assignment of error presents for consideration the exclusion of evidence of a statement of one of the Kearney boys about the time of the shooting. The witness by whom such statement was sought to be proved testified that immediately after the shots were fired some 12 or 15 Kearney boys came running west down the road and met the witness between 100 and 125 feet from the line of boys across the road, and that some boy made an outcry. Witness was then asked what he said: The state objected, and the objection was sustained, as not part of the *res gestæ* and hearsay. Defendant then offered to show by this witness that as the boys were running back some boy called out, "The Dagoes shot." Whether or not a declaration made by one of the participants in a transaction is a part of the *res gestæ* is dependent upon the circumstances of each case. The rule was stated in *Pledger v. Chicago, B. & Q. R. Co.*, 69 Neb., 456, as follows:

"A declaration to be competent evidence, as part of the *res gestæ*, must be made at such time, and under such cir-

cumstances, as to raise the presumption that it was the unpremeditated and spontaneous explanation of the matter about which made."

In the same case it is held: "The admission or exclusion of such evidence rests largely in the discretion of the trial court, such discretion is not an absolute discretion to be exercised arbitrarily, but a legal discretion, the abuse of which constitutes reversible error."

It may be conceded that the evidence offered comes within the rule above stated and its admission would not have been error of which the state could complain, but whether its rejection was reversible error as to the defendant depends upon several other matters now to be noticed. The *res gestæ* was the shooting of deceased by some person whose identity was sought. The spoken words are so indefinite that their meaning cannot be ascertained. They may have been intended to convey the information that "The Dago's shot" (the Dago is shot), or that "the Dagoes shot" (the Dagoes fired). The first is the most natural conclusion, as to convey the other meaning the cry would ordinarily have been "The Dagoes are firing," or "shooting." If the former, it referred to a fact about which there was no dispute; if the latter, it merely tended to corroborate the testimony of several of defendant's witnesses that the "Dagoes" fired two or three shots in the air. There is not the slightest basis in the evidence for a claim that John Shada was killed or hit by any of the shots fired from the east. This was physically impossible from the location of the wound and the undisputed evidence of the location of the parties when the shots were fired. The evidence is overwhelmingly convincing that John was in the road facing south and that the fatal shot came from the north and west striking him behind the right ear. All the evidence as to shots coming from the east place the point of firing back and to the left of John and on the south side of the road, and all but two witnesses testified that they were fired in the air or over the heads of the Kearney boys, and the two that the gun was held straight

out. No witness claims that these shots hit any one; some of them only saw the second and third shot fired. It is a fair inference from all the evidence that these shots, if they came from the east, were after a slight pause, and after the shot that killed John. Under these circumstances, and assuming that the evidence was within the *res gestæ* rule, we are unwilling to hold that the trial judge abused his discretion by rejecting the offer.

4. This assigns error in permitting witness Yanney to testify to statements made by Ernest Noble after the first fight in the afternoon. This evidence was brought out on redirect, in response to a suggestion of defendant's counsel on cross-examination that Noble had been kept captive by the Syrians. It seems Noble had been left behind when his comrades left for town after being defeated in the fight, and the statements were to the effect that he and his crowd had been in the wrong. He was allowed to clean up and one of Gabriel's boys took him back to town. The whole description of this first fight was probably immaterial, but the evidence objected to was called out to meet the suggestion that Noble had been kept a captive. We find no error in its reception.

(4) 7, 8, 9. These assignments relate to alleged error on account of remarks of the trial judge during the trial. The witnesses for the state were nearly all Syrians, some of whom did not appear to understand English very well, and there was some discussion as to the need of calling an interpreter. It would needlessly extend this opinion to quote all the questions and answers, but the remarks of the court to which objection is made are as follows: A witness, Mrs. Simon, having been asked by the court, "Do you understand?" answered, "I don't know." And the court said: "You have to understand before you answer." Again, the same witness was asked, "How close did they get to the car?" And the state's attorney said, "Now, you know she don't understand that." And the court: "Well, I tell you gentlemen, I will appoint somebody as interpreter here pretty quick. I am going to know wheth-

er this witness knows what she is testifying about." Mr. Hamer for defendant: "Well, I don't think there is an interpreter here from whom you can get what she—" The court: "Well, I think there are plenty of good honest men around here who will interpret it honestly." Mr. Hamer: "Well, I don't think so." The witness: "Mister, please—" The court: "Hold on. I will give you a chance, but I don't want her misled here." Mr. Hamer: "I don't want to mislead her. That is just what I am trying not to do. I don't want the court to get the idea that I am trying to mislead, nor that suggestion made here, for I am not." The court: "No, I don't think you are, but I am afraid we get her to answer things that she don't understand and then where are we? I am afraid she don't understand the language. Now, we will try it again and see." Later in the trial when Mary Shada was called as a witness, the county attorney said: "Judge, this lady doesn't understand English very well. We will do the best we can with her." The court: "If you want an interpreter, I will appoint one. It was very unsatisfactory with the other witness we examined here the other day. I am very much in doubt as to how much she understood about it." An interpreter was called and the court remarked: "You can go on here with your simple questions for a little while without the interpreter. Of course, counsel understand that, on cross-examination of a person who don't understand the language, you can get them all balled up and it is better to have an interpreter."

It is argued by defendant's counsel that the remarks of the court were "equivalent to saying that the contradictions between the testimony of the witness, Mrs. Simon, and her daughter, Mrs. Miller, could be accounted for on the theory that she hadn't understood the language." When this witness was first called the county attorney suggested that they would need an interpreter, but was instructed by the court to make his questions simple. A perusal of the examination of this witness convinces us that there was a real question as to the need of an interpreter. The

remark of the court was a part of the discussion of that question. We think it will not bear the construction put upon it by defendant's counsel.

Counsel contends that the remark of the court to the effect that an honest interpreter could be had was "a damaging indorsement of the Syrian witnesses," but we do not so consider it. The discussion regarded an interpreter. Probably a Syrian would have to be selected, but not necessarily so. At any rate, to characterize this remark as a comment upon the credibility of witnesses in the case would be giving it a significance not warranted by the words themselves nor the circumstances under which they were uttered.

The remark of the judge that he did not want the witness misled was evidently misunderstood by counsel, and perhaps might have been by the jury; but in his next utterance the judge said he did not believe counsel were trying to mislead her, thus correcting any erroneous impression the jury may have received.

It is suggested that certain statements of the court "show the desire of the court to keep the rude acts done by the boys constantly before the jury to the obscuring of the real issue in the case, or else to convey to the jury the thought that because of these acts the boys were unworthy of credit on the main issue." This proposition is absolutely without foundation in the record, upon a most painstaking examination of which we are unable to find any evidence of bias or partiality on the part of the court. Upon the record we are convinced that defendant had a fair trial. It has been suggested in argument that if any prejudice existed in the community it would be in favor of defendant belonging to a well and favorably known family as against the Syrians. We would be loath to recognize any such condition as would endanger the liberty of a citizen or punishment for crime, but in the present case its nonexistence is manifest by the verdict of the jury.

We have discussed all of the matters argued in the briefs as ground for reversal, and have considered all other as-

signments of error presented upon the oral argument, and have discovered no prejudicial error warranting our interference with the judgment.

AFFIRMED.

ROY H. DENNIS ET AL., APPELLEES, V. CHARLES H. SLAMA, EXECUTOR, APPELLANT.

FILED NOVEMBER 23, 1928. No. 26177.

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

Slama & Donato and *Votava & McGroarty,* for appellant.

E. D. O'Sullivan, contra.

Heard before GOSS, C. J., THOMPSON and EBERLY, JJ., and REDICK and STALMASTER, District Judges.

PER CURIAM.

The appellees, hereinafter called plaintiffs, instituted this action in the district court for Douglas county against Nels F. Peterson, who afterwards died and the action was revived in the name of the appellant, hereafter designated as defendant, to recover $842.94, the purchase price of certain cattle; and at the same time plaintiffs filed the necessary affidavit to procure the issuance of a writ of attachment and garnishment, alleging as grounds therefor that such Peterson, the then defendant, fraudulently contracted the debt in suit. The writ was issued and Denny commission company, who was indebted to defendant in the sum of about $1,000, was served as garnishee. Defendant did not plead to the petition, but filed a motion to dissolve the attachment and garnishment on the grounds, in substance, that the facts set forth in plaintiff's affidavit of attachment were untrue, and that the debt was not fraudulently contracted. After evidence was introduced on the issues thus presented, both as to the debt and the

affidavit for attachment, the court found on each thereof in favor of the plaintiffs, overruled the motion to dissolve the attachment and garnishment, ordered the garnishee to pay into court $854.34, and entered judgment accordingly. To the overruling of such motion to dissolve the attachment and garnishment defendant appeals, and challenges such judgment on the sole ground that it is contrary to the evidence and the weight thereof.

An examination of the record discloses proof warranting the conclusions reached by the trial court. While we might have found differently if we had been the original triers of fact, it must be remembered that, where a law case is submitted to the court, the same rule is applicable to its findings of fact that would be applicable if such determination had been arrived at by a jury, to wit, that such judgment or verdict will not be disturbed on appeal unless the same is without support in the evidence.

Therefore, as we have seen that the findings and judgment of the trial court were not without supporting evidence, its determination should be, and is, in all things

AFFIRMED.

MARY LANNING MEMORIAL HOSPITAL ASSOCIATION, APPELLEE, V. ADAMS COUNTY, APPELLANT.

FILED NOVEMBER 23, 1928. No. 26196.

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

Walter M. Crow, for appellant.

Herman G. Schroeder and *Stiner & Boslaugh, contra.*

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

PER CURIAM.

Affirmed on authority of *St. Elizabeth Hospital v. Lancaster County,* 109 Neb. 104, *House of the Good Shepherd*

v. Board of Equalization, 113 Neb. 489, and *Central Union Conference Ass'n v. Lancaster County,* 109 Neb. 106.

AFFIRMED.

THOMAS L. HALL, APPELLANT, V. EMERSON L. BOWERS ET AL., APPELLEES.

FILED NOVEMBER 23, 1928. No. 26171.

1. **Appeal in Equity:** MOTION FOR NEW TRIAL. "In an equity case appealed to this court, if it is desired to review alleged erroneous rulings of the trial court as to the reception of evidence, a motion for a new trial must be filed and overruled in the district court." *Farmers Loan & Trust Co. v. Joseph,* 86 Neb. 256.
2. **Eminent Domain:** RAILROAD RIGHT OF WAY: GRANT OF USE. Where lands have been legally condemned and appropriated for railroad right of way through a farm, the use of a strip of that right of way, granted by written license from the railroad company to one of its patrons for his convenience in driving live stock to the railroad station for shipment and terminable on short written notice, will not be enjoined at the instance of the adjoining owner who is the owner of the fee in the right of way, in the absence of special or irreparable damage to such owner.

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

Burkett, Wilson, Brown & Wilson, for appellant.

Kennedy, Holland, De Lacy & McLaughlin, contra.

Heard before GOSS, C. J., THOMPSON and EBERLY, JJ., and REDICK and STALMASTER, District Judges.

GOSS, C. J.

This suit was brought to enjoin defendant from using the right of way of the railroad company for the purpose of driving live stock toward a local station for shipment to market. From a decree adjudging that Emerson L. Bowers, the chief defendant, might use a lane on the right of way created under a license from the railroad company the plaintiff appeals.

Emerson L. Bowers (who will be referred to as defendant unless it becomes necessary to distinguish him from other defendants) and Thomas L. Hall own and occupy farms north of the village of Verdon, both located in the west half of a certain section. The Hall farm is directly south of the Bowers farm and therefore is nearer to the railroad station at Verdon, which is their normal shipping point. The railroad runs in a southeasterly direction through both farms toward Verdon. The right of way is held by the railroad company by virtue of condemnation proceedings. On the easterly side of the right of way Mr. Hall has on his farm a private road 23 feet wide running southward from his improvements to the east and west public highway on the south of his farm. From this public highway there is a public highway south toward Verdon and adjacent to the east side of the right of way. The evidence does not show how far Verdon is from the east and west highway, but it is not far. Previously the defendant had to drive his stock for shipment north of his home and around by the public road, additional distance, of about two miles, to Verdon, but some time prior to the commencement of the suit he had been driving them down the right of way to the aforesaid east and west public highway and thence to Verdon along the said public highway adjacent to the right of way. He testified that it saved him $40 to $50 a car to use this shorter route to drive his hogs to Verdon for shipment as compared with hauling them by truck, which was necessary when taking the longer route, because it is too far and there are too many bridges on the road; and that during the prior year he had had a total of 141 cars of all kinds for all his farms in and out of Verdon on the Missouri Pacific. Plaintiff had two private way crossings of the railroad near his improvements in the northern part of his farm for the use of that part of his farm west of the railroad.

The petition was filed March 4, 1926, and we assume that is the date of the commencement of the suit. At that time defendant had no license from the railroad company to use

its right of way for the purposes complained of; and for some time he had been driving his stock through a fence on his south line and thence down the right of way and on plaintiff's private road, which was not then fenced against the right of way. Such was the situation until after the suit was commenced.

The evidence shows that under date of April 10, 1928, defendant and the Missouri Pacific Railroad Corporation in Nebraska, which owned the railroad in question, entered into a written agreement, called a "License to occupy railroad right of way." This license covered a strip of the right of way 28½ feet wide along the east side thereof and next to the private road of plaintiff. It extended from the east and west highway in a northeasterly direction about 2,870 feet to defendant's land. It provided for a fence along the boundary of the strip nearest the railroad track and for gates to be constructed across the strip where it intersected the private crossings of plaintiff. The license was not to be operative until the fence and gates should be constructed and installed and it provided for other things not necessary to state here. The gates and fence were not yet constructed, but a fence had been erected on the right of way line between the railroad and the Hall private road before the time of trial.

The district court found that, at the commencement of the action, the defendant Emerson L. Bowers had, without lawful right, been using the railroad right of way where it crossed plaintiff's lands for the purpose of driving live stock to the station at Verdon, that at such times they had trespassed on plaintiff's lands and private driveway and that, at the commencement of the action, plaintiff was entitled to an injunction restraining said defendant from using the right of way and from said trespasses on said land; that, after the action was begun, the railroad company had granted said defendant the license to drive his live stock through the lane made by the boundary line fence of the right of way and by the fence between that and the railroad track; and that said license was valid

as between plaintiff and defendant. The court decreed that the defendant might use the land described only as permitted by the license.

The questions raised on appeal are questions of law. Appellant's first assignment alleges that the court erred in receiving the license in evidence under the answer, which consisted of a general denial. The petition alleged that the defendant trespassed on plaintiff's private way without the consent of plaintiff, drove his live stock along both the right of way of the railroad company and the private way of plaintiff with no fence to separate said ways; that the driving of cattle and hogs over the right of way of the railroad was no part of the railroad business; that the condemnation proceedings by which the right of way was acquired gave the railroad company no authority to drive live stock over the right of way or to permit the same to be done by the defendant; and that the said acts of the defendant were done by him without right or authority and without any permission or grant of leave by the plaintiff. The general denial raised an issue on all the material facts alleged. Plaintiff was therefore required to prove in these respects that the defendant had no permission (1) from the plaintiff to trespass on his land and (2) had no authority from the railroad company to drive his stock along the right of way. Of course, plaintiff had in reserve as a matter of law the lack of legal right of the defendant to use the right of way even if granted such authority by the railroad as it might have. It is to be noted that, when the license was offered in evidence, the plaintiff did not object to its admission on the ground that it was not pleaded in the answer, but merely objected to it "as incompetent and immaterial under the issues." This did not fairly bring to the notice of the trial court the objection that he argues here. If he had objected to the license on the ground that it was not pleaded, the court might have allowed the answer to be amended on such terms as might be just. Moreover, the transcript does not show that any motion for a new trial was filed. In *Farm-*

ers Loan & Trust Co. v. Joseph, 86 Neb. 256, we held: "In an equity case appealed to this court, if it is desired to review alleged erroneous rulings of the trial court as to the reception of evidence, a motion for a new trial must be filed and overruled in the district court." That is the settled rule both in actions at law as well as in suits in equity. *State v. Citizens State Bank,* 115 Neb. 271, and cases cited therein. We think there was no error in the ruling of the court and, if the ruling was erroneous, it has not been properly challenged and preserved.

The other assignments of error attack the right of the railroad company to use the right of way or to allow it to be used by another even for the limited purpose of driving the live stock of the defendant through the land toward the station for shipment, or from the station to his home.

It was stipulated on the trial that the railroad company has no title to the real estate except such as was obtained by its predecessor, which condemned the right of way across the land now owned by plaintiff; and that the plaintiff is the owner of the fee, subject only to the rights of the railroad company obtained under such condemnation proceedings.

The main question for consideration is whether the proposed use of the right of way was reasonably to be contemplated when the right of way was transferred to the railroad company. Questions somewhat analogous to that involved here have arisen in a multitude of cases, too numerous even to cite. It has been held, when the business is conducted by the railroad or by its patrons in such a way as to further the business of the railroad, the right of way may be used for elevators, lumber yards, coal yards and sheds, for wharves, docks and piers, for warehouses and corn cribs, for storage purposes, for stock-yards and pens, for refreshment and recreation places, for hotels and boarding houses, and for telegraph and telephone poles, for cultivation of portions of the right of way by third persons, and for uses for many other miscellaneous purposes. In an extensive note on the uses to which railroad right of

way may be devoted as against the owner of the fee, found in 36 L. R. A. n. s. 512, the author well sums up the general principles in these words: "The general rule seems to be that any use of the right of way, or any structure upon it that tends to the convenience or benefit of the railway company or of its patrons, and that does not interfere with the business of the company or its duty to the public, and that does not cause special or irreparable damage to the fee owner, will be permitted, even against the objection of the fee owner."

The testimony in this case shows that the use of the right of way was induced by an arrangement between defendant and the railroad company that he should give the railroad company all business arising out of live stock shipped by him and driven over the right of way. By the terms of the written license either party may terminate it on 30 days' written notice served on the other.

This arrangement served the purposes of both parties to it. It saves the licensee a long drive of his fat cattle and hogs to the station for shipment and such incidents in the way of time and shrinkage as would flow therefrom. As long as the license continues it insures tonnage of live stock to the railroad through this advantage over its competitor in the same town.

We are of the opinion that the general rule heretofore quoted is peculiarly applicable to this case. Is there any great and irreparable injury likely to result to the appellant? When he brought the suit the license to use the right of way was not in existence and, as the evidence shows, the almost inevitable result of driving cattle down the right of way was to cause a trespass on his private driveway if not upon his farm lands. At the time of the trial his main objection was removed by the fact that the right of way had by that time been fenced off from his driveway. If it had not been for the injunction the lane contemplated by the license would probably have been fenced. Before the license can be operative by its terms, it must be fenced. When that is done the appellant's causes of complaint will

be limited to the use by defendant of the right of way over appellant's two railroad crossings between the east and west sides of his farm. The license from the railroad, in precise terms, requires the licensee to put "the necessary gates therein at all places where said strip intersects existing private crossings." The appellant does not have the right to the continuous and exclusive use of these crossings at all times so that he can prevent all other use of that portion of the right of way. The evidence shows that it is the intention of the railroad company and of its licensee that gates shall be so provided that, when the strip or lane is used under the license, swinging gates may close the crossings against the live stock driven down the right of way and the same gates may serve to protect the lane and make an open crossing for appellant after the live stock of the licensee shall have passed the crossing.

Each case of this kind must be bottomed on its own facts. To our minds the appellant has suffered and will suffer no irreparable injury through the use of the right of way as contemplated by the license; the contemplated use of the surface of the right of way does not jeopardize his fee title, is not likely to injure the health of his own live stock, does not impair his use and enjoyment of his contiguous lands and does not entitle him to injunctive relief under the facts shown.

We are of the opinion that, where lands have been legally condemned and appropriated for railroad right of way through a farm, the use of a strip of that right of way, granted by written license from the railroad company to one of its patrons for his convenience in driving live stock to the railroad station for shipment and terminable on short written notice, will not be enjoined at the instance of the adjoining owner who is the owner of the fee in the right of way, in the absence of special or irreparable damage to such owner.

The decree of the district court was right and it is

AFFIRMED.

Heard on motion for rehearing April 25, 1929, before GOSS, C. J., DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and REDICK and SHEPHERD, District Judges. *Motion overruled. Former opinion adhered to.*

SHEPHERD, District Judge, dissenting.

Because of the following, I dissent from the majority opinion.

Shippers and feeders commonly handle more or less diseased stock, not of intention, but because it cannot be avoided—stock infected with cholera, tuberculosis and other communicable diseases. One hundred and fifty carloads a year through a narrow runway on a man's farm expose him to no small risk through danger of infection to his own stock. Cattle, horses and hogs go eagerly to smell and to lick the fencing along such a runway. The runway in question permits the lessee, not only to drive away upon it for shipment by the Missouri Pacific, but to bring in by it for feeding from 100 points accessible by the county highways. Is Hall's injury in this particular reparable because he may sue Bowers at law when his cattle fall sick from such a cause? And must he incur the hazards of proof in a law action time after time as loss occurs, when the danger is at all times obvious and when he might have complete relief by a single suit in equity? The very question suggests a negative answer. Used as it is, this runway decreases the salable value of plaintiff's place by many hundreds of dollars, though no doubt such a use was never thought of when the land was condemned. In addition to this, he has been postponed in his prior acquired right of crossing to the present privilege now granted to the defendant—in his access from one part of his farm to another, given him long before by the company. It seems to the writer that it is being blind to the evidence and to patent conditions to dismiss Hall's damage with the statement that it is neither special nor irreparable. Hitherto it has been widely accepted as elementary that what is improper and illegal, except in certain cases of special and peculiar character, may be restrained without reference

to the degree of injury involved. The plaintiff may have a penchant for disagreement with his friends and neighbors, though this appears rather by statement of counsel than by the record; but, even so, he should not be stripped of his legal rights as he stands before the court.

With due regard for the views of the majority, the pronouncement that the railroad company may use its right of way in any manner beneficial to it or to its patrons is much too strong. It not only extends the power of railroad companies over their right of way far beyond the bounds heretofore established by our decisions, but it creates in substance a new estate almost as desirable as an estate in fee simple. Under and by virtue of power derived from condemnation, as recognized by the opinion, a railroad might construct a speedway for motor vehicles upon its right of way, or for a valuable consideration commit the right to do so to third parties. And hardly could it be enjoined if a nuisance were there maintained in that connection. The point is, we are abandoning the old ground that railroads may condemn and use their right of way only for such things as are naturally incident to operating a railroad, and going to a doctrine which has little support in logic and which promises many difficulties.

I think that the power which the company assumed to exercise in giving Bowers a right to build a private cattle road upon Hall's farm was a power which it did not possess. As before stated, nothing of the kind was contemplated on original condemnation or considered in the award of damages. Yet, from the simple easement acquired for railroad purposes, the company proceeded to carve out and convey a leasehold estate, *i. e.*, to grant Bowers this private way for his stock over his neighbor's land. If power to do a thing of this kind is within the powers of railroads generally, why should they be troubling themselves in these latter days to get deeds to ground long ago condemned by them for right of way?

Perhaps giving Bowers a privilege so valuable (he tes-

tifies that it is worth $5,000 year to him) was not strictly a rebate, but it was a buying of his shipping business, and practically tantamount thereto. It was, in the opinion of the writer, an undue and unreasonable preference such as the law prohibits. Comp. St. 1922, sec. 5510; sections 5440 and 5509 of said statutes, as amended by chapter 160, Laws of 1923, and chapter 164, Laws 1925. "Under the law in this state, a railroad company or other common carrier may not exchange transportation for services or property by way of barter, uniformity of charge being required." *State v. Union P. R. Co.*, 87 Neb. 29. This transaction between the Missouri Pacific and Bowers was a barter by which in effect the latter secured a reduction in his shipping charges. This court stated in *State v. Chicago, B. & Q. R. Co.*, 112 Neb. 248, that at common law a carrier of goods or passengers was under no obligation to treat all persons equally, but might grant one individual an unreasonably low rate or even carry for him without making any charge whatever. But it concluded in said case, in view of section 7, art. X of the Constitution, providing that the legislature shall pass laws to correct abuses and prevent unjust discrimination by telegraph and railroad companies in Nebraska, that such power on the part of common carriers has been taken away. The case will be remembered as the suit brought to prohibit railroads from giving transportation to ministers. The favor granted to Bowers should not receive the sanction of the court.

The opinion, I am quite sure, does some violence to fundamental rules of pleadings. As clearly presented in the argument of plaintiff, the general denial filed by the defendant was not sufficient to entitle him to show the lease which he obtained from the company after the commencement of the case at bar. If he desired to defend upon this lease—and without it he would have been without any defense whatever—it was incumbent upon him to plead it, just as the maker of a note is required to plead payment if he would avail himself of that defense in a suit upon

said note. And the objection of "incompetent" to the offer of said lease upon trial was enough to exclude it, unless we go upon the subversive theory that the one at fault is to have more tender consideration at the hands of the court than the one who is without blame. So far from requiring the party to particularize his objection, it would seem more reasonable to oblige the trial court to inquire as to the specific end to be reached by the general objection of "incompetent" before the objector is to be deprived of any exception which he is entitled to under the broadest meaning of the term. The matter is of much importance to the plaintiff in this case, but it is of far greater importance in its effect upon rules of constant application.

For these reasons, I consider the majority opinion unsound, and think that the decision should be in favor of the appellant, and that he should be awarded the relief prayed.

THOMPSON and EBERLY, JJ., dissenting.

While we join in the conclusions reached by Shepherd, District Judge, in his dissent, it might be well to further suggest that this court should take judicial notice that the Missouri Pacific Railroad (involved herein) is one engaged in interstate commerce, and hence the federal laws, as well as those of our state, must have consideration and be permitted to function in determining the question of illegal discrimination. Such federal laws have been construed in the following cases: *United States v. Vacuum Oil Co.*, 153 Fed. 598; *Hocking Valley R. Co. v. United States*, 210 Fed. 735; *Spencer Kellogg & Sons v. United States*, 20 Fed. (2d) 459; *Armour Packing Co. v. United States*, 207 U. S. 590; *United States v. P. Koenig Coal Co.*, 270 U. S. 512.

Thus considered, it necessarily follows that syllabus No. 2 of the majority opinion is erroneous, as is the affirmance of the trial court's judgment.

IN RE ESTATE OF JAMES KERR.
DAVID ARMSTRONG, APPELLANT, V. MARGARET WALL ET AL., APPELLEES.

FILED NOVEMBER 23, 1928. No. 25953.

1. Wills: APPEAL: TRIAL DE NOVO. A defeated litigant in the contest of a will is not entitled to a trial *de novo* on appeal to the supreme court.
2. ———: ———: ISSUES OF FACT. On appeal to the supreme court from a judgment in the contest of a will, issues of fact are determined by the sufficiency of the evidence to sustain the verdict of the jury or the findings of the district court.
3. ———: MENTAL CAPACITY: QUESTION FOR JURY. Where evidence relating to mental capacity to make a will is conflicting, the issues of fact are questions for the jury.
4. ———: ———: PROOF. In resisting the probate of a will, contestants, under an allegation that testator did not have mental or testamentary capacity to make it and was not of sound mind, may introduce evidence tending to prove that he had insane delusions with respect to ignored kindred who would inherit his property in absence of a will and that he was thus controlled and rendered insensible to the ties of blood and kindred.
5. ———: ———. "Where the testator is not claimed to have been generally insane, but controlled by insane notions with respect to a particular subject, the question to be determined is whether he was the victim of such delusions as controlled his actions and rendered him insensible to the ties of blood and kindred." *McClary v. Stull*, 44 Neb. 175.
6. Trial: SPECIAL FINDINGS: JUDGMENT. "To entitle a party to a judgment on the special findings of a jury, where the general verdict is against him, such findings must establish all the ultimate facts from which his right to a judgment results as a necessary legal conclusion." *Omaha Life Ass'n v. Kettenbach*, 55 Neb. 330.
7. Wills: CONTEST: INSTRUCTIONS. Instructions referring to kindred who would inherit the property of testator in absence of a will, as "the natural objects of his bounty," and stating that "a man is under certain moral obligations" to them, *held* not prejudicially erroneous, where the jury were directed that the one principal question for consideration was his competency to make a will and that, notwithstanding the ties of blood and kindred and such obligations, he had a right to leave his prop-

erty to whomsoever he pleased, if possessing testamentary capacity.

8. ———: ———: PROVINCE OF JURY. In the contest of a will, the jury, if they find unnatural and unreasonable provisions therein, may be permitted to consider them in connection with evidence of testator's mental incompetency, when instructed to sustain the will if they find that testator was competent to make it.

APPEAL from the district court for HOWARD COUNTY: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

T. T. Bell, Prince & Prince and *Haggart & Haggart,* for appellant.

Taylor & Spikes, Charles W. Dobry, and *Hall, Cline & Williams, contra.*

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

ROSE, J.

This is a proceeding to probate a written instrument as the will of James Kerr, a bachelor residing in Howard county. The instrument offered for probate was in legal form a will. It was dated December 26, 1923, was signed by James Kerr as testator and was witnessed by two persons. It purported to leave real estate and personal property exceeding in value $40,000 to David Armstrong, a cousin of testator, without mentioning nearer relatives. Kerr died February 18, 1926, at the age of 67 years. Armstrong was nominated in the will as executor. As proponent he offered the will for probate in the county court of Howard county, where it was assailed by a brother of testator, by four sisters and by children of three deceased sisters, all of them contestants on the ground, among others, that Kerr was mentally incapacitated at the time from making a valid will. The county court admitted the will to probate and contestants appealed to the district court. At the close of a protracted trial there, the jury rendered a general verdict in favor of contestants, finding that the

instrument offered for probate was not a valid will. From a judgment on the verdict proponent appealed to the supreme court.

The sufficiency of the evidence to sustain a finding that testator did not have mental capacity to make a will December 26, 1923, was challenged by motion for a peremptory instruction in favor of proponent and by a motion for a judgment probating the will notwithstanding the general verdict. The question raised by those motions was vigorously presented on appeal and required examination of a record containing over 1,000 pages of typewritten matter. On review in the supreme court this issue of fact is not to be determined by a preponderance of the evidence. Here the case is not for trial *de novo*. The question for determination is the sufficiency of the evidence to sustain the general verdict of the jury. *In re Estate of O'Connor*, p. 636, *post*. Owng to the great volume of testimony admitted during the trial in the district court, an analysis of the evidence in an opinion is deemed to be impracticable. Evidence relating to mental capacity was conflicting and presented a question for the jury. Incidents and circumstances detailed by witnesses and opinions expressed by them were sufficient to sustain a general finding that James Kerr, when he signed the instrument offered for probate, was controlled by insane delusions with respect to his brother and sisters. The evidence was also sufficient to warrant the inference that hostility toward them was without justification in reason. These deductions inhere in the general verdict that the instrument offered for probate was not the valid will of decedent. Upon consideration of the case from every standpoint the conclusion is unanimous that the verdict should not be set aside on the ground that it is not supported by sufficient evidence.

Several assignments of error were directed to special interrogations, to answers of the jury and to rulings in relation to those subjects. Interrogatories requested by proponent and submitted to the jury follow: (1) "Did the

deceased, James Kerr, at the time he signed the instrument tendered in evidence as his last will and testament, understand the nature of the instrument which he was signing?" (2) "Did the deceased, James Kerr, at the time of signing said instrument, comprehend generally the nature and extent of the property which constituted his estate?" (3) "Did the deceased, James Kerr, at that time know his relatives and did he know whom he desired to make the object of his bounty?" To each of these the jury answered "Yes."

Contestants requested and the court gave two additional interrogations in the following form: (4) "Was James Kerr, at the time of the execution of the purported will, of sound mind?" (5) "If James Kerr knew what property he had and who the natural objects of his bounty were, at the time of the execution of the purported will, was he at such time laboring under any insane delusions regarding the natural objects of his bounty, which rendered him insensible to the ties of blood and kindred and which controlled or influenced him in the execution of said purported will?" To the first of these the jury answered "No" and to the second "Yes."

The fourth and fifth interrogatories were submitted and answered without objection. Thereafter proponent assailed the fourth interrogatory by motion to set it aside on the ground that it was incompetent, irrelevant and immaterial and not supported by the evidence. The fifth was likewise assailed, including the additional ground that it was not within the issues. The motions attack also the special findings of the jury in answering those questions. Taking the position that questions four and five and the answers thereto should have been stricken out, proponent moved for judgment in his favor on the first, second and third special findings notwithstanding the general verdict. Conceding for the purposes of a decision that the proper method was pursued in the attempt to eliminate the fourth and fifth questions and the answers thereto, but not ruling on that point, it seems clear that the position taken

by proponent is untenable. In the answer of contestants to proponent's petition for the probating of the will it was alleged:

"At the time of the execution of said instrument offered for probate, the said James Kerr did not have mental ability and testamentary capacity to execute a will and was not of sound mind and memory."

Contestants adduced testimony tending to prove that testator, with respect to relatives who would inherit his property in absence of a will, had insane delusions that rendered him insensible to the ties of blood and kindred and that controlled him in making the instrument offered for probate. This testimony was within the issues. A person who may make a will is described by statute as follows:

"Every person of full age and sound mind, being seised in his own right of any lands, or any right thereto, or entitled to any interest therein, descendable to his heirs, may devise and dispose of the same by his last will and testament in writing." Comp. St. 1922, sec. 1241.

A "sound mind" is essential to testamentary capacity. A principle applying to that term has been stated in this form:

"Where the testator is not claimed to have been generally insane, but controlled by insane notions with respect to a particular subject, the question to be determined is whether he was the victim of such delusions as controlled his actions and rendered him insensible to the ties of blood and kindred." *McClary v. Stull,* 44 Neb. 175.

This principle applies to the issue of insane delusions respecting relatives who would inherit decedent's property in absence of a will. *In re Estate of Ayer,* 114 Neb. 849. That issue was not determined by the ultimate facts found by the jury in their answers to questions one, two and three. It follows, therefore, that proponent would not have been entitled to a judgment on the special findings in his favor notwithstanding the general verdict, even if interrogatories four and five had not been submitted or

had been stricken out. The following has long been a rule of the supreme court:

"To entitle a party to a judgment on the special findings of a jury, where the general verdict is against him, such findings must establish all the ultimate facts from which his right to a judgment results as a necessary legal conclusion." *Omaha Life Ass'n v. Kettenbach,* 55 Neb. 330. See, also, *Kafka v. Union Stock Yards Co.,* 78 Neb. 140; *Crabtree v. Missouri P. R. Co.,* 86 Neb. 33.

Findings one, two and three omit an ultimate, issuable, evidential fact essential to the legal conclusion that proponent is entitled to a judgment in his favor notwithstanding the general verdict against him. The assignments of error directed to the rulings that apply to the general and special verdicts of the jury are overruled.

Proponent criticises as erroneous and prejudicial instructions referring to kindred who would inherit the property of testator in absence of a will, as "the natural objects of his bounty," and stating that "a man is under certain moral obligations" to them. In the making of a will the mental capacity of a testator to recognize kindred who would inherit his property in absence of a will may be material. *Carter v. Gahagan,* 102 Neb. 404; *In re Estate of Wilson,* 78 Neb. 758; *In re Estate of Nelson,* 75 Neb. 298. Detached expressions in the instructions, however, were open to criticism and should not have been used under the circumstances disclosed by the record, but they were not prejudicial to proponent when viewed in the light of the entire charge which confined the jury to mental capacity of testator as the controlling issue. The jury were directed that the one principal question for consideration was the competency of testator to make a will and that, notwithstanding the ties of blood and kindred and his obligations to them, he had a right to leave his property to whomsoever he pleased, if possessing testamentary capacity. The rights of proponent were protected by the trial court. The jury were not misled.

There is also criticism of an instruction containing lan-

guage to the effect that, if the jury find from the evidence that testator, in leaving his property to his cousin rather than to his legal heirs, acted in an unreasonable, unjust and unnatural manner, that fact may be considered as bearing upon the condition of his mind at the time the will was made. "That fact," if so found by the jury, was, according to the entire charge, for consideration in connection with all other evidence in the case. The jury were directed to find for proponent notwithstanding unreasonable, unjust and unnatural terms of the will, if Kerr had testamentary capacity to make it. Undue prominence was not given to that feature of the evidence. It was without probative effect in absence of evidence showing want of testamentary capacity. As limited by the instructions the trial court did not err in permitting the jury to consider it. *In re Estate of Gunderman,* 102 Neb. 590; Schouler, Wills (6th ed.) sec. 212.

Prejudicial error in the proceedings has not been found and the judgment on the general verdict is

AFFIRMED.

IN RE ESTATE OF JOHN O'CONNOR.
ELIZABETH O'CONNOR BURGOYNE ET AL., CLAIMANTS, APPELLANTS: CHARLES M. O'CONNOR ET AL., CLAIMANTS, APPELLEES, V. STATE OF NEBRASKA, INTERVENER, APPELLEE.
CHARLES M. O'CONNOR ET AL., CLAIMANTS, APPELLANTS, V. STATE OF NEBRASKA, INTERVENER, APPELLEE.
ANNA BEEBE ET AL., CLAIMANTS, APPELLANTS, V. JOHN SLAKER, ADMINISTRATOR DE BONIS NON, ET AL., APPELLEES.
ANNA BEEBE ET AL., CLAIMANTS, APPELLANTS, V. JOHN SLAKER, ADMINISTRATOR DE BONIS NON, ET AL., APPELLEES.

FILED NOVEMBER 23, 1928. NOS. 26457, 26462, 26464, 26731.

1. **Escheat: INTERVENTION BY STATE.** Where, in proceedings to probate the estate of a decedent, numerous persons file petitions

alleging that they are related to decedent, and there is reason to believe that decedent died without heirs and that the asserted claims to such relationship are not well founded, it is proper for the state to intervene and assert its right to the property of the decedent by escheat and prevent the establishment as genuine of a spurious claim.

2. **Appeal.** Prejudicial error cannot be predicated on a ruling or judgment entered by the trial court which does not affect any substantial right of the complaining party.

3. **Descent and Distribution:** ESCHEAT: BURDEN OF PROOF. There is a presumption that every deceased person left surviving some kindred, and the burden is on the state to prove the failure of kindred or surviving spouse, entitling it to the property of deceased by escheat. There is no presumption of law that any particular person or claimant is an heir of the decedent.

4. ———: BURDEN OF PROOF. Where two or more groups of persons claim to be the next of kin and heirs of a decedent, each group has the burden of establishing its claim by a preponderance of the evidence.

5. **Appeal.** A ruling of the trial court on the rejection or admission of evidence which works no injury to the complaining party is not a ground for reversing a judgment or for awarding a new trial.

6. **Descent and Distribution:** RELATIONSHIP: PROOF. Evidence of general resemblance of one individual to another should not be received for the purpose of establishing consanguineous relationship; but, where specific traits and particular or peculiarly marked physical characteristics are shown to exist, evidence thereof should be received for the purpose of proving such relationship, and the weight and value of such evidence left to the jury.

7. **Trial:** ORDER OF PROOF. It is a general rule that in the trial of an action the party against whom judgment would go if no evidence were introduced shall first introduce evidence and be entitled to open and close the arguments to the jury. This rule is not applicable, however, to a case where there are several parties, and where judgment would go against each of the parties if no evidence were introduced. In such a case, it rests within the sound discretion of the trial court to determine which of the litigants shall first produce evidence and which shall open and close the arguments to the jury; and error on the part of the trial court in this respect can be predicated only by showing an abuse of this discretion.

8. ———: PROCEDURE. In the trial of causes contingencies not infrequently arise where no rule has been prescribed either by legislative action or judicial opinion. In such cases the trial court should adopt a rule that will promote the administration of justice and fairly protect the rights of all the parties litigant.

9. Jury: HEIRSHIP: QUESTIONS OF FACT. In the trial of a cause in the district court, where different groups of litigants are seeking to establish that they are heirs at law of decedent, and where questions of fact only are involved, the proceeding is purely legal, and the parties are entitled to a trial of the issues to a jury.

10. Appeal. An instruction to the jury that is not prejudicial to the complaining party constitutes no ground for a reversal of the judgment.

11. Evidence examined and *held* to support the verdict.

12. New Trial. "A new trial will not be granted upon the ground of newly discovered evidence, where such evidence is merely cumulative and would not, in all probability, affect the result if a new trial were granted." *Parkins v. Missouri P. R. Co.*, 79 Neb. 788.

APPEAL from the district court for Adams county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

D. B. Massie and *Ambrose C. Epperson*, for appellants.

Charles E. Bruckman, Richard Price, Allen G. Fisher and *Charles A. Fisher*, for Charles M. O'Connor et al.

Paul E. Boslaugh and *John A. Lawler*, for the State.

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

GOOD, J.

These actions involve the final settlement of, and determination of heirship to, the estate of John O'Connor, deceased, and originated in the county court of Adams county.

O'Connor departed this life August 17, 1913, intestate. So far as disclosed, he was never married and left surviving no parent or issue. His place of birth, age and wheth-

er he left surviving any relatives, who are entitled to inherit his estate, are matters in dispute.

O'Connor had lived in the city of Hastings for a period of about 40 years preceding his death. When he first located in that city he was a cobbler and for several years worked at his trade. Later he became a shoe merchant and about 1908 he retired from the mercantile business and devoted his time and attention to looking after his property interests. He lived frugally and invested his savings prudently. At the time of his death his property was valued at approximately $100,000. During his 40 years' residence in Hastings he was known generally as a bachelor and to be reticent concerning his past life and family history. It is not disclosed that during his residence in Hastings any relative, or person claiming to be a relative, ever visited him. Among his personal effects there was not found any picture or photograph of, or letter purporting to have been written by, any relative.

Soon after the death of O'Connor many persons, claiming the right to succeed to his estate, appeared. Some presented and sought the probate of instruments purporting to be wills executed by O'Connor. Others claimed to be relatives and entitled to inherit his property, if it should be determined that he died intestate. Many of these claims have been heretofore litigated and finally determined adversely to the proponents of purported wills and to those claiming the right to inherit as next of kin. A number of these cases have been brought to and determined by this court. The following reported decisions relate to these matters: *In re Estate of O'Connor,* 101 Neb. 617; *In re Estate of O'Connor,* 105 Neb. 88; *In re Estate of O'Connor,* 114 Neb. 266.

In the present proceedings in the county court there were 12 distinct groups of persons, each group claiming to be relatives of O'Connor and to have the exclusive right to inherit his property. The state of Nebraska intervened as to each of the claimants, alleging that O'Connor had died intestate, without widow or kindred to inherit his

property, and claiming title thereto by escheat. A trial in the county court resulted in a finding in favor of the state and against each group of claimants. Three of these groups appealed from the judgment of the county court to the district court, and the state appeared in that court as intervener, as against the appealing claimants. The several appeals were consolidated and tried as one action to the court and a jury. The verdict was against each group of claimants and for the state, finding that O'Connor had died without leaving a widow or any kindred. Judgment was entered on the verdict. Each group of claimants has perfected a separate appeal to this court, where, for the purposes of argument, the appeals were consolidated and heard at one time. For convenience, the several groups of claimants will be designated and hereinafter referred to as the Burgoyne claimants, the O'Connor claimants, and the Beebe claimants.

After the trial in the district court and at a subsequent term of court, the Beebe claimants filed a second motion for a new trial, based upon the ground of newly discovered evidence. This motion was by the district court overruled, and the Beebe claimants have perfected a second appeal to this court, to review the ruling of the court on the motion for a new trial.

The Burgoyne claimants assert that they are nieces of O'Connor, being daughters of his deceased sister Margaret. They aver that their mother was one of four children, the other three of whom were brothers named John, James E., and Michael; that James E. and Michael predeceased John O'Connor and left no surviving issue; that their grandparents came from County of Clare, Ireland, to St. Alphonse, in Quebec, Canada; that John O'Connor learned the cobbler's trade and left home about 1864, and apparently was not seen again nor heard from directly by any member of the family of these claimants until 1896, when, it is claimed, he visited his sister Margaret, in Washburn, Wisconsin.

The O'Connor claimants aver that they are children

of Michael O'Connor, deceased, and that Michael O'Connor was a brother of John O'Connor; that John and Michael and another brother came from Ireland to the state of Michigan about 1858, and that in 1859 or 1860 John O'Connor left Jackson, Michigan, and went west; that none of this group of claimants or their families ever again saw him in his lifetime.

The Beebe claimants assert that they are descendants of brothers of John O'Connor; that the latter was born in Ballyhoolie, county of Cork, Ireland; that John O'Connor was one of a family of four children; that he came from Ireland to Pennsylvania, from there removed to Ontario, Canada, later going to Dubuque, Iowa, and from there to Nebraska. Each of the several groups of claimants deny the relationship of either of the other groups to John O'Connor, and each group of claimants disclaim any relationship to either of the other groups.

There are numerous assignments of error, a number of which are common to each of the appeals. These will be considered first.

Each of the claimants alleges error in that the trial court permitted the state to intervene and resist the right of any claimant to the estate of John O'Connor. It seems to be the contention of the claimants that, as long as there is any person claiming to be an heir of O'Connor and whose right has not been judicially determined, the state has no right to intervene and has no interest in the estate.

Section 8552, Comp. St. 1922, confers on any person, who has or claims an interest in the matter in litigation in any pending action, the right to become a party to such action. Such intervener may join with either plaintiff or defendant to resist the claims of the other, or, if his interest so requires, he may resist the demands of both. The state was claiming that O'Connor died without leaving heirs or widow, and that it was entitled, under the law, to take the estate left by O'Connor. Each group of claimants were seeking to establish kinship to decedent, and if any of them could establish their claims they were entitled

to the estate. The real question, in its final analysis, was to determine who was entitled to the property of decedent. The state's claim was adverse to each of the other claimants, and it claimed an interest in the subject-matter of the litigation, namely, the property of John O'Connor, deceased.

The right of the state to intervene in such a proceeding is conferred by statute and has been heretofore established by the decisions of this court in the following cases: *In re Estate of Keller,* 101 Neb. 115; *In re Estate of O'Connor,* 114 Neb. 266. In the latter case it was held: "Where, in the county court in the probate of the estate of an intestate decedent, numerous persons file petitions, alleging that they are related to decedent, and there is reason to believe that the decedent died without heirs, it is proper for the state to intervene in the proceedings, and assert its right and prevent the establishment of a spurious claim as genuine." Among the decisions from other jurisdictions, holding to the same effect as those of our own court, are the following: *State v. Lancaster,* 119 Tenn. 638; *In re Estate of McClellan,* 31 S. Dak. 641; *State v. O'Day,* 41 Or. 495. We adhere to the rule adopted in our former cited opinion.

It is contended by each group of claimants that the court erred in entering a judgment for, and awarding the property of O'Connor to, the state. Prejudicial error cannot be predicated on a ruling or judgment of the trial court which does not affect the substantial rights of the complaining party. In the instant case, if the judgment against each group of claimants, adjudging that they are not heirs of O'Connor, is free from prejudicial error, the judgment for the state does not concern them nor affect any of their substantial rights. Whether prejudicial error has been committed in the verdict and judgment against any of the claimants will be determined in the course of this opinion.

Another contention made by two or more of the groups of claimants is that the presumption obtains that every deceased person left heirs, and that the burden is on the

state to prove the failure of kindred or surviving spouse, and it is insisted that this should be by proof of high degree. While the presumption obtains that the deceased person left surviving heirs, it does not follow that there is a presumption that any particular person or claimant is an heir. If such were the case, then, of more than 200 persons, who have appeared, claiming the O'Connor estate, there would be a presumption in favor of each one, although the various sets of claimants, more than a score in number, are unrelated to each other. This presumption would probably obtain as against the right of the state to a judgment of escheat, but, as heretofore pointed out, unless there was error in the trial, relating to one or more of the groups of claimants, wherein the jury found that they were not related to O'Connor, they are not in a position to raise any objection as to the verdict and judgment for the state, since, if they are not related to O'Connor and are not entitled to inherit his estate, they cannot be prejudiced by the judgment entered for the state.

During the trial evidence was offered by different groups of claimants, tending to show that the claimants bore a physical resemblance to O'Connor, and in most instances this evidence was excluded. In some instances it was admitted without objection, and in others it appears to have been admitted over objection. Complaint is made because the evidence was not admitted by those who offered it, and because it was admitted in some instances as to another group of claimants, when offered.

Two of the groups of claimants complain of rulings of the trial court in admitting evidence tending to prove that there existed between the deceased and some of the other groups of claimants a personal physical resemblance. Since the verdict was against the latter group, the error, if any, was harmless. Harmless error is not a ground for reversing a judgment.

Two of the groups allege error in the exclusion of evidence tending to prove a resemblance in personal appearance of some members of the respective groups to the de-

ceased. The position of some of the groups is inconsistent. They objected to such evidence when offered by other claimants, and in nearly every instance the objections were sustained, but complain when a like ruling is made against them. Under such circumstances, this court could properly decline to consider the alleged error. We prefer, however, to consider the question on its merits.

There is a contrariety of judicial opinion on admissibility of evidence of personal resemblance to prove consanguineous relationship. In England, the prevailing view is in favor of its admission. Formerly this view was, to some extent, followed in this country. The trend in later years has been either adverse to or for a modification of the English rule. So far as we are at present advised, this court has passed upon the question in filiation cases only, and has held that it is improper in such proceedings to exhibit the child to the jury for the purpose of showing its personal resemblance to the putative father, as tending to prove the relationship of parent and child.

In *Hutchinson v. State*, 19 Neb. 262, in an opinion by Reese, J., it was said: "A number of authorities are cited which hold that it is improper to introduce or present a child to a jury for the purpose of permitting the jury to draw conclusions as to its paternity from a supposed resemblance to the alleged father, unless by a difference in color or some other marked characteristic the resemblance or want thereof can be clearly shown."

In *Ingram v. State*, 24 Neb. 33, where counsel for the prosecution, in a filiation proceeding, directed the prosecutrix to turn the face of the illegitimate child so that the jury could observe it, an objection was made and sustained by the court, and the ruling apparently approved.

In *Esch v. Graue*, 72 Neb. 719, the following language from the opinion in *Hanawalt v. State*, 64 Wis. 84, was cited with apparent approval: "In bastardy proceedings the bastard child may not be exhibited to the jury for the purpose of showing by its likeness to the defendant that it is his child." And Barnes, J., in writing the opinion com-

mented as follows: "This rule seems to have been approved by us in *Ingram v. State,* 24 Neb. 33. In fact it is believed that the great weight of authority now holds that a child less than two years of age may not be exhibited to the jury for the purpose of showing its likeness to the defendant in a bastardy proceeding."

It is a well-known fact that there are distinct racial characteristics, especially as to the color of skin, hair and eyes. As a rule the North American Indian has black eyes, straight black hair, brown or copper-colored skin and prominent or high cheek bones. The African has black or dark skin, black eyes, hair kinky and black, and he usually has thick lips and a rather flat nose. Other races possess distinct characteristics. To a somewhat lesser degree there are distinctive personal characteristics in people of the same nativity. Usually, the Norwegian and Swede have light complexion, light-colored hair and eyes, while the people of Southern Italy, Spain and Mexico are usually swarthy, with dark hair and eyes. It is also a well-known fact that frequently peculiar and distinctive physical characteristics do exist in members of the same family, and that particular traits and physical characteristics may be transmitted from parent to child. On the other hand, it is a well-known fact that members of the same family may be entirely different from each other and have, apparently, no points of resemblance in personal appearance. Also, it is well known that very strong personal resemblances frequently exist between persons who are wholly unrelated. The fact that particular traits and marked physical characteristics are shown to exist between two individuals may be of slight worth in determining whether they are related by consanguinity; yet such fact, where it exists, is a circumstance that may be considered, with other evidence, in determining the question of relationship.

The decisions, in bastardy proceedings, holding that the resemblance between child and the putative father is not admissible, are grounded upon good reason. It is a well-known fact that a child of very tender years, ordinarily,

has no decidedly marked features, and that the family characteristics, if any, are not developed in early infancy. We think the proper rule to be deduced is that evidence of general resemblance of one individual to another should not be admitted for the purpose of establishing a relationship by consanguinity, but, where specific traits and particular or peculiarly marked physical characteristics are shown to exist, that evidence thereof should be received and the weight of such evidence left to the jury.

Applying this rule to the facts in the instant case, as disclosed by the record, we find that most of the excluded evidence was that of a general resemblance and was, therefore, properly excluded. Other evidence offered along this line did not disclose that the person testifying had a personal knowledge of either the peculiar traits or marked physical characteristics of the deceased, or of the member of claimants' family to whom it was sought to establish a resemblance. We find no prejudicial error committed by the trial court in the exclusion of such evidence.

Two groups of claimants assert that there was error in permitting counsel for the state to close the arguments to the jury. The Burgoyne claimants, particularly, contend that, since they were directed to first introduce evidence and to open the arguments to the jury, their counsel should have been permitted to make the closing argument.

It is a general rule in the trial of an action that the party against whom judgment would go if no evidence were introduced is entitled to open and close the arguments to the jury. This rule, however, is not applicable to all classes of cases. In the instant case, each group of claimants would fail and judgment go against each group if no evidence were introduced. Likewise, if no evidence were introduced, no judgment could go in favor of the state. It is a situation where each of the four interested parties would lose if no evidence were introduced. It is impossible that each should have the opening and each have the close of the arguments to the jury. The general rule, therefore, is not applicable to the situation here presented.

In *Bays v. State,* 6 Neb. 167, where a matter of practice arose as to which there was no statutory provision applicable, this court said: "In the practice of the courts contingencies not infrequently arise which the legislature has not anticipated by any suitable provision. These must be met by some general or special rule of court suited to the exigency, and which shall protect suitors in all their legal rights." The language in the above case is quoted with approval in *Lindley v. State, ante* p. 597.

Where, in the trial of a case, a situation arises regarding the practice that should obtain, and where there is no statutory rule, or none has been enunciated by the court which is applicable, the matter rests in the sound discretion of the trial court, and no error may be predicated on its exercise of such discretion unless an abuse thereof is disclosed. In the instant case, the trial court directed the Burgoyne claimants to first introduce evidence, followed in turn by the O'Connor and Beebe claimants, and then the evidence for the state, and each group of claimants and the state, in turn, were permitted to offer rebuttal testimony. The trial court directed that arguments be made to the jury, first by the Burgoyne claimants, followed by the other claimants and the state in order, and permitted each group of claimants and the state, in the same order, to reply to the principal arguments made by the respective parties. This ruling of the court was fair and reasonable to all parties, and it does not appear to have been prejudicial to any. The rule of procedure adopted by the trial court meets with our approval.

Some of the claimants contend that the trial court should have heard the cases without the intervention of a jury; that it was error to submit the questions of fact to the jury, and that they are entitled to a trial *de novo* upon the issues in this court.

The only statutory provision, requiring a trial *de novo* on questions of fact in this court in cases brought here by appeal, is contained in section 9150, Comp. St. 1922. That section is as follows: "In all appeals from the district court

to the supreme court in suits in equity, wherein review of some or all of the findings of fact of the district court is asked by the appellant, it shall be the duty of the supreme court to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions, and upon trial *de novo* of such question or questions of fact, reach an independent conclusion." The same question was presented to this court in *In re Estate of O'Connor*, 114 Neb. 266, wherein it was held: "A proceeding begun in the county court, to determine whether petitioners are next of kin and heirs at law of a decedent, does not present a case calling for the exercise of equitable jurisdiction, and does not fall within the provisions of section 9150, Comp. St. 1922, requiring a trial of the issue of fact *de novo* in the supreme court."

In the case last cited the trial court adopted the findings of fact made by the jury and rendered judgment upon its findings as well as upon the verdict of the jury. This was evidently a precautionary measure taken by the trial court. We might rest this question without further discussion, but the question seems to be recurring from time to time in the trial courts as to whether, in actions of this character, the litigants are entitled to a trial by jury.

Formerly, civil actions were brought to this court by error proceedings, except in equity matters, where they would be brought by appeal. While that condition of the law existed, this court, by Norval, J., rendered an opinion in *Whalen v. Kitchen*, 61 Neb. 329, in which it was held that this court could not review, on appeal, decisions made by a county court in the settlement of the estate of a deceased person, and that such decision could only be reviewed in this court by error proceedings. This opinion recognized that the action was essentially and in all respects legal in its nature, as distinguished from equitable. The rule there announced was applied and followed in *Boales v. Ferguson*, 2 Neb. (Unof.) 172.

While the proceeding for the settlement of estates of deceased persons is statutory, in the absence of regulatory

statutory provisions, the trials in such matters must be governed by those applicable to the trial of civil cases at law, rather than in equity. It was observed by this court in *In re Estate of O'Connor,* 114 Neb. 266, in a like situation, that no equitable doctrine is invoked and the application of no principle of equity is required in the determination of the issues presented in cases of this character.

In proceedings to determine whether claimants are next of kin to a decedent and entitled to inherit his estate, only questions of fact are involved. In the recent case of *In re Estate of Buder, ante,* p. 52, a similar question was presented. In the course of the opinion this language may be found: "The only question for the county court to determine was, who were the legal heirs of Marie Buder. This question is purely legal; no equitable considerations affect it, and in the absence of the alleged contract would be perfectly simple." Since the proceeding is purely legal in its nature, the parties litigant were entitled, in the district court, to a jury trial.

The Burgoyne claimants assert error in that the jury returned a verdict in less than six hours and that it was a five-sixths verdict. In civil actions the statute permits a jury, after deliberating six hours, to return a verdict signed by five-sixths of their number. In the instant case, the record discloses that more than six hours elapsed after the submission of the cases and before a verdict was received, and it fails to disclose that the jury were not deliberating during this entire time. Error is not shown in this respect.

The Burgoyne claimants complain of the giving of instruction No. 4, in which the brother of Margaret O'Connor is referred to as of Washburn, implying that O'Connor, deceased, had at some time lived in Washburn, Wisconsin. A careful examination of the instruction shows that it was outlining to the jury who were the several groups of claimants, and the reference was, evidently, to the fact that Margaret O'Connor, mother of the Burgoyne claimants, had a brother, John O'Connor, and the question for

the jury to determine was whether the deceased was a brother of Margaret O'Connor of Washburn. The instruction is not subject to the criticism made, and it does not recite that O'Connor, deceased, ever resided in Washburn, Wisconsin, and, had it done so, it is difficult to see how it could have prejudiced any claimant. An instruction that is not prejudicial to the complaining party is no ground for reversal of the judgment.

The Burgoyne claimants further complain of the refusal to give two instructions, one of which would have directed a finding against the O'Connor claimants, and the other relating to the weight of expert testimony on handwriting. With respect to the refused instruction, it appears that the jury found against the O'Connor claimants. The refusal to give the instruction did not harm the Burgoyne claimants. The one relating to the weight to be given expert testimony seems to be a correct statement of the law, but the general instructions that were given by the court seem to be sufficient to cover every phase of the weight to be given to any testimony offered in the case, and no error is shown in the refusal to give the requested instruction.

The O'Connor claimants complain of the refusal to give a group of several instructions, and also complain of the giving of a group of several instructions. Under the rule well recognized in this court, such an assignment requires only an examination sufficient to show that any one of the group of instructions given was properly given, and that any one of the group refused was properly refused. An examination of the group given and the group refused shows clearly that most, if not all, of those given were properly given, and that at least a number of those refused were properly refused.

Each set of claimants complain that the verdict is not sustained by the evidence, and the Burgoyne claimants, in particular, contend that the evidence is sufficient to have required a verdict in their favor. We have carefully read the entire bill of exceptions, consisting of many hundreds of pages, and have carefully scrutinized every exhibit of-

fered, whether received or rejected, and, while the evidence in behalf of the Burgoyne claimants, standing alone, is quite strong, yet, when the cross-examination of their witnesses, the unreasonableness of the testimony given by some of them, and the contradictory evidence given by other witnesses are taken into consideration, the record simply presents a case where the evidence is in conflict. The weight and value of such evidence were for the jury to determine, and their verdict is conclusive on the questions of fact to them submitted.

At a term of court subsequent to that of the trial, the Beebe claimants filed a second motion for a new trial, based upon the ground of newly discovered evidence. This motion was by the district court overruled, and from the overruling thereof the Beebe claimants have prosecuted a second appeal.

In *Parkins v. Missouri P. R. Co.*, 79 Neb. 788, this court held: "A new trial will not be granted upon the ground of newly discovered evidence, where such evidence is merely cumulative and would not, in all probability, affect the result if a new trial were granted." The same rule was adhered to in *Kraus v. Clark*, 81 Neb. 575. The evidence which the Beebe claimants assert is newly discovered was only cumulative in its nature, and it does not appear that it was likely to have been of such import or weight as would have resulted in a different verdict, had a new trial been granted. Morever, O'Connor had been dead for more than a decade when the trial occurred, and no reason is shown why these claimants could not have obtained any evidence that they desired, if they had been diligent. We find no error in the overruling of the Beebe claimants' motion for a new trial.

There are numerous other assignments of error which we deem unnecessary to discuss, but we have considered and examined each and every one.

No error prejudicial to any group of claimants has been found. The judgment of the district court is therefore

AFFIRMED.

R. O. BROWNELL, RECEIVER OF THE FIRST BANK OF NICKERSON, APPELLANT, V. W. A. ANDERSON ET AL., APPELLEES.

FILED NOVEMBER 23, 1928. No. 26270.

1. **Banks and Banking**: STOCKHOLDERS: LIABILITY: REMEDY. "The remedy for the enforcement of the entire double liability imposed by the Constitution upon stockholders of a state bank in the event of insolvency is a suit in equity by a creditor for the benefit of all the creditors, or by the receiver, against all the stockholders." *Rogers v. Selleck, ante*, p. 569.
2. ———: ———: ———: PROCEEDINGS BY RECEIVER. A receiver of an insolvent state bank, duly appointed by the district court, lodged with the county court a contingent claim for double stock liability against the estate of a deceased stockholder, then being administered by it. *Held*, (a) that the filing of such claim did not vest the county court with exclusive jurisdiction over it, and neither did such filing deprive the receiver of the right to proceed in the district court appointing him, in a suit in equity, to determine the liability of such stockholder; (b) that the executor of such estate was a proper party defendant; (c) that it was the duty of the county court to direct the executor to retain in his hands sufficient of the assets to pay such contingent claim when the same became absolute.

APPEAL from the district court for Dodge county: FREDERICK W. BUTTON, JUDGE. *Reversed, with directions.*

Dolezal, Spear & Mapes, C. M. Skiles and *Ira D. Beynon*, for appellant.

Courtright, Sidner, Lee & Gunderson, contra.

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and HOWELL, JJ., and CHASE and REDICK, District Judges.

THOMPSON, J.

This action was instituted by appellant, the receiver of the First Bank of Nickerson, against the appellees by way of a petition in equity, in due and usual form in such cases, to enforce the double liability of appellees as stockholders of the above insolvent bank under sections 4 and 7, art. XII of the Constitution of this state. At the trial the ap-

pellee, Seymour S. Sidner, as executor of the estate of John Sidner, deceased, filed a special appearance which challenged the jurisdiction of the district court over him, as well as over the subject-matter. The court sustained the challenge and dismissed the action, to reverse which the receiver appeals and presents as reasons for such reversal, in substance, that, under the facts shown by the record and the law applicable thereto, the special appearance should have been overruled and appellant permitted to proceed with his action to final judgment.

The facts material for our consideration, as shown by the record, are: The First Bank of Nickerson is one organized under the laws of this state for commercial banking business at Nickerson, in Dodge county. The appellees, defendants, with others were and are stockholders in the bank, one of whom, as above indicated, was John Sidner, who died testate a resident of Dodge county on August 15, 1923. On September 10, 1923, in the county court of such county, the will was admitted to probate, and Seymour S. Sidner, appointed executor, who qualified and entered upon the discharge of his duties, and has been ever since so acting. On July 10, 1924, the bank was, by the district court for Dodge county, adjudged insolvent and Emil Folda appointed receiver, who subsequently resigned and R. O. Brownell, the appellant, was appointed his successor. On August 29, 1924, the receiver filed in the county court, in the matter of the estate of John Sidner, a contingent claim, in substance, as follows: That he, as receiver of the above named bank, was then engaged in ascertaining and assembling the assets and liabilities thereof; that such John Sidner at the time of his death was the owner of 20 shares of the capital stock of the bank of the par value of $100 a share; that on January 11, 1924, the county court, in the course of administering the Sidner estate, entered an order barring claims, which, however, was about six months prior to the appointment of Folda as receiver; that on August 22, 1924, the executor of such estate filed his first report and petition for discharge,

which was set for hearing September 15, 1924, all as shown by the record of such county court; that on information and belief claimant states there will be a liability by reason of such stock subscription and ownership against the Sidner estate which is not now ascertainable, but which may reach the sum of $2,000 when fully accrued; and then prayed "that final discharge of said executor be deferred until the receiver's claim is ascertained, or that he be directed by the court to retain from distribution sufficient of the assets of said estate to pay this claim when ascertained and proved, and for such other and further relief as may be appropriate in the premises." This record further shows that every condition precedent necessary to the bringing of this action has been had, and, as hereinbefore indicated, such conditions in usual form are set forth in appellant's petition.

On the record as hereinbefore disclosed, appellee contends that on the probate of the will, the qualification of the executor, and the filing of the contingent claim by the receiver, the county court became vested with exclusive jurisdiction of the matters involved herein. Then, as to appellant's challenges to the judgment of the trial court, appellee asserts: "(1) This is an action for a money judgment only, so far as this appellee is concerned. (2) The district court has no jurisdiction over the executor in this action." In our opinion, these contentions of appellee were approved and followed by the trial court. Appellee relies on section 1374, Comp. St. 1922, and our holdings in *Burke v. Scheer,* 89 Neb. 80; *Dickinson v. Kline,* 96 Neb. 435; *Drainage District v. O'Neill,* 109 Neb. 552; and *Hill v. May,* 115 Neb. 690. Section 1374 of our statutes provides: "No action shall be commenced against the executor or administrator except actions to recover the possession of real or personal property, and actions for relief other than for the recovery of money only, and such actions as are permitted in this chapter; nor shall any attachment or execution be issued against the estate of the deceased until the expiration of the time limited by the court for the pay-

ment of the debts, except in the action mentioned in this chapter."

Thus, the question is: Is the action in the district court, under this record, one for the recovery of money only? That part of the opinion in *Drainage District v. O'Neill, supra,* material here is: "A demurrer for misjoinder of causes of action is properly sustained where the suit is brought on four distinct bonds, signed by different sureties and where several judgments are prayed"—purely a law action. In the recent case of *Rogers v. Selleck, ante,* p. 569, involving the liability of stockholders in insolvent state banks, wherein our previous holdings on this subject were reviewed, we held: "The remedy for the enforcement of the entire double liability imposed by the Constitution upon stockholders of a state bank in the event of insolvency is a suit in equity by a creditor for the benefit of all the creditors, or by the receiver, against all the stockholders. Dicta to the contrary in *Burke v. Scheer,* 89 Neb. 80, and in *Dickinson v. Kline,* 96 Neb. 435, disapproved." Further, in the course of the opinion in the *Rogers* case, we distinguished the case of *Hill v. May, supra,* and in so doing stated: "The controlling question therein decided is not involved in the present inquiry. The opinion properly holds that a suit on a promissory note given by a stockholder for an assessment of stock to restore the reserve or the solvency of a bank was an action at law."

Hence, we conclude that this action is not one for the recovery of money only, does not come within the prohibitions contained in the above quoted section 1374, and is not controlled by our holdings in *Burke v. Scheer, Dickinson v. Kline, Drainage District v. O'Neill,* and *Hill v. May, supra.*

This leaves for our consideration the effect of the receiver's filing with the county court the contingent claim referred to herein. The record shows it to have been lodged at the earliest opportunity. It was necessary to a fair distribution of the assets that the probate court have the information it afforded, and that such court grant the relief prayed. The Constitution, so far as involved, clothed

the district court, under our decisions, with authority to administer the trust imposed by its taking charge of the assets of such insolvent bank. Until it had acted and finally determined that a stock liability existed, and the extent thereof, neither the receiver nor the county court could proceed in any other or different manner than that pursued by the receiver in these respective courts. The course followed by the receiver is in harmony with section 1359, Comp. St. 1922, which reads as follows: "If any person shall be liable as security for the deceased, or have any other contingent claim against his estate which cannot be proved as a debt, the same may be presented, with the proper proof, to the county court, which, if satisfied that such claim is a legal demand against said estate, may order the executor or administrator to retain in his hands sufficient to pay such contingent claim, when the same shall become absolute, or if the estate shall be insolvent, sufficient to pay a proportion equal to the dividends of other creditors."

The filing of the contingent claim in the county court did not vest such court with exclusive jurisdiction over the claim, nor was the district court, by reason thereof, deprived of its right to proceed to a final determination of the cause of action presented by the receiver's petition against the executor, as well as the other defendants named.

Therefore, the trial court erred in holding that it was without jurisdiction, and in entering judgment dismissing the suit.

Our conclusions herein find support in *Hazlett v. Blakely*, 70 Neb. 613, 621.

The judgment of the district court is reversed and the cause remanded, with directions to proceed in harmony with this opinion.

REVERSED.

LUCY MULLER, GUARDIAN, APPELLANT, V. ERNEST A. HARMS ET AL., APPELLEES.

FILED NOVEMBER 28, 1928. No. 26156.

Executors and Administrators: LEASE BY ADMINISTRATOR. Under the statute granting to an administrator the right to possession of decedent's real property and to the rents thereof "until the estate shall have been settled," an administrator's lease for a longer period is not necessarily "void," as distinguished from "voidable," but may be accepted and ratified by mutual consent of the lessee and the heirs and continued in full force after the settlement of the estate and the discharge of the administrator, the heirs subsequently receiving the rent. Comp. St. 1922, sec. 1320.

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

Fischer & Fischer and *J. Gerald MacVeigh,* for appellant.

J. C. Travis, contra.

Heard before GOSS, C. J., ROSE, THOMPSON and EBERLY, JJ., and REDICK and STALMASTER, District Judges.

ROSE, J.

This is an action to recover $450, the amount of a claim for two monthly instalments of unpaid rent, each for $225. The property for which rents are claimed is the Apollo Theatre at 2824 Leavenworth street, Omaha. It was formerly owned by Fritz Muller, now deceased. He left surviving him his widow and their two minor sons, Walter Frederick Muller and Paul Ernest Muller. Charles B. Schleicher, administrator of decedent's estate, entered into a lease demising the Apollo Theatre to Ernest A. Harms and Mathilda A. F. Harms for a term of five years for $13,500 payable in instalments of $225 on the first day of each month beginning January 1, 1926. The lease was in writing and was formally executed by lessor and lessees. The latter paid the monthly rents from January 1, 1926, until October 1, 1926, but in the meantime, September 24, 1926,

gave notice that they would terminate their tenancy October 31, 1926. The attempt to do so was resisted and this suit was brought to recover the instalments due under the lease November 1, 1926, and December 1, 1926. The administrator settled decedent's estate and was discharged. These and other facts were pleaded in detail by plaintiff. The plaintiff is Lucy Muller, guardian of the two minors. The lessees are defendants.

To the petition a general demurrer was interposed by defendants and sustained by the court. Plaintiff refused to plead further and her action was dismissed. From that judgment she has appealed.

Plaintiff contends as pleaded that defendants are bound by the lease and that they are indebted to her for two months' rent. Defendants take the position that the administrator had no power to make the lease and that it was void, because it provided for a long tenancy after the settlement of decedent's estate. A determination of the controversy requires consideration of additional facts stated in the petition. When Fritz Muller was owner of the Apollo Theatre he leased it to defendant Ernest A. Harms December 1, 1922, for a term of three years beginning January 1, 1923. The consideration named was $6,300 payable in monthly instalments of $175 each. A chronology of events fully pleaded by plaintiff in her petition follows:

November 4, 1923, Fritz Muller died, leaving a will devising the Apollo Theatre to his two minor sons, Walter Frederick Muller and Paul Ernest Muller—a will subsequently probated; January 22, 1924, Charles B. Schleicher granted letters of administration with the will annexed; April 8, 1925, and prior thereto, defendants solicited the administrator and also Lucy Muller, mother and natural guardian of the two minors, for a new lease extending the tenancy beyond the terms of the old and offering increased rents; April 8, 1925, administrator, with the consent and approval of plaintiff, under authority of the county court, accepted the offer of defendants and with them entered into a lease demising the Apollo Theatre to them for a term

of five years for $13,500, payable in monthly instalments of $225 each, beginning January 1, 1926; April 9, 1925, Lucy Muller appointed and qualified as guardian of the minors; May 27, 1925, entry of decree by county court that the Apollo Theatre passed to the minors by will of their father; May 27, 1925, final account of administrator approved; June 2, 1925, debts paid and estate distributed; January 14, 1926, administrator discharged, leaving plaintiff as guardian in control of the persons and the property of her two minor sons. September 24, 1926, defendants notified plaintiff they would terminate their tenancy and vacate the premises October 31, 1926. The facts summarized were fully stated in the petition.

By means of copies the will, the two leases and notice of lessees' purpose to terminate the tenancy were included in the petition. Plaintiff alleged also that defendants paid to her the rent under the first lease from July 1, 1925, to and including December, 1925, and under the new lease from and including January, 1926, to and including October, 1926; that the rent for November and December, 1926, is due and unpaid.

In argument by defendants on the proposition that the period of tenancy extended beyond the tenure of the administrator as such and that consequently his lease was void, reference was made to the following provisions of statute:

"The executor or administrator shall have a right to the possession of all the real as well as the personal estate of the deceased, and may receive the rents, issues and profits of the real estate, until the estate shall have been settled, or until delivered over, by order of the county court, to the heirs or devisees, and shall keep in good tenantable repair all houses, buildings, and fences thereon which are under his control." Comp. St. 1922, sec. 1320.

This statute does not declare that agreements made by an administrator in excess of the powers granted are void. An authoritative opinion of this court so holding has not been cited or observed. Attention, however, was called to

Hollman v. Pattison, & Co., 104 Neb. 313, where the syllabus contains a ruling that "an administrator cannot lease an estate of which he is administrator beyond his term of office," but upon a reconsideration of that case the syllabus was withdrawn. *Hollman v. Pattison & Co.*, 104 Neb. 846. Contractual obligations exceeding authority granted or limited by statute, when not declared invalid by the lawmakers, have often been enforced. *Smith v. First Nat. Bank of Chadron*, 45 Neb. 444; *Bank of College View v. Nelson*, 106 Neb. 129; *Simmons v. Farmers Union Cooperative Ass'n*, 114 Neb. 463; *Nebraska Nat. Bank v. Parsons*, 115 Neb. 770. At most the statute made the lease voidable upon a timely exercise of a right to declare it void. Under the statute heirs and devisees of a deceased person are protected in their right to the possession and control of their property upon the settlement of decedent's estate and the discharge of the administrator. He entered into the new lease for the benefit of the two minor devisees, with the approval of their mother, the natural guardian. After execution of the lease, and the discharge of the administrator, while defendants were in possession of the property as lessees, the guardian and the county court elected for the minors to take advantage of the new lease, thus enhancing the value of their patrimony. This election was a proper exercise of power committed by law to the guardian and the county court. *Gentry v. Bearss*, 88 Neb. 742. Defendants approached the administrator for the new lease extending the term of the tenancy while he was in control of the property, and he accepted their offer with the consent of the natural guardian in addition to authority from the county court. The transaction was free from even a suspicion of fraud on the part of either the administrator or plaintiff. After the administrator was discharged the new lease was effective for the purpose of enabling defendants to retain possession of the property for their own benefit beyond the period fixed by the first lease. By paying to plaintiff for several months the increased rent as stipulated and by continued occupa-

tion of the leased premises, defendants recognized plaintiff as the guardian, as the lessor and as the administrator's successor. The lease was thus accepted by both plaintiff and defendants. Plaintiff received her rent and defendants continued to occupy the premises as tenants. Without the consent of plaintiff the lease was not open to rejection by defendants when they gave notice that they would terminate their tenancy.

The demurrer was erroneously sustained. As a result of the error the judgment of the district court dismissing the action is reversed and the cause remanded for further proceedings.

REVERSED.

HARRY L. ASHTON, APPELLEE, V. BLUE RIVER POWER COMPANY ET AL., APPELLANTS: IOWA-NEBRASKA LIGHT & POWER COMPANY, INTERVENER, APPELLANT.

FILED NOVEMBER 28, 1928. No. 26598.

1. **Abatement:** WAIVER. The pendency of a former suit between the same parties may be shown in abatement when a judgment in such suit would be a bar to a judgment in the second action, but this right of abatement may be waived.
2. **Jurisdiction.** Under the facts disclosed by the record in this case and as set forth in the opinion, the district court for Seward county, Nebraska, did not err in retaining jurisdiction of this cause and in determining the same upon its merits.
3. **Master and Servant:** INJURY TO SERVANT: LIMITATIONS. Where, after a compensable injury has been suffered, neither of the parties in interest institute proceedings to secure an adjudication of the matters involved in the accident, and there is no evidence of a valid agreement of settlement between the parties that in any manner conforms to the requirements of the compensation statute, but by or with the direction or consent of the employer payments of compensation are promptly commenced and thereafter continued to the employee for a period of time, the limitations provided by section 3061, Comp. St. 1922, shall not take effect until the expiration of one year from the time of making the last of such payments.
4. ———: EMPLOYERS' LIABILITY ACT: INTERPRETATION. The

interpretation of subdivision 3, sec. 3044, Comp. St. 1922, in conjunction with subdivision 1 of the same section, as announced in *Frost v. United States Fidelity & Guaranty Co.*, 109 Neb. 161, followed and applied in *Johnson v. David Cole Creamery Co.*, 109 Neb. 707, *Schlesselman v. Travelers Ins. Co.*, 112 Neb. 332, and *Davis v. Lincoln County, ante*, p. 148, again followed and again approved.

5. "Wilful Negligence." In the absence of intoxication on part of of the injured party, wilful negligence may be defined as (1) a deliberate act; or (2) such conduct as evidenced reckless indifference to safety. As a statutory term it involves more than want of ordinary care. It implies a rash and careless spirit, not necessarily amounting to wantonness, but approximating it in a degree, a willingness to take a chance.
6. Evidence examined, and *held* to support the judgment of the district court.

APPEAL from the district court for Seward county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

Thomas & Vail, for appellants.

T. L. Norval, H. L. Ashton and *Frost & Kinsinger, contra.*

Heard before GOSS, C. J., THOMPSON and EBERLY, JJ., and REDICK and STALMASTER, District Judges.

EBERLY, J.

This is a proceeding under the workmen's compensation act. Ashton, as claimant, was awarded compensation for personal injuries against his former employer, the Blue River Power Company, and its successors in interest. An appeal to the district court for Seward county, Nebraska, was then prosecuted by the defendant companies which resulted in the confirmation of the award made. From this judgment, the defendants appeal to this court.

The following facts of the transaction involved may be deemed of importance. Ashton, an experienced electrician, was employed by the Blue River Power Company on February 1, 1923, at an agreed compensation of $200 a month. On September 21, 1923, his employer sent him to

Adams, Nebraska, to perform an emergency job—connecting up the company's high tension transmission line with the local distributing system. In the course of his employment, he received severe electric burns on his left hand and arm, and severe electric burns on the soles of both feet, in addition to the shock which accompanied these injuries. The hand and arm injuries resulted in the amputation of one arm six inches below the elbow. All medical testimony on the subject is in agreement that the injuries to both feet were properly classified as third degree burns —burns which extended deep into the tissues. The employer, through its officers, had actual notice of the accident and the injuries occasioned thereby on the day of its occurrence. Claimant was thereafter, during his convalescence, continually under the care and in charge of surgeons selected and employed and paid by the employer. The doctors appearing as witnesses at the trial also agreed that the impairment of each of appellee's feet, due to these injuries, will be permanent in nature and from 20 to 25 per cent. disabled.

Under the foregoing facts, that actual knowledge by the employer of the fact of the accident and of the general nature and extent of the injuries occasioned thereby was acquired substantially as of date of the occurrence cannot be gainsaid.

The first question presented in behalf of the appellants is that the trial court erred in failing to sustain their request for a stay of proceedings until it should be determined finally whether the Lancaster county district court "was right in assuming jurisdiction of a prior appeal to that court from the same award of the compensation commissioner." Appellants contend that an appeal from an award by the compensation commissioner is in the nature of a transitory action, and an action within the jurisdiction of any district court of this state; and if a petition on appeal be filed in such court and a general appearance made by the adverse party, jurisdiction will be acquired even though the county be other than the residence of the em-

ployer; that, therefore, when appellant on October 19, 1927, properly commenced his proceeding for review in the district court for Lancaster county, Nebraska, and caused the statutory summons or notice to issue thereon, which was thereafter properly served upon claimant, jurisdiction attached as of the date of the commencement of this action; that this jurisdiction was not divested by the fact that the appellants, being in doubt as to the proper forum, on October 20, 1927, commenced an identical proceeding for review in the district court for Seward county, Nebraska, and caused a proper summons to be issued and duly served on the claimant in Seward county, Nebraska, which, in turn, in the orderly course of proceeding, was followed by the filing of complainant's answer to the appellants' petition filed in the district court for Seward county, Nebraska.

It is to be remembered in this connection that both summonses, though issued respectively from Lancaster and Seward counties, were served on the claimant on the same day in Seward county, Nebraska.

It may be conceded for the purpose of this appeal that the record here discloses that, solely as the result of appellants' own acts, two cases on appeal were pending in the district courts of this state involving the same subject-matter and seeking the same relief. True, it may also be conceded that neither was intended by appellants to be vexatious, and that both were commenced in good faith solely out of abundance of caution.

This court is committed to the doctrine that "The pendency of a former suit between the same parties may be shown in abatement when a judgment in such suit would be a bar to a judgment in the second action." *State v. North Lincoln Street R. Co.*, 34 Neb. 634. It may further be conceded for the purpose of this appeal that this principle is applicable to the proceeding now before us. But, "The principle on which pleas of another action pending are sustained is that the law, which abhors a multiplicity of suits, will not permit a defendant to be harassed and

oppressed by two actions for the same cause where plaintiff has a complete remedy by one of them." 1 C. J. 45, sec. 38.

This court is committed to the doctrine that this right of abatement may be waived. *Gregory v. Kenyon*, 34 Neb. 640.

As this multiplicity of proceedings before us is solely the result of appellants' acts as moving party in prosecuting by appeal, they may be considered as possessing the status of a "plaintiff." Claimant is therefore the sole injured party. Within the reason of the rule, he only may invoke or waive it, and he has expressly waived its provisions so far as Seward county proceedings are concerned. Furthermore, the Lancaster county district court, in the proceeding had before it, while overruling the special appearance of claimant and his objections challenging the jurisdiction, concluded: "It is further suggested that this trial be continued until after the trial of the same action in Seward county, Nebraska." It follows that the contention that the district court for Seward county, Nebraska, erred in retaining jurisdiction of this cause and in determining the same upon its merits cannot be sustained.

Section 3061, Comp. St. 1922, is urged by appellants as a complete defense to claimant's action. Preliminary to the examination of this contention it is to be remembered that, after the occurrence of an accident of a compensable nature, our statute requires, (1) the employer or insurance company shall truthfully report the same to the compensation commissioner (this is wholly *ex parte* and is a matter in which the employee has no part); (2) the employee shall then, if he desires to secure the benefit of the statute, bring knowledge of his accident to the employer as soon as practicable and make claim for compensation within six months after the occurrence of the injuries; (3) thereupon either the employer or employee may file a petition with the compensation commissioner and have the matter of liability adjudicated.

In addition, our compensation statutes further provide:

"The interested parties shall have the right to settle all matters of compensation between themselves in accordance with the provisions of this article: Provided, that a copy of such settlement shall be filed with the compensation commissioner, and no such settlement shall be binding unless in accord with the provisions of this article." Comp. St. 1922, sec. 3059.

The provisions last quoted should be read in connection with the following provisions: "The commissioner of labor of the state is hereby made the compensation commissioner and there is hereby imposed upon him the duty of executing all of the provisions" of our compensation legislation and acts amendatory thereto. Comp. St. 1922, sec. 3076.

It is also expressly provided: "No agreement by an employee to waive his rights to compensation under this article shall be valid." Comp. St. 1922, sec. 3054.

"All settlements by agreement of the parties with the approval of the compensation commissioner and all awards of compensation made by the court, except those amounts payable periodically for six months or more, shall be final and not subject to readjustment: Provided, however, no settlement shall be final unless it be in conformity with the provisions of this article, a finding by the compensation commissioner, the district court or any appellate court." Comp. St. 1922, sec. 3064.

In respect to the provisions above quoted, the public has an interest in their due enforcement and observance which it is the duty of the court to protect, even without regard to the wishes of the parties. The act of which they form a part creates new remedies and new liabilities. The manner in which it operates is to be found within the legislation itself. *Perry v. Huffman Automobile Co.*, 104 Neb. 211.

There is no question that neither of the parties in interest instituted proceedings to secure an adjudication of the matters involved in the accident before the compensation commissioner, and there is no evidence of a valid agree-

ment of settlement between the parties that in any manner conformed to the requirements of the statutes above quoted either as to compensation for the loss of a hand or covering the other disabilities suffered at the time.

It may also be inferred from the evidence, in view of the terms of a report from the office of the department of labor, that a complete report as to the nature and extent of the accident, suffered by claimant, and the injuries resulting therefrom, had not been made by the employer to the office of the department of labor, as required thereby.

Under the circumstances detailed, the weekly payments of $15 a week, which had commenced shortly after the occurrence of the accident, were continued until the payment made in January, 1927, after which payments ceased and further payments were refused. Claimant commenced his proceeding before the compensation commissioner on August 2, 1927, to secure the statutory award. Appellants met this demand with the contention that the following language of section 3061, Comp. St. 1922, wholly barred claimant's proceeding thus commenced: "In case of personal injury, all claim for compensation shall be forever barred unless, within one year after the accident, the parties shall have agreed upon the compensation payable under this act, or unless, within one year after the accident, one of the parties shall have filed a petition as provided in section 3680 (3062) hereof. * * * Where, however, payments of compensation have been made in any case, said limitation shall not take effect until the expiration of one year from the time of the making of the last payment."

Is plaintiff barred, or is his right to compensation within the exception created by the statute?

The language quoted, in the exact form it appears above, also appears in the Pennsylvania legislation on this subject, and in construing the same the supreme court of that state said: "Does section 315 bar the claim? The latter part of this section reads: 'Where, however, payments of compensation have been made in any case, said limitations shall not take effect until the expiration of one year from

the time of the making of the last payment.' This section was placed in the act to prevent imposition on unwary employees; that is, to prevent money being paid for a period of time after an injury under some verbal arrangement, causing the employee to neglect presenting the agreement in some form as provided by law. The year limitation, under the act, would begin to run from the last payment." *Chase v. Emery Mfg. Co.*, 271 Pa. St. 265.

But appellants contend that the payments of compensation were, in fact, appropriated to and limited for injuries occasioned by the loss of a hand exclusively, and insist that the appellee is seeking to recover for injuries for which no payments have ever been made, and, therefore, as to injuries to the feet the bar of the statute is applicable. The trouble is, however, that the district court evidently found to the contrary, and the evidence in the record supports that conclusion.

The evidence of the plaintiff is wholly uncontradicted that, shortly after his injuries and when the conditions of his feet and hand and arm were equally obvious, the secretary and general manager and assistant manager of his employer visited him in the hospital and told him "not to worry, but go home and try to get well, and he would be taken care of;" that the insurance carrier thereafter commenced the payment of $15 a week while he was in the hospital; that there was nothing of a restrictive character in or connected with the vouchers or remittances which in any manner advised claimant that payments being made were for hand injuries only; that the amount paid was the equivalent of the maximum weekly payment if all injuries received were considered; that no notice of any kind was ever given at or prior to the time any of these payments were made by appellants of any specific appropriation to injuries occasioned by the loss of a hand exclusively.

It is thought that various injuries received as a result of one accident, in view of the policy evidenced by the statute, cannot be separated, and that compensation under the statute must be awarded for the disabilities created

thereby as an entirety. *Nebraska Nat. Guard v. Morgan,* 112 Neb. 432.

If, however, it be conceded that, under the policy of our statute, the several injuries received by a claimant may be segregated and considered as separate and unconnected items of indebtedness to which a bar of a statute of limitations is sought to be applied, it would also follow that—"Where a debtor remits money to his creditor without a request or instruction on what particular debt to apply the same, the creditor may apply the money upon any debt of his debtor which he chooses." *Lenzen v. Miller,* 53 Neb. 137; *Lau v. Blomberg,* 3 Neb. (Unof.) 124.

Indeed, "The weight of authority holds that the debtor must direct the application of his payment at or before the time of payment and that he cannot do so afterward." 30 Cyc. 1230.

At common law the creditor was not compelled to exercise his right of application at the time the payment was made, and while there was some conflict of authorities as to how long that right exists, the record before us discloses that the application was seasonably made to the indebtedness as an entirety; also, that the payments made were not accompanied by any distinctive appropriation by appellants, but that they were continued three years without informing appellee in any way of the purpose to pay only for the loss of the hand. They did not notify appellee until long after the whole of the term in which appellee would have been required to file his petition, had no payments been made, had fully expired. The purpose of the statute was to prevent just such a situation, and it clearly applies to the instant case.

The appellants challenge the recovery allowed by the trial court as being excessive and as not warranted by the terms of our compensation act, properly construed. So far as facts are concerned, the trial court found that the claimant, in addition to the loss of a hand by amputation, had suffered a permanent im-

pairment of, at least, 20 per cent. to each foot, and also 10 per cent. general impairment to his health.

It is to be remembered that findings of fact made by the district court in a compensation case will not be reviewed on appeal unless clearly wrong. *McGuire v. Phelan-Shirley Co.*, 111 Neb. 609; *Miller v. Morris & Co.*, 101 Neb. 169; *City of Fremont v. Lea*, 115 Neb. 565.

The evidence in the record amply supports this determination of the trial court as to the extent and quality of the impairment suffered. On the basis of these facts so found, the district court adjudged that the complainant was entitled to compensation to the extent of "one-half of 100 per cent. total for hand plus 20 per cent. partial loss for feet, viz., 60 per cent. partial total disability, or 300 weeks at $15 a week, and $12 a week for the remainder of his life." This conclusion appellants challenge on the ground that the rule announced in *Frost v. United States Fidelity & Guaranty Co.*, 109 Neb. 161, is incorrect and erroneous and not justified by the terms of the statute construed. We have carefully reexamined this statute. Giving due consideration to the public policy involved, according to the language of the enactment, and to the full and complete meaning expressed by the terms employed, we are unable to accept the able and ingenuous arguments of counsel for appellants or agree with the conclusion for which they contend. We are impressed with the thought that the doctrine announced in *Frost v. United States Fidelity & Guaranty Co., supra,* is not only in accord with the literal terms employed by the legislators, but fairly expressive of the true legislative intent evidenced by this act. This case has been followed by this court in *Johnson v. David Cole Creamery Co.*, 109 Neb. 707; *Schlesselman v. Travelers Ins. Co.*, 112 Neb. 332; *Davis v. Lincoln County, ante,* p. 148. Three legislatures have convened and adjourned since the announcement of this rule without the adoption of any amendment to the controlling statute in this case.

Indeed, similar legislation in other jurisdictions has re-

ceived a similar construction. *Vishney v. Empire Steel & Iron Co.*, 87 N. J. Law, 481; *Orlando v. Ferguson & Son*, 90 N. J. Law, 553. We are therefore constrained to adhere to the rule thus heretofore announced by this court.

On the question of wilful negligence, insisted upon by the appellants, a careful consideration of the record confirms us in the belief that it is wholly unsupported by the evidence in the case. Conceding that appellee's negligence was contributory to the accident, it does not obtain the degree of wilful negligence. On this subject we are in full accord with the opinion of the trial judge who, in his written opinion, says: "It does not seem to me that a case of wilful negligence has been made out. Wilful negligence means a greater degree of negligence than mere negligence and a greater degree of negligence than gross negligence. I would hestitate to hold that the plaintiff was guilty of gross negligence, and I have no hesitancy at all in holding him not guilty of wilful negligence. My best judgment is that he was guilty of an error of judgment only. He was not guilty of a reckless indifference to his own safety. When he threw the switch, he believed that it was safe to do so. He was not willing to take a chance; he did not believe that he was taking a chance. His negligence was no greater in my opinion than that of the employee in *Farmers Grain & Supply Co. v. Blanchard*, 104 Neb. 637."

It follows that the action of the district court in its determination of the award of compensation to plaintiff is, in all things, sustained.

AFFIRMED.

JOSEPH WALTER ET AL., APPELLEES V. IGNATIUS WALTER ET AL., APPELLANTS.

FILED NOVEMBER 28, 1928. No. 26107.

1. **Tenancy in Common**: POSSESSION BY COTENANT. Possession by one cotenant of common property is presumed to be friendly as regards his cotenants; and before such possession can become adverse, notice that the tenant in possession is claiming the en-

tire estate in hostility to his cotenants must be brought home to the latter in some plain and unequivocal manner.

2. ———: ———: ADVERSE POSSESSION: NOTICE. Notice of such hostile claim may be shown by acts of the tenant in possession of such a notorious and hostile character as would put a man of ordinary prudence upon his guard; but acts which are reasonably consistent with the existence of title in his cotenants are not sufficient.

3. ———: ———: ———: ———. Exclusive possession by a cotenant, receipt of the rents and profits, payment of taxes and making ordinary improvements proper for the full enjoyment or use of the estate, however notorious and long continued, are not, of themselves, acts of such character as to give notice to his cotenants of a hostile claim.

4. ———: ———: ———. Acts which might be held to constitute a disseisin if done by a stranger may not have such effect if done by a tenant in common against the other tenant, because of the presumption that such acts are for the benefit of all cotenants.

5. ———: ———: ———: LACHES. The possession by a cotenant being presumed to be friendly, his cotenants are not chargeable with laches for failure to demand their share of the possession and profits, where they have no notice of a hostile claim by the tenant in possession.

6. ———: ADVERSE POSSESSION: DEED AS NOTICE. A quitclaim deed purporting to convey the entire estate by four heirs of a deceased cotenant to two other heirs of the same may be sufficient notice of a hostile claim of title by the latter to the cotenants of their deceased ancestor; but such a deed purporting to convey only the "apparent interest" of the grantors *in the estate of their deceased ancestor* will not have that effect; it merely releases their share of the estate which they held in common with the grantees—in this case one-fourth.

7. ———: AGREEMENT AMONG HEIRS OF DECEASED COTENANT. A "family arrangement" between the heirs of a deceased cotenant in possession is not binding upon cotenants of deceased, where they took no part therein, had no notice thereof and had no interest in deceased's estate.

APPEAL from the district court for Dodge county: FREDERICK W. BUTTON, JUDGE. *Reversed, with directions.*

Courtright, Sidner, Lee & Gunderson, for appellants.

Dolezal, Spear & Mapes and *Hugo F. Srb, contra.*

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

REDICK, District Judge.

This case was presented to the commission, division No. 1, and an opinion written affirming the judgment of the district court. A motion for rehearing allowed, and reargument had before the court.

The action is in equity by two tenants in common to quiet title to certain lands against two of their cotenants and the heirs of a third cotenant. The claim of the plaintiffs is based upon adverse possession for a period of 10 years and involves a farm of 80 acres, which will hereinafter be designated as tract B. The history and chronology of the facts to be considered will now be stated.

Joseph Walter, Sr., in 1875, became the owner of the north half of the northwest quarter, section 8, township 20, range 5. This will be referred to as tract A, but it is not in controversy in this action. March 31, 1883, Joseph purchased from the Union Pacific Railroad Company the east 40 acres, and on June 9, 1888, the west 40 acres, which together constituted the south half of the northeast quarter of section 7, township 20, range 5. This is tract B, the land in controversy, and corners on tract A at the southwest. Title to both tracts was in Joseph Walter, Sr., who lived with his wife and family on tract A, farming the same in the usual manner. October 11, 1880, Joseph, Sr., and wife, Anna, entered into a contract with their son Anton whereby tract A was to be conveyed to Anton in consideration that he would deliver to Joseph and Anna Walter, so long as either of them should live, one-fourth of all crops raised thereon and permit them to occupy the north half of the house on said premises, and by the same contract personal property of the value of $150 was transferred to Anton. The deed was executed in pursuance of this contract and filed for record October 26, 1880, and

the contract October 27, 1880. The suggestion that the deed formed the entire contract of the parties because it contained no reservation finds no support in the evidence which clearly requires the inference that it was executed in pursuance of the contract. From that time forward Anton conducted the farm on tract A, and after the purchase of tract B, with the apparent permission of his father, cultivated and managed that tract, both tracts being used as one farm. The transaction appears to have been simply a substitution of Anton for his father in the management of the farm because of the latter's advancing years.

Joseph, Sr., died December 19, 1892, leaving surviving him four children, Joseph M. II, Ignatius, Mary K, Anton, and Anna, his widow. Anna continued to live on the farm until her death September 22, 1900.

Anton Walter died February 2, 1913, leaving surviving him six children, Rosa, Frank, Anton, Mary, Joe, and Otillie, and Mary, his widow. These are all living.

Joseph M. II died June 23, 1893, leaving surviving him four children, Fannie, Victor, George, Joseph III, and Clotilda, his widow, all defendants herein.

Upon the death of Joseph, Sr., title to the tract in question descended to his four children in equal shares, subject to the interest of Anna as widow, and upon the death of Joseph M. II, his one-fourth passed to his four children and Clotilda, his widow.

At the death of Joseph M. II in 1893, therefore, the record title was vested in Ignatius, one-fourth, Mary K, one-fourth, Anton, one-fourth, and the children of Joseph II, one-fourth, subject to the rights of the widows, which are not in controversy. The title has so remained up to the present time, except that the children of Anton succeeded to his interest February 2, 1913, four of whom, Rosa, Frank, Anton, and Mary, quitclaimed to Joe and Otillie, plaintiffs, May 10, 1913. This suit was brought January 2, 1924.

The action is brought against Ignatius and Mary K. and the four children of Joseph II and their respective wives and husbands, where married, and the claim of plaintiffs is that they and their ancestor, Anton Walter, have been in the actual, exclusive and adverse possession of the tract in controversy for more than ten years, and they pray that their title may be quieted as against the other defendants. Issue was joined by the filing of a joint answer and cross-petition praying for partition and an accounting of the rents and profits, to which plaintiffs filed a reply alleging that defendants were guilty of laches and other matters in the nature of estoppel, not necessary to be detailed at this point. The district court found for the plaintiffs and entered a decree quieting their title. Joseph III filed a separate motion for new trial, the others joining in a similar motion, which motions were overruled, and defendants appeal to this court.

As we view it, there is but one question to be determined, and that is whether or not the plaintiffs by the evidence have established an ouster of their cotenants so as to start the running of the statute of limitations.

It is well established that the possession by one cotenant of common property will be presumed to be friendly as regards his contenants, and that, before such possession can become adverse, notice by the tenant in possession that he claims title, or that his possession is hostile as against his cotenants, must be brought home to them in some plain and unequivocal manner. *Beitz v. Buendiger,* 144 Minn. 52. Until such notice is shown the law presumes that the possession is for the benefit of all the cotenants. 38 Cyc. 21. This notice need not be direct and positive, but may be inferred from acts of the tenant in possession, in hostility to the title of his cotenants, of such an open and notorious character as would put a man of ordinary prudence upon his guard. Acts of the tenant, however notorious, which are reasonably consistent with the existence of title in his cotenants are not sufficient, they must be hostile and of such a character as would put a reasonable man,

aware of his rights, upon inquiry. See *Carson v. Broady*, 56 Neb. 648; *Chase v. Lavelle*, 105 Neb. 796; *Keleher v. Kelly*, 89 Neb. 127; *Lambert v. Hemler*, 244 Ill. 254; *Schoonmaker v. Schoonmaker*, 154 Ia. 500; *Campbell v. Humphreys*, 202 Ia. 472; *Hudson v. Coe*, 79 Me. 83; *Patton v. Patton*, 197 Ky. 237. Land having descended to heirs, it is presumed that the possession and management thereof is for the benefit of all. *Stull v. Stull*, 197 Pa. St. 243.

With these principles in mind, we will now examine the evidence as preserved in the record.

The tract in question was not improved except by a fence enclosing it. Twenty-five or thirty acres were cultivated and the remainder used for hay and pasture. There never were any buildings, nor has any one ever lived upon the tract. It was farmed and controlled in connection with tract A as one farm by plaintiffs' ancestor Anton until his death in 1913. Several ditches were dug upon it for the purpose of draining the lower portions. After Anton's death the tract remained in the possession of his widow and children living on tract A and operated in the same manner as theretofore down to the present time. There is not a scintilla of evidence to warrant a finding that the possession of Anton was adverse to Joseph, Sr. In fact, this is not claimed by plaintiffs; nor do we find any evidence of any facts brought home to the knowledge of defendants which would put them upon notice of any hostile claim by Anton during his lifetime. The existence of the fence enclosing the property and the digging of the drainage ditches are both consistent with the existence of title in the cotenants and afford no inference of a hostile claim by the tenant in possession. It follows that the ouster, if any, must have taken place after Anton's death in 1913.

The plaintiffs rely upon the following facts and circumstances to show ouster: Anton Walter died testate leaving a will devising and bequeathing his property, real and personal, to four of his children, excluding plaintiffs, Joe and Otillie, who were not mentioned in any way. The

will disposed of real estate in Knox county, but made no disposition of the tracts A and B, which are in Dodge county. This failure to include any Dodge county property is attempted to be accounted for in an affidavit of Frank Dolezal, attorney for plaintiffs, recorded April 24, 1917, in which he says: "That the complications in said estate arose on account of the fact that the said deceased by conference with his family had worked out a plan of willing his property and had been mistakenly advised that there would have to be a separate will for his property in Dodge county and another separate will for his property in Knox county, and that deceased had made the will for the property in *Dodge* county, and before completing his will for the property in Knox county, he died, and the family desired to have his wishes carried out the same as if he had completed the will for this property in *Knox* county. It was for this reason that the agreement and stipulation and transfer of interest was made." It is evident that the words "Dodge" and "Knox" were inadvertently transposed as the will of the Knox county property was complete.

Ignatius was a witness to his brother's will, and on the trial was asked whether anything was said at the time the will was drawn about this 80 acres, and he answered, "Yes." "Q. What did you say? A. I served notice that he could not will anything that did not belong to him." Plaintiffs claim this answer shows conclusively that Anton was claiming the land in 1912. On cross-examination witness testified that this had reference to the *east* eighty. Frank Walter, Anton's son, testified that in 1913, shortly after Anton's death, he and Ignatius made an examination in the register of deed's office of Dodge county, and that, opening a record book which was handed to them, containing the record of the eighty in question, he said: "Here it is; it is in grandfather's name, and should be in your father's name." This was denied by Ignatius. Ignatius was named executor in Anton's will, but declined to serve and took no further part in the

settlement of Anton's estate beyond testifying as a witness to the will. The inventory in that estate included both tract A and tract B. Objections to the probate of the will were filed by Joe and Otillie March 4, 1913, because they were not mentioned in the will, and in order that the will might be probated an arrangement was entered into between the heirs of Anton that the personal property and the two tracts in Dodge county should be turned over to plaintiffs, with the results that the other children of Anton took the lands in Knox county under the will, and the quitclaim deed above referred to, dated May 10, 1913, was executed in pursuance of that arrangement. The widow was awarded a homestead interest in both tracts. This arrangement was made about May 10, 1913, the quitclaim deed to plaintiffs executed that date and recorded June 11, 1913. Inventory in the estate was filed December 6, 1913; final decree and discharge of administrator filed February 14, 1916; distribution of estate in Dodge county was based upon and in accordance with the arrangement between the heirs as appears from recitals of the decree. January 1, 1922, in reply to a letter from Joe, Ignatius wrote, saying: "A quitclaim is no good and some day you must go into the district court and have that deed corrected and that will cost money, too." Prior to this, in 1921, Joe had asked his uncle for a quitclaim deed and been refused. There was a claim, not now insisted upon in the briefs, that Anton had paid for the eighty in dispute. This letter may have referred to this claim—that title should have been made to Anton instead of Joseph, Sr. The evidence does not disclose a discussion of an adverse possession, either at the register of deeds' office or in connection with this letter. The letter to which it was an answer was not produced.

In 1893 Ignatius was administrator of his brother's (Joseph II) estate and did not include in his inventory the undivided one-fourth of the tract in Dodge county which he now claims his brother owned. February 14, 1916, Mary Walter, widow of Anton, quitclaimed to plaintiffs

tracts "A and B," reserving a homestead interest "to assure the carrying out of the understanding and agreement on which the last will and testament *after* deceased husband was probated."

The quitclaim deed of the four other children of Joseph II to plaintiffs covered both tracts and contained the following recital: "This is to quitclaim the apparent interest of grantors as heirs at law of Anton Walter, deceased, to grantees who are also heirs at law of said deceased to effect disposition agreed on." Anton paid the taxes on tract B which was assessed in the name of Joseph, Sr., until Anton's death, after which it was assessed to Joseph Walter et al. After Anton's death his widow paid the taxes until "a few years back"—"then I paid them, I always paid the taxes for her," Joe Walter testified.

It being conceded that it is incumbent upon the plaintiffs to prove an ouster of their cotenants, what is there in all this testimony (leaving out of view for the present the effect to be given the fact of such possession and occupancy as plaintiffs have shown) which tends in any manner to establish an ouster? There is no evidence of any positive notice to defendants that plaintiffs claimed the title adversely to them until the year 1921, when Ignatius was asked for a quitclaim deed, about five years before the beginning of the suit. The statement by Ignatius to his brother that he could not will anything that did not belong to him, according to Ignatius, had reference to the east eighty, which he says his father was about to put into the will. This eighty had been conveyed by the father to Anton in 1880. The incident referred to by Frank Walter at the register of deeds' office, when Ignatius is claimed to have said with reference to the eighty in question, "It is in grandfather's name, and should be in your father's name," might be evidence against Ignatius, but not against the other defendants. Ignatius denies this incident *in toto*. The same may be said of the fact that Ignatius, as administrator of the estate of Joseph II, in Knox county, failed to include in the inventory the one-

fourth interest which he now claims Joseph II had in the land in controversy. The arrangement made between the children of Anton Walter, upon objection being made to the probate of Anton's will, was one in which the defendants had no interest. They were not heirs or devisees of Anton, and the only connection Ignatius had with the matter was as a witness to the will, he having declined to act as executor. It is not shown nor claimed that any of these defendants were parties to that arrangement, nor, for that matter, had any knowledge of it. The fact that the land in question was included in the inventory of Anton's estate does not bind the defendants, but is explained upon the record itself. The arrangement was made in 1913, the quitclaim deed to plaintiffs being executed May 10 and recorded June 11 of that year. The inventory was not filed until December 6 following, and the decree of distribution recites that it was made in accordance with the stipulation and arrangement of the parties. The inventory, the same as the decree, was made after and in conformity with the arrangement between the heirs of Anton. It is argued that the recording of the quitclaim deed dated May 10, 1913, was notice to defendants of the hostile claim of the plaintiffs; but this is incorrect for several reasons. The deed included both tracts, A and B, and purported to convey only "the apparent interest of grantors as heirs at law of Anton Walter, deceased." What was the *apparent* interest of grantors? It was their two-thirds interest in the one-fourth interest which their ancestor Anton received in tract B as one of the four children of Joseph, Sr. The title to the land was in Joseph, Sr., and upon his death the apparent title was in his four children. The deed does not purport to convey the entire tracts, but only their apparent interest, which is as above stated. Clearly this was no notice to defendants of a hostile claim by plaintiffs, because it only dealt with an interest which plaintiffs are conceded to hold, to wit, one-fourth. It also conveyed their apparent interest in tract A, as heirs of Anton. The decree and proceedings in

Anton's estate were not notice to defendants, because they had no interest in that estate.

The deed of Mary Walter to plaintiffs cannot be considered as notice because it was dated February 14, 1916, and, therefore, within the ten year period.

We are, therefore, brought to the question whether or not the possession of plaintiffs and their ancestor was of such a notorious and exclusive character as to amount to an ouster. What was the nature of this possession and in whom was it vested? It must be borne in mind that we are not concerned with the possession of tract A beyond the fact that it was the home place and had always been farmed in connection with the land in dispute as one tract. At the death of Joseph, Sr., the title and ownership of A was in Anton, while that of B was in Joseph, Sr. Tract A was the homestead of Joseph and his wife, Anna, by virtue of the reservation in their deed to Anton; and tract B was a part of the home farm of Joseph, Sr., and was subject to the homestead right of his widow, Anna, who was entitled to the possession thereof during her life. It would seem, therefore, that the possession of tract B, as well as tract A, would be referable to Anna's title as widow, and not to plaintiffs and other children of Anton who lived with her and assisted her in carrying on the farm. She died in 1900, after which event, Anton became the full owner of tract A and of one-fourth of tract B and continued in possession of both tracts until his death in 1913, since which time his widow and heirs have remained in possession making no claim brought home to the notice of the defendants of any hostility to their interests as heirs of Joseph, Sr., along with plaintiffs' ancestor, Anton, until 1921. There were no buildings upon tract B, no one has ever lived upon it, and the only improvements placed thereon by plaintiffs or their ancestor were the digging of certain ditches to drain the lower portions of the tract, which was done by Joe some time after 1914.

We find nothing in the character of this possession calculated to give notice of a hostile claim by plaintiffs. The

fence existed before the death of Joseph, Sr., and the digging of ditches was not an act of such notoriety as to furnish such notice. It was only such an act as would be done by an ordinary tenant seeking to make profitable use of the land. Morever, they were dug within the ten year period.

Plaintiffs confidently rely upon the case of *Lund v. Nelson*, 89 Neb. 449, and quote the syllabus thereof in the following language: "Where one tenant in common enters upon the whole estate, improves it, takes the profits, pays all the taxes, makes it his home, and claims the whole for more than the period of the statute of limitations, an actual ouster should be presumed although not otherwise proved."

As applied to the facts of that case the statement of the law is doubtless correct, but what were the facts to which it was applied? Plaintiffs' ancestor had purchased in 1890 from the defendant Renstrom a twenty-four twenty-fifths interest in the land in question, had taken possession, built buildings, made other extensive improvements, and made the same his home up to the time of his death, after which his family remained in possession, constructing buildings and farming it as owners, paying the taxes and receiving the income; the names of the original owners of the one twenty-fifth interest were unknown, and the action was against the original grantor, Renstrom. It was said in a concurring opinion by Root, J., that the appellant Renstrom "had no title to or interest in this land, is not a tenant in common, and the question of adverse possession does not arise in the case." It thus appears that there was a difference of opinion among the judges as to the existence of any title in the defendants, but the case was decided upon the proposition that the general rule, that the possession of one tenant in common is the possession of all, was not applicable to that case, and that ouster would be presumed from the state of facts proved. We are not disposed to give effect to so general a statement of the rule beyond the facts of the case in which it was announced.

In the instant case the only improvements made were digging some ditches, but these were dug within ten years prior to commencement of this suit. The possession was in connection with the east eighty. As above stated, this possession after death of Joseph, Sr., might be referable to Anna, his widow, until her death in 1900. So far as Anton and his heirs are concerned, the only acts claimed to be hostile are the payment of taxes, farming the tract and retaining the rents and profits without objection for a period of 31 years. The possssion was by fence, not erected by claimants, the cultivation of about 30 acres, and the use of the remainder for pasture. While these facts might be sufficient to establish adverse possession where the entry was tortious and wrongful, we think they are not enough where entry was presumably permissive and friendly. In the latter case—"Something must affirmatively appear that indicates a purpose to assert title adverse to the cotenants, knowledge of which is chargeable to the other cotenants, before an ouster can be held to have taken place, and the statute of limitations started, on which title by adverse possession can rest." *Campbell v. Humphreys,* 202 Ia. 472, quoting from *Clarke v. Dirks,* 178 Ia. 335. Acts which might be held to constitute a disseisin if done by a stranger may not have such effect if done by one tenant in common against the other tenant. *Hudson v. Coe,* 79 Me. 83; *Warfield v. Lindell,* 30 Mo. 272. Mere possession, receipt of rents and profits and payment of taxes are not sufficient to start the statute of limitations, because the possession was rightful and receipt of the rents and profits made it the duty of the cotenant in possession to pay the taxes for the benefit of all. *Long v. Morrison,* 251 Ill. 143; *Blackaby v. Blackaby,* 185 Ill. 94; *Smith v. Libby,* 122 Me. 156; *Warfield v. Lindell,* 30 Mo. 272; *Schoonmaker v. Schoonmaker,* 154 Ia. 500.

Finally, it is contended that defendants have been guilty of laches in failing to claim their rights as cotenants. We think the doctrine of laches has no application here.

Until notice that their rights were threatened is brought home to them, cotenants are not required to take affirmative action, but may rest secure that the possession of their cotenant is their possession and that payment of taxes is for the benefit of all. "Where one joint tenant is in exclusive possession under the common title, a cotenant cannot lose his right by mere laches in failing to demand admission into joint possession or share of the rents and profits. There must be an ouster operating to give title under the statute of limitations." *Reed v. Bachman,* 61 W. Va. 452. The burden of affirmative action is upon the party in possession, if he wishes to convert a peaceful and lawful possession into a hostile holding. Plaintiffs cite *Butler v. Peterson,* 79 Neb. 715, and *Hawley v. Von Lanken,* 75 Neb. 597. They are not controlling. In both cases the doctrine was invoked against the plaintiff, and in both it appeared that defendants were prejudiced by the delay. In *Hawley v. Von Lanken* the rule was stated: "In applying the doctrine of laches the true inquiry should be whether the adverse party has been prejudiced by the delay in bringing the action and whether a reasonable excuse is offered for the delay." In the present case no such prejudice appears. The cost of the ditches and taxes paid are a lien upon the lands and may be fully recovered upon an accounting between the parties. And, as heretofore stated, defendants were entitled to rely upon their legal rights as cotenants of plaintiffs and their ancestor, thus furnishing a reasonable excuse for not bringing suit. In this connection it is argued that plaintiffs gave up valuable rights in the Knox county lands in reliance upon the undisturbed possession by Anton of the lands in dispute. The plaintiffs received upon the settlement all the personal estate of Anton in Dodge county and the east eighty. The evidence furnishes no clue as to the comparative values of the estate in Knox and Dodge counties, respectively. But for the "family arrangement" in Anton's estate the interest of plaintiffs in the east eighty would have been reduced to one-third, and their interest in Knox county es-

tate would have been one-third, after the payment of $3,000 of legacies and a $3,000 mortgage. No prejudice is shown. It is said in 30 Cyc. 190, that, until a "prescriptive title is created, neither laches nor the statute of limitations will prevent the maintenance of proceedings for partition" —citing cases from twelve states. The rule seems reasonable, for at any time before the statute of limitations is complete action may be brought against the cotenant.

It follows that the opinion by the commission must be set aside and the judgment of the district court reversed, and the cause remanded, with instructions to decree partition and an accounting as prayed in the cross-petition.

REVERSED.

HYACINTHE W. STRATTON, APPELLEE, V. SERVICE LIFE INSURANCE COMPANY, APPELLANT.

FILED NOVEMBER 28, 1928. No. 26140.

1. Insurance: PLEADING. Where, in an action on a life insurance policy, the petition alleged payment of premiums and the answer admitted the issuance of the policy, death of assured and proofs of loss and denied all other allegations not expressly admitted, *held*, that payment of premiums was not put in issue, in the absence of an allegation that the policy had lapsed.
2. ———: ———. Where the issuance of a policy of insurance is admitted, and the insurer relies upon a breach of a condition thereof as a defense, the facts showing such breach must be specially pleaded in the answer.
3. ———: POLICY: CONSTRUCTION. A clause in an insurance policy that it should be incontestable after a specified time, except as to certain matters stated, operates to exclude all defenses not within the exception, provided the limitation of time be reasonable.
4. ———: ———: FRAUD: LIMITATIONS. A limitation of one year within which an insurance policy may be contested for fraud in its procurement is a reasonable one.
5. ———: ———: ———: ———. Such a limitation is valid though the statutory provision was two years, as it was for the protection of both parties to the contract, and it was within their competence to provide a shorter period; no question of public policy is here involved.

APPEAL from the district court for Saunders county: HARRY D. LANDIS, JUDGE. *Affirmed.*

Allen & Requartte, for appellant.

Slama & Donato, contra.

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

REDICK, District Judge.

The action is brought to recover upon an insurance policy issued by defendant to Lee H. Stratton, by Hyacinthe W. Stratton, widow and beneficiary. The petition alleged the issuance and delivery of the policy and payment of the first year's premium, $195.75, and that assured died January 17, 1927. It was then alleged that on the 3d day of March, 1926, said Lee H. Stratton paid the annual premium on said policy, and that all conditions of the contract had been performed; that proofs of loss had been made, but that defendant refused to pay. A copy of the policy and application therefor, which was made a part of the contract, was attached to the petition and made a part thereof.

The defendant answered, admitting the issuance of the policy, the death of the insured, proofs of loss and rejection of the claim, and made the following denial: "De fendant denies each and every allegation and averment in plaintiff's petition except as herein expressly admitted to be true." The answer then proceeded, under the heading "Defendant's Affirmative Defense," and alleged that the policy was procured by fraud, in that insured, in his written application, made a number of statements as to his present and previous condition of health which he knew to be false, upon which defendant relied in issuing the policy. The answer then contained the following allegations:

"12. That plaintiff had paid in his lifetime on said policy premiums in the sum of $336.55; that said sum with

interest has been tendered to the beneficiary and refused and defendant again tenders said amount into court."

"That by reason of the statements, representations and warranties hereinbefore set forth, the defendant was and is totally exempt from any and all liability to the beneficiary named in the said policy sued on, on account of the death of said Lee H. Stratton, which was and is directly traceable to the condition of his health at and prior to the time the policy herein was issued."

The prayer was as follows:

"Wherefore defendant prays that plaintiff's petition may be dismissed, and that it may have judgment against the plaintiff for its costs herein, and that it be determined by the court that the defendant is exempt from liability to said beneficiary under said policy herein sued on."

The plaintiff thereupon filed a motion for judgment in her favor on the pleadings, on the ground that the answer failed to state a defense, which motion was sustained by the court and judgment rendered for the full amount of the policy with interest, $5,145, and $350 attorney's fee. Defendant excepted and brings the cause to this court, making four assignments of error, but which present only two questions for our determination:

(1) That by the general denial of the answer, the allegation of the petition that the premium for the second year had been paid was put in issue and that the court therefore erred in sustaining the motion. We think this assignment is not well taken. If the answer had consisted merely of a general denial, thereby putting in issue the existence of the policy, the position of defendant would probably be correct; but where the existence of the policy at one time is admitted, and defendant seeks to avoid liability by the breach of some condition in the policy thereafter occurring, the defense is in the nature of a forfeiture, and it is incumbent upon the defendant to specially plead the condition and breach. *Sharpe v. Grand Lodge, A. O. U. W.*, 108 Neb. 193; *Farmers & Merchants Ins. Co. v. Newman*, 58 Neb. 504; *World Mutual Benefit Ass'n v. Worthing*, 59

Neb. 587; *Pickett v. Fidelity & Casualty Co.*, 60 S. Car. 477; *Helvetia Swiss Fire Ins. Co. v. Allis Co.*, 11 Colo. App. 264; *National Mutual Fire Ins. Co. v. Sprague*, 40 Colo. 344; *Harris v. Security Life Ins. Co.*, 248 Mo. 304; *Globe Mutual Life Ins. Ass'n v. March*, 118 Ill. App. 261. Where the allegation was that the policy was issued for a valuable consideration and the answer expressly denied this allegation, it was held this "did not tender an issue relative to the premium note being unpaid, or whether the policy was invalidated by reason of such nonpayment." "Where the insurer relies upon a stipulation in a policy to defeat a recovery it must plead affirmatively a breach thereof as a defense." *Farmers & Merchants Ins. Co. v. Wiard*, 59 Neb. 451. Where petition alleged performance of all conditions and answer denied the same but did not specify any breaches, it was held insufficient. *Pickett v. Fidelity & Casualty Co.*, 60 S. Car. 477. The defense sought to be interposed by the general denial is that, by reason of failure to pay the full second year premium, the policy had lapsed, and was no longer in force. This was an affirmative defense depending upon a breach of some condition of the policy and should have been specially pleaded. Again, it is very doubtful, applying the rule that the allegations are to be taken most strongly against the pleader, whether payment of the premium is denied. There are no facts pleaded or lapse alleged; the answer simply alleges the payment of $336.55 in connection with a tender of that sum to the beneficiary, and sets forth as the only reason why it should be exempt from liability the falsity of the statements and warranties in the application; this without any suggestion as to the insufficiency of that amount.

But there is another reason why defendant may not insist upon this assignment of error in this court, from the fact that this particular question was not argued and presented to the district court upon argument of the motion for judgment. This fact is stated in brief of appellee, and not denied by appellant, except by insistence that the question was presented by the pleadings. The statement

in the brief, however, is borne out by the opinion of the district judge set out in the brief of appellee, in which opinion no reference is made to the question under discussion. It is too well settled in this jurisdiction to require citation of authorities that upon appeal this court will not consider questions not presented to the lower court, and that the issues upon which the cause was there tried are binding upon the parties upon appeal to this court. *Foster v. City of Lincoln,* 107 Neb. 404.

(2) That the answer set up a good defense on account of the fraud in the inception of the policy. In compliance with the requirements of the statute of Nebraska, section 7837, Comp. St. 1922, as amended by chapter 121, Laws 1925, the policy in question contained the following provision:

"This policy and the application therefor constitute the entire contract between the insured and the company and shall be incontestable after one year from date hereof, except for the nonpayment of premiums. All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statements shall avoid the policy unless it is contained in the written application therefor, a copy of which is attached hereto. If the age of the insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age."

It is argued by defendant that by the second sentence of said clause the right is reserved to the insurance company, at any time, to defend on the ground that the policy had been fraudulently obtained. We think not. The language of this clause is not precisely that of the statute which reads as follows:

"No policy of life or endowment insurance, except policies of industrial insurance or where the premiums are payable monthly or oftener, shall be issued or delivered in this state unless it contains in substance the following provisions: * * *

"4. A provision that all statements made by the insured

shall, in the absence of fraud, be deemed representations and not warranties, and that no such statement shall avoid the policy unless it is contained in a written application, and a copy of such application shall be indorsed upon or attached to the policy when issued; and

"5. A provision that the policy shall be incontestable after * * * two years from its date, except for nonpayment of premiums, and except for violations of the conditions of the policy relating to naval and military service in time of war." Laws 1925, ch. 121.

It will be noted that the statute required that the policy be incontestable after two years from its date, whereas the policy makes it one year. This difference will be referred to later. If there is any difference in the legal effect of the provisions of the statute and those of the policy, the defendant would be in no position to take advantage thereof, but is bound by the terms of its contract as made, and it does not attempt to make any distinction. But defendant argues that paragraph 4, above quoted, reserves the defense of fraud in the procurement of the policy. To adopt this construction would require the insertion in paragraph 5 of an additional exception, which contains but two, (a) nonpayment of premiums, and (b) violation of conditions relating to naval and military service in time of war. The two sections must be construed together in order that both may stand. If we adopt the construction insisted upon by defendant we enlarge the specific exceptions of paragraph 5. This we cannot do. Section 4 merely provides that all statements and representations of assured shall not be considered warranties, in the absence of fraud, while section 5 provides that the policy shall be incontestable after two years, except as to certain matters, not including fraud. We think the two year limitation applies to every other defense than those excepted or otherwise provided for and fixes a period after which those other defenses shall not be available. The provision as to fraud is in full force during the limitation of one year, the effect of which is to require the insurer to make such

investigation as he desires with reference thereto, and take proper steps to cancel or rescind the policy within the period of limitation, failing which the policy will be incontestable on that ground. *Metropolitan Life Ins. Co. v. Peeler,* 71 Okla. 238. By this construction all provisions of the statute are reconciled and given force.

It is not contended that such a provision of incontestability is beyond the competence of the legislature; in fact, similar provisions have been uniformly sustained by the courts of many different states. *Metropolitan Life Ins. Co. v. Peeler, supra,* where many of the cases are cited; also reported in 6 A. L. R. 441, containing a valuable annotation at pages 453-456. See, also, 14 R. C. L. 1199, sec. 380, where it is said: "The general rule is that a provision in a contract of insurance limiting the time in which the insurer may take advantage of certain facts that might otherwise constitute a good defense to its liability on such contract precludes every defense to the policy other than the defenses excepted in the provision itself, including false answers in the application, and even fraud where the time fixed by the contract is not unreasonably short"—citing cases.

Defendant cites *Welch v. Union Central Life Ins. Co.,* 108 Ia. 224, as parallel to the present case, but there was no limitation in the policy there considered within which the defense of fraud could be made. Moreover, the contract provided that the facts stated in the application are warranted to be true, and a subsequent clause provided that, "except as hereinbefore provided, the policy shall be incontestable for any cause except misstatement of age," and it was held that the defense of fraud was thereby preserved. The case recognizes the general rule that, where the contract provided it should be incontestable after a specified time, the defense of fraud would be thereby shut out, saying: "Such stipulations did not condone the fraud, but limited the insurer to a time within which it might assert the fraud as against the contract. In these cases the right to defend on the ground of fraud within the time

agreed upon is recognized"—citing *Wright v. Mutual Benefit Ass'n*, 43 Hun (N. Y.) 61; *Massachusetts Benefit Life Ass'n v. Robinson*, 104 Ga. 256. Cases cited by defendant to the effect that fraud is not excluded by an incontestable clause operating from the date of the policy have no application here; such cases are *Reagan v. Union Mutual Life Ins. Co.*, 189 Mass. 555, and *New York Life Ins. Co. v. Weaver's Adm'r.*, 114 Ky. 195.

The voluntary reduction by defendant from two years to one was within the competency of the parties to the contract, and has been held analogous to those cases where the doctrine is announced that the parties may contract for a period of limitations within which action may be brought less than that provided by general statute. *Southern Union Life Ins. Co. v. White*, 188 S. W. (Tex. Civ. App.) 266; *Metropolitan Life Ins. Co. v. Peeler*, 71 Okla. 238; *Citizens Life Ins. Co. v. McClure*, 138 Ky. 138.

The construction we have adopted would not require us to hold, as suggested by defendant, that defense for misstatement of age could only be made in one year, for the reason that the contract specifically provides for that situation.

In conclusion, we hold that the period of one year is a reasonable limitation for contesting the policy for fraud, that the defense that the policy lapsed for nonpayment of premium is not presented by the answer, and that the motion for judgment on the pleadings was properly sustained.

AFFIRMED.

MONA M. WILSON V. STATE OF NEBRASKA.

FILED NOVEMBER 28, 1928. No. 26553.

1. **Homicide: INFORMATION.** Information set out at length in the opinion examined, and *held* to be sufficient to charge the crime of murder in the first degree "by administering poison" under section 9544, Comp. St. 1922.
2. **———: PLEA OF GUILT: PROVINCE OF JURY.** A defendant charged with first degree murder "by administering poison" is,

upon conviction, subject to the death penalty or to be imprisoned in the penitentiary during life, "in the discretion of the jury," and a plea of guilty to such a charge vests the power exclusively with a jury to determine what the penalty shall be. A court, therefore, in attempting to pronounce and impose sentence to the plea of guilty of a defendant to such a charge pronounces a legal nullity.

3. Criminal Law: SENTENCE: JURISDICTION. "Jurisdiction to pronounce a particular sentence imposed is as essential as jurisdiction of the person and subject-matter. If the first does not exist the sentence is void." *In re McVey*, 50 Neb. 481.

4. ———: VOID SENTENCE. Where the sentence of the trial court in a criminal case is void for want of jurisdiction, it may be brought into question and raised for the first time on appeal in this court without the question first having been presented to the trial court in a motion for a new trial.

ERROR to the district court for Sheridan county: EARL L. MEYER, JUDGE. *Reversed.*

Charles E. Matson and *R. L. Wilhite*, for plaintiff in error.

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

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

STALMASTER, District Judge.

This was a criminal prosecution against the plaintiff in error, who will hereafter be called the defendant, commenced by the county attorney for Sheridan county, Nebraska. The information filed was very obviously drawn under section 9544, Comp. St. 1922, and was intended to charge the defendant with murder in the first degree by administering poison.

The information was filed July 22, 1927, and on the same day the defendant pleaded guilty and was sentenced by the court to a term of 30 years in the state penitentiary. It is nowhere apparent from the record that a jury was impaneled and sworn at any stage of the proceedings, and

we must, therefore, assume that a jury was never called to consider or hear the case.

The defendant filed her petition in error in this court, setting forth seven assignments of error, but an examination of the transcript discloses that only the statutory ground of newly discovered evidence was assigned in the lower court as ground for a new trial. The motion for a new trial was filed August 27, 1927, and on the same day a motion in arrest of judgment was also filed, the reason therein set out being that "the facts stated in the information filed herein do not constitute an offense under the statutes of the state of Nebraska."

On January 26, 1928, both of these motions were overruled by the trial court, after which the petition in error was duly filed in this court.

In the brief filed by the defendant, twelve distinct propositions of law are presented for consideration. An examination of the transcript, however, discloses that only propositions numbered one to ten are necessary to the consideration of the matters presented for review.

The first proposition urged is that only the court *and jury* may determine the penalty to be imposed in first degree murder, and that a defendant charged with that offense cannot waive the statutory requirement of a jury to fix the penalty. The second is that, since the information does not state an offense under the laws of this state, the motion in arrest of judgment should have been sustained under the provisions of section 10159, Comp. St. 1922.

We shall consider the last-named proposition first and the first-named last, because of the manifest precedence the latter has over the former.

1. Without reciting the formal introduction, the information filed charged the defendant did—

"On the 17th day of July, A. D. 1927, in the county of Sheridan and state of Nebraska, aforesaid, then and there being, did then and there unlawfully, purposely, feloniously and of deliberate and premeditated malice, one Olive E.

Loomis, with poison, to kill and murder in and upon the said Olive E. Loomis, then and there being, wilfully, feloniously and of her deliberate and premeditated malice, did make an assault, and a large quantity, to wit, two grains' weight of a certain deadly poison called strychnine, then and there wilfully, feloniously and of her malice aforethought did give and administer unto the said Olive E. Loomis, with intent that the said Olive E. Loomis should take and swallow the said strychnine down into her body, she the said Mona M. Wilson, then and there well knowing the said strychnine to be a deadly poison, and the said Olive E. Loomis, the said strychnine, so given and administered unto her by the said Mona M. Wilson, as aforesaid, did then and there take and swallow down into her body, by reason and by means of which said taking and swallowing down the said strychnine into her body, she, the said Olive E. Loomis, then and there became and was mortally sick and distempered in her body, and of the said mortal sickness and distemper on the said 17th day of July, A. D. 1927, she the said Olive E. Loomis, in the county and state aforesaid, of the said mortal sickness and distemper died."

It then concludes with this final statement:

"And so the said county attorney, aforesaid, on oath doth say that the said Mona M. Wilson did murder her, the said Olive E. Loomis, as aforesaid, unlawfully, purposely, feloniously, and of her deliberate and premeditated malice, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of Nebraska."

Since the concluding part of the information last quoted is nothing more than a mere conclusion arising from the facts previously stated and cannot cure any defects in the premises on which it assumes to be predicated, we must leave it wholly out of consideration in determining the sufficiency of the information. *Schaffer v. State*, 22 Neb. 557.

The material parts of section 9544, Comp. St. 1922, under which the information was drawn reads:

"Whoever shall purposely and of deliberate and premeditated malice * * * by administering poison, or causing the same to be done, kill another, * * * every person so offending shall be guilty of murder in the first degree."

There is much that might have been left out of the information as drawn without affecting the essential parts stated therein. This court has held that, where words appear in an information which might be stricken out, leaving an offense sufficiently charged, and such words do not tend to negative any of the essential averments therein, they may be treated as surplusage, and be entirely rejected. *Hase v. State,* 74 Neb. 493.

The information reduced to the simplest form merely states that the defendant unlawfully, purposely, feloniously and of deliberate and premeditated malice to kill and murder one Loomis with poison, did give and administer a deadly poison called strychnine to the said Loomis, knowing it to be a deadly poison, and that Loomis did take the poison so given and administered, by reason of which Loomis died on July 17, 1927.

We think this substantially recites all of the elements of the crime under section 9544, which states that whoever purposely and of deliberate and premeditated malice by administering poison kills another is guilty of murder in the first degree.

In charging the commission of an offense in an indictment, it is not necessary that the exact words of the statute be used, provided that the words employed are the equivalents in meaning of those contained in the statute. *Hase v. State,* 74 Neb. 493.

We think it not improper to suggest that the style employed for stating the offense is rather involved, but on the whole it is sufficient to meet the requirements of the statute under which it was drawn. The motion in arrest of judgment was therefore properly overruled.

2. The defendant pleaded guilty to the information set out heretofore, and it is clear that no plea could be received to anything less than first degree murder under the information before the court. Section 9544 heretofore quoted also provides:

"Every person so offending shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death or shall be imprisoned in the penitentiary during life, *in the discretion of the jury.*"

Upon the plea of guilty by the defendant, the court without the aid or intervention of a jury sentenced her to 30 years in the state penitentiary. It may be observed that, if the court did have the right to pronounce sentence, it could only do so by imposing the death penalty or imprison the defendant in the penitentiary during life.

It seems to us, however, that the court undertook to do that which is exclusively vested "in the discretion of the jury." What the penalty should be for murder in the first degree is for the jury to determine. It is then but a mere formality for the court to pronounce a sentence the determination of which the law vests with the jury exclusively.

The law of Indiana governing capital cases is almost identical with that of Nebraska. The same question seems to have been presented in *Wartner v. State,* 102 Ind. 51. In this case the court received a plea of guilty to a charge of murder in the first degree and fixed the penalty at death. Reversing the action of the trial court, the supreme court of Indiana said:

"In the case in hand, the record fails to show whether or not the appellant waived, or attempted to waive, his constitutional right to a trial by jury; but, as such a waiver is not authorized by statute in this case, the silence of the record on this point is wholly immaterial. Nor is it material that the record fails to show any objection or exception, by or on behalf of the appellant, to the trial of his case by the court or to any of the proceedings had therein. It is shown by the record that appellant's case is a capital

case, and that the court, without the intervention of a jury, tried his case, found him guilty as charged, and adjudged that he suffer the penalty of death. This the court was not authorized to do, nor was the appellant authorized to consent thereto by any law of this state. *Koerner v. State,* 96 Ind. 243. After the appellant's plea of guilty, the proceedings and judgment of the court are erroneous, and errors of so grave a character that he has the right to insist upon them here as affording substantial grounds for the reversal of the judgment. The law of his case as declared in section 1904, Rev. St. 1881, is that for the felony, whereof he says he is guilty, he 'shall suffer death or be imprisoned in the state prison during life, *in the discretion of the jury.*' In assessing his punishment the record shows that the court usurped and exercised a discretion which the statute has conferred upon the jury, and not upon the court. Under the statute the appellant had and has the right to have a jury say, in their discretion, which one of the two punishments he shall suffer."

We have heretofore written approvingly that, where there is a plea of guilty in a homicide case and the court determines the crime to be first degree murder, the proper procedure then is to submit to a jury the question of the penalty to be imposed. *Cole v. State,* 105 Neb. 371. It is our opinion, therefore, that the court invaded the province of the jury in fixing the penalty, the right so to do being vested exclusively with the jury.

3. We have held on another occasion: "Jurisdiction to pronounce a particular sentence imposed is as essential as jurisdiction of the person and subject-matter. If the first does not exist the sentence is void." *In re McVey,* 50 Neb. 481.

4. It is argued by the state, however, that the attack upon the right of the trial court to pronounce the sentence and the validity of it should have been first made in the motion for a new trial, and not having done so, the defendant may not now urge it for the first time in this court. A number of authorities are cited in the state's brief to

sustain the proposition, with which there can be no dispute, that errors complained of to be available on appeal must be set out in the motion for a new trial. We believe, however, that the situation in hand is without the rule contended for.

The trial court having no authority or power to fix the penalty could not legally pronounce it upon the defendant, and its attempt to do so was a nullity and without legal force and effect. The complaint to be made, therefore, is not that a mere error has been committed in the proceedings before the lower court. It is rather that the court was without jurisdiction to proceed at all as it did.

Where the court pronounces a sentence upon a defendant in a criminal case which it has no jurisdiction to fix or determine, objections to the exercise of such jurisdiction by the trial court may be raised for the first time on appeal to this court without first having presented the question before the trial court in a motion for a new trial. *State v. Swikert,* 65 Or. 286; *Johnson v. State,* 141 Ala. 7; *Waters v. Commonwealth,* 171 Ky. 457; *Monroe v. State,* 103 Miss. 759; *Rodgers v. City of Hattiesburg,* 99 Miss. 639. See, also, 17 C. J. 67, sec. 3334, and cases cited in note 27.

The transcript shows that the defendant was given a preliminary hearing in the county court on July 22, 1927; that a few hours later she was given a hearing upon the information in question in the district court, where she pleaded guilty; that on July 24, 1927, she was committed to the penitentiary and began serving her sentence. From an examination of the record we deem it proper to instruct the court to permit the defendant, if so advised, to withdraw her plea of guilty at any subsequent hearing.

For the reasons given, the judgment rendered in the district court is set aside and the cause is remanded.

REVERSED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1929.

ELSIE BENNER, APPELLEE, V. EVANS LAUNDRY COMPANY, APPELLANT.

FILED JANUARY 4, 1929. No. 26180.

1. **Master and Servant: INJURY TO MINOR EMPLOYEE: ACTION AT COMMON LAW.** A minor under 16 and over 14, employed in a laundry and injured while working at a laundry mangle, may maintain an action at common law for damages against the employer who has failed to procure the employment certificate prescribed by section 7670, Comp. St. 1922.
2. ———: ———: ———. The law does not compel such a minor in such circumstances to be classified, under section 3038, Comp. St. 1922, among those in the service of an employer as "including minors who are legally permitted to work under the laws of the state, who for the purpose of making election of remedies under this Code shall have the same power of contracting and electing as adult employees," and hence does not require such minors to rely on the compensation act for damages.
3. ———: ———: FAILURE TO PROCURE EMPLOYMENT CERTIFICATE. The main purpose of requiring the employment certificate is educational, though the health and physical fitness is an element to be considered in issuing it; but failure of an employer of a child under 16 and over 14 to secure the employment certificate prescribed by section 7670, Comp. St. 1929, cannot be said to be the proximate cause of an injury to the child; evidence of such failure to procure the certificate is material only for the purpose of sustaining the right to bring an action at common law rather than under the compensation act.

APPEAL from the district court for Lancaster county: MASON WHEELER, JUDGE. *Reversed.*

H. W. Baird and *James W. Kinsinger,* for appellant.

Wilmer B. Comstock, contra.

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

GOSS, C. J.

Elsie Benner, born February 20, 1911, sued the Evans Laundry Company for damages for an injury to her hand suffered in a mangle on September 3, 1926, while employed by the defendant in its laundry. From a verdict and judgment of $8,000 in her favor the defendant appealed.

The plaintiff was between 15 and 16 years old when she received the injury. The defendant had not procured the employment certificate required when a minor over 14 and under 16 years of age is employed in a laundry. Comp. St. 1922, sec. 7670. In the instructions to the jury the court limited the functions of the jury to the ascertainment of damages. The defendant assigns error in overruling a special demurrer setting up that the case was one for the workmen's compensation court rather than at common law and error in overruling a general demurrer to the petition; and assigns errors in the giving and refusal of instructions, and that the verdict was excessive.

The petition was framed under the common law and alleged that plaintiff, a minor of 15, was employed to work in a laundry without the permit required by section 7670, and in a place of danger to life and limb, in violation of section 7681; and that the defendant, in violation of sections 7690, 7691, and 7692, negligently and unlawfully failed to provide guards, boxes and screens to protect plaintiff from the laundry mangle at which she was required to work and permitted the appliances furnished to become broken, ineffective and out of repair. The special demurrer interposed by the defendant raised the issue that the petition did not set forth a cause of action at common law, but a right to proceed under the workmen's compensation law, in which the district court had no jurisdiction except on appeal. When the special demurrer was over-

ruled the defendant filed its general demurrer, which was likewise overruled. It thereupon answered, preserving its demurrer, denying the allegations of the petition, and alleging that the injury to the plaintiff, if any, was due to her negligence and carelessness.

The precise question involved in this feature of the case relating to the exclusive remedy under the compensation law has not been passed on by this court. The defendant cites *Navracel v. Cudahy Packing Co.*, 109 Neb. 506, as authority for the propositions that, where an employee has not rejected the compensation law, its remedies are exclusive, and that this rule is applicable to an employee who is a minor of an age when he is "legally permitted to work under the laws of the state," to quote from section 3038, Comp. St. 1922, from the definition including certain minors under the classification of employees in the compensation act. But Navracel was 19 years of age, was clearly of an age when he could lawfully be permitted to work without any special permit or license, and was held in that case to have elected to come under the compensation act by his failure to reject it formally. Indeed, in the progress of the argument in the opinion in the *Navracel* case, the court cited a case typical of those holding that, under statutes like ours, in such an occupation, minors under 16 are not "legally permitted to work" and so cannot be presumed to have submitted themselves to the provisions of the compensation act. The case to which we refer is *New Albany Box & Basket Co., v. Davidson,* 189 Ind. 57. The syllabus in that case reads as follows:

"The employment of a boy fifteen years of age to operate a wood joiner in violation of section 8022e, Burns 1914, Acts 1911, p. 511, and without the affidavit as to age, required by sections 8022, 8038, Burns 1914, Acts 1899, p. 231, being illegal and punishable as a misdemeanor under the statute, is not embraced within the provisions of the workmen's compensation act; and hence the latter act is not a bar to a common-law action for damages for injuries suffered in such employment."

Several cases are reviewed at length and others are cited by the Indiana court supporting the principle announced in the opinion.

In *Messmer v. Industrial Board,* 282 Ill. 562, the supreme court of Illinois reversed a compensation award in favor of the claimant, who was a minor between 14 and 16 and who might have been legally employed but for the fact that he had not secured the necessary permit to work. In *Taglinette v. Sydney Worsted Co.,* 42 R. I. 133, where the compensation act provided that "a minor working at an age legally permitted under the laws of this state shall be deemed *sui juris* for the purpose of this act," and where another statute prohibited any child between 14 and 16 from being permitted to work in any factory or manufacturing establishment, unless the firm employing him "has in its possession an age and employment certificate, given by or under the direction of the school committee," it was held that a minor over 14 years was not, simply because of his age, legally an employee.

Operation under workmen's compensation is a matter not of compulsion but election. The provisions against employing minors penalize employers and not minors. The employer should not be permitted to use them as a shield for himself and as a sword for the child. *Western Union Telegraph Co. v. Ausbrooks,* 148 Tenn. 615.

Without going further into a review of the cases, it may confidently be said that the great weight of authority in the review of statutes and situations like that now before us constrains us to hold that a minor under 16 and over 14 employed in a laundry and injured while working at a laundry mangle may maintain an action at common law for damages against the employer who has failed to procure the employment certificate prescribed by section 7670, Comp. St. 1922. The law does not compel such a minor in such circumstances to be classified, under section 3038 Comp. St. 1922, among those in the service of an employer as "including minors who are legally permitted to work under the laws of the state, who for the purpose of making

election of remedies under this Code shall have the same power of contracting and electing as adult employees," and hence does not require such minors to rely on the compensation act for damages.

The court had jurisdiction of the action for damages at common law and properly overruled the special demurrer and the general demurrer.

Of the errors assigned, the next for disposition is that relating to instructions. Did the court err in taking from the jury everything except the fixing of the damages?

On the point under examination, our own cases are not fully decisive. Plaintiff cites *Hankins v. Riemers,* 86 Neb. 307. In that case a master required his servant, a lad under 16, to do dangerous work in a cave, as a result of which the servant was killed. The administrator sued, but was defeated, and the opinion directed a retrial of the case because of an erroneous instruction on another point. As an aid to the trial court, this court quoted what is now section 7681 and in the second point of the syllabus stated the law thereon in these words: "If the employment of an infant under the age of 16 years, contrary to the provisions of the statute, is the proximate cause of an injury to the child, his master is liable therefor." In the discussion of specifically prohibited employment and of inherently dangerous work, leading up to that proposition of law, the court said: "The legislature may either designate such employments by name or it may prohibit child labor in dangerous work. In the latter event it is a question of fact, in each case to be ascertained from a consideration of the evidence, if not admitted in the answer, whether the work is dangerous. Proof that the child was injured would not in itself establish that the work was dangerous within the meaning of the law." The case is therefore of authoritative value only for the proposition that the trial court in the instant case, if the violation of section 7681 (the employment in a work "dangerous to life and limb") as alleged in the petition was relied on, could not entirely take the finding of proximate cause away from the jury

on that phase of the case; but it does not aid much in the other feature of the case now on review. However, the plaintiff herein relied in her pleadings on a violation of section 7681 and the case was tried on that issue as well as on others.

Rookstool v. Cudahy Packing Co., 100 Neb. 851, is cited in briefs of both parties. The boy injured was between 14 and 15 years of age at the time of the injury. The opinion, however, holds that, inasmuch as the petition counted only upon the common-law liability of the employer and all the proceedings upon the trial were upon that theory and it was thus submitted to the trial court, "this court upon appeal will so consider it, and the statute which prohibits the employment of minors between the ages of 14 and 16 years has no application." It was suggested in the course of the opinion, in reference to the provision requiring an employment certificate set out in the sections following the one which prohibits employment between the ages of 14 and 16 years, that it might be contended that this provision is rather in the interest of education than to protect it from unnecessary dangers, but the point was not necessary to be decided and the case was determined on the other point indicated above. That point never has been decided in this court, but it is raised by the issues and is argued by the appellant in its brief. More will be said of this later.

O'Neill v. Rovatsos, 114 Neb. 142, is cited by the appellee, but in that case the injured boy was under 14 years of age. His employment as a messenger was a violation of section 7669, Comp. St. 1922. It was absolutely and specifically prohibited, just as that section prohibits employment by children of that age in laundries. The trial court had erroneously directed a verdict for the defendant. This court held that, where a minor under 14 is employed in violation of section 7669 and is injured in the course of such employment, contributory negligence cannot be attributed to the minor, nor can he be held to have assumed the risk of the employment; and "that the question of

proximate cause is for the jury." If the proximate cause is for the jury in the case of a boy under 14, whose employment was there held to be in positive violation of section 7669, how can we logically escape the conclusion that the proximate cause is to be submitted, under proper instructions, to the jury in an action based on a violation of the companion section, 7670, by reason of the employment and injury of a girl between 14 and 16 years of age, who is not in all circumstances prohibited from working?

It would unduly prolong this opinion, and is unnecessary, to state fully the nature and contents of the employment certificate required in such a case. In short, it is a certificate from the superintendent of schools relating almost entirely to the attendance and qualification of the child. There are no references to the child physically, except that the certificate shall show that it "has reached the normal development of a child of its age, and is in sound health and is physically able to perform the work which it intends to do" (section 7672), and only in doubtful cases shall its physical fitness be determined by a physician. The evidence indicates that the plaintiff was in every way qualified to be properly certified and that when she engaged employment it was arranged that such a certificate would be obtained. Probably in the delegation of that duty it was overlooked.

It is apparent that the chief office of such a certificate is to provide that children who labor shall not be withdrawn from an opportunity to secure the rudiments of an education, though the complete fulfilling of the law requires at least a lay opinion that they are physically fit.

With reference to the educational purpose of the act, we have heretofore quoted what our court suggested on that subject in the case of *Rookstool v. Cudahy Packing Co.*, 100 Neb. 851.

In *Steel Car Forge Co. v. Chec*, 184 Fed. 868, the circuit court of appeals for the seventh circuit had under review and reversed a judgment obtained by a minor between 14 and 16 years of age, obtained in Indiana and involving a

failure to procure the employment certificate required in a statute much like ours. It is the same act that was involved in *New Albany Box & Basket Co. v. Davidson*, 189 Ind. 57, and referred to in the syllabus quoted in that part of this opinion relating to the compensation act. The court elaborately discussed the educational purposes of the act, held that in no way could it be said that the failure to observe the statutory requirements had a tendency to bring about the accident complained of, and that the trial judge erred in instructing the jury that the charge of negligence against the defendant was sustained if the jury found that the plaintiff was under 16 years of age at the time of the injury.

Lindell v. Stone, 77 N. H. 582, holds that, in a case of a boy 15 years' old, employed in a mill, where a statute prohibits under penalty the employment of children under 16 years while the schools are in session, without a permit from the school superintendent, non-compliance with the statute is not relevant upon the issue of defendant's negligence; and that the evident purpose of the legislature, so far as the law applies to children between 14 and 16 years of age, was to compel school attendance and to promote education.

Whatever efficacy is there in the failure to procure and file such a certificate, which might have been procured and filed, by which the law of the case is so transformed that the proximate cause of plaintiff's injury would be presumed when otherwise it would be submitted to a jury? Suppose the plaintiff had had a twin sister who had the same educational qualifications, the same physical qualities and state of health, who was working alongside plaintiff, in the same employment, and was injured by the same act. Could it be said to be the law that, if the twin sister had an employment certificate on file with the employer, she would have to prove and have the jury find that the negligence of her employer was the proximate cause of her injury and the amount of her damages, but that all the plaintiff would need to have submitted to the jury would

be the amount of her damages, as was done by the trial court in this case?

It should be borne in mind that the legislature has sanctioned the employment of children of plaintiff's age in laundries, provided the employer has secured a proper employment certificate for the child to work. That is the policy of the state. The work at which the plaintiff was engaged was not of itself so inherently dangerous as to be under the ban of public policy as a matter of law, whatever may have been the fact as to the alleged negligence of the employer, as to the kind and condition of his appliances to safeguard the employee when operating the mangle at which she was injured. By its classification in section 7670, work in a laundry was removed specifically from those employments prohibited a child over 14 and under 16 years and defined by the terms of section 7681, Comp. St. 1922, as "any work which by reason of the work, or place of performance, is dangerous to life or limb," or at any rate it would ordinarily be at best a question of fact for the jury, rather than of law for the court, to decide if the place of work in this particular laundry and at the particular mangle at which plaintiff received the injury was one of such inherent danger as to remove it from the expressly permissible occupations described in section 7670.

We think the main purpose of requiring the employment certificate is educational, though the health and physical fitness is an element to be considered in issuing it; but failure of an employer of a child under 16 and over 14 to secure the employment certificate prescribed by section 7670 cannot be said to be the proximate cause of an injury to the child; evidence of such failure to procure the certificate is material only for the purpose of sustaining the right to bring an action at common law rather than under the compensation act.

It was a question for the jury whether the negligence of the employer was the proximate cause, or a contributing cause, of the plaintiff's injury.

The trial court assumed that the facts of the injury of plaintiff, and the proximate cause of the injury, were matters of law for him to decide, upon which he could predicate actionable negligence of the defendant without the intervention of a jury. This indicates a reversal of the judgment and a new trial at which the negligence of the parties should be submitted to the jury and decided by them under appropriate instructions from the court in harmony with this opinion. Judgment accordingly.

REVERSED AND REMANDED.

STATE OF NEBRASKA V. HENRY H. LOVELL.

FILED JANUARY 4, 1929. No. 26808.

1. **Contempt**: EDITORIAL ON CASE PENDING. Publisher's editorial on a case pending in court set out in opinion and *held* contemptuous *per se*.
2. ———: ———: SUFFICIENCY OF EVIDENCE. In the prosecution of a publisher for contempt by the publication of editorial comments on the court in connection with a pending case, the editorial itself, the disclosed purpose to influence the court in making a decision and the effect intended are subjects of judicial scrutiny and consideration and may be sufficient to refute defendant's oral evidence of his innocence and of his intention to exercise the freedom of the press as guaranteed by the Constitution.
3. ———: ISSUE OF GUILT QUESTION OF FACT. Defendant in a prosecution for constructive contempt of court by abusing the freedom of the press in commenting on pending litigation may testify to his intent, but the issue of guilt is a question of fact determinable by the court from all the evidence.
4. **Constitutional Law**: FREEDOM OF THE PRESS. The freedom of the press implies the publisher's respect for the constitutional rights of others, including the rights of litigants to appear before an independent, impartial court, uninfluenced or embarrassed by contemptuous publications pending litigation.
5. **Contempt**: DUTY OF COURT. It is the duty of a court of justice to protect its purity, impartiality and independence and the rights of litigants from extraneous and lawless influences.

6. **Constitutional Law**: FREEDOM OF THE PRESS. The freedom of the press does not extend to contemptuous interference with pending litigation.

Original proceeding for contempt against Henry H. Lovell. *Judgment of conviction.*

O. S. Spillman, Attorney General, and *George W. Ayres,* for the state.

Henry H. Lovell, pro se.

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

ROSE, J.

In a prosecution by the state in the supreme court of Nebraska, the attorney general by formal information charged Henry H. Lovell, defendant, with contempt of court. He was found guilty and for the offense charged the court imposed upon him a sentence of imprisonment in the Douglas county jail for a period of ten days.

Defendant wrote, printed, published and circulated in Nebraska an editorial or article of which the following is a copy:

"Court Cannot be Corrupted.

"Since Judge *Shepard's* decision in the case of *Price et al. v. W. A. Fraser et al.,* as officers of the Woodmen of the World, and the appeal of the case by the defendant officers to the Nebraska Supreme Court, the question has, of course, been widely discussed as to the possibility of a reversion of the decree by the Supreme Court when it is taken up as planned October 6th next.

"The Forum is confident that Judge *Shepard's* decree will be sustained and the order through its officers and the Globe Life Insurance Company through its officers, who have also been officers of the Woodmen of the World, required to restore to the treasury of the Woodmen of the World the approximately $2,000,000.00 of cash and other

assets which the Lancaster county court held were fraudulently and wrongfully used.

"Our opinion is, as any editorial opinion worth while always is, not a personal idea of the individual, but the maturely crystalized concensus of opinion of a large number of competent and honest minds, omitting, of course, naturally the attorneys directly interested on the other side. The almost unanimous opinion of the legal fraternity is that Judge *Shepard's* decision was entirely sound and will be promptly sustained by the Nebraska Supreme Court, but one idea differing from this has been expressed, and since this idea, quite extensively passed about, strikes so at the foundations of our government that we cannot ignore it. That gossip in flavored form suggests the thought that on some flimsy pretext or technicality enough members of the Nebraska Supreme Court can be influenced to reverse the decision of Judge *Shepard* and undo all the work that has been done by the plaintiffs and their attorneys in protecting the interests of the membership of the Woodmen of the World. The appellants, Mr. Fraser and his associates, through their attorneys, have filed their brief. It has been designated and we sympathize with that designation as one of the rankest pieces of pettifogging ever presented to the Supreme Court of Nebraska. The defendants, on appeal, have filed their answer and to the layman there would seem to be no occasion to worry but that the Supreme Court would promptly sustain Judge *Shepard.* The case, of course, must be decided by the Judges, and we prefer to withhold a detailed article showing the presentations of both sides of the case until we can announce the decision of the Supreme Court.

"But when a situation exists, built up through gossip or otherwise, that leads a man, not a philanthropist, to offer to bet that the Supreme Court will reverse Judge *Shepard* in this case, and asserts as the reason for his position that interests friendly to the Woodmen of the World gang are in a position to influence the Judges of our Supreme Court, it is time they were defended.

"We do not believe that Judge Thompson can be influenced in the slightest degree because his son has been temporarily or otherwise in the employ of one of the supposed supporters of Mr. Fraser.

"We do not believe that Judge Goss would be affected by the gestures of Mr. Bradshaw towards the social advancement of his daughter.

"We do not believe that Judge Howell is under such obligations to any interests favorable to Mr. Fraser that warrants a fear that he might be influenced in their favor.

"In fact we believe that the entire membership of our Supreme bench is representative of the people of Nebraska and not of any special interests and that the rights and the money interests of the thousands of our citizens constituting the local membership of the Woodmen of the World, as well as the grand total of approximately one-half million members, citizens of other states, are safe in the hands of the Nebraska Supreme Court.

"It would seem that the importance of the matter warrants as near immediate decision as is possible. The defendants on appeal have clearly and simply stated their case and no better move to more firmly establish the idea of the integrity of the court could be made than to have the decision handed down in advance of the coming general election."

The information in the contempt proceeding contains a copy of the newspaper article and charges that it was unlawfully and contemptuously written, printed and published by defendant with intent to hinder the due administration of justice in the pending suit. The publication appeared September 15, 1928, in *The Forum,* a monthly periodical or newspaper "Devoted," as indicated by its cover, "to the insurance interests of the public and the best elements of all branches of underwriting." Defendant was the writer, editor and publisher.

The pending suit to which the publication referred was a controversy between members and executive officers of the Woodmen of the World, a fraternal beneficiary society

carrying life insurance on its members. The complaining members were plaintiffs and the executive officers and the Globe Life Insurance Company were defendants. An issue raised by the pleadings was the misuse by the officers of fraternal funds or property to the extent of approximately $2,000,000 for the purpose of organizing the Globe Life Insurance Company to write what is called "Old-Line Life Insurance," as distinguished from fraternal insurance. The pending suit was one in equity, tried and determined in the district court for Lancaster county, Judge Frederick E. Shepherd, presiding. From a decree against the Globe Life Insurance Company and the executive officers of the Woodmen of the World, requiring them to restore the misappropriated funds, they appealed to the supreme court, where the case was pending for trial *de novo* September 15, 1928, when the editorial or article under consideration was published.

Defendant Lovell was cited to appear November 19, 1928, and show cause, if any, why he should not be punished for contempt. At the appointed time he appeared personally in open court and presented an answer in which he regretted he was not financially able to be represented by eminent counsel; admitted publication of the article in the September issue of *The Forum;* denied he wrote it unlawfully or contemptuously or to obstruct proceedings in the pending suit or to hinder the due administration of justice therein; denied he intended to be contemptuous or disrespectful toward the court; expressed regret, if the publication was susceptible to an interpretation not intended, and offered an apology in that event; asserted he had at all times the greatest respect for the supreme court and for each member thereof; relied on its justice and humanity to protect him from false accusations; prayed for acceptance of his apology, if he had inadvertently committed any offense, and for dismissal of the prosecution. He expressed his willingness to submit his defense on his answer and on oral statements in harmony with it, but he was reminded from the bench of the gravity of the accusa-

tion against him and on the court's own motion he was given until November 26, 1928, to procure counsel and to prepare for trial.

Upon the convening of the court at the time fixed he again stated he was not financially able to employ eminent counsel and asked permission to act for himself in making his defense. His right to do so was recognized. He did not produce any witness in his own behalf, but was called to the witness-stand by the state. In answering questions by the attorney general and by members of the court he gave under oath his own interpretation of the published article and explained in detail the motives and the intent that prompted him in preparing and publishing it. He also exercised the right of advocacy in his own behalf. In his testimony he admitted sole responsibility for writing and publishing the editorial as reproduced in the information; said the rumors published by him had been previously circulated; admitted he did not inquire at the sources of knowledge to ascertain the facts concerning the rumors published by him; justified publication of them to give assurance that the court would not be influenced by them in deciding the pending case; expressed confidence in and respect for the supreme court and for each member thereof; disavowed any intention to be disrespectful or contemptuous. Defendant also expressed the conviction that he intended to keep within his rights when making his comments on the court in connection with the pending suit and argued that his publication required an innuendo to make it contemptuous, that the information did not contain an innuendo, and that consequently his explanation and apology should be accepted and the prosecution dismissed.

If defendant in his testimony and explanation truly interpreted his intent and attitude, the publication and circulation of his editorial were nevertheless unlawful. The published article was of itself contemptuous. It gave the court, the litigants and the public, in unmistakable terms, an impression at variance with the author's expressed in-

tent and attitude. It asserted when and how the pending case should be decided by the supreme court. It meant that, before the November election, there should be an affirmance of the decree requiring defendants in the suit pending on appeal to restore to the Woodmen of the World approximately $2,000,000 in misappropriated money or property. When and how the appeal should be decided were questions for judicial determination. The opinion of the editor and "The maturely crystalized concensus of opinion of a large number of competent and honest minds," to which he referred, were not factors for judicial consideration in disposing of the appeal. The resort to "The almost unanimous opinion of the legal fraternity" to show the soundness of Judge Shepherd's decision was improper. The supreme court is required by statute to dispose of the appeal without reference to the conclusion reached in the district court. Comp. St. 1922, sec. 9150. Furthermore, the published rumors were all without foundation in fact. The deliberate purpose to influence the judgment of the supreme court cannot be explained away. Defendant knew the civil case was pending on appeal. The article so shows on its face. It shows also that he considered the publication an editorial. Defendant took liberties the litigants themselves could not lawfully take. Parties to a pending action are not permitted to influence the court or a member thereof privately or through the press on the merits of pending litigation. Publishers have no greater rights. On the merits of a contested case the parties are heard in the presence of each other in open court. This is the system provided by law. Objectionable interference by strangers pending litigation is forbidden.

The test of guilt in a prosecution like this is not necessarily found in the mental processes by which the publisher, according to his testimony, justifies his utterances. What the article itself expresses, the motive of the author thus disclosed and the effect intended are subjects of judicial scrutiny and consideration and may be sufficient to refute oral evidence of innocence and the intention to ex-

ercise a constitutional right. The issue is one of fact for the court. The published article, the answer prepared by defendant in his own behalf, his testimony on the witness-stand, his advocacy at the bar, and his use and understanding of the English language show an intelligence and a mental acumen that make him answerable to the state according to the true import of what he wrote, published and circulated.

The freedom of the press vouchsafed by the Constitution implies the publisher's respect for the equal rights of others. One of those rights that the publisher is bound to respect is a litigant's privilege of appearing before an independent, impartial court for judicial redress, uninfluenced or embarrassed by contemptuous publications pending litigation. Under the Constitution this right is as sacred as the freedom of the press. By both state and federal Constitutions government is composed of distinct legislative, executive and judicial departments of equal rank. The judiciary is an independent tribunal to which the individual may resort whenever his property rights are invaded by private wrongdoers, by public agencies or by the legislative or executive departments. In controversies over rights guaranteed by the Constitution the individual stands before the court on an equality with government itself. The constitutional provision creating an independent judiciary is recognized by historians, philosophers and statesmen as a vast contribution to the science of government. To preserve the purity, impartiality and independence of the court is a solemn duty that cannot be evaded without endangering all constitutional rights, including the freedom of the press.

Each member of the court has an abiding conviction that defendant's editorial and the published rumors will not affect his judicial conduct in the pending case. If that conviction is well founded, a proper disposition of the suit pending on appeal will not efface the evil arising from the contempt. A judicial decision should be free from even the suspicion of intimidation, coercion or other ex-

ternal influence. If the judiciary is happily unmoved by the editorial in determining the appeal, the litigants, the public and the respect due to the courts of justice must still be considered. Will the appellants have a suspicion that the court was intimidated or otherwise improperly influenced by the publication in the event of an affirmance in accordance with the editor's expressed view as to what the decision should be? If appellants prevail and the judgment against them is reversed will appellees have a suspicion that the court permitted indignation arising from the publisher's article to influence the decision? Will the public or the readers of *The Forum* suspect coercion of the court if the judgment is affirmed? Will the appellants suspect that the article condemning them was inspired by appellees? The editorial, if disregarded by the court, would have a tendency, at least, to arouse such suspicions and to lessen confidence in the judicial decision, whatever it may be.

The constitutional provision that "Every person may freely speak, write and publish on all subjects" is followed by the restriction, "being responsible for the abuse of that liberty." Const., art. I, sec. 5. Abuses of the press in commenting on pending litigation with a view to influencing judicial action have been rare. Punishment of publishers for contempt has seldom been imposed, but statutory and common-law power to do so has long been recognized and occasionally exercised. Comp. St. 1922, sec. 9189; *State v. Bee Publishing Co.*, 60 Neb. 282. The freedom of the press and its powerful agency in the evolution of just and efficient government are scrupulously protected by the court. *Howell v. Bee Publishing Co.*, 100 Neb. 39. This freedom, however, does not extend to contemptuous interference with pending litigation.

The evidence establishes the guilt of defendant beyond a reasonable doubt. This conclusion is wholly free from resentment or revenge. No fine has been imposed. Imprisonment is limited to ten days. This leniency is ex-

tended to defendant out of consideration for his pecuniary situation and the needs of his family.

SENTENCE ACCORDINGLY.

THEODORE GRIESS V. STATE OF NEBRASKA.

FILED JANUARY 4, 1929. No. 26387.

Instruction set out in the opinion examined and disapproved under the record made.

ERROR to the district court for Clay county: LEWIS H. BLACKLEDGE, JUDGE. *Reversed.*

Mullen & Morrissey, Waring & Waring and *C. L. Stewart,* for plaintiff in error.

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

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

HOWELL, J.

Plaintiff in error brings this case to us from the district court for Clay county, wherein he was convicted, on counts one and two, of embezzlement, abstraction and wilful misapplication of $2,773.63 and $2,932, respectively, funds of Nebraska State Bank of Harvard, of which he was president.

Errors assigned are seven in number, but we will mention only the following: (1) Denying a continuance; (2) admitting evidence concerning books and records of the Omaha National Bank, not present in court; and (3) error in giving paragraph No. 4 of the instructions. In view of our conclusions, it is not necessary to pass upon the correctness of the ruling of the court denying plaintiff's application for a continuance.

Since this case is to be remanded for another trial, we do so with the mere admonition that it may be well to

obviate the criticisms of counsel for plaintiff in error as to testimony concerning what the records of Omaha National Bank do or do not disclose. However, we suggest that there may be a distinction between a negative showing that certain papers (not numerous), touching a subject, do not show a certain fact or recital and that no such documents exist.

Paragraph 4 of the instructions, criticised, presents a boundary line question. It reads:

"The evidence in this case is somewhat involved covering many different transactions, records and entries of accounts. The particular things, however, upon which the charge is based are not so complicated or difficult to understand, and I will explain to you somewhat the theory upon which both the prosecution and defense have presented their sides of the case.

"The charge made by the first count of the information is in reference to the embezzlement, abstraction or wilful misapplication of the funds of the bank in an amount of $2,773.63, which, according to the theory of the prosecution, was made up of two certain items of $773.63 and $2,000, respectively, which it is claimed the defendant obtained by crediting the same in the books of the bank $773.63 in his own personal account and $2,000 in the account of Griess & Thomas, and that the defendant did not at the time put in any moneys, bills of exchange or funds of any kind for such credit, so that he thereby effected a disposition of the moneys and funds of the bank which he afterwards checked out from the two accounts for his own use and benefit.

"In the second count the charge is based upon transactions whereby it is claimed the defendant issued five certain checks in the amounts of $800, $410, $500, $510, and $712, respectively, the aggregate amounting to $2,932, which he put in circulation, and afterwards, when in the course of business they were returned to the bank for payment, he caused them to be paid from the funds of the bank by means of a draft issued therefor which included

the total amount of said checks and also other items of exchange making the total of the draft in which it is claimed payment of these checks was included the sum of $7,010.13.

"The foregoing are the particular items upon which the charges are based in this case. The other items and transactions referred to in the evidence are claimed on the part of the state to be transactions made for the purpose of carrying on or covering up or concealing the original misapplication of the funds occasioned by the transactions first above referred to and are to be considered by you only in so far as they may throw light upon the character, quality and purpose of the transactions themselves.

"The defendant relies upon his plea of not guilty and his claim that the evidence introduced on behalf of the state is not sufficient to authorize his conviction upon either offense charged. The defendant did not testify in his own behalf, and you are instructed that, although the statute of this state provides that a person charged with a crime may testify in his own behalf, yet he is not under any obligation to do so, and the statute also expressly declares that his neglect to do so shall not create any presumption against him."

After having stated to the jury that the evidence is somewhat involved, the court said: "The particular things, however, upon which the charge is based are not so complicated or difficult to understand, and I will explain to you somewhat the theory upon which both the prosecution and defense have presented their sides of the case." There is a monitory tinge, molecular it is true, in the words of the court, which tends to indicate a warning that, while there is an involvement, yet it must not be regarded as troublesome, since the particular things charged against the defendant are not complicated or difficult to understand. The court then definitely explained that two specific items, testified to as to count one, made up the embezzled item charged, according to the theory of the prosecution. The same was repeated as to count two, only

five items were called to the attention of the jury instead of two. The court then states, "The foregoing are the *particular items upon which the charges are based*" (italics ours), thus directing the minds of the jury to such items only, to the exclusion of all others shown in the books, records and deposit slips in evidence.

Standing alone, it may be doubted whether the province of the jury was invaded. The jury were then told, in effect, now that you know what items to consider, "the defendant relies (for an acquittal) upon *his plea of not guilty* and his claim that the evidence introduced *on behalf of the state* is not sufficient to authorize his conviction." (Italics ours.)

In this state, the presumption of innocence, afforded one charged with crime, rises to the dignity of evidence and follows him throughout the trial. The effect of the charge was to tell the jury the defendant relied upon the insufficiency of the state's evidence alone, and his plea of not guilty, and not upon the evidence of presumed innocence with which the law supplied him. In effect, the law produces evidence of innocence on behalf of every accused person put upon trial for crime, which evidence must be weighed fairly by the jury and overcome by other evidence to the point that his guilt has been proved beyond a reasonable doubt. The instruction effectually wasted that presumption, or evidence, to the prejudice of defendant, as if it applied to a witness on the stand, testifying in his behalf. The subsequent instruction, that "the defendant is presumed to be innocent * * * until he has by sufficient evidence been proved to be guilty; and it is the duty of the jury to give the defendant the full benefit of this presumption as evidence in his favor," etc., does not cure the painful statement that "the defendant relies upon his plea," etc., to escape his dilemma.

Taking the case as a whole, we have been impressed with the words of the learned trial judge: "I cannot get from the history of this case as it comes to me any venal quality in the acts of the defendant," although we do not

lodge a reversal on that language. At oral argument, some time was spent on the meaning of "venal." It may very well be said to mean dishonesty, infidelity, faithlessness, perfidy, treachery, unfairness, baseness, turpitude, rascality, and improbity, and we would hesitate to believe that it excludes embezzlement. We are also inclined to say that the instruction complained of is too argumentative.

For the reasons indicated, the judgment of the district court is

REVERSED.

FRANK E. FOLTS ET AL., APPELLEES, V. GLOBE LIFE INSURANCE COMPANY ET AL., APPELLANTS.

FILED JANUARY 4, 1929. No. 26604.

1. Insurance: BENEFICIAL ASSOCIATIONS: MISAPPROPRIATION OF FUNDS: SUIT TO RECOVER. A member of a fraternal benefit corporation, organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit, may sue the corporation and its officers for himself and all others similarly situated, to recover corporate funds wrongfully misappropriated, when it appears that an appeal to such officers and the supreme governing body for redress would be ignored or denied.
2. ———: ———: FORFEITURE OF MEMBERSHIP. A provision in in the constitution and laws of a fraternal benefit corporation, voiding the certificate of membership of a member, if he, for any cause, at any time, for any purpose, institutes a suit against the corporation or any of its officers because of any action done or contemplated by such officer or a committee of the corporation, without first submitting his grievances to and exhausting his remedies before the proper tribunals, is not applicable to an act done by the supreme governing body from which no appeal lies.
3. ———: ———: LIMITATION OF POWERS. No fraternal benefit corporation, organized under the laws of Nebraska, has any power, directly or indirectly, to write insurance or issue membership certificates for profit; nor can it use its funds to incorporate an old line insurance stock corporation and subscribe for its capital stock to be sold to members of the fraternal, under the guise of having such stock company cooperate with the fraternal in writing a line of insurance not permitted to fraternals.

4. ———: ———: ———. Such fraternals, having surplus funds available for investment in securities prescribed by its constitution and laws, cannot organize and subscribe for the whole of the capital stock of a business corporation, under the pretext that such transaction constitutes an investment.

5. ———: ———: INVESTMENT IN STOCK COMPANY: ULTRA VIRES. When, as in this case, a fraternal benefit corporation, organized and carried on under the laws of the state, for the sole benefit of its members and beneficiaries, and not for profit, causes its officers to organize a stock insurance corporation, using the funds of the fraternal to subscribe for the capital stock and surplus of the insurance corporation, such transaction is *ultra vires* of its charter, unlawful, against public policy, and void.

6. ———: ———: EXEMPTIONS AND RESTRICTIONS. Fraternal benefit insurance organizations, while exempt from the statutes relating to insurance corporations and corporations generally, are not exempt from the general principles of law which confine all corporations, societies and associations to the objects and purposes of their existence.

7. ———: ———: AMENABLE TO STATUTES. Fraternal societies, as such, are generally left free to determine their own course on matters relating to qualifications, discipline, control and conduct of their members concerning internal government; but, in matters of business, property rights and contracts, they are answerable to the laws of the land, and, in these latter respects, they have no implied power to stray from the purposes declared in the statutes under which they are organized.

8. ———: ———: INVESTMENT IN STOCK COMPANY. Under the facts in this case, the organization of the Globe Life Insurance Company by Sovereign Camp Woodmen of the World and its officers, and their subscribing for the entire capital stock of the Globe Life Insurance Company, in no sense constituted a consolidation under chapter 122, Laws 1925.

9. Corporations: ULTRA VIRES ACTS: EQUITABLE RELIEF. Laches is a creature of equity. Equity will deny relief as to consummated purely *ultra vires* acts of a corporation, even though it be technically expedient and proper, when to grant it will occasion the public great inconvenience, and the defendant serious loss, if the plaintiff may be readily compensated in damages.

10. ———: ———: ———. In determining whether equitable relief will be granted in a given case, courts will balance the equities and govern themselves accordingly; and, in doing so,

will take into consideration whether the act complained of is merely *ultra vires*, or is against public policy, unlawful, and wholly void.

11. Insurance: BENEFICIAL ASSOCIATIONS: ULTRA VIRES ACTS: LACHES. Under the facts in this case, *held*, the plaintiffs are not estopped, nor precluded by laches, to maintain this suit.

12. ———: ———: MISAPPROPRIATION OF FUNDS: APPROVAL BY DEPARTMENT OF TRADE AND COMMERCE. The fact that the department of trade and commerce is vested by law with supervisory powers over insurance business conducted within the state, and that it approved the transaction in question, can afford no protection to wrongdoers.

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

Brogan, Ellick & Raymond, Gaines, McGilton, Van Orsdel & Gaines and *Hainer, Flansburg & Lee*, for appellants.

A. M. Morrissey, M. L. Donovan, C. J. Campbell, G. E. Hager, Don W. Stewart, John P. Breen, William B. Price and *W. H. Hatteroth, contra.*

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

HOWELL, J.

This is an appeal by Globe Life Insurance Company, Sovereign Camp Woodmen of the World, W. A. Fraser, John T. Yates, T. E. Patterson, and J. E. FitzGerald, from a decree of the district court for Lancaster county, requiring all appellants, except Sovereign Camp Woodmen of the World, to return to Sovereign Camp Woodmen of the World certain bonds and moneys aggregating $2,000,000, paid to the Globe Life Insurance Company by Sovereign Camp Woodmen of the World and individual appellants in subscribing for practically the total capital stock of Globe Life Insurance Company, which appellees, Frank E. Folts, Charles Bowen, and William B. Price, as plaintiffs, and Alex F. Hummel, as intervener, claim to have been illegal

and fraudulent, and enjoining each and all of the appellants from using the good will, property or organization of Sovereign Camp Woodmen of the World in the business of Globe Life Insurance Company.

Appellees will be referred to as plaintiffs, Globe Life Insurance Company as Insurance Company, and Sovereign Camp Woodmen of the World as W. O. W.

The petition and the petition of intervention are quite lengthy and, in a general way, seek the same relief.

Plaintiffs sue, as members of W. O. W., for themselves and all others similarly situated, and aver: W. O. W. is a Nebraska fraternal benefit corporation, organized for the sole benefit of its members, and not for profit, with a membership of about 450,000, carrying insurance of about $750,000,000; plaintiffs are members, in good standing; the individual defendants, with others, compose the Sovereign Executive Council of W. O. W., also are members of the Sovereign Camp, and, in violation of the articles of incorporation and the statutes of Nebraska governing fraternals, conspired to organize the Insurance Company with funds of W. O. W., and to divert its business to the Insurance Company; on June 16, 1927, certain officers of the Executive Council caused the Sovereign Camp to adopt a resolution directing the Executive Council to organize a legal reserve life insurance company, with capital and surplus of $2,000,000, to be paid from funds of W. O. W.; the defendant officers did organize and incorporate the Insurance Company on October 31, 1927, under the laws of Delaware, its capital stock and surplus to be paid before commencing business; its nature, objects and purposes were to issue contracts of annuity, endowment, disability, accident, health, and other forms of life insurance, and to reinsure and coinsure contracts issued by other corporations; defendants Fraser, Yates, Patterson and others were elected president of the board, vice-president and secretary, respectively, of the Insurance Company, and, on November 1, 1927, caused certificates of stock of Insurance Company

to be issued to themselves, others and W. O. W., representing $2,000,000 in face and surplus value, $1,997,200 being issued to Fraser and Yates as trustees of W. O. W., and caused bonds and cash of the total value of $2,000,000 to be turned over to the Insurance Company, including $100,000 in bonds deposited on December 16, 1927, with the department of trade and commerce of Nebraska; November 14, 1927, said officers procured certificates in Delaware and Nebraska, authorizing the Insurance Company to do business in both states; under its articles of incorporation and laws of Nebraska, W. O. W. had no authority to do such things; the organization and purchase of the stock of the Insurance Company were illegal and void; organizers and deputies are being trained to sell insurance for the Insurance Company and to solicit members of W. O. W. to purchase such insurance; circulars, pamphlets, letters and other advertising are being circulated among the members of W. O. W., commending the Insurance Company for its line of insurance; the officers of W. O. W. are devoting their time and funds of W. O. W., and its good will, to acquire business for the Insurance Company, greatly injuring W. O. W.

The prayer is that the bonds and money, turned over to the Insurance Company, be returned to W. O. W; the officers named be removed and an election of new officers ordered; a permanent injunction be issued to prevent defendants from interfering with the business of W. O. W.; the Insurance Company be ordered to pay W. O. W. for losses and damages, and for general equitable relief.

The petition of intervention contains similar allegations, in addition to others, among which, that the individual defendants were officers of both the Insurance Company and W. O. W.

Defendant Bliss, secretary of trade and commerce, filed no answer or other pleading, except a general demurrer, which was overruled.

W. O. W. answered, in substance: Admitted practically

all of the allegations of the petition except illegality and fraud; alleged that it was a self-governing body, with a lodge system, organized under the laws of Nebraska, in the name of Sovereign Camp of W. O. W., made up of elective officers and delegates; under its constitution and laws, it is authorized to conduct the business affairs of W. O. W., and it had provided for investments of accumulated funds as authorized from time to time; Sovereign Camp authorized the use of $1,997,200 of surplus funds of W. O. W. to subscribe for stock in the Insurance Company; it had ample funds for all purposes and a large surplus, exclusive of the mortuary funds, justifying such investment; it became apparent to the officers of W. O. W., and to the members of Sovereign Camp, it would be to the best interests of W. O. W. to offer to its members forms of life insurance *which it was not permitted to write under the laws* (italics ours), which fact was called to the attention of the Sovereign Camp in 1925, when the Sovereign Commander (Mr. Fraser) was requested to submit plans for writing such insurance, which he, accordingly, did at the Sovereign Camp meeting in June, 1927; the report was submitted to a committee which reported by resolution, directing the Executive Council to organize a corporation, invest surplus funds in its stock, and sell the same to its members; the members of the Sovereign Camp and officers of W. O. W. were wholly actuated by a desire to serve the best interests of W. O. W. and its members, and to strengthen W. O. W.; pursuant to the resolution, the Insurance Company was formed; about December 10, 1927, full information concerning the stock was mailed to every member, advising them that they might buy as much thereof as they desired; the plaintiffs are without equity, having no interest in the association; suit was not brought in good faith, and, even if plaintiffs had any legal right to have the funds of W. O. W. apportioned among the members, each would receive less than $5; immediately after adoption of the resolution, it was fully explained to plaintiffs and all members as

to the plans, by notice through the mails, and such action was known to and discussed by the members long before suit was brought; in reliance upon the resolution, said stock was purchased and paid for by W. O. W., and Insurance Company entered upon the business of life insurance; when this suit was commenced December, 1927, the stock had been resold by W. O. W. to members and a large amount of life insurance had been issued to, and premiums paid thereon by, policyholders, in reliance upon the action of June, 1927, and acquiescence by all members; to grant the prayer of the plaintiffs, compelling restoration of the funds of W. O. W., great and irreparable loss and damage would be caused to W. O. W. as the principal stockholder, to the Insurance Company, and to its policyholders, without corresponding benefits to any one; neither the plaintiffs nor any member complained of, or protested, the action taken; by reason of all of which the plaintiffs are estopped, and, because of their acquiescence, laches has been such as to deny equitable relief.

Further answering: Plaintiffs have no capacity to sue, for that, as section 57 of the constitution and laws provides for automatic forfeiture of membership if a member should sue W. O. W. or its officers before submitting his grievances to their consideration, and by final appeal to the Sovereign Camp, they had lost their membership by bringing this suit, since the Executive Council had a session of the Sovereign Camp scheduled for February, 1928. (We now observe that no appeal to any power short of the Sovereign Camp would have availed, and for plaintiffs to have delayed all action until the Sovereign Camp meeting scheduled for February, 1928, would have greatly reinforced the plea of laches. Moreover, there could be no appeal from actions of the Sovereign Camp. It is certain, a request addressed to it to retreat would have been ignored, neglected or instantly denied. The law does not require the doing of idle things).

The Insurance Company filed a similar answer, plead-

ing affirmatively: Its incorporation under the laws of Delaware, to engage in life insurance business; it caused a large amount of insurance to be written for which it collected premiums; adopted all of the allegations of the answer of W. O. W., and plead estoppel.

Answers were filed for Fraser, Yates, FitzGerald, and Patterson, and Fraser and Yates as trustees, adopting the answer of W. O. W.

Replies were filed by plaintiffs to each answer.

Answers were filed to the petition of intervention, adopting, in the main, the several answers to plaintiffs' petition, to which suitable replies were filed.

It being quite impossible to go into details, we deem it sufficient to state the situation generally.

W. O. W. was organized in 1890 under the laws of Nebraska, as a nonprofit fraternal benefit association, continuously thereafter doing business as such. The articles of incorporation and laws of the association and the laws of Nebraska existing in 1927, when officers of W. O. W. organized the Insurance Company, will be referred to, pausing to observe that, under the laws of Nebraska existing until 1887, fraternal benevolent societies, issuing certificates of insurance, were subject to the general corporation and insurance statutes in force, and, by act of the legislature (Laws 1887, ch. 18) they were exempted therefrom. Section 7902, Comp. St. 1922, as amended by chapter 120, Laws 1925, provided: "A fraternal beneficiary association is hereby declared to be a corporation, society or voluntary association, formed or organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit. Each such beneficiary association shall have a lodge system, with ritualistic forms of work, and a representative form of government."

The consitution and laws of W. O. W., in effect September 1, 1927, provided, among other things: Section 1. "This corporation shall be known as the 'Sovereign Camp

of the Woodmen of the World,' * * * and its supreme legislative body shall be known as the Sovereign Camp."

In section 2, W. O. W. is given original and appellate jurisdiction as to general welfare; power to determine charges against members and appeals from Camps, Head Camps and the Sovereign Executive Council; to enact laws; levy and collect assessments, premiums and dues "necessary to pay all beneficiary claims and expenses of management, and shall have generally such powers and may perform such duties as it may deem wise for the welfare of the association."

Section 3. "The objects of this association shall be to combine white persons of sound bodily health, * * * into a secret, fraternal beneficiary and benevolent association; provide funds for their relief; comfort the sick and cheer the unfortunate by attentive ministrations in times of sorrow and distress; promote fraternal love and unity; create funds," etc.

Section 25 provides, among other things, that the Sovereign Camp shall have *de novo* jurisdiction over offenses committed by members for "instituting suits or legal proceedings against the Sovereign Camp or any of its officers without first submitting grievances or complaints to the Sovereign Executive Council for adjudication," and that appeals are taken from camp trials to the Sovereign Commander, thence to the Sovereign Executive Council, thence to the Sovereign Camp; all other appeals to be from the Sovereign Commander to the Discipline Committee, thence to the Executive Council, thence to the Sovereign Camp.

Section 57 provides, among other things: "If a member, for any cause whatever, shall at any time or for any purpose institute a suit or suits for any cause or complaint against the association or any of its officers, *because of any action or contemplated action of such officer* (italics ours) or on account of the action of any of its committees, without first submitting his grievances to and exhausting his remedies before the proper tribunals of this association,

his beneficiary certificate shall at once become void and of no effect, and all payments theretofore made thereon shall be retained by the association as liquidated damages," etc.

Section 89 provides, among other things, that a member, who is found guilty of violating association laws, may be expelled from fraternal relations and benefits for a time or for life, but, where the member is expelled from fraternal benefits and relationships, "he may retain his insurance protection by paying the assessments on his certificate," if so determined by the person, committee or body before whom he is tried.

Section 95 provides: "As often as practicable, when funds have accumulated not immediately needed to pay the obligations of the association," they shall be invested in bonds of the United States, state, or subdivision of a state, in federal farm loan bonds, or notes secured by first lien real estate mortgages, "and may make such other investments as may be at any time authorized by the Sovereign Camp," which investments (section 93) "may be used for the payment of benefits and monument obligations when the beneficiary fund on hand, together with one beneficiary instalment of assessment per month on all of the members of this association, is not sufficient to pay the approved beneficiary and monument obligations," and "if the uninvested fund on hand, together with said one instalment of assessment and beneficiary funds on hand, are not sufficient to pay such approved beneficiary and monument obligations, then the Sovereign Commander and Sovereign Clerk shall convert so much of the invested fund into money as may be sufficient to meet the excess of losses over that which the said one instalment of assessment, together with the beneficiary fund and uninvested funds on hand, will pay, which shall be transferred to and placed in the beneficiary fund and disbursed for the payment of such approved claims and obligations as aforesaid."

The Sovereign Executive Council was ostensibly author-

ized and directed, by resolution passed June 16, 1927, to do the following: "To organize a legal reserve life insurance company with an authorized capital stock of not less than $1,000,000, and cause to be issued so much of said capital stock from time to time as may in their judgment be necessary; * * * said capital stock shall be sold at 2 to 1, that is to say, each $1.00 of capital stock shall be sold for $2.00 to cover the capital and surplus, and the amount issued and delivered to this association shall be paid for at said rate, and shall be held by said association as its other investments are held, except that it may sell all or any portion of such capital stock to the members of this association in such amounts as the members may desire to purchase;" the board of directors of the corporation to be organized "shall at no time exceed twenty-one members, and that at all times fourteen of said members shall be the Sovereign officers of this association;" the corporation "shall be incorporated in such state and with such name and for such amount of paid-up capital stock as the Executive Council of this association shall determine," and such officers are "directed to draw upon the funds of this association for such sum as may be necessary to pay for the capital stock of such life insurance company issued to this association, and to make payment to said life insurance company of the amount of the capital stock so purchased by this association upon the delivery to said association of said capital stock."

About two years before June, 1927, the Sovereign Commander began to formulate in his mind some plan to circumvent the recognized limitations of a fraternal benefit association to write old line insurance. In 1925, the legislature (Laws 1925, ch. 122) authorized fraternal beneficiary associations to consolidate or make reinsurance contracts with other associations or organizations or life insurance companies authorized to do business in Nebraska, requiring a certain procedure. In 1927, the legislature (Laws, 1927, ch. 135) authorized corporations and associations,

having a representative form of government without capital stock, doing business without profit for the sole benefit of their members and beneficiaries, to change their form of government and the character of insurance they should write, and become legal reserve life insurance companies.

W. O. W. did not seek to take advantage of either act, but sought to go around both by organizing the Insurance Company. Prior to the Sovereign Camp meeting at Los Angeles in June, 1927, the Sovereign Commander worked out a plan which he then submitted to the Sovereign Camp. A committee was appointed to investigate and report on that plan. It reported in the form of the resolution above referred to.

During the discussion of the resolution, Sovereign Commander Fraser being in the chair, some members insisted that Woodmen of the World should retain 51 per cent. of the stock to be sold to W. O. W. In an extended colloquy between the Sovereign Commander and two delegates, the Sovereign Commander adroitly maintained his position against any change. In one statement, he said: "It is so safeguarded that this Sovereign Camp at all times controls the new company on a ratio of two to one. So I think it is safeguarded at least 200 per cent. because it is a two to one proposition in favor of the Sovereign Camp."

An amendment to the committee's resolution was offered, to the effect that the Sovereign Camp "shall retain at least 51 per cent. of the capital stock of this new corporation." The Sovereign Commander stated, "If I were not in the chair, I would make an amendment that they own 100 per cent." A point of order was made against the amendment and sustained by the Sovereign Commander. The delegate stated: "I change my amendment, then, that it sell no more than 49 per cent. of the stock of this corporation." Sovereign Commander: "Who is it going to sell it to?" Delegate: "The present members of the Woodmen of the World." Sovereign Commander: "Sup-

posing we cannot supply the demand?" Delegate: "Don't sell but 49 per cent. and prorate it out." Sovereign Commander: "I am sorry you have not had confidence in the Sovereign officers." Sovereign Commander: "Let me tell you that in the time that I have run the affairs of this organization I have brought it up from an insolvent wreck until it is the richest in the world. There has never been a dollar lost in this society, and never will be, in my judgment, no matter who is presiding over it, because I believe the great membership of this organization are able and keen enough to select men who are both honest and capable."

The resolution was adopted and the executive officers at once proceeded actively to bring about the organization of the Insurance Company.

The only information or notice which the members at large of the W. O. W. had or could have had of this proceeding, so far as the record shows, was the publication of the proceedings of the Sovereign Camp in "Sovereign Visitor," a paper published and mailed monthly to members. The only purported account of the proceedings, given in the "Sovereign Visitor," aside from an article republished from the "Los Angeles News," relating to the matter in question, is as follows: "Monday, June 13. Sovereign Commander Fraser outlined a program for this special meeting, appointed certain committees, taking a recess until" the next day. "June 16. The committee on Sovereign Commander Fraser's report submitted its report, which was discussed pro and con, taking the entire morning. The committee offered resolution commending very favorably the entire report. Sovereign Lecturer, A. G. Matthews, spoke at great length on the Sovereign Commander's report. The entire executive board of Sovereign officers was reelected for four years—till 1931. Sovereign Commander Fraser thanked the delegates for the esteem and confidence bestowed on the officers, hoping that the present progress and prosperity would keep on and on for all time."

The "Los Angeles News" article was preceded by misleading headlines in large type, in these words: "SOVEREIGN CAMP TAKES ACTION TO WRITE ANY KIND OF INSURANCE POLICY." That article appeared in the "Sovereign Visitor" on a page other than that upon which the purported proceedings of the Camp were given. That publication was at least ambiguous, if not also deceptive. Its purport was that the plan of the Commander "for a commercial insurance company with capital and surplus of $2,000,000 for members and under the joint control of the Pacific Woodmen Life Association and W. O. W., was adopted. The stock is to be purchased by the association and resold to its members on demand. The name of the company will be announced later. Directors of the Pacific-Woodmen Life Insurance Association and W. O. W. * * * directors will administer the affairs of the new combination."

The articles of incorporation of the Insurance Company were filed in Delaware October 31, 1927, and, so far as advised, this was not known to W. O. W. members except those who were actively engaged in its organization and perhaps a few of their personal friends and supporters. They were filed in Nebraska November 14, 1927. There is nothing to show that the plaintiffs, or W. O. W. members generally, knew that. The only evidence having probative force that the plaintiffs, or any others of the members at large except as above stated, had knowledge of the organization of the Insurance Company, what its articles of incorporation were, and what the organizing officers had done, was imparted by letter sent out by the Sovereign Commander on December 10, 1927, in which the members were given the privilege of buying stock in the Insurance Company until January 1, 1928.

We do not take into consideration the testimony relating to the lease and sale of the W. O. W. Building in Omaha.

Up to the trial of this case in the district court, the W. O. W. sold, of the capital stock it received in the Insur-

ance Company, $430,000 worth, $110,000 being to three persons named, and $320,000 worth to small purchases by members, leaving still on hand $1,570,000 worth. All purchasers of stock were members of W. O. W., some of whom were made members for that purpose.

Up until December 23, 1927, the Insurance Company wrote insurance amounting to $1,400,000, which increased to $3,200,000 by April 14, 1928. Premiums collected to January 1, 1928, were $10,677.20, and, from January 4, 1928, to April 18, 1928, $20,672.31, or a total of $31,349.51. How much of these premiums were collected up to December 23, 1927, is not disclosed.

Appellants' counsel offers this statement: "There was still plenty of time for the officers of the association to consider what safeguards were necessary, and it was entirely in their power to discuss and adopt safeguards to prevent the control of the Life Insurance Company from passing out of the hands of the Woodmen, either as an association, or of its members." This is a pregnant statement. It was likewise in their power to do otherwise. It, in effect, admits that no such safeguards existed up to then. The time to have considered "what safeguards were necessary" was before the $2,000,000 left the treasury of W. O. W. We do not understand why there was so much aversion, at the Sovereign Camp meeting in June, to a provision in the articles of incorporation of the Insurance Company to retain 51 per cent. of the stock. In the words of Ben Johnson, "The dignity of truth is lost with much protesting."

It is contended by appellants that, as the only "restrictions in our law upon the activities of these societies, except as may apply to the citizens generally," are statutory, the burden is "upon plaintiffs to point out what section * * * was violated." We do not accept this as a correct statement. The act of the legislature, exempting fraternals from general insurance laws, gave them no additional powers. The effect was to deprive them of business powers incident to corporations generally and to with-

hold all except indwelling, declared powers. *Scott v. Bankers Union*, 73 Kan. 575. Every act of the legislature, in and subsequent to 1887, clearly indicate that such societies could transact business "for the sole (mutual) benefit of its members and their beneficiaries, and not for profit," which is significant and all-controlling. General business exploits and activities of such associations are manifestly excluded. No one could seriously contend that W. O. W. possessed authority to go into a foreign jurisdiction, organize a foreign corporation, controlled by foreign laws, and then escort such corporation into Nebraska solely for the purpose of having it do what W. O. W. could not, and did not, believe it had a right to do directly. The claimed purpose of organizing the Insurance Company as a subsidiary helpmeet of W. O. W. is devoid of candor and rectitude, in face of the record made by the officers themselves, who left it easily within their transient and ephemeral power to sell every share of stock subscribed for by W. O. W., whereby everything claimed as a justification of their acts could be lost. There is no tie between W. O. W. and the Insurance Company which can be preserved by law. It does not even limit potentialities to present officers. They extend to future officers who have not been so boundlessly trusted.

It is said: "The new company (is) to act as a subsidiary to the Woodmen of the World, and to cooperate with it in the insurance field." "Subsidiary" means an "inferior portion or capacity." Just how the Delaware corporation can be said to be inferior to W. O. W., with a majority of its board of directors made up of officers of W. O. W., which board of directors may delegate to two or more persons its power, is not plain. By what reasoning can it be determined, in advance, which corporation may, and how soon, end in an inferior position? The whole movement so far has been toward benefiting the Delaware corporation to the full measure of its entire capital stock at the expense of W. O. W., and reveals something new as a stock-selling scheme.

There is no doubt that W. O. W. would over-leap its powers if it undertook a legal reserve life insurance business under its present articles, constitution and laws. The resolution of the committee, endorsing the plans of the Sovereign Commander, disclosed that he was urging the organization of a company whose capital stock "shall be subscribed by this association," all of which "shall be sold to the members of this association, except such few shares as are necessary to be held by the persons acting as incorporators of said company." The corporation, which was organized by the officers of W. O. W., not only failed to make any reference to that, but the Insurance Company board of directors was authorized to make and alter its own by-laws, or by resolution, so that "two or more of their number to (would) constitute an executive committee" which shall have "and exercise any or all of the powers of the board of directors in the management of the business and affairs of this corporation."

There were other provisions in these articles authorizing the board of directors (executive committee) to refuse stockholders access to its corporate books and records, denying them such right except it be conferred by law or by resolution of the board of directors or stockholders.

That part of the resolution of the Sovereign Camp which required 14 of its officers to be always on the board of directors of the Insurance Company has not been carried out. There are no safeguards in favor of the W. O. W. to protect its property, funds and interest. The Insurance Company is wholly independent of W. O. W. as a legal entity. The net results of the transaction so far is the throwing of $2,000,000 of property and assets of the W. O. W. into the lap of the Insurance Company. It is true that, as conditions stood at the time of the trial of this case, it was in the power of the officers of W. O. W. to refrain from selling a majority of the Insurance Company's stock. It is true, Mr. Fraser testified he had no intention of selling more than 49 per cent. Such skeleton

is a trifling prop. Many doors are left open through which the Insurance Company can pass to gain complete control of its organization, to the exclusion of W. O. W., regardless of the resolution of June, 1927, one of which is a provision in its certificates of stock: "No stockholder may sell or transfer his stock or this certificate until said stock has been offered to the company for sale at the market price, and, if there is no market price, then at book value. If the company does not find a purchaser for said stock within 15 days, the holder may sell and legally transfer the same." What power does W. O. W. have over its members to compel them to hold stock in any corporation?

With an energetic campaign, the Insurance Company could acquire a majority of its stock in its own hands, or in the hands of friends or dummies, and elect its board of directors without naming one member or one officer of W. O. W.

Later in this opinion, in discussing the question of investment, attention will be called to the fact that, under the articles of incorporation of the Insurance Company, there was almost no limit to the kinds of business which it was authorized to transact, and that W. O. W. did not possess authority to engage in any one mentioned except to invest in some of the securities enumerated.

Until the passing of the June resolution, we find no instance where the W. O. W. assumed or claimed power to organize independent corporations, or to conduct an old line business for profit, having no thought of benevolence or brotherly love. The resolution itself was in violation of the articles of incorporation, constitution and laws of the order, which the laws of Nebraska required to be filed with the state. In no sense was it an amendment to its articles. Were it such, it would be void. Had the constitution and laws provided for conducting a business for profit, it would have been void, as opposed to its articles of incorporation and the statutes of Nebraska, if not section 1, art. XII of the Constitution of the state. The resolution itself, being a nullity, affords no protection to any one.

Fraternal insurance orders seem to have been favored because of their benevolent, rather than commercial, pretensions, and they should be confined to their chosen field or remove the shield by changing their form of government, as provided by law they may do.

Counsel gave three illustrations of the use of its surplus funds, to wit, constructing and endowing a tuberculosis hospital, maintaining a uniform rank where members are drilled in encampments, and its Omaha radio station. They might be justified as aiding the health of, and wholesome entertainment for, its members, and legitimate advertising. We see no connection between the W. O. W. and the Insurance Company to justify a claim that the Insurance Company is an incident to conducting fraternal insurance.

Counsel very aptly state that the legislature was familiar with the situation. We doubt if history records an instance where a fraternal, incorporated or otherwise, ever attempted to do what is attempted here, without some statutory authority. Mr. Bradshaw, chief counsel for W. O. W., testified he never heard of such. Up to this time, no fraternal has so attempted to abuse its conceded and quite well-understood privileges as to call for legislation. Existing laws will control that until the legislature otherwise provides. To follow out the extraordinary claims, made for W. O. W., to their ultimate conclusion, it could create a corporation to buy and operate almost every business in Nebraska, under the pretext of hiring clerks who would give it business, by joining the order with the privilege of purchasing stock in its corporation.

The officers of W. O. W. and the Sovereign Camp knew they could not write old line insurance and, because of that, set up a circumbendibus to outwit the law. W. O. W. possessed power to assess and draw money from its members for two general purposes only—to pay benefits and necessary operating expenses.

We reach the conclusion that the resolution passed by Sovereign Camp in June, 1927, at Los Angeles, was void

and contrary to the laws of the state of Nebraska, its own articles of incorporation, constitution and laws, and public policy. It could not confer authority upon any of its officers to organize an old line insurance company. We are pressed to this conclusion from the nature of the business W. O. W. was incorporated to perform; limitations implied by law upon fraternal benefit associations; interpretations by the associations themselves and hundreds of thousands of their members; and the public policy of the state, manifested by the administration of insurance corporations, and further indicated by the two acts of the legislature in 1925 and 1927, affording to such associations an opportunity to write other classes of insurance, upon conditions prescribed.

This brings us to the question of W. O. W.'s power to invest. It has been discussed with force that the provision in section 95 (a), Constitution and Laws of W. O. W., saying officers "may make such other investments as may be at any time authorized by the Sovereign Camp," justifies the organization, and subscription to stock, of insurance companies as an investment.

Aside from the fact that the law does not so regard it, it is hardly compatible with the spirit of the resolution which suggests that the officers of W. O. W. shall sell all of the stock to its members, except such few shares as are necessary to go to the incorporators. The purpose of organizing W. O. W. was not to seek investments to be sold to its members on demand, but to benefit them in the spirit of fraternalism and brotherly love, by giving them insurance within the reach of men and women desiring to protect their beneficiaries, such as its articles of incorporation, constitution and laws permit. Even though it be said that stocks of a going corporation may be the subject of investment, the following authorities justify the conclusion that subscriptions for stock, in the organization of a new corporation, cannot be regarded as an investment. *Anglo-American Land Mortgage & Agency Co. v. Lombard,* 132 Fed. 721; *DeLaVergne Refrigerating Ma-*

chine Co. v. German Savings Institution, 175 U. S. 40; 2 Fletcher, Ency. of Corporations, 2071, sec. 1119; *Robotham v. Prudential Ins. Co.,* 64 N. J. Eq. 673, 53 Atl. 842; *McAlester Mfg. Co. v. Florence Cotton & Iron Co.,* 128 Ala. 240, 30 So. 632; 14-A C. J. sec. 2129; *Franklin Co. v. Lewiston Institution for Savings,* 68 Me. 43; 1 Thompson, Corporations (2d ed.) 792, sec. 652; *Commercial Fire Ins. Co. v. Board of Revenue,* 99 Ala. 1; *Nebraska Shirt Co. v. Horton,* 3 Neb. (Unof.) 888.

If W. O. W. could transact the business with its own means which the Insurance Company was organized to conduct, a debate, that purchasing its stock is an investment, would be more pardonable. This court has held, in *Allison v. Fidelity Mutual Fire Ins. Co.,* 81 Neb. 494, that a mutual fire insurance company has no power to write reinsurance. It would naturally follow that such company could not with its own means incorporate another company which could reinsure.

Appellants contend that the law pertaining to ordinary corporations and mutual insurance companies does not apply to fraternals. That may be admitted as a general proposition, but we are holding in this case that a fraternal cannot transact business which is foreign to its avowed purposes in accordance with the statutes of the state. That being true, the general principles of law relating to that subject are applicable to all corporations. Aside from that, section 95 of the constitution and by-laws of W. O. W. prescribes what investments shall be made.

The effect of this transaction was to put $2,000,000 belonging to W. O. W. at work to finance a Delaware corporation, the articles of which authorize it to transact many kinds of business, such as all kinds of insurance, reinsure and coinsure, own and sell certain enumerated securities, to manufacture, hold, own, mortgage, pledge, sell, transfer and dispose of, and to deal and trade in goods, wares, merchandise and personal property; to acquire good will, rights and property; to guarantee, purchase or acquire, hold, sell or assign shares of capital stock or evidences of

indebtedness created by other corporations; to deal in licenses, patents, inventions, improvements, processes, formulas, trade-names; to make and perform contracts of every kind for any lawful purpose without limit; to make, accept, indorse or discount notes, drafts, bills of exchange, warrants, debentures and other negotiable instruments; to issue bonds, debentures or obligations; to carry on any other business, and other miscellaneous powers. Not one of those powers is within the leap of a fraternal insurance order as prescribed by the laws of the state of Nebraska or the constitution and laws of W. O. W. The adroit argument of appellants' counsel that the legislature has not conferred powers on fraternal associations, such as a grant or franchise, but assumes a "state of affairs" only "imposing regulations upon them," and does not purport to grant them all the powers which they may use, is disposed of by what has already been said.

It was not until the articles of incorporation were filed in Nebraska, November 14, 1927, that members could know what was going to be, and what had been, done. What was published in the August "Sovereign Visitor" gave no account of the plans. The publication in the "Visitor" of the "Los Angeles News" article was not enlightening, and was not published as—indeed, did not purport to be—a comprehensive report of the Camp proceedings. Had members read the resolution, its provisions would have advised them that the Sovereign Executive officers would attend to "details" necessary to protect W. O. W., in having "at all times fourteen" of "not to exceed twenty-one members" of the board of directors of the Insurance Company, which was never done.

The next effort to notify members of what had been done was a letter, dated December 10, 1927, extending to them the privilege of buying stock until January 1, 1928. There is no such limitation in the resolution. There must have been some underlying purpose.

This suit was filed December 23, 1927, thirteen days after the letter was mailed to members.

At no time were the members given adequate explanations of where the scheme might land. The same men were at the helm for W. O. W. and the proposed Insurance Company from and after June 16, 1927. They contracted with themselves. They were left alone to keep their own counsels, without supervision. "What has he to do with contracts who can command, who is master by nature, who comes on the scene with * * * demeanor?" Those who plead laches are the same who stood behind their tenacious barricade of seclusion and now solicit immunity because not discovered with sufficient alacrity to ward off the blows of legal acrobats. We are not prepared to say, as a matter of law, plaintiffs are precluded by their own laches to maintain this suit, but do conclude, as a matter of fact, they are not.

We own to the rule that laches, the creature of equity, will prevent relief, after the consummation of an *ultra vires* act, even though it be technically expedient and proper, where, to grant it will occasion the public great inconvenience and the defendant serious loss, if the plaintiff can be readily compensated in damages. Courts will balance equities and, where they are equal or predominate against him who seeks relief, equity will follow that rule. So far as appears, there are but few policyholders, who took insurance prior to this suit, to be affected, some of whom were aware of the situation. Men may not interject themselves into, or intermeddle with, situations to aid wrongdoing, and escape the consequences.

Aside from what has been said, it appears that, before complete connections can be made to tie the W. O. W. and Insurance Company together, something more must be done.

In balancing equities, we must take into consideration the good that may be done to those who have been wronged, against the evil that may befall innocent persons. The plaintiffs sued, not only for themselves, but for all those members of W. O. W. who are similarly situated, who

are carrying insurance in about the sum of $750,000,000, as they had the right to do under section 8543, Comp. St. 1922. Section 95, Constitution and Laws of W. O. W., provides: "When funds have accumulated not immediately needed to pay the obligations of the association," they "may be used for the payment of benefits and monument obligations," and that, "if the uninvested fund on hand, together with said one instalment of assessment and beneficiary funds on hand, are not sufficient to pay such approved beneficiary and monument obligations, then the Sovereign Commander and Sovereign Clerk shall convert so much of the invested fund into money as may be sufficient to meet the excess of losses over that which the said one instalment of assessment, together with the beneficiary fund and uninvested funds on hand, will pay, which shall be transferred to and placed in the beneficiary fund." That means that the $2,000,000 expended to incorporate the Insurance Company, being in excess of W. O. W.'s needs as a surplus, could have been transferred to the beneficiary fund to relieve the members of an assessment to raise that amount.

If W. O. W. receives back the $2,000,000, it will not be injured. If the Insurance Company is required to pay back $2,000,000, it cannot complain, since it knew all about the unlawful act by which W. O. W. transferred $2,000,000 of its funds. The officers of both corporations engineered and transacted the whole deal, which imparts knowledge to them of everything that had transpired.

As to stock resold to members of W. O. W. by W. O. W., such purchasers are in no position to claim innocence. They were members of W. O. W., or they could not have properly purchased the stock. Their membership in W. O. W. imparted notice to them of the constitution and laws of W. O. W., and they must know the law relating to fraternals in Nebraska. We fail to see where any legal or equitable injustice can befall W. O. W., Insurance Company, or members of W. O. W. who purchased with knowledge.

There remains the equities of those who took insurance in Insurance Company. Some of the members of W. O. W. who purchased stock took insurance in the Insurance Company, either to themselves or group insurance on persons in their employ. Such policyholders are without equity. Who the other policyholders are, and when they purchased their policies, are not disclosed by the record. Insurance Company received premiums amounting to $10,677.20 up to January 1, 1928. How much of that sum was received before the commencement of this suit, we do not know. From January 4, 1928, until April 18, 1928, it received premiums amounting to $20,672.31, making a total of $31,-349.51. When the equities are so overwhelming in favor of the members of W. O. W., of the W. O. W. itself, certain of its policyholders and members who purchased its stock, and against Insurance Company, we are not disposed to find such injuries to innocent parties, if there be such, as to deny equitable relief. We may add that we have no knowledge as to who are the parties denominated innocent policyholders, in so far as the record discloses. Of this we are quite certain: That a large part of the premiums were paid for policies by persons who had knowledge of sufficient facts, by virtue of their membership in W. O. W. and of their early participation in the plans of organizing the Insurance Company, as to leave the number of innocent policyholders, if any, in doubt.

It is claimed that the plaintiffs may not maintain this action because they have sued W. O. W. and its officers in violation of section 57 "Eighth," Constitution and Laws of W. O. W. We need give little attention to this point, since this action is brought against W. O. W. and its officers because of the resolution of June, 1927, purporting to authorize the officers to organize the Insurance Company. There is no appeal from acts of the Sovereign Camp. Aside from that, this record shows a state of affairs which is conclusive, to our minds, that, had the plaintiff waited until the scheduled Sovereign Camp meeting in February, 1928, their complaint would have fallen on deaf ears, and the law does

not require the doing of idle things. Moreover, had plaintiffs waited until February, 1928, they would have been confronted with intervening possibilities which might have arisen to confound them far beyond what appellants now claim should result in their defeat in this suit.

What we have already said disposes of the question of *ultra vires*.

On the question of consolidation under the act of the legislature of 1925, we say: In the instant case, there is no pretense that W. O. W. attempted to consolidate or reinsure, or that the method of consolidation therein provided was ever thought of. In appellants' brief, it is said: "Until authorized by law, fraternals were not allowed to consolidate." This is quite a concession, in the face of the other contention that W. O. W. was free to do as it pleased, by virtue of being a self-governing legislative organization. Again, in appellants' brief: "The W. O. W. was attempting, by organizing the Globe Life Insurance Company, to extend its operations." That being true, it was attempting to indirectly write old line insurance, which it could not do directly without first embracing the general insurance laws of the state, by methods provided by law. The test to be applied here is the misuse of W. O. W.'s funds, and not its right to consolidate with an existing company. If it had been the purpose of the officers of W. O. W. to either consolidate or organize another company, why were not the provisions of those acts followed, or attempted to be followed? There is in no sense a consolidation. Members owning stock in the Insurance Company can dispose of it as they please, provided they first offer it to the Insurance Company. This position is reinforced by a frank admission in appellants' brief: "It must be admitted that the fraternal society in this case did not make a direct attempt to comply with the 1925 law, since its officers and governing body were convinced that they had authority to do what they did do, by reason of the general provision and policy of the law, giving fraternals, through their representative body, wide latitude in investments."

Under no definition of the word "consolidation" do the facts before us fit. Both corporations are acting under laws of different states, under different charters, names, management, kinds of business and officers; and any business they transact with each other is as much subject to future arrangement as though nothing had been done tending to form ties between them.

There was no consolidation, either by a new and distinct corporation; the absorption of one by the other; issuing shares in one to the shareholders in the other in exchange; making one company the holder of all in the other company, or by regarding the united shareholders of both companies as shareholders in each corporation, acting under similar charters and under the same management, so as to bring about consolidation, merger or amalgamation, as suggested in *Tod v. Kentucky Union Land Co.*, 57 Fed. 47, cited by appellants.

We do not think authorities cited, holding that one profit corporation may buy stock in a similar corporation, are in point; nor do we think this is a case involving laches or estoppel, as in *Leininger v. North American Nat. Life Ins. Co.*, 115 Neb. 801. In that case, there was a transformation of a mutual to a stock company, confessedly under specific acts of the legislature prescribing the course to be followed. Every move was a substantial compliance with law, which provided an appeal by aggrieved members. After the transaction was fully completed and no appeal taken, suit was commenced to unscramble the egg. In the instant case, we have a corporation taking funds from W. O. W. for its entire capital stock, without authority of law, and launching its own separate business, with such credit and standing as it could secure from persons doing business with it. Its obligations are its own. It makes its own contracts, to meet which it pledged its own credit. Its policyholders could not look to W. O. W. or its members for payment of money that W. O. W. could not divert therefor. It received money from the officers of the W. O. W. who could not ratify such acts. Those

who dealt with the Insurance Company must look to it alone. We do not pretend to dissolve the Insurance Company or create anew the W. O. W.; nor do we separate that which has never been joined.

We have examined all of the propositions of law urged by appellants, and have read many of the citations following each, and find nothing in them to lead us to a different conclusion than herein expressed.

The only remaining question for consideration is whether there has been error in the amount of the decree. We think the decree, when properly construed, does not prejudice any of the defendants. It seems to require nothing more than a complete restoration of cash and securities, according to the necessities of the occasion and the facts.

The decree of the district court should be and is

AFFIRMED.

MARGARETHA CATHERINE OHLE GOOS, APPELLANT, V. KARL BROCKS ET AL., APPELLANTS: MATHEW A. SCHOLL ET AL., APPELLEES.

FILED JANUARY 10, 1929. No. 26730.

1. Treaties: CONSTRUCTION. Ordinarily, the provisions of treaties should be given a liberal rather than a narrow construction.
2. Aliens: RIGHT OF INHERITANCE. Article 14 of the treaty with Prussia, concluded in May, 1828, and article 7 of the treaty with Hamburg, concluded in December, 1827, when given a liberal interpretation, confer on subjects of the contracting provinces or states the right to inherit real estate situate in the United States from a citizen of this country when such right would be conferred by state statute but for their alienage.
3. ———: ———. Where the rights of nonresident aliens to an inheritance have vested under provisions of a treaty, such rights will not be affected by the subsequent suspension or abrogation of the treaty.
4. Treaties: EFFECT OF WAR. A state of war between the parties to a treaty will operate to abrogate only such of its provisions as are incompatible with a state of war.
5. Aliens: RIGHT OF INHERITANCE: EFFECT OF WAR. The treaty

right of a nonresident alien to inherit lands situated in the United States is not incompatible with, nor abrogated by, a state of war between this country and the other contracting power.

APPEAL from the district court for Adams county: LEWIS H. BLACKLEDGE, and J. W. JAMES, JUDGES. *Reversed, with directions.*

Tibbets, Lambe & Hewitt and *Detjen & Detjen,* for appellants.

O. S. Spillman, Attorney General, Paul E. Boslaugh, E. P. Nuss and *Pierce & Simmons, contra.*

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

GOOD, J.

This appeal arises out of an action to partition lands in Adams county and involves the right of nonresident aliens to inherit land in the state of Nebraska. The parties to the original action claim to be the owners of the land as next of kin and heirs at law of Fred Ohle, who died, intestate, October 23, 1917, seised of the lands in controversy, and leaving him surviving no widow, issue or parent. In the partition action there was an order confirming the shares of the parties, ordering partition, the appointment of a referee, and, upon his report, a sale ordered and had. The purchasers paid one-fourth of the purchase price at the time of the bid. The parties moved for a confirmation of the sale and for a distribution of the proceeds. Thereupon, the purchasers filed a petition in which they asked that the sale be vacated and that they be released from their bid and for a refund of the money paid by them. The ground on which the purchasers sought to vacate the sale and be released from their bid was that the parties to the action were nonresident aliens and were incapable of inheriting the lands in question; that, therefore, they had no title and no title could be given the purchasers.

The trial court found and determined that the parties to the action were nonresident aliens and were incapable of inheriting the lands from Ohle, and vacated the sale and released the purchasers from their bid. All of the parties to the original partition proceeding have appealed. After the appeal was lodged in this court, the state of Nebraska, having first obtained leave, intervened and claims title to the real estate by escheat, upon the ground that Ohle left no kindred capable of inheriting. The facts are not in dispute. The original parties to the action were, at the time of the death of Mr. Ohle, nonresident aliens and citizens of the then empire of Germany. At the time of Ohle's death a state of war existed between the United States and the German Empire.

At common law nonresident aliens were incapable of inheriting land. At the time Mr. Ohle died, section 6273, Rev. St. 1913, was in force. That section provides: "Nonresident aliens * * * are hereby prohibited from acquiring title to or taking or holding any lands or real estate in this state by descent, devise, purchase or otherwise, only as hereinafter provided."

It will thus be seen that under the common law and statutes nonresident aliens were incapable of inheriting, unless such right was secured to them by a superior power. The Constitution of the United States makes treaties, entered into between the United States and other nations, the supreme law of the land, and such treaties, when made and ratified, will override or render nugatory for the time being any statute of a state to the contrary on matters which may be lawfully the subject of a treaty. That the right of nonresident aliens to inherit lands may be conferred by treaty has been recognized for many years.

In the instant case, the purchasers at the partition sale and the intervener contend that the declaration of war, on the part of the United States, against Germany, occurring April 6, 1917, operated to abrogate any treaty rights of the subjects of Germany being nonresidents, to inherit

lands in the United States, and the intervener further contends that the treaties which existed at the time war was declared did not extend to or cover the right of a subject of Germany to inherit lands from a citizen of the United States. On the other hand, the appellants contend that the existing treaties between the United States and provinces which formed a part of the German Empire were sufficient to guarantee to them the right to inherit from a citizen of the United States, and also that the treaty provisions, respecting the right to inherit, were not abrogated by the fact that a state of war existed between the United States and the German Empire.

The treaty provisions on which the appellants rely are set out as follows: Article XIV of the treaty with Prussia, concluded in May, 1828, and promulgated March 14, 1829, among other things, provides: "The citizens or subjects of each party shall have power to dispose of their personal goods within the jurisdiction of the other, by testament. * * * And where, on the death of any person holding real estate within the territories of the one party, such real estate would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a reasonable time to sell the same, and to withdraw the proceeds without molestation, and exempt from all duties of detraction, on the part of the government of the respective States." Treaties and Conventions, vol. II, p. 1500.

Article VII of the treaty with Hamburg, concluded December 20, 1827, and promulgated January 2, 1828, among other things, provides: "The citizens of each of the contracting parties shall have power to dispose of their personal goods, within the jurisdiction of the other, by sale, * * * and if, in the case of real estate, the said heirs would be prevented from entering into the possession of the inheritance on account of their character of aliens, there shall be granted to them the term of three years to dispose of the same, as they may think proper, and to withdraw the proceeds without molestation, and exempt from all

duties of detraction on the part of the government of the respective States." Treaties and Conventions, vol. I, p. 903.

Article X of the treaty with the German Empire, concluded December 11, 1871, and promulgated June 1, 1872, among other things, provides: "In case of the death of any citizen of Germany in the United States, or of any citizen of the United States in the German Empire, without having in the country of his decease any known heirs or testamentary executors by him appointed, the competent local authorities shall at once inform the nearest consular office of the nation to which the deceased belongs of the circumstance, in order that the necessary information may be immediately forwarded to parties interested. * * * In all successions to inheritances, citizens of each of the contracting parties shall pay in the country of the other such duties only as they would be liable to pay, if they were citizens of the country in which the property is situated or the judicial administration of the same may be exercised." Treaties and Conventions, vol. I, p. 553.

The intervener contends that the provisions of the treaties above set out were not intended to control the devolution of title to real estate from a citizen of the country in which it is situated, but only to control the right to inherit real estate from an alien owner residing in the country where the real estate is situated, and cites as supporting this view *Petersen v. Iowa*, 245 U. S. 170, 62 L. ed. 225; *Duus v. Brown*, 245 U. S. 176, 62 L. ed. 228; *Frederickson v. Louisiana*, 23 How. (U. S.) 445, 16 L. ed. 577; and other cases from state jurisdictions. An examination of all of these cases discloses that the opinions deal with the right of the state to impose succession or death taxes, and not to the right of aliens to inherit from citizens of this country. The authorities cited, therefore, are not in point on the question presented by the record in this case.

Accepted principles require a liberal rather than a narrow interpretation of the terms of treaties. *Jordan v. Tashiro*, 49 Sup. Ct. Rep. 47. Applying this principle of

interpretation, we think the treaty provisions above quoted clearly provide for, and guarantee to the subjects of the provinces of the German Empire, with which the treaties were concluded, the right to inherit real estate from a citizen of the United States, where such right would be conferred by state statute but for his alienage.

The principal question for determination is: Were the treaty provisions, relied upon by the next of kin of Fred Ohle, in force at the time of his death; or were they abrogated because of the then-existing state of war between this country and the German Empire?

Intervener and appellees invoke the rule announced in *Sullivan v. Kidd,* 254 U. S. 433, 65 L. ed. 344, namely: That the construction placed upon a treaty by the executive department of the federal government charged with the supervision of our foreign relations should be given much weight, and, as a basis for its application, cite the following letter:

"Department of State, Washington, March 21, 1923.
"Sir:

"The department has received your letter of March 10, 1923, requesting to be informed concerning the treaty of 1928 between the United States and Prussia.

"In reply, you are advised that this treaty is regarded as having been in force at the time of the declaration of the state of war between the United States and Germany.

"By the treaty concluded between the United States and Germany on August 25, 1921, to restore friendly relations between the two nations, Germany accords to the United States rights and advantages stipulated for its benefit under the treaty of Versailles, which has not been ratified by this government. Under article 289 of that treaty bilateral treaties with Germany concluded with each of the allied and associated powers are in effect declared abrogated and the right is accorded to each allied or associated power to revive by giving notice to Germany within a specified period any treaty or convention which it may

be desired to continue in effect. This government did not give notice within the period referred to in article 289 as extended by paragraph 5 of article 2 of the treaty between the United States and Germany of August, last, of its intention to revive the treaty of 1828 between the United States and Prussia and this treaty, therefore, is not regarded by the department as now being in force."

From this letter it will be observed that there is nothing to indicate that the federal department of state was holding that the treaty with Prussia was not in force in October, 1917, or that it was abrogated by the declaration of war between the United States and Germany. The inference is plain that the abrogation of the treaty was effected by the treaty of peace concluded between this country and Germany in August, 1921, and which adopted the provisions of the treaty of Versailles with certain exceptions. This treaty of peace was concluded long after the death of Ohle.

It is a well-established rule that wherever the rights of individuals have vested under provisions of a treaty they will not be affected by its subsequent suspension or abrogation. *Society for Propagation of the Gospel v. New Haven*, 8 Wheat. (U. S.) *464, 5 L. ed. 662. There is, therefore, no occasion for application of the rule announced in *Sullivan v. Kidd, supra.*

This brings us to the real problem presented by this appeal, viz.: Did the declaration of war against the German Empire operate to suspend or annul the provisions of the treaties with the German states hereinbefore quoted and which secure to the citizens of the German states the right to inherit real estate in this country? That a state of war between the contracting powers to treaties will operate to terminate some and not affect other treaty provisions is now generally recognized by practically all modern authorities. Treaty provisions for friendly commercial relations, for alliances, and, generally, of a political nature, are necessarily suspended or abrogated by a state of war between the contracting powers. Those treaty provisions

which fix national boundaries and which cede territory from one nation to another nation and which from their nature are intended to be permanent will remain in force unaffected by a state of war between the parties to such treaties.

After a careful examination of all the authorities cited in the able briefs of counsel and from a somewhat extended independent research of the authorities pertaining to the subject, we find the clearest and most comprehensive statement of the law in the opinion in *Techt v. Hughes*, 229 N. Y. 222, 11 A. L. R. 166, by that eminent jurist, Judge Cardozo. In the opinion in that case the authorities are extensively reviewed. The situation concerning the confused state of the authorities is set forth in the following apt language in the opinion:

"The effect of war upon the existing treaties of belligerents is one of the unsettled problems of the law. The older writers sometimes said that treaties ended *ipso facto* when war came. 3 Phillimore, International Law, 794. The writers of our own time reject these sweeping statements. 2 Oppenheim, International Law, sec. 99; Hall, International Law, 398, 401; Fiore, International Law (Borchard's Translations) sec. 845. International law today does not preserve treaties or annul them regardless of the effects produced. It deals with such problems pragmatically, preserving or annulling as the necessities of war exact. It establishes standards, but it does not fetter itself with rules. When it attempts to do more, it finds that there is neither unanimity of opinion nor uniformity of practice. 'The whole question remains as yet unsettled.' Oppenheim, *supra*. This does not mean, of course, that there are not some classes of treaties about which there is general agreement. Treaties of alliance fall. Treaties of boundary or cession, 'dispositive' or 'transitory' conventions, survive. Hall, International Law, 398, 401; 2 Westlake, International Law, 34; Oppenheim, *supra*. So, of course, do treaties which regulate the conduct of hostilities. Hall, *supra;* 5 Moore, International

Law Dig. 372; *Society for Propagation of the Gospel v. New Haven*, 8 Wheat. *464, *494; 5 L. ed. 662, 669.

"Intention in such circumstances is clear. These instances do not represent distinct and final principles. They are illustrations of the same principle. They are applications of a standard. When I ask what that principle or standard is, and endeavor to extract it from the long chapters in the books, I get this, and nothing more: That provisions compatible with a state of hostilities, unless expressly terminated, will be enforced, and those incompatible rejected.

"Treaties lose their efficacy in war only if their execution is incompatible with war. * * * Bluntschli, Droit International Codifié, sec. 538.

"That in substance was Kent's view, here as often in advance of the thought of his day: 'All those duties of which the exercise is not necessarily suspended by the war subsist in their full force. The obligation of keeping faith is so far from ceasing in time of war that its efficacy becomes increased, from the increased necessity of it.' "

The following language from the opinion in *Techt v. Hughes, supra*, "That (treaty) provisions compatible with a state of hostilities, unless expressly terminated, will be enforced, and those incompatible rejected," we regard as stating a principle founded on logic and sound reason. It follows that the treaty provision involved in this action may not be disregarded unless required by the necessities of war. The right of alien enemies to inherit cannot affect the fortunes of war existing between the parties to the treaty unless the inheritance may be sold and the proceeds placed in the possession of the enemy during the progress of hostilities. It is at all times within the power of the government of this country to prohibit the withdrawal of such funds by citizens of a nation with which we are at war. This power has been exercised in the passage of the act providing for the appointment of a custodian of alien enemy property who by national legislation is authorized to seize and hold during the war all property

situated in this country and owned by alien enemies. Moreover, the federal government is vested with power to confiscate the property of alien enemies which may come into its possession. This nation has not found it necessary to resort to such drastic measures. It has adopted the more humane policy of restoring to the citizens of Germany their property which has been seized by the alien property custodian.

We therefore hold that the right to inherit lands conferred by the treaties involved is a provision that is compatible with, and is not abrogated by, a state of war between this country and the German empire.

A like question was presented to the supreme court of Kansas in the case of *State v. Reardon,* 120 Kan. 614, which involved one of the same treaties that is here in question. That court followed the rule laid down in *Techt v. Hughes, supra,* and held that citizens of the German empire were entitled to inherit from a citizen of the state of Kansas. We conclude that the next of kin of Fred Ohle, deceased, who resided within the German empire at the time of his decease, were entitled to and did inherit the lands in this action.

It follows that the judgment of the district court should be and is reversed, and the cause remanded, with directions to enter judgment in conformity with this opinion.

REVERSED.

HERBERT T. PEMBROOK V. STATE OF NEBRASKA.

FILED JANUARY 10, 1929. No. 26389.

1. **Homicide.** To justify a verdict of murder in the first degree, the information must charge, and the evidence must show beyond a reasonable doubt, the killing to have been done purposely, and with deliberate and premeditated malice.
2. ———. As thus used, "purposely" means intentionally, "deliberate" means maturely reflected, "premeditated" means conceived beforehand, and "malice" means a wilful or corrupt intention of the mind.

3. **Instructions** 2 and 3 considered, and *held* to be prejudicially erroneous.
4. **Record** examined and found without evidence to sustain a conviction of murder in either the first or second degree.

ERROR to the district court for Clay county: LEWIS H. BLACKLEDGE, JUDGE. *Reversed.*

C. L. Stewart and *Waring & Waring*, for plaintiff in error.

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

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

THOMPSON, J.

At Harvard, in Clay county, in an altercation between one French and the plaintiff in error, hereinafter called defendant, in which such French was the aggressor, the latter was stabbed several times by defendant with the blade of a small pocket knife, from which wounds French died. An information was filed which, omitting formal parts, charged that: "Defendant, unlawfully, feloniously, purposely and of his premeditated malice, stabbed Herbert French with a knife, and as a result thereof he died September 19, 1927. Defendant, Herbert T. Pembrook, thus committed murder in the first degree." To this information defendant interposed a plea of not guilty. Trial was had, jury instructed as to first and second degree murder, and manslaughter, and defendant found guilty of murder in the second degree and sentenced to imprisonment for twenty years; to reverse which judgment he prosecutes error.

At the threshhold of every case stands the question of jurisdiction, which should be first to receive the trial court's consideration. The above indicated three offenses are specifically defined in the Compiled Statutes of Nebraska for 1922, and, so far as material, are as follows:

"Section 9544. Whoever shall purposely and of deliberate and premeditated malice * * * kill another * * * shall be deemed guilty of murder in the first degree.

"Section 9545. Whoever shall purposely and maliciously, but without deliberation and premeditation, kill another * * * shall be deemed guilty of murder in the second degree.

"Section 9546. Whoever shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter."

In these enactments the legislature was dealing with the most sacred and highly prized rights of mankind—life and liberty. This it must have realized at the time, as by carefully selected words it restricted the application of each quoted statute to those persons coming clearly within its provisions. Hence, in construing such enactments as quoted, each word should be considered as material and permitted its full force and effect.

The unbroken holdings of this court have been that, in charging these crimes, the pleader must follow the words of the above statutes, or use their equivalent. In harmony with this rule, and in furtherance of uniformity and dispatch, in *Nichols v. State*, 109 Neb. 335, under a statute authorizing this court to establish rules, we promulgated a plain, succinct form charging murder in the first degree, as a guide to bench and bar. This form was followed in the instant case, except that the words "deliberate and" which appear in such form between the words "of his" and "premeditated" are, as we have seen, omitted.

At the trial the court, in instruction 1, described the charge against the defendant by including therein that part of the information hereinbefore quoted. Instruction 2 informed the jury: "The charge against the defendant as made in said information covers and includes three different grades or degrees of the offense commonly termed 'homicide,' which is the unlawful killing of another person. These degrees are termed, 'murder in the first degree,'

'murder in the second degree,' and 'manslaughter.'" And further appearing in such instruction is practically a reiteration of the aforesaid quoted sections. This is followed by the challenged instruction 3, wherein the court undertook to define, for the enlightenment of the jury, the words "purposely," "deliberate," "premeditated," and "malice," as such words respectively are used in the statutes being considered; and in so doing, as we conclude, informed the jury that—"By the word 'purposely' is meant intentionally." That "deliberate" and "premeditated" "mean substantially the same thing and signify that the act to which they are applied is not suddenly and rashly done but has been planned or thought of beforehand." And further on in the same instruction informed the jury—"If a person has actually formed the purpose to kill, and has deliberated or premeditated upon it before he performs the act, and then performs it, he is guilty of murder in the first degree however short the time may have been between the forming of the purpose and its execution." As to "malice" the court stated to the jury that—"Malice, in law, signifies hatred or ill will; so that when one wilfully and without just cause or excuse does that which he knows will seriously injure another person it is then done with malice or maliciously." It should be said, however, that the above are but parts of this challenged instruction, and that in other parts thereof the elements of first and second degree murder and manslaughter are correctly reflected.

Thus, it becomes essential that we analyze instructions 1, 2, and 3, and the information. As well said in *State v. Mangano*, 77 N. J. Law, 544, 546, quoting with approval from *State v. Deliso*, 46 Vroom (N. J. Law) 808: "While the statute in its enumeration of the three mental states essential to murder in the first degree places the word 'wilful' (in our statute 'purposely') before 'deliberate' and 'premeditated,' these mental states normally succeed each other in the inverse order, premeditation, both as a mental process and by force of its prefix, necessarily preceding the weighing of the mental content that is implied by the

figurative term 'deliberate,' both of which must precede the acceptance by the will of the matter thus previously premeditated upon and weighed." As used in our statutes, "purposely" means intentionally, "deliberate" means maturely reflected, and "premeditated" means conceived beforehand. In defining "malice" the trial court gave the *common* acceptation of the term and designated it as the *legal* acceptation. While this was not necessarily reversible error, the better course would have been to have given the instruction approved by us in *Housh v. State*, 43 Neb. 163, 167, as follows:

" 'Malice,' in its legal sense, differs from the meaning which it bears in common speech. In common acceptation it signifies ill will, hatred, or revenge toward a particular individual. Such a condition of mind would, of course, constitute malice in the eye of the law, but such is not necessarily its legal sense. 'Malice,' in its legal sense, denotes that condition of mind which is manifested by the intentionally doing of a wrongful act without just cause or excuse. It means any wilful or corrupt intention of the mind."

Thus, we conclude that the trial court erred in instructing the jury, under the statutes here involved, that "deliberate" and "premeditated" mean substantially the same thing; also erred in the use of the word "or" in place of the word "and" in that part of instruction 3 wherein it is stated: "If a person has actually formed the purpose to kill, and has deliberated *or* premeditated upon it before he performs the act," etc.—thus reducing the scope of the statute as well as the amount of evidence necessary to a conviction; and further the court was incorrect in its definition of the term "malice."

This brings us to a consideration of the information, and incidentally instructions 1 and 2. Did the absence of the words "deliberate and" in such information render it ineffective to charge the crime of murder in the first degree? In *Simmerman v. State*, 14 Neb. 568, we announced the law to be: "To justify a verdict of murder in the first degree,

the evidence must show the killing to have been done not only *purposely,* but also with *deliberation* and *premeditation.*" If it is necessary to prove "*deliberation,*" then it is elementary that it is equally necessary that such word or its equivalent be properly alleged in the information and covered by an instruction. This conclusion finds support in *State v. Johnson,* 8 Ia. 525, which has been by that court unbrokenly followed and approved, wherein it is held: "An instruction on the trial of an indictment for murder, which omits the element of premeditation, in defining the crime of murder in the first degree, is erroneous." It follows that the information under consideration does not charge murder in the first degree. It further follows that this necessarily renders prejudicially erroneous the giving of instruction No. 2 so far as it applies to murder in the first degree.

Further, we find the record is without proof to sustain a conviction of murder, either in the first or second degree. Thus, the giving of instruction 2 as to murder in the first and second degree was prejudicially erroneous. *Botsch v. State,* 43 Neb. 501; *Whitehead v. State,* 115 Neb. 143. Also, as French, the deceased, conceived and planned the fatal meeting, and was the aggressor at the start of the altercation, it might be advisable to say we do not want to be understood as holding that this record reflects sufficient evidence to warrant a conviction of the crime of manslaughter; and as a re-trial may be had, neither do we think it wise to discuss the indicated facts, notwithstanding we have read with care the entire record.

This renders it unnecessary to consider the other claimed errors.

The judgment of the trial court is reversed and the cause remanded.

REVERSED.

JOSEPH J. MULLIGAN, APPELLEE, V. IRA C. SNAVELY ET AL., APPELLEES: THOMAS WOLFE, APPELLANT: DAVID G. WINE ET AL., CROSS-APPELLANTS.

FILED JANUARY 10, 1929. No. 25774.

1. **Mortgages:** NOTICE. Actual notice of the existence of an instrument affecting title to real estate is as binding as constructive notice by the record.
2. ———: ———. One who by himself or his agent has examined the record, or an abstract (so far as the same is correct) of title purporting to be taken therefrom, is charged with actual notice of what the record contains, not only of such matters as are properly of record, but also of instruments not entitled to record but appearing thereon; and in such case the effect of the record as constructive notice is immaterial.
3. ———: ———: FALSE STATEMENT IN ABSTRACT. A subsequent purchaser or mortgagee can take no benefit from a false statement in an abstract of title, but may rely upon such abstract to the extent that it correctly reflects the record.
4. ———: ———: RECORD. One charged with actual notice of what a record contains is entitled to the benefit of such facts appearing thereon which are to his advantage, and may rely upon the validity of all instruments which do not disclose facts impeaching them or putting him upon inquiry.
5. **Deeds:** UNWITNESSED DEED: VALIDITY. A deed or other instrument required by statute to be witnessed, though not witnessed, is nevertheless valid between the parties and as against all others except creditors and subsequent purchasers or mortgagees in good faith, if otherwise unobjectionable.
6. **Mortgages:** RELEASE: SUBSEQUENT MORTGAGEE. A subsequent mortgagee in good faith, having no notice of an assignment of the debt secured by a prior mortgage, may rely upon a release of said prior mortgage executed by the prior mortgagee of record, of which he has actual or constructive notice.
7. ———: ASSIGNMENT. An assignment of a real estate mortgage, securing a negotiable promissory note, to the indorsee of such note, is an instrument affecting the title to real estate within the meaning of the recording acts.
8. ———: ———: PRIORITIES. A subsequent mortgagee upon whom no duty rests to pay a prior mortgage, and who in good faith relies upon a release thereof executed by the mortgagee, has a superior equity to an assignee of such prior mortgage

whose assignment is not of record, and of which he had no knowledge, nor of any facts sufficient to put him upon inquiry. Especially is this true where the assignee knew of the negotiations for a new mortgage and kept silent, though under the belief induced by the fraud of his assignor that his assignment was of record, the subsequent mortgagee not being a party to such fraud.

9. **Quære.** Whether or not a release of a real estate mortgage requires a subscribing witness, or whether the signature of the notary (in whose presence the document was signed) to the certificate of acknowledgment is a sufficient witnessing, not decided.

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

Roper & Fuller, for appellant.

Meeker & Anderson, T. B. Dysart, Scott & Scott and *Cordeal, Colfer & Russell, contra.*

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

REDICK, District Judge.

This case was originally presented to Commission No. 1, an opinion written and adopted by this court, affirming the judgment of the court below; a motion for rehearing was filed and arguments heard thereon by the court. The same will now be disposed of. The action is to foreclose a mortgage upon lands, and the only question presented is the priority of liens.

The plaintiff, Joseph J. Mulligan, is the assignee of a mortgage originally executed by Ira C. Snavely and wife to the Peters Trust Company of Omaha, for the sum of $10,000, upon 1,200 acres of land, dated August 1, 1918, and recorded August 7, 1918, at 9 o'clock a. m., upon the records of Chase county, where the land was situated.

The defendant Thomas Wolfe filed a cross-petition seeking foreclosure of a mortgage dated March 1, 1918, and recorded the same day, for $18,000, executed by the Snave-

lys to one David G. Wine, the note which it secured having been indorsed by said Wine to Wolfe about the day of its date, as collateral security for certain indebtedness of Wine to Wolfe. It was agreed that an assignment of the mortgage should be executed and filed for record by Wine for Wolfe, but this was never done. The defendants David G. Wine and Farmers & Merchants Bank of Imperial filed a joint answer and cross-petition seeking the foreclosure of a mortgage for $17,636.75, executed January 5, 1921, by the Snavelys to Wine, which, with the note it secured, were held by the bank as collateral security for an indebtedness of Wine. It was alleged that Wine's debt to Wolfe and the $18,000 mortgage had been fully paid, and Wine and the bank claim a lien second only to that of the Peters mortgage. The defendant Harley G. Humphrey purchased a part of the lands from the Snavelys subject to a portion of the Peters mortgage, which he agreed to pay, and filed his answer and cross-petition asking that the remaining lands not covered by his deed be first exhausted to pay the prior liens. The allegations of the several answers and cross-petitions are put in issue by replies. The decree of the district court established the Peters mortgage as a first lien, the $18,000 mortgage as a second lien, in favor of Wolfe, except as to the Humphrey lands, and the Wine mortgage for $17,636.75, a third lien in favor of the bank. Wolfe appeals, and Wine, the bank and the Humphreys file cross-appeals.

The fruitful cause of the litigation involved was the failure of Wolfe to obtain an assignment of the $18,000 mortgage and file the same for record, whereby it was made possible for the Peters Trust Company to make the loan secured by its mortgage, the circumstances of which we will now relate. Early in July negotiations were instituted by Snavely and Wine to procure a loan of $10,000 from the Peters Trust Company on the lands covered by the $18,000 mortgage, which culminated, August 1, 1918, in the execution of the note and mortgage of the plaintiff. Wolfe had knowledge of these negotiations, and there is

written evidence in a letter signed by Wolfe tending to prove that Wine had Wolfe's authority to collect the $18,000 mortgage. The transaction was carried out and completed in the customary manner with loan companies as follows: The note and mortgage were executed by the Snavelys to the trust company August 1, 1918, and were sent to Chase county for record, and recorded at 9 o'clock a. m. August 7. At the same hour and date a release of the $18,000 mortgage was recorded, executed by David G. Wine, the record holder thereof. There was no subscribing witness to this release at the place upon the instrument provided therefor, but it was properly acknowledged before a notary public who testified that Wine executed the same in his presence. The evidence does not establish which one of these documents was actually first filed for record, but at the top of the release appears in pencil the figure "1," and at the top of the mortgage the figure "2," which is the customary method by the recording officer of indicating the order of filing. The abstract was then extended to show these filings, and submitted to the plaintiff which approved the same, and thereafter the money was paid to the mortgagor Snavely or his order. It seems that $5,080 was paid to Wine on account of the $18,000 mortgage, the application of the remainder not shown.

Upon this state of facts, the plaintiff takes the position that it relied upon the recorded release of the $18,000 mortgage, having no notice of the fact that the note secured thereby had been assigned to Wolfe, and that therefore it was an innocent mortgagee and entitled to priority.

On the other hand, defendant Wolfe contends that, because the release did not have a subscribing witness as required by statute, it was not entitled to record, and therefore did not impart constructive notice upon which plaintiff might rely. To this plaintiff replies (1) that the instrument in question did not require a witness under the statute, and (2), if it did so require, that the signature of the notary to the acknowledgment, coupled with the fact that the instrument was executed by Wine in his presence,

was a sufficient compliance as to witnessing; (3) "any irregularities in the execution, which was actually recorded, would not be known by those relying on the record until the record was inspected and then the instrument, as actually recorded, would be actual notice of its existence to the person who saw the record."

These questions—the necessity for witness, the sufficiency of the notary's signature, whether the instrument was entitled to record, and whether it imparted constructive notice—are exceedingly interesting and are learnedly and exhaustively discussed in the briefs, the major portions of which are devoted to that purpose; but after the most careful consideration we are convinced that their decision is not requisite to a proper disposition of the case, which presents a state of facts involving not constructive, but actual, notice.

The object of recording instruments affecting real estate is to secure a permanent record of the title and provide a place where persons dealing with the property may inform themselves as to the condition of the title. The record, when regularly made, is constructive notice to the world of what it contains. All persons dealing with the land are conclusively presumed to have knowledge of it and are bound thereby. The purpose of the record, so far as third persons are concerned, is to give notice to those who have it not. Persons who have knowledge of the facts disclosed by the record are bound by their knowledge, and the constructive notice by record adds nothing and is immaterial. "Actual knowledge of the existence of a real estate mortgage is as binding as constructive notice thereof." *Bradford v. Anderson,* 60 Neb. 368. Where a grantee reads a deed, he has actual, not constructive, notice of its contents. *Jones v. Woodward,* 50 Okla. 704.

So far as the question of notice is concerned, it seems to be conceded that, if the release in question was entitled to record so as to impart constructive notice, plaintiff would have been protected thereby, as distinctly held in *Whipple v. Fowler,* 41 Neb. 675. But it is contended by

defendant, supported by reasoning which to us is not persuasive, that, though plaintiff might rely upon a record regularly made, he is not entitled to rely to the same extent, upon the same facts appearing of record and brought to his attention in some other manner. If I purchase land with actual knowledge of the existence thereon of an unrecorded mortgage, I buy subject thereto. If I purchase land after having examined the records, and having found recorded therein a deed from my grantor of the same lands to a third party, which deed was not properly witnessed and therefore not entitled to record, I buy subject to the rights of the prior grantee, not because of the record of the defective deed, but because of my actual knowledge of its existence derived from the record. One who actually sees the record of an instrument is bound by his knowledge thus acquired, regardless of the question whether such instrument was entitled to record.

The principles above stated are well established and are applicable to the situation of plaintiff so far as the question of record and notice are concerned. The abstract of the land in question was submitted to the plaintiff and passed upon by it before the loan was consummated by the payment of the money. That abstract showed the release in question, but erroneously stated that it was properly witnessed. Of course, plaintiff could take no benefit from the false statement in the abstract, except upon the question of his good faith. But one error did not vitiate the entire abstract, and he may rely upon it to the extent that it correctly reflects the record. In this instance it showed at least a release properly acknowledged by the apparent holder of the mortgage, and, upon examination by plaintiff's attorney or agent, imparted actual knowledge of the existence of the instrument. True, the plaintiff did not examine the record itself, but a properly exemplified copy is of equal effect. One with actual notice of a written instrument good between the parties is in no position to raise the point of defective execution, but takes subject to it.

Russum v. Wanser, 53 Md. 92; *Johnston v. Canby,* 29 Md. 211; *Gardner, Dexter & Co. v. Moore, Trimble & Co.,* 51 Ga. 268, holding: "A mortgage of real estate attested by but one witness is not void, and, if a subsequent mortgagee or purchaser buys or takes his mortgage with actual notice of a prior mortgage, he takes subject to it even though it have but one witness." One with actual notice is not affected by failure to record. *National Mutual Building & Loan Ass'n v. Blair,* 98 Va. 490. We are clearly of the opinion that the plaintiff had the same right to rely upon its actual knowledge of the existence of the release to the same extent that it might rely upon constructive notice furnished by an instrument regularly recorded.

Defendant Wolfe, however, makes the further contention that under no circumstances is plaintiff entitled to rely upon the release in question, executed by the mortgagee, without requiring the production of the negotiable note secured by the mortgage; that, inasmuch as the plaintiff has not brought itself within the rule of protection by the recording act, it became its duty to satisfy itself by proper inquiry that the indebtedness secured by the mortgage had been paid. He cites two cases from other states: *Northup v. Reese,* 68 Fla. 451, and *Early Co. v. Williams,* 135 Tenn. 249, but in these states an assignment of a mortgage is not required to be recorded in order to protect subsequent purchasers and mortgagees. He also cites *Griffith v. Salleng,* 54 Neb. 362. In that case it was held that a purchaser of land subject to a mortgage, who subsequently paid the mortgage debt to the mortgagee, holder of the note with negotiable coupons attached, taking a release from the mortgagee, was not protected against the assignee of prior coupons which were due but unpaid. The case of *Whipple v. Fowler,* 41 Neb. 675, was cited by the plaintiff and distinguished by the court in the following language: "That case is not at all in point. It was there held that one who bought relying on a release of a mortgage, on record and executed by the mortgagee, was protected against the mortgage although it had been assigned

to another and the original mortgagee had no right to release it. In this case Smith bought with the mortgage standing of record, unreleased, and merely assumed that, when he found the principal bond in the possession of a third person, he was safe in paying that third person, without inquiring what had become of the negotiable interest coupons." The case is authority merely for the proposition that, where a person undertakes to pay a prior incumbrance, he is bound to pay it to the right party. Also *Heintz v. Klebba*, 5 Neb. (Unof.) 289. The syllabus in that case is as follows: "One who purchases real estate incumbered by a recorded mortgage securing negotiable notes and receives along with his deed an unrecorded release of the mortgage, executed by the mortgagee after he had sold the notes and assigned the mortgage, cannot resist a foreclosure by a *bona fide* holder of the unpaid secured notes." In the opinion the case of *Whipple v. Fowler, supra*, was discussed, and, while intimating that the holding therein was upon a question not involved, conceded that the rule as announced is just and reaffirmed in many subsequent cases. The facts upon which such holding was predicated are set forth in the opinion: "We are of the opinion that where a sister mortgages real estate to her brother, who then sells the mortgage debt to a stranger and thereafter executes a release of the mortgage, and the sister afterwards conveys the mortgaged property to her parents, the burden of proof in an action by the owner of the debt to foreclose the mortgage will rest upon the parents to show that they bought and fully paid for the property without notice of the want of authority in the mortgagee to release the mortgage." And after referring to the rule in *Whipple v. Fowler, supra*, Commissioner Glanville, who wrote the opinion, remarked: "While the rule is just, we do not think it relieves the purchaser of the burden of proving that he is within the rule in a contest with the holder of the unsatisfied lien; and surely where the relationship of the parties is as shown in this case, the burden of proving good faith, and all the

elements required to bring the purchaser within the rule, is upon the appellees and they cannot prevail because plaintiff failed to prove they were not within the rule." The commissioner cited the case of *Whitney v. Lowe*, 59 Neb. 87, but in that case the release was not executed until the day following the purchase. Also *Bridges & White v. Bidwell*, 20 Neb. 185, holding that a purchaser from a mortgagee who had acquired the equity of redemption by deed from the mortgagors was not protected where the mortgage appeared unreleased and upon the record. Here the release was executed and filed before loan was paid over. Also *Mathews v. Jones*, 47 Neb. 616. A purchaser under similar conditions as in the case last cited was held not protected against a mortgage properly recorded, but in that case the deed from the mortgagor to the mortgagee contained a clause by which the grantee assumed and agreed to pay the indebtedness secured by the mortgage, which implied the continued existence of the security. While the rule announced in *Heintz v. Klebba, supra*, was proper as applied to the peculiar relationship of the parties involved, we do not think it controlling in this case.

The rule announced in *Whipple v. Fowler*, 41 Neb. 675, is as follows: "A satisfaction entered on the record by a mortgagee, after he has sold and delivered the notes secured by the mortgage to a third party, will protect a subsequent mortgagee in good faith, or *bona fide* purchaser, of the mortgaged premises, in case he had no notice at the date of the purchase, or the payment of the consideration, that the debt was assigned, or was unpaid, or that the release was unauthorized; but as to all other persons the lien of the mortgage will not be impaired." The rule as thus stated has been approved and applied in many subsequent cases, among which are the following: *Cram v. Cotrell*, 48 Neb. 646; *Cheshire Provident Institution v. Gibson*, 2 Neb. (Unof.) 392; *Columbia Nat. Bank v. Marshall*, 2 Neb. (Unof.) 790; *Perry v. Baker*, 61 Neb. 841.

A distinction must be taken between cases where the purchaser buys property incumbered by a mortgage and

subsequently attempts to pay off the incumbrance. Such were *Ames v. Miller*, 65 Neb. 204, *Eggert v. Beyer*, 43 Neb. 711, *Snell v. Margritz*, 64 Neb. 6, and *Griffith v. Salleng*, 54 Neb. 362. Or cases where the subsequent incumbrancer agrees to apply the proceeds of the lien in payment of the prior incumbrance, as in *Porter v. Ourada*, 51 Neb. 510. In such cases there is no doubt that a duty is imposed upon the purchaser or subsequent incumbrancer to pay the right party, and if he pays the mortgagor or mortgagee without securing the evidence of indebtedness he does so at his peril. In the instant case the plaintiff's mortgage was not to be subject to the prior incumbrance which, prior to the payment of the money loaned, appeared to have been released by the record owner. Much stress is laid upon the fact that the release and plaintiff's mortgage were filed for record at the same time, and it is thence argued that plaintiff could not have relied upon the release; and in this connection attention is called to the fact that the mortgage is dated August 1, at a time when the prior mortgage appeared unreleased upon the record; but this is all explained by the manner in which the transaction was closed, the money loaned not being paid over until the release was executed and filed. We have held in two cases that, where the release and deed were executed and recorded on the same day as a part of the same transaction, the purchaser was protected by the release. *Cram v. Cotrell*, 48 Neb. 646, and *Columbia Nat. Bank v. Marshall*, 2 Neb. (Unof.) 790. In the *Cram* case the rule was stated: "Where the mortgage debt has been assigned, a purchaser in good faith without notice of the assignment will be protected by a release of the mortgage executed by the original mortgagee."

In the present case no duty rested upon the plaintiff to pay off the prior incumbrance. The duty was upon the borrower to clear the property of liens so that plaintiff's lien should be first. This he did by presenting a release from the mortgagee, Wine, upon which plaintiff relied.

The defendant, conceding that he was guilty of laches

in not procuring an assignment of the mortgage and having it recorded, insists that such laches are balanced by those of the plaintiff in failing to inquire as to the ownership of the note secured by the $18,000 mortgage, and procuring it to be delivered up and canceled, and that therefore the mortgages will be enforced in the order of their respective dates. We think this question has been disposed of by our observations as to the duty of the plaintiff in that regard. However, in *Ames v. Miller,* 65 Neb. 204, where the debt had been assigned but no assignment of the mortgage recorded and the purchaser took title from the mortgagee holding both the legal title and the mortgage, so far as the record showed, it was said by Holcomb, J., at page 213: "The plaintiff (the assignee), because of his failure and neglect to record the assignment of his mortgage, has lost his right to enforce his mortgage lien on the premises described therein as against the purchaser of such real estate. This, as between the parties, gives to the purchaser the superior equity, to which we think he is entitled." In that case it was also held that an assignment of a real estate mortgage was an instrument affecting the title to real estate within the meaning of the recording acts.

We think the principle that, where one of two innocent parties must suffer a loss, he whose negligence caused the injury shall bear the loss is applicable here. *Porter v. Ourada,* 51 Neb. 510; *Deleski v. Peters Trust Co.,* 115 Neb. 547. As we have above remarked, the failure of Wolfe to procure and record an assignment afforded Wine the opportunity of defrauding plaintiff by the execution of an unauthorized release, and under the circumstances Wolfe should bear the loss. The fraud of Wine in not executing and recording the assignment cannot be charged to plaintiff.

It is contended by the plaintiff and the cross-complainants, Farmers & Merchants Bank and the Humphreys, that the debt of Wine to Wolfe has been fully paid, and evidence tending to establish that contention was introduced, as

well as evidence to the contrary. There is such a conflict in the evidence on this point that we feel justified in taking into consideration the finding of the district court, who saw the witnesses and was in much better position than the reviewing court to weigh the evidence. His finding on this point was in favor of Wolfe and will be sustained.

We conclude that the decree of the district court and the former judgment of this court are right. The motion for rehearing is overruled and the former judgment adhered to.

AFFIRMED.

IN RE ESTATE OF HIRAM L. SMITH. ELWIN W. SHERRARD, APPELLANT, V. CHARLES H. SLOAN ET AL., EXECUTORS, APPELLEES.

FILED JANUARY 10, 1929. No. 26173.

1. Wills. Relevant portions of a will set out in the opinion construed.
2. ———: CONSTRUCTION. When it becomes necessary to construe a will, the entire instrument will be considered, and if, from its language, the intention of the testator can be ascertained, such decree will be entered as best effectuates the intention therein expressed. *In re Estate of Vandeveer*, 110 Neb. 651.
3. ———: DIVESTMENT: CONDITION SUBSEQUENT. A provision in a codicil to a will, that no devisee shall be a beneficiary who is addicted to the excessive use of intoxicating liquors or harmful drugs, is a valid condition subsequent, and may operate to devest an estate which had vested under a prior devise.
4. ———: ———. Where an interest in lands is vested in the devisee, subject to be devested in case certain conditions are not performed, the executors being given authority to determine the fact of such performance, the right of the devisee to the possession and income derived from the lands will be withheld until conditions performed, if such appears to have been the intention of the testator.
5. ———: CONSTRUCTION. Where an irreconcilable repugnancy exists between two provisions of a will, the later will prevail over the earlier, unless from a consideration of the entire will a contrary intention is evinced.

APPEAL from the district court for Fillmore county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

Waring & Waring and *Cline & Williams*, for appellant.

Sloans, Keenan & Corbitt, contra.

Heard before GOSS, C. J., THOMPSON and EBERLY, JJ. and STALMASTER and REDICK, District Judges.

REDICK, District Judge.

This action involves the construction of the will of Hiram L. Smith, and presents but one question, namely, whether the income, rents and profits of the share bequeathed and devised to the appellant, Elwin W. Sherrard, shall be paid over to him by the executors before his arrival at the age of 35 years, he now being aged 21. The county court, and, upon appeal, the district court for Fillmore county, held that he was not entitled to receive the income until he reached the age of 35, and he brings the case here for review.

The will in question, with two codicils, is quite lengthy, and we do not consider it necessary to set it forth *in extenso*, but will quote such portions as are relevant to the question for decision.

After the formal parts and providing for some legacies, the will provided as follows:

"5th. I give, bequeath and devise unto my well-loved grandchildren, Mrs. Bess Butler Wilson, Newell Butler, and Dorothy Butler, and to the infant child of my deceased granddaughter, Mrs. Maud Butler Sherrard, the 800 acres owned by me in Geneva township, Fillmore county, Nebraska, and more fully described as follows: The north half (N½) of section twenty (20); the northwest quarter (NW¼) of section twenty-one (21); and the south half (S½) of section twenty-eight (28); all being in town seven (7) north, range three (3) west of the 6th P. M. in Fillmore county, Nebraska, according to the government survey, to be theirs absolutely, share and share alike as ten-

ants in common; subject to the possessory right hereinafter granted to my trustees hereinafter named, until said trust is fully executed or said trustees duly discharged; and subject further to the condition that the devises herein granted shall not vest and ripen until each of the said legatees shall reach the age of twenty-one (21) years, and if any of said devisees shall die before reaching the age of 21 years, leaving no lawful issue of his, or her body, then the share of such devisee so deceased shall pass to and vest in the surviving of my said grandchildren or greatgrandchild; but if such devisee so deceased shall leave lawful issue of his, or her body, then I direct that the share of such deceased devisee shall pass to such lawful issue by right of representation.

"6th. All the rest and residue of my estate, real, personal, and mixed, together with the rents and profits, use and benefits, and full legal possession of the lands devised in paragraph five (5) hereof, I hereby set apart and constitute the same as a trust fund and estate, to be created, collected and governed, used and expended as follows:"

Then follow the appointment of trustees and instructions as to their duties, including the following:

"(c) That the said trust fund and estate shall be used, expended and applied as follows:

"(1) In the payment of the taxes and legal assessments on the property so held in trust. In the payment of the necessary costs of necessary and proper repairs and insurance upon said property, so that the same shall be kept in good reasonable condition and free from loss or waste thereon."

The will then provides for the establishment of a "Ladies Home" at Orland in the state of Indiana. This bequest was revoked by the first codicil and in lieu thereof a pension fund of $30,000 was provided for the benefit of certain classes residing in and within a radius of ten miles of the town of Orland.

"7th. All the rest, residue and remainder of my estate,

real, personal and mixed, I give and bequeath unto my lawful heirs, my son Curtis Adams Smith, and Hattie Smith Butler, of Geneva, Nebraska, to be theirs absolutely, share and share alike, subject to the possessory rights heretofore granted to my said trustees in said property, but the rights of possession and the rents and profits therefrom, in my said heirs, is deferred until all the charges, bequests and trusts in my will provided have been fully met and complied with."

"15th. I further direct that my said trustees, during the time that the amounts of the bequests herein provided for are accumulating, that such funds shall be kept safely invested in interest bearing and readily disposable securities, so that the funds so on hand shall not lie idle, but shall add to the said trust fund by the interest earned on such funds as they accrue in the hands of my said trustees. But in the loaning of such funds care to be exercised and the safety of the principal to be carefully guarded rather than to attempt to secure a specially large rate of interest."

The will was dated January 3, 1911, and on March 12, 1913, a codicil was executed revoking one of the bequests of a legacy and that for the establishment of a Ladies Home as above stated, and containing the following:

"Third. Having now arrived at the age of eighty-four years, and having seen a great many men, and having observed the effect upon them, their health, and fortunes, of the excessive use of intoxicating liquors, it is my desire and will that no person shall be a beneficiary under this will of mine who shall use intoxicating liquors as a beverage, and while I do not regard myself as perfect in any respect, yet I have never regretted my own course of life in this respect. I hereby direct, authorize, and empower my executors hereinafter named to withhold and absolutely deny any person named or referred to in my will who shall not for a period of not less than five years next preceding the time for distribution wholly abstain from the use of intoxicating liquors as a beverage. And should any of the

said beneficiaries be adjudged by my said executors to have within such period used intoxicating liquors as a beverage, then they shall cause such person or persons interest in my estate to lapse and become a part of my general estate for the benefit of my other heirs and legatees."

The appellees were appointed executors and provision made for the filling of vacancies.

On June 24, 1915, a second codicil was executed containing the following provisions:

"First. I hereby direct that my executors named in my will, or those that may succeed them or any of them, to fully inform themselves concerning the personal habits and practices of each and every legatee or devisee under my will, with special reference to whether they or any of them have subsequently to this date, and before delivering unto him, her, or them, a share or any part of my estate, used intoxicating liquors or harmful drugs to the extent of intemperance or excess. That my said executors or a majority of them shall be the judge of that fact, and if my said executors shall find that any such heir or devisee has within the period above mentioned indulged in the use of intoxicating liquors or such harmful drugs to the extent of intemperance or excess, then the said heir or devisee shall forfeit all right to receive any share or portion of my estate, real, personal or mixed, and that such share or portion so forfeited shall lapse, and become a part of my general estate, to be divided according to the terms of my will relating to the residue of my estate after paying expense of administration, my just debts, discharge of my trust imposed, payment of bequests and compliance with all other special bequests or devises in said will provided.

"Second. I further specifically will and direct that should any bequest or devise made by me to any of my heirs or devisees become complete upon the settlement of my estate and such devisee or heir shall not have attained the age of 35 years, then and in that case or cases I direct that said share be controlled by my executors named in my will or their successors, for the benefit of such heir or

devisee until he, she or they shall have attained the age of 35 years. It is further provided that if the real estate devised to any of my heirs should through legal process be converted into money, or if my representatives hereinbefore referred to shall deem it for the best interest of such devisees or heirs to convert such real estate into money, then and in that event the proceeds thereof shall be immediately invested in good Fillmore county, Nebraska, farming lands, or securities thereon, to be held for such heirs or devisees, until he, she or they shall have attained the age of 35 years."

The will then contained a special provision for the building of a home for appellant upon a tract of 40 acres upon condition that said tract be conveyed by appellant's father to said Elwin, such conveyance to contain a provision that title "shall remain in him inalienable and incapable of incumbrance until he shall reach the age of thirty-five years."

The object to be obtained by the construction of a will is to discover the intention of the testator, and when this is made clear, it is the duty of the court to effectuate such intention and enforce the will according to its terms. The intention of the testator must be found in the words used by him, giving them their general meaning in preference to any technical significance which may have attached to them by legal usage, in case of conflict. As stated by many decisions, it is the duty of the court to take the will by its four corners and from a critical consideration of the entire will determine the testator's intention. 40 Cyc. 1389. If the language of the will is ambiguous or uncertain and capable of more than one construction, the court may then consider the relationship existing between the testator and the objects of his bounty and the surrounding circumstances at the time the will was made and any other facts having a tendency to throw any light upon the testator's intention.

We think the will in question makes use of words and language which clearly indicate the intention of the testator. The will and codicils together constitute the last

will of the deceased and must be construed as one document, excluding such earlier portions as have been canceled or revoked by later provisions. The construction of deeds and wills differs in this respect, that, where inconsistencies exist between different portions of the document, the prior provision controls in case of a deed, but the last provision in case of a will. *Martley v. Martley*, 77 Neb. 163.

It follows, as conceded by the parties, to which construction we agree, that although by the provisions of the fifth paragraph of the main will the estate thereby devised to appellant vested in him upon his arrival at the age of 21 years, it was subject to be devested upon some condition or the happening of some contingency provided for by later clauses. In fact, it is agreed by all that appellant took a vested estate upon arrival at 21, subject to be devested in case he should not attain the age of 35, or if during a period of five years prior to his arrival at the age of 35 he had become addicted to the use of intoxicating liquors or harmful drugs to the extent of intemperance or excess. That a vested estate may be devested by a condition subsequent, see, *Smith v. Smith*, 64 Neb. 563.

This being the true position, the question for determination is whether or not appellant is entitled to receive the income and profits of the estate during the period between the ages of 21 and 35. The appellant strongly maintains the affirmative of this proposition, basing his argument principally upon that portion of the second paragraph of the second codicil which is in the following language:

"Second. I further specifically will and direct that should any bequest or devise made by me to any of my heirs or devisees become complete upon the settlement of my estate and such devisee or heir shall not have attained the age of 35 years, then in that case or cases I direct that said share be controlled by my executors named in my will or their successors, *for the benefit of such heir or devisee* until he, she or they shall have attained the age of 35 years."

The argument of counsel is that the words "for the benefit of such heir or devisee" mean the same as the expression "for the use and benefit of such heir or devisee," and he cites a number of cases to that effect and holding that under either expression the devisee is entitled to the income during the period prior to the happening of the condition or contingency imposed. The decisions cited probably state the correct rule of law as applied to those cases as follows: "The general rule is that, if a bequest of a residue vests subject to be devested on the happening of a contingency, the first legatee is entitled to receive the income accruing until the contingency happens, *unless a different intention on the part of the testator appears*" (italics ours)—citing a number of cases, the quotation being taken from *Wright v. White,* 136 Mass. 470.

It thus is seen that the question still remains whether the general meaning of the phrase in question is controlled by other provisions of the will. We think it is.

By the sixth provision above quoted the rents and profits of the lands devised in paragraph five are set apart as a trust fund for the establishment of a ladies home at Orland. This might have deferred the right of the devisee to possession to a period beyond his arrival at the age of 21. True, this bequest was revoked, but another one was substituted therefor, the creation of a fund for pensions, which might have postponed the right of possession for an indefinite period, to wit, until the last pensioner had been provided for.

Again, by the seventh paragraph the shares of the residuary legatees were made subject to the possessory rights of the trustees, and their rights to the possession and rents and profits were deferred until all charges, bequests and trusts had been complied with. While this clause does not include the share of applicant in the 800 acres, it has a bearing upon testator's intention. Also by the fifteenth paragraph the testator directed that—"During the time that the amounts of the bequests herein provided for are accumulating, that such funds shall be kept safely invested

in interest bearing and readily disposable securities, so that the funds so on hand shall not lie idle, but shall add to the said trust fund by the interest earned on such funds as they accrue in the hands of my said trustees."

In paragraph third of the first codicil the following language appears: "It is my desire and will that no person shall be a beneficiary under this will of mine who shall use intoxicating liquors as a beverage." And the following: "I hereby direct, authorize, and empower my executors hereinafter named to withhold and absolutely deny any person named or referred to in my will who shall not for a period of not less than five years next preceding the time for distribution wholly abstain from the use of intoxicating liquors as a beverage. And should any of the said beneficiaries be adjudged by my said executors to have within such period used intoxicating liquors as a beverage, then they shall cause such person or persons interest in my estate to lapse and become a part of my general estate for the benefit of my other heirs and legatees." And paragraph "first," above quoted, of the second codicil places the duty upon the executors to inform themselves as to the personal habits of every devisee with special reference to whether he used intoxicating liquors or harmful drugs to the extent of intemperance or excess, "before delivering unto him, her, or them, a share or any part of my estate;" and if in the judgment of the executors such devisee has been so addicted within the period above mentioned, he "shall forfeit all right to receive any share or portion of my estate," and provides for the lapse of such share into the general estate.

Does it appear from the language of these provisions that the testator had a different intention than that which would be ordinarily inferred from the use of the words "for the benefit of such heir or devisee until he, she or they shall have attained the age of 35 years," appearing in the second paragraph of the last codicil? The answer must be in the affirmative. The testator recites the knowledge gained by him during an active life of 84 years, of

the ravages, distress and loss occasioned by the excessive use of intoxicating liquors and harmful drugs, and it was his evident intention to protect his devisees, as far as he was able, from the calamities resulting from the habits denounced, until such time, as in his judgment, they had attained an age when their own experience and years would probably render them immune from the dangers and temptations of youth in connection with those particular matters. That it was testator's intention that appellant should not have control of any part of his devise until arrival at age 35 is further indicated by the provision for building him a house upon condition that the deed to the 40 acres should contain a provision against alienation or incumbrance until that time. The necessity for this provision is not apparent if devisee was to receive full control of the income of his devise at 21. Appellant contends that there is no express provision for accumulation of interest and income, and that the word "share" as used in the second paragraph of the second codicil must be construed as having reference to the corpus only of the devise. This may be conceded considering this paragraph by itself, but when read in connection with other clauses of the will, as we must do, it is evident, as above stated, that it was the intention of the testator that no person should be a "beneficiary under this will," or have delivered unto him "a share or *any part* of my estate," who was a victim of the habits denounced. And it is specifically provided that such person "shall forfeit all right to receive any share *or portion* of my estate," and that such person's "interest in my estate shall lapse" and become a part of the general estate. The language quoted permits of but one interpretation, viz., that such person shall be excluded from any share, part, portion and interest in the estate. The greater includes the less, and the context clearly implies that the word "share" in the second paragraph was intended to include the income by providing that, if the devise became complete before the arrival of devisee at 35 years of age, the control should be in the executors. What reason for

such control, unless to secure the carrying out of testator's intention to exclude certain devisees from all participation in his estate unless the condition subsequent was complied with?

The "first" and "second" clauses of the last codicil are not inconsistent. The "first" provides the condition upon which the devisee may take, and the "second," that until arrival at 35 years the executors shall control.

It is argued by appellant that under the construction we have adopted, "if the 'heir' should die any time before his thirty-fifth birthday, the 'heir' would never receive any benefit of the devise or legacy." It may be true that appellant, in such event, would receive no benefit; but whether true, or whether appellant's heirs would be cut off, we need not determine at this time. Cases of this kind must be determined from the language of the particular instrument involved, and decisions upon the construction of other wills are of little value except as to the general principles of construction. We have examined the cases cited by appellant and they are not applicable to the peculiar provisions of the will in question.

A testator has a right to dispose of his property in any manner he sees fit and to attach any conditions to its possession and enjoyment, provided no positive rule of law or public policy is infringed; and, as before stated, it is the duty of the courts to enforce the will of the testator, under the above limitations, in accordance with his intention as expressed by the words used.

The judgment of the district court is right and is

AFFIRMED.

MAY MCCANN, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED JANUARY 10, 1929. No. 26217.

1. Carriers: EVIDENCE: SUDDEN STOPPING OF STREET CAR. In an action for personal injuries claimed to have resulted from an

unusual and violent stopping of the car in which plaintiff was a passenger, it is competent, when the proper foundation is laid, for a witness to state that he had, in his experience, never known a street car to stop as violently as in the instant case. While the evidence is in the nature of a conclusion, it is within the exception that, where all of the facts cannot be presented to the jury, such conclusion may be given.

2. Appeal: HARMLESS ERROR. In such case, where witness said she only knew of one other case of a stop so violent, it was error to permit her to state where it was, that being immaterial, but in this case without prejudice.

3. Evidence: METHOD OF STOPPING STREET CAR. In an action by a passenger for damages resulting from the violent and unusual stopping of a street car at a certain place, it is competent for a properly qualified witness to testify as to the proper method of bringing the car to a smooth stop, though he had not operated cars on the particular line where the accident occurred.

4. Trial: DIRECTION OF VERDICT. Where the evidence is conflicting, but sufficient to sustain a verdict for either party, a motion for a directed verdict is properly overruled.

5. Carriers: INJURY TO PASSENGER: PROOF OF NEGLIGENCE. In an action by a passenger for damages against a street railway company, it is not sufficient for plaintiff to show merely that he was injured by a jerking or lurching of the car; he must go further and show that the jerking or lurching was of such an unusual character as to warrant an inference of negligent handling of the car, or that it was attributable to some act of negligence shown.

6. New Trial: REMITTITUR. Where a verdict is excessive, but not so much so as to indicate passion and prejudice on the part of the jury, the error may be corrected by a remittitur.

7. Appeal: REMITTITUR: DISCRETION OF COURT. Where the trial court has ordered a reduction of the verdict as a condition of denying a new trial, such order will not, ordinarily, be reversed, unless an abuse of discretion is shown, for the reason that the trial court is in a better position to determine that question than a court of review.

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

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

Smith, Schall, Howell & Sheehan, contra.

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

REDICK, District Judge.

This action is brought for damages for personal injury to plaintiff while a passenger on one of the street cars of defendant. The petition alleges that about 10 o'clock a. m., on April 21, 1926, the plaintiff was a passenger on defendant's car, and, desiring to alight at Sixteenth and Farnam streets, she signaled the car to stop and arose from her seat and proceeded toward the front exit, and, while in the exercise of due care on her part, defendant negligently stopped said car with a violent, sudden, unnecessary and unusual stop, in consequence of which plaintiff was thrown against the rear of the motorman's vestibule and to the floor of the car, whereby she was injured. The answer was a general denial. Case tried to a jury, which rendered a verdict of $11,050 for the plaintiff. Motion of defendant for new trial was overruled upon condition that plaintiff remit from the verdict the sum of $4,050, leaving it stand for $7,000. Plaintiff filed remittitur, and judgment rendered for plaintiff as ordered; to which order plaintiff and defendant each excepted. Defendant appealed to this court and plaintiff filed a cross-appeal.

Defendant presents seven assignments of error, the first two of which may be considered together.

Having shown that the plaintiff, Mrs. McCann, and a witness, Mrs. Wilbur, had been riding upon the street cars for many years in the city of Omaha, Mrs. McCann was asked whether she had ever known of or observed the car to stop as suddenly and abruptly as the car did when she was injured, to which she answered, "I never have." Substantially the same question was asked Mrs. Wilbur, a passenger on the car, and she answered, "At one other time, I remember." Question: "Where was it?" Answer:

"At the Boulevard and Cuming street" (a distant part of the city). Defendant contends that it was of no concern to the jury whether plaintiff ever observed a street car to stop as suddenly and abruptly "at any other time or any other place;" that the only question was whether there was a negligent stopping at the time and place of this particular accident. True, but it was not the purpose of the questions to show that negligent stops had been made at other times, but to show the character of stops in general for the purpose of proving that the instant stop was of a different character,—unusual and more violent. We think the evidence was competent for that purpose. The answer of Mrs. Wilbur that she had seen one other such stop was immaterial and would have been incompetent, if offered for the purpose of affording an inference of a negligent stop at the time in question from the fact of a previous negligent stop; but that was not the purpose. The witness could not truthfully answer the question in the negative without the qualification. The question, "Where was it?" was immaterial, and the objection to it should have been sustained, but we think the error was without prejudice. If the witness had answered the question, "Only on one other occasion," her evidence, so far as material, would have been substantially the same. Defendant did not move to strike the answer, and we think no prejudice resulted. The suggestion that it would have been equally competent to call an unlimited number of witnesses to testify to sudden and violent stops at other times and places, while correct as a general proposition, is inapplicable here because not attempted.

The third assignment has to do with the testimony of witness Goodrich. Having shown that the witness had been a motorman for the defendant company for about six years, some time prior to the accident, on other lines of defendant, upon which the grades of the streets were as steep or steeper than that on Farnam street approaching Sixteenth, he was asked to describe the usual manner of bringing a street car to a stop on the west side of Sixteenth

and Farnam, to which he answered: "If you had gradually applied your air and as you came to a stop you gradually released it to keep it from coming to a sudden stop." And in reply to the question, "What would be the probabilities as to whether or not that would bring that car to a sudden stop?" he answered, "That is, if you applied it and did not release it fast enough it would bring it to a sudden stop because your wheels would be locked." The argument here is that the witness never operated a car at the place of the accident, did not see it, and had no personal knowledge whether the street car was stopped with a sudden jerk; and it is therefore suggested that his testimony was conjectural and speculative. We think not. The purpose of the testimony was merely to show the usual manner of stopping cars whereby a smooth stop could be accomplished. The evidence had its application to the point in question as well as any other place on defendant's line, and was proper for the purpose of aiding the jury in determining whether or not the proper methods had been used in making the stop complained of.

Motorman Johnson, in charge of the car at the time of the accident, described the manner of stopping the car precisely, and, almost in the same language, identically with the witness Goodrich, and said he used that method and made a smooth stop without any violent jerk or lurch. Defendant contends that, inasmuch as the motorman testified that he used the method described by Goodrich, he was not guilty of negligence in stopping the street car. This takes for granted that the motorman's evidence was true, but this was a question for the jury upon all the evidence and circumstances. The evidence of Goodrich was competent.

The fourth assignment is the overruling of defendant's motion for a directed verdict, made at the close of all the evidence. The evidence of plaintiff and Mrs. Wilbur was to the effect that the stop in question was unusually violent. The defendant produced the motorman and con-

ductor and one passenger who testified that there was nothing unusual about the character of the stop, and another passenger that it stopped in the regular way so far as he knew, that he did not pay any attention to it. These witnesses for defendant also testified that they were not thrown by the stop; but the passengers were seated and the conductor at his usual place in the rear vestibule, and therefore not in position to be affected by a sudden stop. So far as there is a conflict in this testimony, we think it was a question for the jury, and that the court did not err in overruling defendant's motion. Defendant's principal contention on this point is that it is insufficient for the plaintiff merely to show that her injuries resulted from a jerk or lurch of the car, but that she must go further and trace the jerk to some negligent act of defendant; that the doctrine of *res ipsa loquitur* has no application, the mere happening of the accident not furnishing any inference of negligence. In support of the proposition he cites a number of cases, which we have examined, but they all presented the situation where nothing but a jerk or lurch, followed by injury to the plaintiff, was shown. Two of those cases call attention to the fact that no evidence was offered tending to prove that the jerk or lurch of the car was any greater than usual. *Ottinger v. Detroit United Railway,* 166 Mich. 106; *Faul v. North Jersey Street R. Co.,* 70 N. J. Law, 795, citing from *Burr v. Pennsylvania R. Co.,* 35 Vroom (N. J.) 30: "It was not until extraordinary lurching and violence was shown that negligence could be presumed." This distinguishes the cases cited from the present one where evidence was produced tending to prove the stop unusually violent.

In this connection defendant places considerable stress upon the testimony of the motorman Johnson of admissions by plaintiff: "Q. Did you have any other conversation? A. I asked her if she fell down while the car was in motion or when it stopped, and she didn't know; she said, 'I tripped myself stepping down to the floor.' She said, 'I must have tripped myself stepping down.' Q. Why did you

ask her that question? Did you expect that anybody had fallen when that car stopped? A. No. I even asked her if it was any fault of the car, and she said, 'No; she didn't think so.'" This was denied by plaintiff. Defendant argues that this proves that plaintiff's fall was not the fault of defendant, but in our judgment it only went to the weight of plaintiff's testimony, which was for the jury.

It is further argued that, where plaintiff's injuries may have been due to other causes than carrier's negligence, the fact of the accident does not authorize the inference of negligence, which must be drawn, not from the fact of injury, but from the circumstances under which it occurred. Assuming this to be a correct statement, it was for the jury to determine whether plaintiff received her injuries by tripping or in consequence of a negligent stop. If the jury were unable to determine between the two possible causes, they should, of course, find for defendant; but the evidence was sufficient to support a finding that the car was stopped with extraordinary violence.

The fifth assignment deals with the order of the court for a remittitur from the verdict, it being contended that the verdict was so excessive as to indicate passion and prejudice on the part of the jury, and that therefore the entire verdict should have been set aside and a new trial granted. It seems to be the general rule that a verdict of the character supposed cannot be corrected by remittitur, but should be set aside *in toto*. In this case the learned district court incorporated in his order a finding that in his judgment the verdict was not based upon passion and prejudice of the jury, but that it was clearly excessive to the extent named. In such case defendant, and plaintiff on her cross-appeal, contend that the court had no authority to reduce the verdict in this class of cases where no definite or specific rule exists for the assessment of damages; that it invades the province of the jury, and the court has no measure for determining the extent of the excess. No doubt many cases so hold, though the authorities seem to be quite

divided on the point. See New Trial, 15 Decennial Dig. sec. 162(3). The rule in this state will be discussed later. But the error, if any, on this particular point was favorable to defendant and under familiar rules was not prejudicial. So held in a case involving a remittitur. *Schroeder v. Mauzy,* 16 Cal. App. 443.

The sixth assignment attacks instruction No. 3 as authorizing the jury to find for the plaintiff regardless of any negligence on her part. This assignment was not argued, but is not well taken because there was no pleading of contributory negligence.

The last assignment is that the verdict, both before and after remittitur, is excessive and of itself indicates bias and prejudice of the jury. To recite in detail the evidence as to the injuries suffered by plaintiff would unduly prolong this opinion. It appears, however, according to her evidence, that she suffered a fracture of the left femur in the upper third thereof, which the surgeons experienced great difficulty in reducing, which was attempted without operation for about six weeks when, failing to secure proper apposition, a portion of the shin bone was taken from the right leg and inserted at the point of fracture, the final result being a very good bony union; her leg was placed in a cast and so remained for about nine weeks; she was confined to the hospital for over three months, could not sleep, had pain all over her body, lost 31 pounds in weight, and expended about $1,100 for doctors and hospital fees; that she still required the aid of crutches at the time of the trial, about a year after the accident, and experienced great difficulty in getting up and down stairs; that she had been keeping a boarding-house, doing all the work herself, and earning $100 a month net; that she was 54 years old, and had an expectancy of 18 years; that she is unable to carry on her business without assistance of her daughter and some hired help, her daughter having theretofore earned her own living; that she still suffers considerable pain when walking. It was shown by defendant that plaintiff has Paget's disease, a progressive deterioration of the

bone structure, which existed prior to the accident, but it is not shown to have been the cause thereof nor result of the same, though probably contributing in some degree to plaintiff's continued disability. While the amount fixed by the jury seems quite liberal, we have examined with care the evidence regarding plaintiff's injuries, including that of six or more doctors and surgeons, and are unable to conclude that it clearly appears that the verdict was the result of passion and prejudice, but concur in the finding of the district court on that point.

As permitted by the statute, plaintiff has filed a cross-appeal, and insists that the order of remittitur be set aside and judgment ordered for the full amount of the verdict, on the ground that the court had no authority to order a remittitur where the verdict is not so disproportionate as to disclose passion and prejudice, and cites *Bower v. Chicago & N. W. R. Co.*, 96 Neb. 419, where the court held that the amount of the verdict was not so excessive as to call for a reversal of the judgment or to warrant any reduction by this court. The authority of the court to order a remittitur was not involved. Also *Dailey v. Sovereign Camp, W. O. W.*, 106 Neb. 767, in which it was said: "The law gives to the jury the right to determine the amount of recovery in cases of personal injury. That is, of course, one of its functions, and, if the verdict is not so disproportionate to the injury as to disclose prejudice and passion, it will not be disturbed." A remittitur, however, of $10,000 from a verdict of $50,931 was ordered by this court without a finding of passion or prejudice. These cases are not controlling. The general rule, as quoted from *Dailey v. Sovereign Camp, W. O. W., supra,* has been stated in 17 C. J. 1087, sec. 397, but as above noted the cases are in conflict. Whatever the rule may be in other jurisdictions, this court has recognized the power of the district court to require a reduction of the verdict as a condition for overruling a motion for new trial in a number of cases, and in *Chicago, B. & Q. R. Co. v. Krayenbuhl*, 70 Neb. 766, it was expressly held: "In an action for personal injuries,

where substantial damages are proved, but the verdict of the jury appears to be excessive, the error may be corrected by a proper remittitur of the excess directed by the district court, or by this court on a proceeding in error." The power has been exercised by this court in many cases, *e. g., Mullally v. Haslam,* 106 Neb. 860; *Curran v. Union Stock Yards Co.,* 111 Neb. 251; *Morris v. Hines,* 107 Neb. 788; *Swartz v. Drake Realty Construction Co.,* 109 Neb. 746. While this court has approved the rule that, where the verdict is based upon passion and prejudice, a remittitur will not cure it, but a new trial should be granted (*Hoffman v. Chicago & N. W. R. Co.,* 91 Neb. 783; *Phelps v. Bergers,* 92 Neb. 851; *Hutchinson v. Western Bridge & Construction* Co., 97 Neb. 439), the rule seems equally well established that, where the verdict is *merely* excessive, a remittitur is proper. It seems consonant with reason that where there is a clear liability, or where liability is fairly established by the evidence, and passion and prejudice is not shown, but it appears to the court that the verdict is excessive by reason of the jury having taken a mistaken view of the evidence, or proceeded under an erroneous theory, or for any reason other than that denounced by statute, it should have the power to order a reasonable reduction in the interest of ending litigation. *Welsh v. Tri-City R. Co.,* 148 Ia, 200; 17 C. J. 1087, sec. 397.

Plaintiff's counsel claim that the amount allowed by the jury would not more than cover the loss of plaintiff on account only of her inability to carry on her business, without considering pain and suffering, assuming her disability of 75 per cent. in the use of the injured leg. We have not tested the accuracy of plaintiff's figures, but they assume that 75 per cent. disability of the leg creates the same percentage of disability in the business of keeping a boarding house, which seems unwarranted. Also, it appears that the plaintiff is still engaged in that business, but with what financial success is not shown. They further assume that plaintiff, but for the accident, would have been able every year up to the age of 72 to realize the same profit;

also, that plaintiff, though afflicted with an incurable disease, would live out her expectancy. While the reduction of the verdict by one-third seems liberal on the face of the figures, we are unwilling to hold that the trial judge abused his discretion, especially as he was in a better position than a reviewing court to judge the matter. *McCherry v. Snare & Triest Co.*, 130 App. Div. (N. Y.) 241; *McNulta v. Hendele*, 92 Ill. App. 273.

Plaintiff's cross-appeal is dismissed, and the judgment of the district court in all things

AFFIRMED.

MARIE L. BRADLEY, APPELLEE, V. WILLIAM BECKETT ET AL., APPELLANTS.

FILED JANUARY 16, 1929. No. 26265.

1. **Parent and Child: CUSTODY OF CHILD.** In a legal controversy between a mother and strangers over the custody of a child, where the strangers temporarily provided the child a home with the mother's consent, the best interests of the child are material considerations, but the rights of the mother as a natural guardian of her offspring may also be considered.
2. ———: ———. On facts outlined in the opinion, the mother of a child *held* entitled to its custody in preference to strangers who temporarily provided it a home with the mother's consent.

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

J. E. Porter, for appellants.

V. N. Thomas, contra.

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

ROSE, J.

This is a controversy over the custody of a child named Anna J. Bradley who was born at Crawford, Dawes county, Nebraska, March 19, 1925. The child was the youngest of three daughters. The mother's name was Marie L. Brad-

ley. Twelve days after its birth Anna Beckett took it to the home of herself and her husband, William Beckett, in Crawford. It has been in their custody and care ever since. They are well along in years, are childless, and are not related to the Bradleys. When the infant was 17 months old its mother asked for it and the Becketts refused to give it up. Upon an application by the mother for its custody, a writ of habeas corpus was issued August 23, 1926. The conflicting claims of the mother and the Becketts were asserted in formal pleadings. After a full hearing in the district court for Dawes county, judgment was rendered in favor of the mother September 7, 1927, and the Becketts appealed.

Should the custody of the child be taken from the Becketts and awarded to its mother? This is the question presented by the appeal. In determining the issue, the best interests of the child are material considerations, but the rights of the mother as a natural guardian of her offspring may also be considered.

Marie L. Bradley urges her motherhood and her love for her child. She also contends that the custody of the Becketts resulted from their generosity and ability to give the child proper care, but that their right to custody was only temporary; that the mother has a suitable home and is able to support and rear her children properly. The Becketts take the position that they accepted the child with the consent of its mother without any obligation to return it; that mutual love and attachment for the child bind it to them and them to it; that they are better able to rear and provide for it; that they are willing to care for it permanently; that, if returned, it will not have a suitable home.

The child was born at the home of Joseph Thompson and wife, parents of Marie L. Bradley. Anna J. Bradley, the infant in controversy, was the third child. Its mother at the time was separated from her husband who was not then supporting his family. In a pending suit she procured a divorce and the custody of her three children. In pre-

paring to support them, while the Becketts were keeping the baby, the mother took a course in a beauty culture school in Chicago. Upon her return to Crawford she joined her sister in conducting a beauty parlor there and promptly made a demand upon the Becketts for her child. She then had her own home on a lot adjoining that of her parents, the beauty parlor being in the house occupied by the latter. She was a high school graduate and had attended the state university. At the time of the trial she was earning approximately $100 a month.

In addition to uncontradicted testimony that the Becketts were able and anxious to provide the child a suitable home and that they were proper persons to have its custody and care, witnesses testified that on different occasions Joseph Thompson, the grandfather, had cruelly punished the older daughters of Marie L. Bradley while they were in the Thompson home, the grandmother having temporary charge of the Bradley children at times when their mother was at work in the beauty parlor. That this punishment was unnecessarily severe was contradicted by other witnesses; but, whatever the fact may be, cruel punishment is not likely to be inflicted in the future, since the police department of Crawford inquired into the matter.

An examination of the entire record leads to the conclusions that the mother, when she demanded her child, and when she applied for the writ of habeas corpus, was a fit person to have its custody; that she is now able to support her children; that she has a suitable home for them.

The testimony of Anna Beckett indicates that she and her husband had a right to temporary custody only. She said on the witness stand that the mother, when demanding her child, asked for a bill of expenses. What then occurred was stated in the language of the witness Anna Beckett as follows:

"'Well,' I said, 'you are not going to take her until I get her weaned and her teeth cut.' 'Yes,' she said, 'I am going to take her.' 'Well,' I said, 'if you are going to take her and going to be mean about it, you give me $2.50 a

day for every day I have had her.' 'Well,' she said, 'you will never get one dollar,' and I said, 'if you will let me keep her until we get her weaned and get her teeth, there would not be any expense, and you can take her.' "

This does not indicate that the mother had abandoned her child, or had forfeited her right to its custody, or that the Becketts had acquired a superior right. The entire burden of support did not fall on the Becketts. To some extent at least the mother or the grandparents furnished clothing and milk and did part of the washing. In the home of the Becketts the child would be deprived of the constant companionship and care of its mother and sisters. Out of compassion for the helpless infant and sympathy for the mother in a time of family trouble and pecuniary distress the Becketts gave the child not only a home but lavished upon it affection and care. The separation will no doubt be a distressing ordeal, but under the circumstances the best interests of the child and the natural rights of the mother seem to demand the sacrifice. This conclusion does not disparage the Becketts. They were prompted by the worthy impulses that keep open in humanity the spiritual fountains of generosity, sympathy and love.

AFFIRMED.

EARL E. BOYD, ADMINISTRATOR, APPELLEE, V. WALTER G. HUMPHREYS ET AL., APPELLANTS: TRENMORE CONE, APPELLEE.

FILED JANUARY 16, 1929. No. 26600.

1. **Master and Servant: INJURY TO EMPLOYEE OF SUBCONTRACTOR: LIABILITY OF CONTRACTOR.** Where an owner enters into a construction contract with another, and the latter sublets a segregated part thereof, and such subcontractor employs another to aid him in his part of the construction (each party having complied with the compensation statutes), and while such employee is engaged in the line of his duties he is injured to his damage, without fault on his part or on the part of his employer, but by and through the actionable negligence of the original

contractor, the latter is a "third" party as defined by such statutes, and is liable to such employee for all damages by him sustained by reason of such negligent act.

2. ———: ———: ———. Under the record, the subcontractor is the only employer of the injured party; further, such employer and his employees engaged in the enterprise are the only ones grouped, all others being "third" parties.

3. Evidence examined and found to support the recovery had.

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

Brogan, Ellick & Raymond, for appellants.

Mullen & Morrissey, Robert R. Mullen, C. J. Endres and *James H. Hanley, contra.*

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

THOMPSON, J.

This is an action wherein the appellee, Earl E. Boyd (hereinafter called plaintiff), as administrator of the estate of Henry Ray Peterson, deceased, seeks recovery of appellants, original contractors, hereinafter called defendants, for negligently causing the death of such Peterson. Trial was had, verdict and judgment rendered in favor of plaintiff for $6,500, to reverse which defendants appeal. Cone, subcontractor of the defendants, and employer of Peterson, is not complaining.

From the record we conclude: That all parties concerned in this case were, at the times involved, operating under our compensation statutes; that the owners of the property were desirous of excavating a certain lake, and, in pursuance of such purpose, let the contract to the defendants herein, who sublet a segregated part thereof to Cone; that Cone employed Peterson, then 19 years old, and under our statutes a minor, which minority, however, in no manner affects the questions here presented, other than as such minority would have bearing on the amount

of plaintiff's recovery on behalf of Peterson's dependents; that, in the course of such excavation by Cone, through the actionable negligence of defendants and without fault on the part of Peterson or Cone, Peterson was killed while at work in the course of his employment, leaving as dependents his father, mother, and minor brothers and sisters; that plaintiff was duly appointed administrator, made application for compensation on behalf of such dependents, and, as Cone the employer refused and neglected to institute this action, it was lodged, as is usual in such cases, by such administrator; that recovery was had as hereinbefore stated, and the same is not reversibly excessive.

While there are several claimed errors urged, each thereof is answered by the foregoing except the following question, to this court novel: Are defendants "third" parties under the provisions of chapter 28, Comp. St. 1922, known as our compensation statutes?

The holdings of the courts of last resort of many different states are cited by the respective parties in their briefs, which show extended research and close analysis on the part of their attorneys. However, the compensation statutes of the respective states which form the basis of the opinions thus cited are so dissimilar, and especially from that of our own, as to render the conclusions reached in no manner controlling. Thus, we are left to glean the intent of our legislative body from the context of the act itself.

Section 3041, Comp. St. 1922 (chapter 28), provides: "Where a third person is liable to the employee or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employee or to the dependents against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such employee or dependents, but such employer may recover any amount which such employee or his dependents would have been entitled to recover. Any recovery by the employer against such third person, in excess of the compensation paid by the employer after de-

ducting the expenses of making such recovery, shall be paid forthwith to the employee or to the dependents, and shall be treated as an advance payment by the employer, on account of any future instalments of compensation."

Section 3037 defines "employer" as including, "Every person, firm or corporation, including any public service corporation, who is engaged in any trade, occupation, business, or profession as described in section 97 of this chapter (3029), and who has any person in service under any contract of hire, express or implied, oral or written, and who prior to the time of the accident to the employee for which compensation under this article may be claimed, shall not, in the manner provided in section 103 of this chapter (3035), have elected not to become subject to the provisions of Part II of this article."

Section 3039 provides, in substance, that one who by scheme or artifice seeks to avoid being held responsible to the workmen for the provisions of this chapter shall be included in the term "employer;" but that this section shall be held to exclude an owner who lets a contract to a contractor in good faith, or a contractor who, in good faith, lets to a subcontractor a portion of his contract, if the owner or principal contractor, as the case may be, requires the contractor or subcontractor, respectively, to procure a policy or policies of insurance which guarantee payment of compensation according to this chapter to injured workmen.

Section 3040 provides, among other things: "The compensation shall be calculated with reference to the wage the workman was receiving from the person by whom he was immediately employed at the time of the injury."

Section 3029 provides, in part: "The provisions of this act shall apply to the state of Nebraska and every governmental agency created by it, and to every employer in this state employing one or more employees, in the regular trade, business, profession or vocation of such employer."

Section 3033, in part, provides: "When employer and employee shall by agreement, express or implied, or other-

wise as hereinafter provided, accept the provisions of Part II of this article, compensation shall be made for personal injuries or for the death of such employee by accident arising out of and in the course of his employment, without regard to the negligence of the employer."

Section 3038 provides, among other things: "The terms 'employee' and 'workman' are used interchangeably and have the same meaning throughout this article. The said terms include the plural and all ages and both sexes, and shall be construed to mean: * * * Every person in the service of an employer who is engaged in any trade, occupation, business or profession as described in section 97 (3029) of this chapter, under any contract of hire express or implied, oral or written, including aliens and also including minors who are legally permitted to work under the laws of the state, who for the purpose of making election of remedies under this code shall have the same power of contracting and electing as adult employees."

This chapter deals primarily with the immediate employer and his employee, unless where it was deemed an exception should be made, which exceptions are without force in this consideration and need not be stated. To hold that the statutes warranted the grouping of all those interested in the enterprise within the term "employer," to the extent of excluding them as "third" parties under the statutes, as contended for by defendants, would be to deny to such enactments the plain and every day conception of the language used. The person seeking employment selects the one by whom he desires to be employed, and their minds meet as to the manner of employment. The immediate employer controls, directs, and discharges those by him hired. If any injury coming within the statute occurs, the immediate employer is to receive the notice; he, or the injured party, may lodge the case with the compensation commissioner; if either are aggrieved by the award or refusal thereof, the one thus aggrieved, and he alone, may appeal. If the injury is caused by a third party's negligence, then the immediate employer must refuse or neglect to institute

the common-law action before the employee can thus proceed.

Thus runs the line of demarcation throughout the entire chapter. Hence, we conclude that, under the facts in this case, there is only one employer, and that is Cone, and the only ones grouped are Cone and his employees engaged in the enterprise. The defendants and all others are "third" parties.

The judgment of the trial court is

AFFIRMED.

CHARLES F. PETERSON, APPELLEE, V. WALTER G. HUMPHREYS ET AL., APPELLANTS: TRENMORE CONE, APPELLEE.

FILED FEBRUARY 21, 1929. No. 26673.

Case Followed. Record examined and found to be controlled by the law as announced in *Boyd v. Humphreys, ante*, p. 799; further, the judgment as rendered is sustained by the evidence.

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

Brogan, Ellick & Raymond, for appellants.

Mullen & Morrissey, Robert R. Mullen, C. J. Endres and *James H. Hanley, contra.*

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

THOMPSON, J.

Appellee Peterson recovered judgment against appellants for $2,500, to reverse which the latter appeal and challenge such judgment for the following reasons: That, under our compensation statutes, the appellants are not "third" parties, and, further, that the amount of recovery is excessive.

By agreement this case was consolidated with *Boyd v. Humphreys, ante*, p. 799. The contentions of the respective parties, so far as material, are substantially the same

in the two actions, hence our conclusions in *Boyd v. Humphreys, supra,* are controlling herein as to appellants' first challenge; and as to the second we find the evidence amply sufficient to sustain the recovery had.

It might be well, as further illustrative of the instant case, to state that the appellee Peterson is the father of the injured Peterson boy named in the above reported case, and was employed by the subcontractor Cone, as was the boy, and while so employed and in the course of his business as such employee, while each and all were operating under our compensation statutes, appellee was injured by and through the same actionable negligence of the appellants, the general contractors, as was his son.

Being satisfied with our holding in *Boyd v. Humphreys, supra,* it follows that the judgment of the trial court should be, and is,

AFFIRMED.

RAY MATTHEWS, APPELLANT, V. G. A. CRANCER COMPANY ET AL., APPELLEES.

FILED FEBRUARY 21, 1929. No. 26713.

1. **Master and Servant: WORKMEN'S COMPENSATION ACT: "EMPLOYER."** Under section 3039, Comp. St. 1922, the word "employer," as used therein, does not include an owner who requires his contractor to take out compensation insurance, and neither does it include a contractor who sublets and requires his subcontractor to take out such insurance.
2. ———: ———: **"THIRD PERSON."** Such owner, as to the employees of his contractor, is a "third person," as that term is used in section 3041, Comp. St. 1922, and likewise is such contractor as to the employees of his subcontractor.
3. ———: ———: ———: **LIABILITY.** Such "third person" (owner) is liable at common law for any and all damages sustained by his contractor's employees caused by his actionable negligence, and likewise is such "third person" (contractor) liable to the employees of his subcontractor.
4. **Record** examined, and found that the trial court erred in sustaining the demurrer and dismissing the action.

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

Hall, Cline & Williams and *M. L. Poteet,* for appellant.

Dressler & Neely, contra.

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

THOMPSON, J.

This appeal is prosecuted to reverse a judgment of dismissal of a common-law action for damages on the sustaining of a demurrer to the petition.

For a proper consideration of the demurrer it becomes necessary for us to set out the substance of the material facts pleaded in the petition challenged, all of which facts are admitted by the demurrer, and are as follows: The Crancer Company, appellee, was engaged in buying, selling and delivering pianos and other musical instruments in the city of Lincoln. Payton, appellee, was engaged in the business of moving pianos for hire, as an independent contractor. In the course of such business Payton hired Matthews, appellant, to operate a delivery van for him. In furtherance of its enterprise the Crancer Company contracted with Payton whereby the latter was to deliver pianos for it, and at the same time, as a precautionary measure, requested Payton to procure compensation insurance as by our statutes provided, for the protection of Payton's employees, which was done. Pursuant to the above indicated arrangements, and at the request of the Crancer Company, Payton sent Matthews for a piano, and directed him (as he, Payton, had been informed by the Crancer Company) where and when to go, and how to enter the building where the piano to be delivered was stored. Matthews then proceeded as thus directed, but through the negligence of the Crancer Company, and without fault on his part or on the part of Payton, Matthews was seriously and permanently injured while in the course

of the business for which Payton had employed him, to his great damage. Matthews applied for, and received, compensation from Payton under the above referred to statutes. Payton, after having been by Matthews requested to bring this common-law action, refused and neglected to do so, and Matthews instituted it himself, making Payton a party defendant so that his rights of subrogation and recoupment might be safeguarded.

It is sufficient to say that the allegations of the petition, if proved, would render the Crancer Company liable at common law for the damages which Matthews sustained by reason of the injuries he received, unless such Crancer Company is absolved therefrom by reason of its having required Payton to take out compensation insurance. This conclusion is in harmony with the views expressed in the brief of appellees, as to the demurrer and the questions involved by reason thereof, wherein it is stated: "The Crancer Company demurred to the amended petition filed by the plaintiff for the reason that it had required Payton by express contract to procure a policy of compensation insurance as provided in the compensation act, and was therefore specifically exempted from any common-law liability under section 3039 of the Nebraska workmen's compensation law, and for the further reason that under such section Matthews' rights were to be tested solely by the provisions of the compensation act, and he could not legally bring a common-law suit for damages against the owner of the business in question."

As further stated in appellees' brief, in substance, we have but one question submitted for our consideration: Is the Crancer Company a "third person" within the meaning of section 3041 of such compensation statutes? This question, however, involves the construction of section 3039, as well as section 3041, for, if under section 3039 the Crancer Company is an "employer" of Matthews within the meaning of the act, then certainly it could not be a "third person" as that term is used in section 3041.

We will consider these two sections with others relative

thereto, as was done in the case of *Boyd v. Humphreys, ante,* p. 799.

Section 3039 provides in substance that any owner, or contractor, or subcontractor, who shall, through scheme, artifice or device, seek to execute work without being responsible to the workmen for compensation under the article, shall be included in the term "employer," and with the immediate employer shall be jointly and severally liable to pay compensation, and be subject to all the provisions of the article. And further provides: "This section, however, shall not be so construed as to cover or mean an owner who lets a contract to a contractor in good faith, or a contractor who, in good faith, lets to a subcontractor a portion of his contract, if the owner or principal contractor, as the case may be, requires the contractor or subcontractor, respectively, to procure a policy or policies of insurance from an insurance company licensed to make such insurance in this state, which policy or policies of insurance shall guarantee payment of compensation according to this article to injured workmen."

As we construe this section, the word "employer," as used therein, does not include an owner who requires his contractor to take out compensation insurance, and neither does it include a contractor who sublets and requires his subcontractor to take out such insurance. That is, one who contracts with another to have labor performed, and requires such other to protect the latter's employees by providing compensation insurance, is not an "employer" of such employees, or to them responsible as such; and the same is true as between a contractor and his subcontractor, if the statutory requirements as to compensation insurance are complied with the contractor is not an "employer" of the subcontractor's employees, and neither is he liable to them as such.

Applying this construction to the record before us, the Crancer Company, having required Payton to procure compensation insurance, would have been released from further liability to Payton and his employees so long as it remained

quiescent; but when, as in this case, by and through its wrongful acts of omission and commission, Matthews, Payton's employee, is injured and damaged, it is liable therefor.

Thus, we conclude that the Crancer Company, as to Matthews, was not an "employer," but a "third person" as such term is designated in section 3041, and is answerable to him in damages for the injuries he received. In thus concluding we have but followed our holding in the case hereinbefore cited. Further, under this record and such section 3041, Matthews was clothed with authority to prosecute this action. *O'Donnell v. Baker Ice Machine* Co., 114 Neb. 9.

It follows that the trial court erred in sustaining the demurrer and dismissing the action.

The judgment is reversed and the cause remanded, with leave to defendants to answer.

REVERSED.

JAMES SLOAN, APPELLEE, V. J. S. HARRINGTON, APPELLANT.

FILED FEBRUARY 21, 1929. No. 26719.

1. Master and Servant: WORKMEN'S COMPENSATION ACT: SURRENDER OF RIGHT OF ACTION. Under the record in this case, the surrender, covered by our compensation statutes, of the right to prosecute an action at common law for damages arising from the actionable negligence of another applies solely to the Keystone Company and its injured employee, Sloan.

2. ———: ———: "THIRD PERSON." The term "third person," as used in section 3041, Comp. St. 1922, and applied herein, signifies persons other than such Keystone Company and its injured employee.

3. Trial: WITNESSES: CROSS-EXAMINATION. In a personal injury action, it is permissible, under the rule promulgated in *Jessup v. Davis*, 115 Neb. 1, for the plaintiff to inquire of the defendant on cross-examination as to whether or not he carries liability insurance, and whether he, personally, employed the attorneys for the defense.

4. ———: ———: ———. The purpose of such inquiries is

to inform the court, jury, attorneys, and litigants as to the true status and actual interest of the parties concerned as well as those participating in the litigation.

5. ———: ———: ———: INSTRUCTIONS. Further, if requested so to do, the court should, by an appropriate instruction, limit the jury's consideration of such elicited testimony to the purpose permitting its reception in evidence.

6. *Boyd v. Humphreys, ante*, p. 799, *Peterson v. Humphreys, ante*, p. 804, and *Matthews v. Crancer Co., ante*, p. 805, approved and followed.

7. **Quære.** The question of whether or not the term "third person" can be applied to employees of an immediate employer, as between themselves, is left undetermined in this case, as it was in each of the cases noted in the preceding paragraph.

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

Dressler & Neely and *Amos Henely*, for appellant.

Kennedy, Holland, DeLacy & McLaughlin, contra.

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

THOMPSON, J.

In this action a judgment was recovered by appellee Sloan against appellant Harrington for the sum of $15,000, which on hearing of motion for new trial was, by the court, reduced to $10,000, to reverse which judgment Harrington appeals, and as to the reduction of the amount of recovery from $15,000 to $10,000 Sloan files a cross-appeal.

The city of Omaha was desirous of constructing a storm sewer, and in pursuance thereof let the contract for such construction to the Keystone Pipe & Construction Company, hereinafter called the Keystone Company, and at the same time required it to take out compensation insurance as by the compensation statutes of this state provided. The Keystone Company then sublet a segregated part of the enterprise to Harrington, and as a part of such subletting required him to provide himself with compensation

insurance. In furtherance of that part of the enterprise retained by the original contractor, it employed Sloan, appellee, to lay pipe in trenches excavated and conditioned by Harrington and his employees. As Sloan, in the course of his employment, was so placing a section of pipe, through the negligence of Harrington and his employees, and without fault on the part of the Keystone Company or Sloan, the latter was seriously and permanently injured to his great damage.

It will be seen that all parties involved herein were, so far as their respective contracts are concerned, proceeding under our compensation statutes. The petition is in usual form in actions brought by an employee damaged as charged in this case, by a "third person" as that term is used in section 3041, Comp. St. 1922. Sloan, in his petition, claims in substance that Harrington is, as to him, such a "third person," and thus liable to him at common law for all the damage caused by the negligence of Harrington personally, or by and through his employees. Thus, there is this question, among others, presented: Is Harrington a "third person" within the meaning of section 3041 aforesaid as to Sloan, and indirectly as to the Keystone Company?

It is the contention of Harrington that, as the original contract included the whole project, and the owner required the contractor to provide himself with compensation insurance, and the contractor required the subcontractor to do likewise, the surrender, covered by the statutes involved, of the right to prosecute an action at common law for damages arising from the actionable negligence of another applies to each and all of such parties and their employees; and, further, that the elective compensation provided by our compensatory act is Sloan's sole recovery.

We are convinced that, under the record in this case, such surrender is one that applies solely to the Keystone Company and its injured employee, Sloan; further, that Harrington is a "third person" as to Sloan, and thus liable as by the latter claimed.

To avoid the effect of the foregoing conclusion, however, it is insisted by Harrington that his employees and those of the Keystone Company, in that part of the enterprise out of which the injury to Sloan arose, were, as a matter of fact, jointly acting. This contention is not sustained by the record, and needs no further consideration. Thus, as above determined, Harrington is a "third person." *Boyd v. Humphreys, ante,* p. 799; *Peterson v. Humphreys, ante,* p. 804; *Matthews v. Crancer Co., ante,* p. 805. The question of whether or not the term "third person" can be applied to employees of an immediate employer, as between themselves, is left undetermined in this action, as it was in each of the cases above cited.

Another ground relied on for reversal is that the trial court erred in permitting the attorneys for Sloan to inquire of the defendant on cross-examination as to whether or not he carried liability insurance, and as to whether or not he, personally, employed the attorneys for the defense. The rule permitting of such inquiries was promulgated by this court in *Jessup v. Davis,* 115 Neb. 1, in which case we again construed section 25, art. V of the Constitution of this state as amended in 1920, aided by previous decisions of this court cited in the *Jessup* case. Such rule was in full force at the time of the trial of the instant action, hence, as stated in *Frickel v. Lancaster County,* 115 Neb. 506, 514, this rule "is of course binding on us in review of this case." The purpose of such inquiries, and others of a kindred nature, is to inform the court, jury, attorneys, and litigants as to the true status and actual interest of the parties concerned as well as those participating in the litigation. When this purpose has been met the inquiry should cease. Further, if requested so to do, the court should, by an appropriate instruction, limit the jury's consideration of such elicited testimony to the purpose permitting its reception in evidence. The record before us does not disclose such a request. We do not find the questions propounded to the defendant in the instant case of such a character as to

prejudicially influence the jury, or to deny Harrington due process of law.

We have also given consideration to the challenge of Harrington that the judgment is not supported by the evidence; likewise, the challenge of Sloan, presented by his cross-appeal, that the court erred in reducing the amount of recovery as found by the jury. In doing so, we have carefully examined the entire record, and conclude that the judgment finally rendered is supported thereby.

No reversible error appearing in the record before us, the judgment of the trial court is

AFFIRMED.

JUDITH HALL, APPELLEE, V. LAWRENCE R. RICE ET AL., APPELLANTS.

FILED JANUARY 16, 1929. No. 26161.

1. **False Imprisonment: ELEMENTS: MALICE.** In an action for false imprisonment, malice is not a material element.
2. **———: INSTRUCTIONS: MALICE.** In an action for false imprisonment, an instruction that malice is immaterial, except in so far as, in your opinion, it may affect the extent of her damages, is erroneous, as punitive and exemplary damages are not allowed in this state, unless in cases provided for by express statute, of which false imprisonment is not one. *Johnson v. Bouton*, 35 Neb. 898, syllabus 3, overruled.
3. **Libel and Slander: PRIVILEGED COMMUNICATIONS.** Twenty clerks were employed in a drug store having several departments and a number of cash registers upon which sales were rung up by the clerks indiscriminately. One of the clerks was suspected of taking money from one of the registers, and making false registration of sales, and signed a written confession to that effect. *Held*, in an action for slander by the delinquent against the manager and employer, that a communication by the former to the other clerks of the facts of such confession was qualifiedly privileged.
4. **———: ———: BURDEN OF PROOF.** Where the slanderous words, although libelous *per se*, were uttered under circumstances of qualified privilege, the burden is upon the plaintiff to prove by a preponderance of the evidence that they were uttered with express malice.

5. ———: MALICE: PRESUMPTION: BURDEN OF PROOF. Where the slanderous words are libelous *per se*, malice is presumed, and the presumption furnishes sufficient evidence on that point *prima facie*. It is then incumbent upon defendant to produce evidence sufficient to balance or overcome the presumption; but the burden of proving malice does not shift; it remains with the plaintiff. So much of the fourth syllabus and opinion in *Estelle v. Daily News Publishing Co.*, 99 Neb. 397, as apparently conflicts with the rule as above stated, is overruled.

6. ———: PRIVILEGED COMMUNICATIONS: INSTRUCTIONS. In an action for slander presenting a question of qualified privilege, an instruction that, if the jury found that plaintiff did not take any money belonging to defendant company, defendant's manager would not be justified in stating to the other employees that plaintiff had taken the money and had confessed, is prejudicially erroneous, as it ignores the defense of privilege pleaded in the answer.

7. Trial: INSTRUCTIONS. It is the duty of the trial judge to instruct the jury correctly upon the law as applied to the issues presented by the pleadings, if supported by the evidence, whether requested or not.

8. Appeal: OBJECTIONS. Where objection is made to improper argument of counsel in opening and a ruling had thereon, it is not necessary to make repeated objections on the same point to arguments of other counsel in the closing, in order to review such conduct.

9. ———: MISCONDUCT OF COUNSEL. Conduct of counsel in argument, set forth in opinion, *held* ground for reversal.

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

Montgomery, Hall, Young & Johnsen, for appellants.

George Evens and *Thomsen, Mossman & Standeven, contra.*

Heard before GOSS, C. J., ROSE, THOMPSON and EBERLY, JJ., and REDICK and STALMASTER, District Judges.

REDICK, District Judge.

The plaintiff brings this action against the defendants, Lawrence R. Rice and Louis K. Liggett Company, a cor-

poration, and sets forth in her petition two causes of action, one for false imprisonment and one for slander. Plaintiff was in the employment of the defendant company as manager of the candy department, and defendant Rice was general manager of the drug store.

For her first cause of action, plaintiff alleges that she entered the employ of the defendant company about June 15, 1926, and continued such employment until November 12 following, when she was discharged; that on November 12 she was called from the store to the office and accused of stealing money, that she was forcibly detained in the office, and by threats and intimidation compelled to sign a confession to the effect that she had made a sale in the amount of $2.51 and rung up on the register only 51 cents, had taken $1 from the register for her own purposes, and had, during her employment, taken money of the company in different amounts averaging about $3 a day, a total of $350; that defendants had reported such defalcation to the insurance company who had plaintiff's fidelity bond, in consequence of which she had been blacklisted and unable to obtain work, and alleged damages of $10,000.

For her second cause of action, she alleged that the defendants, wrongfully and wilfully and with the purpose of injuring plaintiff in her character and standing in the community, stated to the other clerks in the store that plaintiff had embezzled money belonging to defendant company and had signed a written confession to that effect; that defendant Rice uttered said slander with full knowledge that the same was untrue and that the confession had been secured by threats and coercion, and asks damages of $15,000.

In separate answers, the defendants answered the first cause of action and denied each allegation thereof except the employment of plaintiff and the forwarding of notice of the defalcation to the bonding company. Defendants further allege that on November 12, 1926, plaintiff was observed to make a cash registration of only 51 cents on a $2.51 sale in her department, and upon being asked for

an explanation admitted the facts set forth in the confession, and made the same voluntarily without any coercion on the part of any one; that plaintiff actually made misappropriations of money, as admitted by her, and that notice to the bonding company was an act which defendant had a legal right to do.

In answer to the second cause of action, defendants denied each and every allegation not specifically admitted, alleged the facts with reference to the register, misappropriation and confession as stated in the answer to the first cause of action, and after the signing of the confession, defendant informed plaintiff's coworkers and fellow employees thereof, and that such communication was made in good faith, in the interest of the integrity of the business and of plaintiff's fellow employees, without malice, for justifiable purposes and with an actual belief in its truth; and that the making of such communication was privileged under all the circumstances.

In reply plaintiff filed a general denial.

The cause was tried and submitted to a jury, which returned a verdict for the plaintiff in the sum of $5,000. Motions for new trial were overruled, judgment rendered on the verdict, and defendants appeal.

Defendants file eight assignments of error as ground for reversal, three of which we will consider.

1. Exception is taken to that portion of instruction No. 12 on the measure of damages upon the cause of action for false imprisonment, to the effect that the jury should take into consideration "whether or not the defendants acted maliciously in the premises. Whether defendants acted maliciously, however, is immaterial to her cause of action for any false imprisonment, except in so far as, in your opinion, it may affect the extent of her damages." The point made is that by this instruction the jury were permitted to assess punitive damages against the defendants if they found that they acted maliciously. The instruction is erroneous. Malice, as stated, was no part of the cause

of action for false imprisonment, and to authorize that element to enter into the assessment of the damages had a tendency to permit the jury to assess the same at a sum in excess of just compensation. It is true that in closing the instruction the court told the jury that they could not allow exemplary or punitive damages, but this was inconsistent with the previous statement, and we are not able to say which statement was adopted by the jury. In 25 C. J. 545, it is said: "Evidence as to malice is ordinarily inadmissible (in a false imprisonment action), malice not being an element of the cause of action. But evidence of good faith importing a lack of malice is admissible for the purpose of obviating or mitigating exemplary damages." The latter part of the text quoted has no application in this state because punitive or exemplary damages are not allowed, unless by express statute in certain cases, in which false imprisonment is not included.

The plaintiff cites on this point *Johnson v. Bouton*, 35 Neb. 898, in which syllabus 3 is as follows: "The question of malice in an action for false imprisonment is immaterial, except so far as it affects the measure of damages." The case in question is not controlling for two reasons: (1) The question arose from the refusal of the trial court to instruct the jury that the plaintiff must prove that the original prosecution was without probable cause and was malicious, and the court approved the refusal, stating: "False imprisonment is the unlawful detention of the injured party"—and then added the matter quoted in the syllabus above, citing *Comer v. Knowles*, 17 Kan. 436. This last expression was not necessary to the determination of the question presented to the court. (2) Under the laws of Kansas at the time of the decision cited, punitive and exemplary damages were allowed.

2. Exception is taken to instructions Nos. 13 and 15, given by the court on its own motion, as follows:

"13. With regard to the plaintiff's second cause of action, *i. e.* her claim for damages on account of slanderous statements claimed to have been made by the defendants,

the defendants in this action allege substantially as a defense that the plaintiff on November 12, 1926, misappropriated money from the cash register and that she had previously during the time of her employment misappropriated other moneys of the defendants. The burden of proof rests upon the defendants to prove these allegations by a preponderance of the evidence. * * * If they have failed to prove either of these allegations by a preponderance of the evidence, then it will be your duty to return a verdict for the plaintiff for the amount in which you find she has been damaged because of these statements made by the defendants."

"15. If you find the plaintiff did not at any time take or misappropriate any money belonging to the defendant company, then the defendant Rice would not be justified in stating to the employees of the store that the plaintiff had taken money of the company or that she had confessed to having taken money of the company."

The objection to these instructions is that they omit all reference to the question of the privileged character of the communication, predicating liability of defendants solely upon the determination of the question whether or not plaintiff had in fact embezzled money of defendant company. Defendants contend that, where the communication complained of is one of qualified privilege, defendants cannot be made liable therefor, unless the plaintiff proves by a preponderance of the evidence that the slanderous communication was made with express malice; that if defendants had an honest belief in the truth of the statements made by them, and such belief was founded upon facts reasonably inducing it, the defendants are not liable, even though the statements were false in fact. We think the point is well taken. That the communication was one of qualified privilege is beyond dispute. It dealt with a matter in which defendant and its employees had a mutual interest. The cash registers in the store were used by all of the employees, at one time or another, and each employee had a personal interest in the honesty of every other, for if

one is dishonest suspicion may be cast upon all. The defendants were interested in the integrity of the business and in protecting their employees from unwarranted criticism in the performance of their duties. The rule is succinctly stated in *Wise v. Brotherhood of Firemen and Enginemen,* 252 Fed. 961: "A communication is privileged if made *bona fide* by one who has an interest in the subject-matter to one who also has an interest in it or stands in such relation that it is a reasonable duty, or is proper, for the writer to give the information." This statement of the rule was approved in *Peterson v. Cleaver,* 105 Neb. 438, in which it was also held that a communication which is qualifiedly privileged, though it contain words which are libelous *per se,* is a complete defense to an action for libel, "unless it is shown by plaintiff by a preponderance of the evidence that the publication was made with express malice." See *Nichols v. Eaton,* 110 Ia. 509; *Harrison v. Garrett,* 132 N. Car. 172; also *Livingston v. Bradford,* 115 Mich. 140, which quotes with approval the remark of Baron Parke: "If such communications are fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected by the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits."

In *Estelle v. Daily News Publishing Co.,* 99 Neb. 397, the fourth syllabus is as follows: "A defendant is not liable for publishing privileged communications unless there was actual malice on his part, and such malice must appear before there can be a recovery. If, however, the statements published are false, and libelous *per se,* malice is presumed, and the burden is upon the defendant to prove that the evidence of the truth of the statements was such as would justify him in making them, and that he did so in good faith, believing them to be true." And in the opinion, page 400, it is said:

"One who publishes of a candidate for office a statement relating to the candidate's qualifications and fitness for the office is not liable in damages if the statement was true

and was made with good motives and for justifiable ends, although such statement is libelous *per se*. If the statement is untrue in fact, the burden is upon the party who makes it to prove, not only that he in good faith believed the truth of the statement, but that he had evidence sufficient to justify a reasonable man in belief of its truth."

There is an apparent conflict between this statement of the rule and that in *Peterson v. Cleaver, supra,* but we think it is only apparent. The latter case merely states the rule, while the former states the legal presumption as a sufficient compliance therewith, unless it is met by evidence of the defendant that he in good faith believed the truth of the statement and that he had evidence sufficient to justify a reasonable man in belief of its truth. In this state it is too well established for discussion that the burden of proof never shifts, that where it is rightly placed upon one party it continues there until the end of the trial. It not infrequently happens that the words "burden of proof" are used to express the idea that, after a *prima facie* case is made by the party having the burden, it is then incumbent upon the other party to produce proof to meet the case so made; but such employment of those words is inaccurate. The word "burden" when used with reference to proof has attained a special significance in law, indicative of a requirement that the party upon whom it is cast must prove the fact in question by a preponderance of the evidence; its use, therefore, to express the idea merely that evidence must be produced to meet a *prima facie* case made is inaccurate. The use of the word "burden" as applied to the defendant in syllabus 4 in the *Estelle* case was unhappy, and is inconsistent with the first paragraph thereof, which implies that the burden of proving malice is upon the plaintiff, as positively held in *Peterson v. Cleaver, supra.* Having thus stated the rule, it is confusing to place the burden of proving the nonexistence of malice upon the defendant. A more accurate statement would be: "If, however, the statements published are false, and libelous *per se,* malice is presumed, and the defendant is then re-

quired to produce evidence sufficient to meet or overcome the presumption, to the effect that evidence of the truth of the statements was such as would justify him in making them, and that he did so in good faith, believing them to be true." We think, moreover, that the word "burden" as used in the syllabus and opinion should be understood as meaning "incumbent upon" or "duty." The presumption merely furnishes a rule of evidence which is sufficient until balanced or overcome by evidence upon the part of the defendant. Whether or not the evidence was sufficient in the present case to defeat the action was a question for the jury and should have been submitted to them by a proper instruction.

Plaintiff, however, invokes the well-established rule that, in order to present for review the failure of the trial court to instruct the jury upon particular issues or evidence in a case, the party complaining must have requested instructions on the omitted topic, citing a number of cases from this state. We have examined those cases and all present a failure to instruct on some particular feature of the case. In one of them it is said: "It is not contended that any of the instructions misstated the law, but the complaint is they omitted certain features of the case upon which the jury should have been instructed, both in stating the issues and the law applicable thereto." *Carter White Lead Co. v. Kinlin*, 47 Neb. 409. The case here presents a different situation. It is not merely a case of omission, but one of commission. The complaint is that the instructions above quoted misstated the law as applied to the case on trial, that it is not a correct statement in a slander case involving the question of privilege, that liability may be predicated by the jury solely upon the falsity of the statement complained of without reference to the question of privilege. That question was properly included in the statement of the pleadings, but was ignored by the instructions which purported to cover all matters necessary for plaintiff to prove. We think the rule contended for is not applicable.

3. The last assignment of error to which we will refer has to do with misconduct of counsel, which defendants claim resulted in an excessive verdict. Upon the opening argument of Mr. Evens, the following colloquy occurred:

"Mr. Johnsen: The defendants except to the argument of Mr. Evens with reference to the giganticness of this corporation, as being prejudicial, and having no bearing on the issues in this case, and having no bearing on the evidence. The exception is predicated upon the remarks made by Mr. Evens to the jury, that the defendant is one of the most gigantic corporations in the country. The Court: I think the exception should be sustained. It is really immaterial whether it is a large corporation or a small one, and I think you had better not comment upon it. Mr. Evens: I will eliminate the word 'gigantic' but I can state that there are some four hundred stores. Mr. Mossman: Call it small, George, call it small. Mr. Johnsen: I except to the remark of Mr. Mossman, as prejudicial. The Court: Yes; leave those remarks out."

Upon the closing argument by Mr. Mossman, a copy of which was presented upon a motion for a new trial before the district court and preserved in the bill of exceptions, the rule and admonition of the court above set forth was entirely ignored by the speaker. Glancing through the report of his argument we note that he referred to defendant company as a corporation without any feeling or soul three times, as a big corporation twice, as consisting of 440 stores once, as rich clients once, and to the witnesses for defendants as these New Yorkers ten times. We need hardly remark that these matters were immaterial and furnished no proper basis for argument. This is particularly true as to such of them as had been ordered left out by the court. Such tactics have been frequently condemned by the courts. Plaintiff calls attention to the rule that, before improper conduct of counsel may be urged as error upon appeal, the objection to it must have been made at the time, a ruling of the court had thereon and exception taken, which is undoubtedly the general rule, but not applicable to the pres-

ent situation. Objection was made and ruling had upon the subject-matter during the opening argument. We think it was unnecessary for defendants' counsel thereafter to make repeated objections to each disregard of the ruling of the court. To require this might result in placing the defendants in a less favorable position before the jury, and thus inflict upon them a penalty for the wrongful conduct of plaintiff's counsel. The remarks of Sullivan, J., in *Ashland Land & Live Stock Co. v May*, 59 Neb. 735, are pertinent:

"We have little patience with counsel who deliberately seek to achieve success by lawless methods; and we do not hesitate, in any case, to deprive them of advantages thus obtained. In the performance of professional duties, counsel should endeavor always to conform their own conduct to the law which they have been commissioned to assist in administering."

In the trial of every contested lawsuit, there is abundance of opportunity, growing out of the material facts and circumstances of the case, for the display of extraordinary talent and the exercise of adroitness and finesse without resort to illegitimate methods tending only to arouse the passion and prejudice of the jury. It is of greater importance that the administration of justice be regular and orderly, than that counsel be afforded an opportunity to exhibit their peculiar prowess in the use of questionable methods.

We are not able to determine what influence, if any, the improper argument of counsel had upon the jury, but it was well calculated to distract their attention from the real issues, and the refusal to grant a new trial on this ground was prejudicial error.

Other errors assigned need not be discussed, as they will probably not occur on another trial.

For errors above noted, the judgment of the district court is

REVERSED.

CECIL F. GALLOWAY, APPELLEE, V. EMIL E. WOLFE ET AL., APPELLANTS.

FILED JANUARY 19, 1929. No. 26393.

Statutes: ACT RELATING TO PUBLIC DANCES: CONSTITUTIONALITY. That portion of section 9795, Comp. St. 1922, providing that any person of the age of fourteen years or upwards found engaged in public dancing on Sunday shall be fined or imprisoned, or both, but excepting from its provisions "cities of metropolitan class having a public welfare board with authority to regulate public dancing," is invalid, as class legislation, under section 18, art. III of the Constitution of Nebraska, prohibiting the passage of any local or special law "granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever:"

(a) Because it discriminates between persons of the same class doing the same act, and,

(b) Because it discriminates between metropolitan cities, and between them and other cities, by a classification having no reasonable basis.

APPEAL from the district court for Saunders county: HARRY D. LANDIS, JUDGE. *Reversed and dismissed.*

Slama & Donato, J. H. Barry and *Burkett, Wilson, Brown & Wilson,* for appellants.

O. S. Spillman, Attorney General, Richard F. Stout, E. S. Schiefelbein and *Cecil F. Galloway, contra.*

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

REDICK, District Judge.

This is an action brought by Cecil F. Galloway, county attorney of Saunders county, to enjoin the defendants from promoting public dancing on Sunday at a park located on Scott's lake, about a mile and three-quarters from the village of Morse Bluff, in that county. The defendants are respectively the owner of the land, the Scott's Lake Outing Club, a corporation, and its officers. The petition alleges that the defendants are permitting and promoting public

dancing on the premises of the club, on Sundays, contrary to the statute in that behalf. The defendants by their answers admit that one of the purposes of the club is to hold dances on Sunday in connection with other amusements usually indulged in at amusement parks, but contend (1) that the statute upon which plaintiff bases his action for an injunction is unconstitutional, being class legislation, and (2) that a court of equity has no jurisdiction to grant the relief prayed. An injunction was allowed by the district court, and defendants appeal.

Section 18, art. III of the Constitution, provides: "The legislature shall not pass local or special laws in any of the following cases, that is to say: * * * Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever. In all other cases where a general law can be made applicable, no special law shall be enacted."

Section 9795, Comp. St. 1922, is the statute under attack, and, in so far as it applies to the question for decision, is as follows:

"If any person of the age of fourteen years or upward shall be found on the first day of the week commonly called Sunday, * * * engaged in public dancing, * * * he or she shall be fined in a sum not exceeding twenty dollars, or be confined in the county jail for a term not exceeding twenty days, or both, at the discretion of the court. * * * Provided, the provision of this act relating to public dancing shall not apply in cities of metropolitan class having a public welfare board with authority to regulate public dancing."

The first question for determination is whether or not the statute above quoted is class legislation within the prohibition of the Constitution above set forth. The principles which must govern us in determining this question are well established and understood. In *Allan v. Kennard,* 81 Neb. 289, it was held: "The power of classification rests with the legislature, and this power cannot be interfered with by the courts, unless it is clearly apparent that the legislature has by artificial and baseless classification at-

tempted to avoid and violate the provisions of the Constitution prohibiting local and special legislation." And it was said in the opinion, page 293: "It is also true that the legislature may classify the subjects, persons or objects as to which it legislates. But such classification should rest upon some difference in situation or circumstances between the thing or person placed in one class and that placed in another." In *State v. Murray,* 104 Neb. 51, 55, the following statement was approved: "By class legislation, we understand such legislation as denies rights to one which are accorded to others, or inflicts upon one individual a more severe penalty than is imposed upon another in like case of offending."

In *Low v. Rees Printing Co.,* 41 Neb. 127, an act excepting those engaged in farm or domestic labor from the operation of the eight hour law was held invalid as class legislation, citing with approval the language of the court in *State v. Sheriff of Ramsey County,* 48 Minn. 236: "In *Nichols v. Walter,* 37 Minn. 264, it was held that a law was general and uniform in its operation which operates equally upon all the subjects within the class for which the rule is adopted, but that the legislature cannot adopt an arbitrary classification, though it be made to operate equally upon each subject within the class; and the classification must be based on some reason suggested by such a difference in the situation and circumstances of the subjects placed in different classes as to disclose the necessity or propriety of different legislation in respect to them."

"A law which is general and uniform throughout the state, operating alike upon all persons and localities of a class, or who are brought within the relations or circumstances provided for, is not objectionable as wanting uniformity of operation." *State v. Berka,* 20 Neb. 375.

In *Connolly v. Union Sewer Pipe Co.,* 184 U. S. 540, 560, it was said by Justice Harlan: "The difficulty is not met by saying that, generally speaking, the state when enacting laws may, in its discretion, make a classification of persons, firms, corporations and associations in order to subserve

public objects. For this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified by calling it classification.' * * * *Gulf, Colorado & Santa Fe Railway v. Ellis*, 165 U. S. 150."

With these principles in mind, let us consider their application to the present problem, and first we should inquire what is the classification attempted to be made by the legislature. The act does not relate to the government of municipalities, and makes no attempt to classify them as such. It has to do only with the conduct of individuals, and divides them into two classes: First, those who live in metropolitan cities, and, second, those who live outside such cities. The first part of the act is general in its terms and includes all persons "of the age of fourteen years or upward" found engaged in public dancing on Sunday. This, therefore, is the class to which the legislation is to be applied. But the act by the proviso seeks to withdraw from its operation persons engaged in public dancing on Sunday in metropolitan cities having a public welfare board with authority to regulate such dances. The effect of this legislation is to make it a misdemeanor punishable by fine and imprisonment for those members of the class engaging in public dancing on Sunday outside of metropolitan cities, but permits other members of the same class to so engage without penalty in the metropolitan cities specified. What reason can be found for this discrimination? Clearly, the mere fact of the location of the individual in one city or another, or in the country, forms no basis for classification. If public dancing on Sunday is a scandal or injurious to health or morals in a village or country park, it is at least equally so in metropolitan cities, if not, indeed, more so, because of the greater number of persons liable to observe it. The only reason suggested is that public dancing may be supervised, regulated and controlled in metropolitan

cities having a welfare board, while they are not subject to such regulation in the country. We will discuss this proposition later on.

It seems to be contended by plaintiff that the classification attempted by the legislation is between counties or surburban communities and metropolitan cities; but, as just above suggested, the act condemned, if vicious, is equally so, considering the general purpose of the legislation, whether committed in a city or less populous community. There is, therefore, no reasonable relation between the act and the classification contended for. Indeed, the legislature seems to have recognized this fact by placing in its proviso the condition that the act should be inapplicable only to metropolitan cities *having a welfare board with authority to regulate public dancing.* We are clearly of the opinion that the classification attempted is of persons or individuals as above indicated, and confers upon members of the class operating in metropolitan cities a special privilege which is withheld from other members of the same class operating in other parts of the state, and is therefore within the prohibition of the Constitution. *Bessette v. People,* 193 Ill. 334; *Badenoch v. City of Chicago,* 222 Ill. 71.

In *Connolly v. Union Sewer Pipe Co.,* 184 U. S. 540, it was held that an Illinois trust statute, providing that all persons who combine their capital, skill or acts for any of the purposes named in the act may be punished as criminals, while agriculturists and live stock raisers, in respect of their products or live stock in hand, are exempted from the operation of the statute, was invalid under the provisions of the federal Constitution that no state shall deny to any person within its jurisdiction the equal protection of the laws, and approved the interpretation of that section as stated in *Missouri v. Lewis,* 101 U. S. 22, 31: "That no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circum-

stances." So far as the phrase "same place and under like circumstances" is concerned, it has no reasonable application to the present case for reasons above stated. It would seem, however, that public dancing is substantially the same wherever carried on, whether out of doors in a park, as here, or in a public hall in a city, and under the circumstances of a dance floor and music.

The plaintiff cites *Allan v. Kennard,* 81 Neb. 289, sustaining a legislative classification discriminating between counties and metropolitan cities with reference to the duties of the county comptroller; there was no attempt to classify persons or individuals; *In re Caldwell,* 82 Neb. 544, classifying barbers as common laborers; and *State v. Murray,* 104 Neb. 51, sustaining the act in question providing a greater penalty for barbers conducting their business on Sunday than that imposed upon common laborers, on the ground that there was a reasonable distinction between barbers and other common laborers, and that the act applied to all barbers in the state. These cases are not in point here. In the instant case the act is not applicable to all members of the same class but discriminates between them without apparent reason.

We next consider the point that metropolitan cities having a welfare board furnish a sufficient difference in circumstances upon which to base the attempted classification. There would be more force in this suggestion if all cities and communities having a welfare board, or power to regulate public dancing, were excepted from the provisions of the act. The reason for the classification would be much more apparent as the regulation of public dances, which require no invitation but are open to all those who are willing to pay a small fee for the privilege, is most desirable on grounds of morality and decency. But to single out metropolitan cities having a welfare board, as a class, has no foundation in reason or experience. The same vices and immoralities may be present at a barn dance in the country as in a gilded palace in a metropolitan city. What reason can be suggested for discrimination, for the pur-

poses of the act, between the city of Omaha and the city of Lincoln? First class cities in Nebraska of over 40,000 and under 100,000 inhabitants, and of 5,000 to 25,000 inhabitants, and second class cities, all have power to regulate public amusements and enforce Sunday laws, but they have no welfare board, and therefore public dancing is a misdemeanor therein. It therefore appears that the only reason for the classification is as applicable to other cities as to those classified, and yet the former are excluded from the privileges and immunities of the latter. Further, the act does not require that public dances be in fact regulated in metropolitan cities, but merely that they have a welfare board with *power* to regulate. If the classification of the proviso had been *all cities and villages* having a welfare board having authority to regulate, or, better still, in which public dancing is supervised and regulated by the municipal authorities, the objection of discrimination between different localities would be met. But suppose these other cities provide a welfare board, still public dancing on Sunday cannot be permitted because they do not measure up to the metropolitan class in population. Before any city outside the metropolitan class can enter the class erected by this statute it must have a population of 100,000 or more, and have a welfare board with authority to regulate public dancing. As a practical proposition they are prevented from ever entering that class, and so within the rule laid down in *State v. Kelso*, 92 Neb. 628, that a classification which limits its provisos to a certain class then in existence, excluding all others from ever entering such class by growth, development, or other cause, is invalid. True, it may be that in 50 or 100 years one or more cities may have a population sufficient to qualify them as metropolitan, but the possibility, except perhaps the city of Lincoln, is so remote as to exclude it from consideration.

In *Bessette v. People*, 193 Ill. 334, it was held that a statute regulating horse-shoeing in cities of over 50,000 and permitting cities of over 10,000 to adopt the provisions of the act, thus excluding towns under 10,000, is void as

discriminatory and unreasonable between persons engaged in the same occupation; and also void if construed as a classification of towns and cities. In *Badenoch v. City of Chicago,* 222 Ill. 71, an act making salaries and wages of officers of certain municipalities subject to garnishment, and exempting others, was declared void and as discriminatory as between persons of the same class. Upon the general question of classification, see, *State v. Mayo,* 15 N. Dak. 327; *Cleland v. Anderson,* 66 Neb. 252; *State v. Robinson,* 35 Neb. 401; *Livingston Loan & Building Ass'n v. Drummond,* 49 Neb. 200; *State v. City Council of City of Lincoln,* 98 Neb. 634.

In *Rushart v. Crippen,* 99 Neb. 682, we held: "In a suit to test the constitutionality of a legislative act, the presumption that an exception to general provisions is justified by facts within the knowledge of the lawmakers can only be overthrown by pleading and proof to the contrary, unless an unreasonable or arbitrary classification appears on the face of the act or is disclosed by facts of which the court will take judicial notice." Giving full force to the presumption above noted, we are constrained to hold invalid that portion of the act in question relating to public dancing on Sunday as being discriminatory between different individuals of the same class, between metropolitan cities, and between them and other cities and communities, by reason of a classification having no logical basis for its support.

We must not be understood as questioning the power of the legislature to prohibit public dancing on Sunday by an act which operates alike upon all persons within the state, or upon all persons alike within the classes to which the law is made applicable, provided the classification declared is based upon such differences of place and circumstance, having a logical relation to the general purpose of the act, as to afford a reasonable basis for differentiation between the classes named. Nor is the remainder of the act affected hereby, it not appearing that the invalid provisions constituted the inducement for its enactment.

In view of our holding, it will not be necessary to discuss the other defense. It follows that the judgment of the district court must be reversed and the action dismissed.

REVERSED AND DISMISSED.

STATE, EX REL. J. I. CASE THRESHING MACHINE COMPANY, APPELLEE, V. FRANK MARSH, SECRETARY OF STATE, APPELLANT.

FILED JANUARY 24, 1929. No. 26821.

Licenses: CORPORATIONS: OCCUPATION TAX. Sections 679-684, and 697, Comp. St. 1922, requiring the payment of an occupation tax by corporations, construed, and *held:*

(1) That it was the intention of the legislature to place domestic and foreign corporations upon an equality with reference to such tax.

(2) That the term "paid-up capital" as applied to Nebraska corporations means the amount of authorized capital stock employed in the business.

(3) A foreign corporation being required to pay the "same amount" as a domestic corporation, the term "paid-up capital" should be understood in the same sense in which it is applied to the latter.

(4) That the occupation tax of a foreign corporation should be computed upon the basis of the amount of its paid-up capital stock employed in this state.

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

O. S. Spillman, Attorney General, and *Lloyd Dort,* for appellant.

John J. Ledwith, H. N. Mattley and *Upham, Black, Russell & Richardson, contra.*

Kennedy, Holland, De Lacy & McLaughlin, Montgomery, Hall, Young & Johnsen, Ziegler & Dunn, Edgar M. Morsman, Jr., and *Brogan, Ellick & Raymond, amici curiæ.*

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

REDICK, District Judge.

Application by the plaintiff for a writ of mandamus directed to the defendant, Frank Marsh, secretary of state, requiring him to accept from the plaintiff the sum of $130 as plaintiff's occupation tax for the year 1928, and to execute a certificate as provided by law. The petition alleges that plaintiff first tendered the sum of $60 together with the annual statement required by law of foreign corporations, and that defendant refused the same upon the ground that the tangible property in the state of Nebraska belonging to plaintiff should be included in arriving at the total amount of its paid-up capital stock employed in Nebraska, and demanded the sum of $130; that thereupon plaintiff tendered $130 but the same was refused, defendant claiming that plaintiff should pay the sum of $2,000. Thereupon this action was brought. Defendant filed a general demurrer to the petition, which was overruled, and, defendant electing to stand upon his demurrer, judgment was entered awarding the writ, and defendant appeals.

The question for determination involves the proper construction of the following sections of the Compiled Statutes of this state for 1922 requiring the payment by domestic and foreign corporations of an annual occupation tax. They will be stated in substance or quoted as seems requisite for a proper understanding of the question.

Section 679 provides for the annual filing on July 1 of reports by corporations organized under the laws of this state.

Section 680 prescribes what shall be set forth in such report: Name of the corporation, location of its principal office, names and addresses of its officers and directors, date of annual election, amount of authorized capital stock and par value of each share, amount of capital stock subscribed, issued, outstanding and paid up, the nature and places of business, and any changes in the above particulars made since the last report.

Section 681: "At the time of filing such annual report it shall be the duty of every corporation, for profit incorporated under the laws of this state, to pay to the secretary of state an annual fee as follows: When the paid-up capital stock of the corporation exceeds one thousand dollars, but does not exceed ten thousand dollars, such annual fee shall be five dollars." Then follow provisions for payment of fees, in an ascending scale up to twenty-five million dollars paid-up capital, upon which the annual fee is fixed at two thousand dollars, and upon all paid up capital in excess thereof twenty-five hundred dollars.

Section 682: "Each foreign corporation for profit, doing business in this state, and owning or using a part or all of its capital or plant in this state and subject to compliance with all other provisions of law, and in addition to all other statements required by law, shall make a report in writing, to the secretary of state, annually, during the month of July, in such form as the secretary of state may prescribe. The report shall be signed and sworn to before an officer authorized to administer oaths, by the president, vice-president, secretary, superintendent or managing agent in this state, and forwarded to the secretary of state."

Section 683 provides for reports by foreign corporations, including all the particulars mentioned in section 680, and in addition the following: "7. The nature and kind of business in which the company is engaged and its place or places of business, both within and without the state. 8. The name and location of its office or offices in Nebraska, and the name and address of the officers or agents of the corporation in charge of its business in Nebraska. 9. The value of the property owned and used by the company in Nebraska, where situated, and the value of the property owned and used outside of Nebraska and where situated."

Section 684: "Upon the filing of such report with the secretary of state, it shall be the duty of every foreign corporation, for profit now or hereafter doing business in this state, to pay to the secretary of state as an annual fee the

same amount as the annual fee prescribed in the third next preceding section (681) for corporations incorporated under the laws of this state."

Section 688 requires the secretary of state to deliver to the corporation a certificate of compliance with the above sections.

Section 697: "Any county clerk shall, upon request of the secretary of state, furnish him with such information as is shown by the records of his office concerning corporations located within his county, and subject to the provisions of this article. The secretary of state, or any person deputed by him for the purpose of determining the amount of fees due from such corporation, shall have authority to investigate and determine the facts showing the proportion of the paid-up capital stock of the company represented by its property and business in Nebraska."

The contention of the plaintiff is that under these sections the occupation tax of foreign corporations should be calculated upon the proportion of its paid-up capital used to transact its business in the state of Nebraska; while defendant contends that it should be calculated upon the total amount of the paid-up capital of the corporation. In reply, plaintiff insists that, if the construction contended for by defendant is the true one, the statute is in conflict with the Constitution of the United States, as an unlawful burden upon interstate commerce, as a tax upon property outside of the state of Nebraska, as denying the plaintiff the equal protection of the laws, and as taking property from plaintiff without due process of law. If plaintiff's construction is the true one, he is entitled to the relief prayed. If defendant's construction is adopted, it will be necessary to consider the constitutional objections above noted.

We will, therefore, first examine the question of construction; but we must first determine whether or not the statutes are a proper subject for construction, and this depends upon whether or not they are clear and unambiguous or whether the language employed by the legislature is

susceptible of more than one meaning. Perhaps we might rest this determination upon the fact that a distinguished attorney general of this state and several secretaries of state have adopted plaintiff's construction, while the present secretary takes the opposite view, but we have considered the question independently, and have no hesitancy in pronouncing the sections of the law ambiguous and requiring construction. The uncertainty arises out of the use of the words "same amount" when considered with the other provisions of the act. Do they mean an equal amount in dollars and cents determined by the total paid-up capital, or such portion as is owned or used in this state?

The question is not free from difficulty. Our purpose, of course, must be to discover and declare the intention of the legislature, and it seems proper to recall briefly the rules of law by which such intention is to be found. Any supposed intention must be consistent with the words of the enactment taken in their ordinary and accepted meaning, unless it clearly appears that they were used in a different sense. The reason and intention of the lawgiver, however, will control the strict letter of the law *(State v. Drexel,* 75 Neb. 614) when the latter would lead to a palpable injustice or absurdity. *Kelley v. Gage County,* 67 Neb. 6. Each and every part of the statute must be given effect. The history of the legislation and the old law upon the same subject, as well as the general object, spirit and purpose of the law may be considered.

We will be aided by a consideration of the history of the legislation as affecting some of the above questions. It began with chapter 25, Laws 1909, whereby a nominal fee was fixed in an ascending scale applicable to all corporations, domestic and foreign, based upon the capital stock of each corporation. By chapter 29, Laws 1911, the above act was amended by providing that the basis of the tax should be the *paid-up* capital stock of the corporation. This change, apparently, was made because it seemed unfair to require payment upon the total capital stock in

cases where only a portion of it was paid in and actually used in the business.

It seems probable, though we do not decide the point, that both of the above acts, as applied to foreign corporations, were obnoxious to the Constitution of the United States under the decisions of *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, *Pullman Company v. Kansas*, 216 U. S. 56, and *Ludwig v. Western Union Telegraph Co.*, 216 U. S. 146.

However, chapter 240, Laws 1913, the present law, was enacted amending that of 1911.

Whether or not the legislature may discriminate between foreign and domestic corporations in the assessment of occupation taxes, it is perfectly clear from a consideration of these three acts that it was the intention of the legislature to put domestic and foreign corporations upon an equality in this regard, no distinct or separate treatment being had in the first two acts, and it being provided by section 684 of present act that a foreign corporation pay the "same amount" as that prescribed for corporations incorporated under the laws of this state By section 681 domestic corporations are required to pay an occupation tax based upon the amount of their paid-up capital, and it seems to be the contention of the defendant that, therefore, if foreign corporations are to pay the same amount, the tax must be computed upon *their* paid-up capital; but this leaves out of view the underlying thought involved in the expression "paid-up capital" as applied to domestic corporations; that is, the amount employed in its business, which is under the protection of the laws of the state and properly subject to taxation. This was apparently the determining factor in the amendment of 1911 changing the law by substituting the words "paid up" for "authorized" capital. Paid-up capital of a domestic corporation, in view of these circumstances, is quite different from paid-up capital of a foreign corporation, which, as such, is not subject to local taxation, or no portion of which is employed in the state. It would seem, therefore, that, if the foreign cor-

poration is to pay the *"same amount"* required of a domestic corporation, the words "paid-up capital" must be understood in *that sense in which they are applied to the latter.* In other words, if all corporations are to be treated alike, and the basis of the tax as to domestic corporations is the amount of capital actually engaged in the prosecution of its business, the same basis should apply to foreign corporations. If the foreign corporation is to pay the same amount as the domestic corporation, the conclusion is irresistible that the intention was to place them upon an equality. Equality is not secured unless the computation in both cases is made upon the same basis. The law does not say that the amount shall be computed on the paid-up capital of the foreign corporation, but that the latter shall pay the same amount as a domestic corporation, and, as appears later on, provides how that amount shall be determined.

Again, section 682 requires a report from each foreign corporation "owning or using a part or all of its capital or plant in this state;" and section 683 requires a statement of how much capital is employed within and how much without the state. The evident intention was (1) to tax only such foreign corporations as used part or all of their capital in the state, and (2) to base the tax exaction upon the amount so used. Now, the business of the foreign corporation subject to an occupation tax in this state is only such portion thereof as is transacted in this state. This state has no power to project even its taxing arm beyond the territorial borders and levy upon property there located. There is a presumption that the legislature intended to tax only that which it had the constitutional power to tax *(Singer Sewing Machine Co. v. Brickell,* 233 U. S. 304), and this is a proper consideration in construing the law. Defendant contends that this is not a tax but a condition imposed for doing business in the state; but these questions are unimportant, in view of the construction we have adopted, the result being the same whether it is a tax or an occupation fee.

But when the provisions of the act specially applicable to foreign corporations are considered, the intention of the legislature to assess the occupation tax upon the basis of the amount of capital employed in the prosecution of its business in the state of Nebraska, and not upon the entire paid-up capital of such corporation, seems more clearly manifest. What purpose would be subserved by the provisions of section 683 requiring the foreign corporation to state in its report "the value of the property owned and used by the company in Nebraska, where situated, and the value of the property owned and used outside of Nebraska and where situated," unless it had some relation to the computation of the tax, the amount of which is determined, with reference to both domestic and foreign corporations, from the statements contained in their respective reports? If the calculation was, in each case, to be made merely upon the basis of paid-up capital, the provisions just quoted from the requirements of the report of foreign corporations would be entirely useless. A construction of a statute will not be adopted which results in the requirement of useless and of absurd acts except where its terms are positive and unavoidable. *State v. Cook*, 178 Mo. 189. Especially is this correct when those acts have no relation to the thing to be accomplished, as would be the case if defendant's construction were adopted.

Leaving out of consideration the maximum restriction of $2,500, a construction which would require, for example, the United States Steel Corporation with a capital of a billion dollars, though only $500,000 was employed in the state, to pay 20 times the occupation tax of a domestic corporation with paid-up capital of $500,000, would seem to be absurd, viewed as a compliance with the provision for paying the "same amount." With the restriction added, such construction would be equally absurd when applied to cases below the maximum. We cannot presume that by inserting these expressions the legislature did a vain thing; and we are not permitted to disregard any part of the en-

actment, but, if possible, must construe it so as to give effect to every word and phrase contained in it.

But there is further confirmation of the correctness of the construction we have adopted in the latter portion of section 697, above quoted, the language of which is as follows: "The secretary of state, or any person deputed by him *for the purpose of determining the amount of fees due from such corporation, shall have authority to investigate and determine the facts showing the proportion of the paid-up capital stock of the company represented by its property and business in Nebraska.*" (Italics ours.) This provision seems specially applicable to foreign corporations, only a portion of whose paid-up capital is used in the prosecution of its business in this state, and is consonant with the basic principles underlying the power to levy taxes above referred to.

Another argument strongly urged by plaintiff is that the continuous interpretation of the statute in question, placed upon it by the officers of the state charged with its enforcement, together with the fact that, notwithstanding such interpretation, although five sessions of the legislature have been held during that time, no attempt has been made to amend the law, is such an administrative and legislative construction upon the act as should be followed by the court. Such construction is of great persuasive force, and will ordinarily be adopted by the courts when it does not do violence to the language, purpose or policy of the act. *Douglas County v. Vinsonhaler,* 82 Neb. 810; *United States v. Minnesota,* 270 U. S. 181.

Defendent argues that, at the time fixed for filing the report, a foreign corporation might have "but a small amount of assets or capital stock employed in the state, and within a minimum period thereafter might employ all of their financial advantage against a competitor in this state," and therefore the construction we have adopted is unfair and discriminatory. This is an inherent difficulty in all tax laws. A time is fixed (April 1) at which returns of personal property for assessment shall be made,

which reaches only property owned at that time. After April 1 the taxpayer may acquire a large amount of property which will escape taxation unless he continues to hold it until the next return day. It can hardly be presumed that a foreign corporation will withdraw its capital from the state each year on June 30, so as to escape a reasonable occupation tax. In the natural order of things, as the business increases each year the tax will augment correspondingly. But this is a matter for legislative consideration. And, moreover, it is provided by section 699 that "a corporation shall not be required to file its first annual report under this article until the proper month hereinbefore provided for the filing of such report, next following the expiration of six months from the date of its incorporation or admission to do business in this state."

We are clearly of the opinion that the law, properly construed, subjects to an occupation tax only that amount of the capital of foreign corporations actually employed in carrying on its business in this state. It will not be necessary to discuss the constitutional questions learnedly and exhaustively presented by the briefs.

There being no dispute as to the correctness of the amount tendered under the construction adopted by this opinion, the judgment of the district court is

AFFIRMED.

P. T. MCGERR, APPELLANT, V. HARRY P. BRADLEY, APPELLEE.

FILED FEBRUARY 1, 1929. No. 26395.

1. Taxation: DELINQUENT TAX SALES. A county treasurer selling real estate for delinquent taxes at either public or private sale should include only delinquent taxes previously advertised.
2. ———: ———: PRIVATE SALES. The revenue law authorizes a county treasurer to sell real estate at private sale for delinquent taxes levied and advertised for the previous year and not sold at public sale for want of bidders, though at the time of such private sale taxes for another year have become delinquent but have not been advertised.
3. ———: ———: ———. A county treasurer selling real

estate at private sale for delinquent taxes levied and advertised for the previous year, but not sold at public sale for want of bidders, should make the private sale subject to any taxes that became delinquent after the advertisement for the previous year but before a new advertisement could be published and before such private sale.

4. **Syllabus Overruled.** The first and second paragraphs of the syllabus in *Wight v. McGuigan*, 94 Neb. 358, overruled.

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

Helen McGerr, for appellant.

Scott & Scott, G. B. Hastings and *C. M. Skiles, contra.*

Heard before GOSS, C. J., ROSE, DEAN, EBERLY and DAY, JJ., and BEGLEY and RAPER, District Judges.

ROSE, J.

This is a suit by P. T. McGerr, plaintiff, to foreclose tax liens on two tracts of land owned by Harry P. Bradley, defendant. The lands are situated in Chase county and are described respectively as the southeast quarter of section 11, township 8, north, range 37, west of the sixth principal meridian and the west half of section 13 in the same township.

The taxes for 1920 became delinquent and, pursuant to statute, the county treasurer, commencing the first week in October, 1921, published notice of the delinquency and advertised the lands for sale at the general tax sale to be held the first Monday in November, 1921. Comp. St. 1922, secs. 6050-6052. The delinquent taxes for 1920 not having been paid at the time fixed in the published notice, the land was regularly offered for sale according to statute but not sold for want of bidders. Comp. St. 1922, sec. 6054. The general tax sale was closed and the treasurer made his return thereof to the county clerk according to law. The county treasurer sold the land at private sale July 1, 1922, to plaintiff, who paid the delinquent taxes for 1920, penalties and costs, amounting on the quarter section to $29.10

and on the half section to $79. Comp. St. 1922, secs. 6061, 6062. July 1, 1922, the treasurer issued to plaintiff a tax sale certificate for each tract, evidencing the sales and reciting the payments made. Comp. St. 1922, secs. 6062, 6065.

Plaintiff, to protect his tax lien on the quarter section, paid in due time taxes in full for subsequent years as follows: 1921, $32.85; 1922, $30.18; 1923, $29.80; 1924, $29.60; 1925, $33.35. He likewise paid taxes on the half section as follows: 1921, $91.10; 1922, $83.98; 1923, $81.10; 1924, $46.40; 1925, $52.15. The facts outlined were pleaded at length in the petition.

The relief sought by plaintiff was the foreclosure of his tax liens, the allowance of interest on each item of taxes paid by him at the rate of 15 per cent. per annum and an attorney's fee equal to 10 per cent. of the amount found due. Comp. St. 1922, secs. 6068, 6089, 6091.

Defendant admitted generally the facts pleaded in the petition, but alleged that the tax sale certificates were void because the sale to plaintiff did not include the delinquent taxes for 1921; that plaintiff acquired only the public's interest in the items of taxes paid by him and that he was only entitled to recover the amount of each item with interest at the rate of 10 per cent. per annum and costs, but no attorney's fee.

The controversy between the parties was narrowed in the district court to the questioned validity of the tax sale certificates on the sole ground stated, an issue involving the right of plaintiff to recover interest at the rate of 15 per cent. per annum and an attorney's fee equal to 10 per cent. of the amount found due.

At the trial below defendant relied on the opinion in the case of *Wight v. McGuigan*, 94 Neb. 358, where the following rules were announced:

"When real estate is sold for taxes, all delinquent taxes thereon must be included in the sale.

"Real estate cannot be sold for taxes at private sale un-

less all taxes thereon then delinquent have been included in the notice of public sale, and the land has been duly offered at such public sale and not sold for want of bidders."

The district court followed these rules and entered judgment in favor of plaintiff for the items in his claim with interest thereon at 10 per cent. per annum, disallowing an attorney's fee. Plaintiff appealed.

The revenue law does not provide that all delinquent taxes must be included in a private sale of land for taxes, nor that real estate cannot be sold for delinquent taxes at private sale "unless all taxes thereon then delinquent have been included in the notice of public sale, and the land has been duly offered at such public sale and not sold for want of bidders." The rules quoted extend the revenue law beyond its terms and would, if allowed to stand, defeat to a considerable extent the obvious legislative purpose, as shown by the statute, to provide a means of procuring for the public the prompt payment of delinquent taxes not collectable at public sale, by offering to individuals inducements to pay them at private sales of the lands taxed, when the taxes, for want of bidders at public sale, are not then available. The rules announced in the case cited would prevent private sales each year from the time taxes generally become delinquent on the first day of May until November. Private sales of real estate for delinquent taxes would be still further restricted in the city of Lincoln, where taxes become delinquent December 1.

The statutory requirement to include "all delinquent taxes" applies to the delinquent tax list, and not to private tax sale. Taxes on real estate generally become delinquent May first of each year. The revenue law provides:

"The county treasurer shall, not less than four nor more than six weeks prior to the first Monday of November in each year, make out a list of all lands and town lots subject to sale, and the amount of all delinquent taxes against each, with interest to the date of sale." Comp. St. 1922, sec. 6050.

Provision is made for notice of public sale. The treasur-

er is required to commence it at the appointed time and continue to offer the advertised lands until they are sold or are not sold for want of bidders. Comp. St. 1922, sec. 6054. Return of sale to the county clerk must be made by the treasurer on or before the first Monday in December. Comp. St. 1922, sec. 6061. The statute further provides:

"After the sale shall have closed, and the treasurer shall have made his return thereof to the county clerk, * * * if any real estate remains unsold for want of bidders therefor, the county treasurer is authorized and required to sell the same at private sale at his office to any person who will pay the amount of taxes, penalty, and costs thereof." Comp. St. 1922, sec. 6062.

This provision does not require the county treasurer to include in private sale all taxes delinquent at the time. To import into that provision from the requirement relating to the published lists of taxes and lands the expression "all delinquent taxes" is inconsistent with the revenue law and with the wise legislative purpose to procure prompt payment of delinquent taxes by means of private tax sale of lands not sold at public sale for want of bidders. The statutory notice of public sale is notice also to delinquent tax debtors that their lands may be sold at private sale, if not sold at public sale for want of bidders. While "all delinquent taxes" must be included in the delinquent tax list and in the notice of public sale, a sale of land at private sale does not necessarily include all the delinquent taxes. This aspect of the revenue law was overlooked when the first and second paragraphs of the syllabus in *Wight v. McGuigan*, 94 Neb. 358, were adopted and for the reasons given they are overruled.

The private sales to plaintiff in the present suit were valid. The judgment below is therefore reversed and the cause remanded to the district court, with instructions to enter a decree conforming to the prayer of plaintiff's petition.

REVERSED.

ULYSSES S. G. SHIRLEY, APPELLANT, V. HARLAN COUNTY ET AL., APPELLEES.

FILED FEBRUARY 1, 1929. No. 26235.

1. **Highways:** ESTABLISHMENT: DUTY OF COUNTY SURVEYOR. Where a county board, pursuant to the provisions of section 2566, Comp. St. 1922, has sought by resolution to establish a road, the county surveyor, acting pursuant to the provisions of section 2569 *et seq.*, Comp. St. 1922, in viewing and reporting upon the expediency of establishing such road, is required to form an independent judgment and to exercise a judicial function.
2. ———: ———: COUNTY SURVEYOR: DISQUALIFICATION. Where a county surveyor is also a member of the county board, and as a member of such board votes for a resolution establishing a highway, pursuant to section 2566, Comp. St. 1922, he has passed judgment upon the expediency of establishing such highway and has thereby disqualified himself from acting as a commissioner to view and pass upon the expediency of the road, as provided by section 2569 *et seq.*, Comp. St. 1922.
3. ———: ———: ———: INVALIDITY OF ACTS. Where a county surveyor is incompetent to act as a commissioner to view and pass upon the expediency of establishing a highway, pursuant to the provisions of section 2569 *et seq.*, Comp. St. 1922, and attempts so to do, his act is invalid, and the result is the same as if no examination or report had been made by the commissioner.
4. ———: ———: JURISDICTION. "A county board has no jurisdiction to establish a public road, when no commissioner has been appointed to examine into and report upon its expediency, unless the written consent of all the landowners whose land is sought to be taken for that purpose is filed with the county clerk." *Warren v. Brown*, 31 Neb. 8.
5. **Eminent Domain:** AGREEMENT WITH OWNER: STATUTE MANDATORY. Where a statute requires that an attempt to agree with the owner shall first be made before the institution of condemnation proceedings to take private lands for public use, such provision is mandatory, and condemnation proceedings, instituted without first making a *bona fide* attempt to agree with the owner, are void.

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

O. E. Bozarth, for appellant.

O. E. Shelburn, contra.

O. S. Spillman, Attorney General, George W. Ayres, Butler & James and *Perry & Van Pelt, amici curiæ.*

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

GOOD, J.

This is an action to enjoin the county of Harlan and its officials from entering upon and opening up a highway through the plaintiff's premises. The grounds on which the relief is sought are that the county has not acquired a right of way for the highway. It is charged specifically that, in the proceedings by which the county sought to obtain the right of way, it has not complied with various sections of the road law, as contained in article I, ch. 23 (secs. 2563-2620) Comp. St. 1922, and further that, in the attempted appraisement of damages for the right of way, the county has attempted to proceed under chapter 56, Laws 1927; that it had not complied with the provisions of said chapter, and that it is unconstitutional and void.

Defendants answered, in which they set forth the proceedings by which the county claims that it has acquired or was acquiring the right of way for the highway. The reply denied new matter set up in the answer. A trial of the issues resulted in a finding and decree for defendants. Plaintiff has appealed.

The record discloses that plaintiff is the owner of a 200-acre farm in Harlan county; that the Chicago, Burlington & Quincy Railway runs through the northeast corner of the farm, leaving slightly more than 4 acres on the northerly side of the railway; that this 4-acre tract is occupied by plaintiff for a building site, whereon he has his dwelling, barn, many outbuildings, well, cistern, silos, and a large number of forest trees; that the proposed highway is to run through this 4-acre tract, parallel to and 33 feet distant from the railroad, and, if established, will cause the destruction of about 100 of plaintiff's trees, four of his

silos; greatly interfere with the convenient occupancy of the premises and require him, in conducting his farm operations, to cross this public highway, as well as the railroad, to reach the major portion of his farm, which lies on the southerly side of the proposed highway and the railroad.

It appears from the record that the board of supervisors of Harlan county, on the 10th of May, 1927, adopted a resolution, which recites that the department of public works of the state has suggested and directed the establishment of the highway hereinafter described; that the board has considered the matter and, in its judgment, deems it expedient to locate and establish a public road parallel to and within 500 feet of the right of way of the Chicago, Burlington & Quincy Railway and distant 33 feet therefrom. The resolution gives the termini of the proposed road, and concludes as follows: "Be it therefore further resolved that said public road, as above described, be and the same hereby is established."

On the same day the county board, by motion, instructed the county attorney to institute such proceedings as may be necessary for the appropriation and condemnation of the real estate, necessary for the right of way for the road established by the foregoing resolution. Immediately after the passage of the resolution the county clerk of Harlan county issued a commission to Edward E. Johnson, the county surveyor of said county, to view and report upon the practicability of the line of road sought to be established by the resolution of the county board, and in the commission the resolution was set forth. Johnson, the surveyor, took the oath, viewed the premises and made a report, which contained an estimate of expenses and damages which would be sustained by the plaintiff, and setting forth therein the following: "The above road to my opinion is a necessity, as without it there would be no federal aid on the Golden Rod highway in Harlan county this summer, and the county has not enough money in the general fund to purchase the right of way on any other location

the federal government would approve." This report was also filed on the 10th of May, 1927.

On the 11th day of May, 1927, Harlan county filed in the county court an application for the appraisement of damages, if any, to be sustained by the plaintiff by reason of the location and establishment of said highway, and asking that three disinterested freeholders be summoned, as provided by chapter 56, Laws 1927, to assess said damages and report the same to the county court. No previous attempt had been made by the county board to agree with the plaintiff as to the amount of damages he would sustain on account of the appropriation of his land for public use. Pursuant to the application, the county judge appointed three persons, who were summoned and qualified, and the appraisers gave notice to the plaintiff of the time and place of hearing to assess and determine damages; whereupon plaintiff instituted this action. It further appears that Edward E. Johnson is a member and chairman of the board of supervisors of Harlan county, and is also occupying the office of county surveyor of said county.

Article I, ch. 23 (secs. 2563-2620) Comp. St. 1922, and particularly section 2566 and the following sections, provide the method of establishing highways. Section 2566, after first providing for initiation of such proceedings by the filing of a petition, signed by ten electors within five miles of the road proposed to be established, contains the following: *"Provided,* that whenever in the judgment of the board of commissioners or board of supervisors of any county it shall be deemed expedient to locate a public road parallel to the right of way of any railroad company, and distant therefrom not more than five-hundred feet, said road may be established by said county board or board of supervisors by resolution without the submitting of a petition as herein provided. When such road is established by the board, and the resolution establishing the same is filed with the county clerk, he shall proceed in all respects as if said road had been established by petition."

Section 2567, Comp. St. 1922, requires, where the road is sought to be established by petition, that the petitioners shall deposit a certain sum of money to pay the expenses in the event the road is not finally established. Section 2568 is as follows: "Upon compliance with the foregoing provisions, and whenever a legal petition or *resolution* of the county board, as herein provided, is filed with the county clerk, he shall notify the county surveyor to view and to report upon the expediency of the proposed road, alteration or vacation." (Italics supplied.)

Prior to 1917, section 2568, as it then existed, provided that the county clerk should appoint a disinterested and qualified elector in the county as a commissioner to view and report on the expediency of the proposed road. Section 2569 *et seq.* relate to the powers and duties of the commissioner. These sections were not amended to substitute the words "county surveyor" for commissioner, but, since there is no other commissioner than the surveyor, it seems clear that the word "commissioner," as used in section 2569 *et seq.*, should be construed to mean the county surveyor. The county surveyor *ex officio* becomes the commissioner to view, examine and report upon the expediency of the establishment of the highway.

One of the objections raised by the plaintiff is that Johnson was incompetent to act as county surveyor and *ex officio* commissioner to view and pass upon the expediency of establishing the highway, for the reason that he was a member of the county board and, in the adoption of the resolution, had already passed upon the expediency of establishing the highway. The record does not advise us as to whether Mr. Johnson first became a member of the board of supervisors and afterwards surveyor, or whether he first became county surveyor and afterwards a member of the board of supervisors. His right to hold the two offices, of course, is not involved in this action.

This court held in *State v. Wait*, 92 Neb. 313, that one cannot hold two offices, the duties of which are incompatible, and specifically held: "It is a well-settled rule at

common law that if a person, while occupying one office, accepts another incompatible with the first, he, *ipso facto*, vacates the first office, and his title thereto is thereby terminated without any other act or proceeding." This court has frequently held that a member of a city council or board of village trustees is disqualified from voting upon a proposition to grant a saloon license to an applicant where the member of the council or board of trustees had signed the applicant's petition for a license, and, further, that the subsequent erasure and withdrawal of his name from the petition would not qualify him to act as a member of the board granting the license. *State v. Kaso*, 25 Neb. 607; *Foster v. Frost*, 25 Neb. 731; *Powell v. Egan*, 42 Neb. 482; *Rosenberg v. Rohrer*, 83 Neb. 469. The reason for this holding is that in voting to grant the license he acts in a judicial capacity, and, having prejudged the question by signing the applicant's petition, he has thereby disqualified himself from ever acting as a member of the board in granting a license to the particular applicant. *Rosenberg v. Rohrer, supra.*

Section 2570, Comp. St. 1922, requires the surveyor and *ex officio* commissioner, in forming his judgment, to take into consideration both public and private convenience and the expense of the proposed road. Section 2571 provides that, if he shall not be in favor of establishing the proposed road, he shall so report, and no further proceedings shall be had. Section 2572 authorizes him, if the road is for the public good and he can determine the precise location of the same and deems it expedient, to proceed to lay out the road and report accordingly.

It seems clear that the statute contemplates that the county surveyor *(ex officio* commissioner) shall form an independent judgment in determining the expediency of finally establishing the road. In fact, as appears, he is, under certain conditions, the final arbiter in determining whether the road shall be established. He is, therefore, required to exercise a judicial function.

We think the principles laid down in cases above cited are applicable to the present situation. As a member of the board of supervisors, Johnson voted for the resolution, seeking to establish the highway. He thereby committed himself and passed judgment upon the expediency of establishing the highway. Under the law, the matter was then referred to the county surveyor to view and make a report as to the amount of damages that would be sustained by plaintiff, and whether it was expedient to establish the road in a particular location, or to vary somewhat from it. In this matter, the county surveyor, as *ex officio* commissioner, was required to exercise a judicial discretion in performing his duty. As a member of the board of supervisors he had prejudged the question and was therefore incompetent to act as surveyor or commissioner to view the premises and decide upon the expediency of establishing the highway. The chairman of the county board was not competent to act in this capacity. There was, therefore, no valid examination or report. The situation is the same as if no examination or report had been made.

In *Warren v. Brown,* 31 Neb. 8, it is held: "A county board has no jurisdiction to establish a public road, when no commissioner has been appointed to examine into and report upon its expediency, unless the written consent of all the landowners whose land is sought to be taken for that purpose is filed with the county clerk."

Another objection to the validity of the proceedings raised by the plaintiff is that the county court was without jurisdiction to appoint any appraisers to assess the damages that plaintiff would sustain by the appropriation of his land, because no previous attempt had been made by the county or its officials to agree with plaintiff as to the amount of damages which he would sustain by reason of the appropriation of his land.

The defendant county, in attempting to have assessed the damages which plaintiff would sustain, proceeded under chapter 56, Laws 1927. Section 3 of that act provides: "If the owner of any real estate shall refuse to agree with

the county board as to the amount of the damages sustained by him on account of the appropriation of his land for public use by the county, the county judge of the county in which such real estate may be situated, shall, upon the written application of either party, direct the sheriff of said county to summon three disinterested freeholders of the county, and not interested in a like question, whose duty it shall be to carefully inspect and view the real estate sought to be appropriated." As above noted, no attempt was made to reach an agreement with the plaintiff as to the damages he would sustain by reason of the appropriation of his land. This was a condition precedent to making an application to the county court for the appointment of appraisers.

Where a statute requires that before the institution of condemnation proceedings to take private lands for public use, an attempt to agree with the owner shall first be made, such provision is mandatory, and the condemnation proceedings are void in case no attempt is made, before beginning them, to come to an agreement with the owner. 20 C. J. 892, sec. 317. In 20 C. J. 895, sec. 318, it is said: "In order to satisfy statutory requirement, there must be a *bona fide* attempt to agree. There must be an offer made honestly and in good faith, and a reasonable effort to induce the owner to accept it." See, also, *Rogers v. Cosgrave*, 98 Neb. 608; *Trotier v. St. Louis, B. & S. R. Co.*, 180 Ill. 471.

This court was not favored by a brief or oral argument on behalf of the defendants. The plaintiff challenges the constitutionality of chapter 56, Laws 1927. The attorney general, as a friend of the court, has filed a brief in which he contends that the statute is constitutional. Other counsel have filed briefs as friends of the court in which they also attack the constitutionality of said chapter 56. The conclusion we have reached on the assignments of error herein discussed renders it unnecessary to consider or pass upon the constitutionality of chapter 56, Laws 1927.

Because of the fact that the county surveyor was disqualified to act as a commissioner, all proceedings thereafter are utterly void. The county has not perfected the right to appropriate the land, and, even had it perfected such right to proceed with condemnation proceedings, it could not inaugurate such proceedings until a good-faith effort had been made to reach an agreement with the plaintiff as to his damages. This was not done.

It follows that the judgment of the district court should be and is reversed, and the cause remanded, with directions to grant the injunction as prayed.

REVERSED.

IN RE ESTATE OF CLARA B. FORT.
EDNA M. FLOOD ET AL., APPELLANTS, V. CLAY COUNTY ET AL., APPELLEES.

FILED FEBRUARY 1, 1929. No. 26245.

1. **Taxation**: INHERITANCE TAX: APPRAISAL. Record examined, and *held* that the basis adopted by the trial court in appraisal of land for inheritance tax purposes was its cash value as of the date of the owner's death.
2. **Evidence** examined, and *held* to support the judgment of the district court.
3. **Taxation**: INHERITANCE TAX: INTEREST. Section 6155, Comp. St. 1922, requires interest to be charged on all inheritance taxes from the time they accrue until paid, unless such taxes are paid within one year from the time they accrue.
4. ———: ———: APPEAL: COSTS. Where the beneficiaries under the will of a decedent appeal to the district court from the assessment of inheritance taxes by the county court, and on such appeal obtain a substantial reduction in the amount of tax assessed, they should not be taxed with the costs in the district court.

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

Fort & Fort, Stiner & Boslaugh and *Edmund Nuss*, for appellants.

D. B. Massie and *Guy Hamilton, contra.*

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

GOOD, J.

From an assessment of an inheritance tax against the property devised to them by the will of Clara B. Fort, the beneficiaries under the will have appealed.

This proceeding originated in the county court of Clay county, and from the assessment of the inheritance tax an appeal was taken to the district court. On a trial *de novo* in that court, the amount of the tax, assessed by the county court, was materially reduced. The beneficiaries still being dissatisfied have appealed to this court. The property subject to the inheritance tax consisted of real estate in Clay, Fillmore, Nuckolls, Cheyenne and Deuel counties. Only the assessment for Fillmore and Clay counties is involved in this appeal.

It is argued that the trial court did not adopt the proper basis of valuation; that the court took as a basis of assessment the value or market value of the property and not the "then cash value" thereof. It is conceded that the proper basis is the cash value of the property at the date of the owner's demise, which in this case was the 18th day of March, 1926. The contention in the instant case is based upon some of the language used by the court in its findings. All of the evidence, however, on behalf of the counties was as to the cash value of the property on the 18th of March, 1926, the date of Mrs. Fort's death.

A careful scrutiny of the court's findings discloses that some loose expressions are used therein, but, on the whole, it sufficiently appears that the basis of value, as found by the trial court, was the cash value at the date of Mrs. Fort's death. This was the proper basis. *In re Estate of Woolsey*, 109 Neb. 138. The contention made is not borne out by the record.

It is strenuously urged that the appraisal of the real es-

tate was entirely too high and that, since the amount of the tax depends upon the appraised value, it resulted in imposing an excessive inheritance tax.

We have carefully examined the entire record, consisting of several hundred pages. The evidence discloses a very wide diversity of opinion, as to the value of the land, between the witnesses called for the beneficiaries under the will and those called by the interested counties. However, the evidence on behalf of the interested counties tends to support a valuation somewhat in excess of that found by the trial court, while the evidence on behalf of the beneficiaries would tend to show that the value of the property at the date of Mrs. Fort's death was much less than that found and determined by the trial court.

It appears that five witnesses, used by the beneficiaries, some four weeks previous to the trial and more than a year after the death of Mrs. Fort, for the purpose of testifying as to the value of the property, viewed the lands involved; that on this occasion 10 or 11 hours were spent in viewing 19 different tracts of land, several of these tracts containing each 640 acres; that they traveled 130 to 140 miles by automobile in viewing these lands and took, at least, sufficient time out of the day for the midday meal. It is apparent that the examination made must have been very superficial. It is true that some of the witnesses had a general knowledge of the land prior to the time they viewed it, but some of the questions involved were as to the amount of low or lagoon land on the several tracts, and another question of fact was as to whether certain portions of the land were infested with noxious weeds. Moreover, some of the witnesses for the beneficiaries, in effect, stated that there was no market value for the land at the time of Mrs. Fort's death; that in arriving at the then cash value they had taken, as a basis, the cash market value of the land several years before, deducting from that value 40 per cent. for depreciation in land values generally, to arrive at the market value, and further reducing by the sum of $25 an acre, to obtain the then cash value.

Such evidence, we think, is entitled to but little weight, and no doubt the trial court so found.

After the evidence was all adduced, at the request of the parties litigant the judge personally viewed and examined all of the lands that were involved in this appeal, and, after his examination, he made his findings. The trial judge had a better opportunity of determining the value of the evidence of the several witnesses, since they were before him and he saw their manner of testifying, and he had the further advantage of viewing the premises. Suffice it to say that after an examination of the record we are satisfied that the findings of the trial court, as to the cash value of the lands at the date of Mrs. Fort's death, are fully supported by the record.

The beneficiaries under the will complain because the judgment required them to pay interest upon the amount of the inheritance tax from the date of Mrs. Fort's death. Section 6155, Comp. St. 1922, which provides for interest on inheritance taxes, is in part as follows: "All taxes imposed by this article, unless otherwise herein provided for, shall be due and payable at the death of the decedent, and interest at the rate of seven per cent. per annum shall be charged and collected therefrom for such time as such taxes are not paid: *Provided,* if said tax is paid within one year from the accruing thereof, interest shall not be charged or collected thereon." Appellants argue that, since an appeal was pending and the exact amount of the tax had not been determined, they could not pay the tax, and for that reason they ought not to be required to pay interest thereon until the correct amount of tax is finally determined.

The contention is not sound for two reasons: First, the language of the statute requires that interest be paid on all taxes from the date of the death; and, second, the statute provides for an exemption from interest on tax if paid within one year. In order to exempt themselves from interest on taxes, the beneficiaries must bring themselves within the language of the proviso. This they have failed

to do. Moreover, as is pointed out in the opinion in *In re Estate of Woolsey,* 113 Neb. 218, the inheritance tax statute provides that, if an erroneous tax is collected, the ones entitled thereto may recover it by filing an application within two years. The situation in that case is somewhat similar to the one in the instant case. In the *Woolsey* case, however, an appeal was taken from the assessment of inheritance tax, as made by the county court, and prior to the determination of the appeal the beneficiaries paid the amount of the tax as fixed by the court, paying part of it, however, under protest. The question then arose as to their right to recover the excess or erroneous tax, and the court held that the beneficiaries were entitled to recover such excess. In the instant case, if they desired to relieve themselves from the interest, the beneficiaries could have paid the entire amount of tax, as assessed in the county court, and, at any time within two years thereafter, as provided by section 6162, Comp. St. 1922, could have recovered any excess over the amount that was finally determined to be due. The statute clearly requires the payment of interest from the date of the death of the owner of the property, unless such tax is paid within one year from the time it accrues.

It is finally contended that the court erred in taxing the costs of the proceedings to the beneficiaries, or to the estate of Mrs. Fort. Section 6163, Comp. St. 1922, relating to costs in inheritance tax cases, *inter alia,* provides: "Any person or persons dissatisfied with the appraisement or assessment may appeal therefrom to the county court of the proper county within sixty days after the making and filing of such appraisement or assessment, conditioned upon the giving of security to the court to pay all costs, together with all taxes that may be fixed by the court." It is further provided in said section that the appraisers shall be paid a reasonable fee by the county treasurer out of the funds he may have in his hands, on account of such tax, on the certificate of the county judge. The statute also fixes the amount which shall be allowed to witnesses

and officers serving process, and then provides: "All costs made or incurred under this article shall be paid by the county treasurer out of any funds he may have in his hands on account of such tax, on certificate of the county judge."

It is difficult to understand why the legislature, as a condition to appeal, should require one who is dissatisfied with the appraisement of property for inheritance tax purposes to give a bond to pay the costs and at the same time require such costs to be paid by the county treasurer. The provisions seem inconsistent. It is possible it was intended that the costs of the appraisement in the proceedings in the county court should be paid by the county treasurer, and not intended to relate to costs which might accrue upon appeal to the district or supreme courts. The statute does not, in any event, require the payment of costs by the heirs or beneficiaries under the will of a decedent, and their liability, if any exists, must be found in the general statutes relating to the taxation of costs.

It appears that the beneficiaries of Mrs. Fort's will, by appealing from the tax assessed in the county court, secured material and substantial relief in the district court. It was there determined that the property was assessed too high and that they had been required to pay an excessive tax. Conceding that, under the general statutes, it was within the discretion of the court to determine whether the costs should be taxed to one party or the other, or should be apportioned between them, we think it would be unjust to penalize the beneficiaries by requiring them to pay the costs in seeking and obtaining the relief to which they were entitled. The costs in the district court should have been taxed to the interested counties.

Since the only relief which the beneficiaries have obtained by their appeal to this court relates to the taxation of costs, and since that question could have been presented in a proceeding for that purpose alone, they should not be entitled to recover all of the costs in this court.

The judgment of the district court is affirmed, except as to the judgment for costs in that court, which is reversed

and the cause remanded, with directions to the district court to render judgment for costs in that court against the appellees; the appellants and appellees to pay the costs by them respectively incurred on this appeal.

AFFIRMED IN PART, AND REVERSED IN PART.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. CITIZENS STATE BANK OF CHADRON, APPELLEE: CROSSMAN, MUNGER & BARTON, INTERVENERS, APPELLANTS.

FILED FEBRUARY 1, 1929. No. 26287.

Banks and Banking: GUARANTY FUND: PREFERENCES. Where attorneys were employed by a bank to collect debts owing to such bank, and after the services were rendered the guaranty fund commission took charge of the bank and later a receiver was appointed, such attorneys are not entitled to an equitable lien on the assets of the bank and a preference before other general claims or claims of depositors, because their services were the means of procuring certain property which the bank acquired before the guaranty fund commission took charge of the bank.

APPEAL from the district court for Dawes county: EARL L. MEYER, JUDGE. *Affirmed.*

Crossman, Munger & Barton, pro se.

C. M. Skiles and *I. D. Beynon, contra.*

Heard before GOSS, C. J., ROSE, DEAN, EBERLY and DAY, JJ., and BEGLEY and RAPER, District Judges.

RAPER, District Judge.

The Citizens State Bank of Chadron in June, 1923, employed the firm of Crossman, Munger & Barton, attorneys, to collect certain securities held by the bank against one Belsky, who owed the bank large sums of money on several notes, a part of said notes being secured by second mortgages on land and personal property and part were un-

secured. The attorneys, pursuant to that employment, secured the dismissal of a foreclosure of the first mortgage, and with the consent of Belsky foreclosed the bank's second mortgage on the land and also the chattel mortgage. In both cases the bank bought the property under the foreclosure sales, subject to the first mortgage on the real estate. The foreclosure sale on the real estate was confirmed on January 26, 1925, and sheriff's deed issued to the bank, and the personal property sold on February 26, 1925, under the foreclosure of the chattel mortgage to the bank. As part of the transaction by which the said Belsky consented to the foreclosures, it was agreed between the bank and Belsky that, if Belsky would assist in facilitating the foreclosures, the bank would give Belsky a lease for a term of years on the land, with option to repurchase the land. The lease had not been executed by the bank to Belsky when the guaranty fund commission took charge on March 9, 1925. The terms of this lease were not familiar to the commission, and their agent wrote to the interveners to inquire about the agreement to be incorporated into the lease. The interveners, on March 31, 1925, wrote to Citizens State Bank, "Attention Mr. J. B. Lacy" (the agent in charge for the commission). This letter recited in a general way the details of the various actions and proceedings in the cases. This letter states in part: "We have completed all matters in connection with the foreclosure of the real estate mortgage upon the ranch and sheriff's deed has been issued to the bank for this property, subject to the $32,000 mortgage of Woods Brothers. We bought in this property in the real estate foreclosure at less than the face of our indebtedness and then proceeded to foreclose the chattel mortgage, so that the title to the ranch and the title to all the personal property and equipment upon the ranch is now in the Citizens State Bank of Chadron. We had just completed this matter a few days prior to the time that the department took over the bank and sent our final bill for services in the amount of $750, which you will find in the files. * * * Inasmuch as

our services have been completed, we wish you would kindly place our bill for services * * * in line for payment." A letter was also written March 30, 1925, by Mr. Lacy, asking for abstracts which interveners had. Another letter was written by interveners on April 8, 1925, giving more in detail the terms of the lease to be executed to Mr. Belsky and which the guaranty fund commission had agreed to make in accordance with the understanding with Belsky at time of the foreclosures. Mr. Lacy, the agent for the commission, later prepared the lease. The sheriff's deed to the property could not be found in the bank, and Mr. Lacy wrote to interveners to send the deed, which was done, and interveners sent to Mr. Lacy a note of $15,000, which they had in their possession, signed by Ila and Guy Belsky, and which, in the foreclosure proceeding, it had been agreed should be canceled. This was sent June 3, 1925. A receiver was appointed in July, 1925. Mr. Lacy, the agent, testified that he never employed the interveners, and the correspondence above stated was merely for the purpose of learning what had been done by the interveners in respect to the matters mentioned. After the receiver was appointed he sold the ranch and personal property and received certain sums as rent from the ranch.

In December, 1924, the interveners sent the bank a bill for their services in the sum of $1,250 and were paid $500 by the bank. No other or later claim was filed, and in December, 1926, the receiver placed the claim of interveners in the classification of general creditor. Interveners then filed their petition claiming an equitable lien on the assets of the bank and asked to have their claim of $750 preferred in rank to the claims of creditors and depositors.

The district court found that the services of interveners were performed for the bank prior to the time the bank was adjudged insolvent and that interveners were not entitled to an equitable lien as claimed, and the court refused the prayer for the equitable lien, but allowed the fee as a general claim. Interveners appealed to this court.

From the facts disclosed, it is apparent that interveners had closed their services for the bank before the bank was taken over by the commission. The bill they rendered in December, 1924, indicates that they were expecting their pay from the bank, and not from any particular property or fund. The correspondence had with the commission's agent was not for the purpose of having any other or new services performed, but solely to get information as to some of the details as to what had been done while they were acting as attorneys. Their own letter unequivocally states that their matters had been concluded. They did not file a new claim with the receiver, nor does the claim itself refer to any services performed after the commission took possession of the bank. They did not file or give notice to the bank or the commission of any claim to an attorney's lien on the real estate foreclosed.

The interveners claim right to the equitable lien and preference, upon the general principle that one jointly interested with others in a common trust fund, who in good faith at his own expense maintains the necessary litigation to save it from waste and destruction and restores it for the purpose of the trust and its proper application, is entitled in equity to reimbursement of his costs and expenses out of the fund itself. This is a wholesome equitable principle and in a proper case should be followed, but the facts in this case do not bring it within that rule.

Interveners cite the cases of *In re Estate of Creighton*, 93 Neb. 90, *Stone v. Omaha Fire Ins. Co.*, 61 Neb. 834, and *State v. Wayne County Agricultural Society*, 101 Neb. 427, among other cases, as authority for their claim.

In the *Creighton* case the attorney general employed attorneys, as the statute empowered him to do, to defend in a will contest involving a public charitable trust. The attorneys were informed by the attorney general that the state would not pay for their services and that they would have to receive their pay from the fund recovered. The attorneys, with that understanding, agreed to and did represent the interest of the trust fund and succeeded in

procuring judgment for a large sum for the charity named in the will and were without any legal means of obtaining compensation except from that fund, and they were rewarded for their services from the fund so recovered. Judge Sedgwick, in that opinion, quotes from *Trustees v. Greenough,* 105 U. S. 527, 532: "Where one of many parties having a common interest in a trust fund, at his own expense, takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement." And the opinion goes on to state: "These attorneys were not themselves interested in the trust fund, but the state was, and in his official capacity was also the attorney general. These attorneys then represented parties in the trust fund, without any legal means of obtaining compensation except from that fund."

In the case of *Stone v. Omaha Fire Ins. Co.,* 61 Neb. 834, the board of directors of the insurance company which became insolvent, for the purpose of procuring the appointment of a receiver to conserve the assets of the corporation for the benefit of all the stockholders, engaged attorneys to institute proper proceedings therefor, and a receiver was appointed. This court held that their services came within the principle announced in *Trustees v. Greenough,* 105 U. S. 527. The *Wayne County* case, *supra,* was, in a general way, similar to the *Stone* case.

There is no similarity in the facts in this case to the conditions in the cases cited. There was no trust fund, and at the time the services were rendered no one had any interest in the securities except the bank.

The bank, while a going concern, and presumably solvent, employed interveners to foreclose or collect the notes, which they performed for the bank while it was still in operation, and as it plainly appears expected to be paid for their services by the bank. They had no agreement with the bank to be paid out of the proceeds of the litigation, filed no claim for lien on the judgment, nor made claim for such lien to any one before the receiver was ap-

pointed. There is an entire lack of equity in their claim for preference.

The decree of the district court should be, and is,

AFFIRMED.

WILLIAM F. SHEAR, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

FILED FEBRUARY 1, 1929. No. 26309.

1. States: LIABILITY FOR TORTS OF AGENTS. Where the legislature has not by law provided for the recovery by an individual or corporation against the state for damages caused by the negligence of an officer, agent, or employee of the state, there can be no recovery for such negligence until the legislature expressly by law makes the state liable therefor.
2. ———: ———: AUTHORIZATION TO SUE. A resolution by one branch of the legislature, authorizing an individual to maintain action against the state to recover damages caused by the negligence of a state employee, does not render the state liable for the negligent acts of its employee, in the absence of a statute making the state liable therefor.

APPEAL from the district court for Dodge county: FREDERICK W. BUTTON, JUDGE. *Affirmed.*

E. J. Robins and *Charles H. Yost*, for appellant.

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

Heard before GOSS, C. J., ROSE, DEAN, EBERLY and DAY, JJ., and BEGLEY and RAPER, District Judges.

RAPER, District Judge.

This is an action for damages sustained by plaintiff, caused by the alleged negligence of the agents of the state in placing an obstruction in a highway which was exclusively under the control and maintenance of the state through its highway department, and thereby causing plaintiff's car to overturn and injure him and his car. The action was authorized by a resolution of the senate,

which purports to give authority to the plaintiff to prosecute his suit to final judgment in the district court for Dodge county, for the purpose of ascertaining and adjudicating his claim and the liability of the state for the payment thereof. The state interposed a general demurrer, that the petition does not state a cause of action against the defendant. This demurrer was sustained and plaintiff's action dismissed. Plaintiff appeals.

The district court did not state the grounds upon which the demurrer was sustained, but appellant in his brief states that the court held that one branch of the legislature was without authority to waive the sovereignty of the state; that the resolution gave only the right to sue, and did not take away from the state the defense of sovereignty; that there is no right of action at common law and no constitutional provision or statute making the state liable.

It may be laid down as a universal rule that a state is not liable to a person injured by the negligence of its employees, unless there is a statute or constitutional provision permitting recovery therefor, so it becomes necessary to determine what authority the legislature and Constitution have granted as to such demands.

Section 22, art. V of the Constitution, provides: "The state may sue and be sued, and the legislature shall provide by law in what manner and in what courts suits shall be brought."

This provision is not self-executing and requires legislative action to make it effective, and no suit could be maintained against the state until the legislature, by law, made provision therefor.

In 1877 the legislature passed an act entitled "An act to provide in what courts the state may sue and be sued," being section 1100, Comp. St. 1922. It grants jurisdiction to the district courts to hear and determine: "First. All claims against the state filed therein which have previously been presented to the auditor of public accounts, and have been in whole or in part rejected or disallowed. Second. All claims or petitions for relief that may be presented to

the legislature, and which may be by any law, or by any rule or resolution of the legislature, or either house thereof, referred to either of said courts for adjudication." The plaintiff claims that this statute, and the resolution of the senate, waive the defense of sovereignty and is sufficient to give right of recovery to the plaintiff on his cause of action for negligence.

This precise question has not been decided by this court, but there are a number of decisions which the appellant insists control this case and give to him the right to recover. He cites *Lancaster County v. State*, 74 Neb. 211, *Lancaster County v. State*, 97 Neb. 95, *Benda v. State*, 109 Neb. 132, and *City of Chadron v. State*, 115 Neb. 650. The first two of these cases were brought against the state to recover money which had been erroneously paid under mistake of fact to the state treasurer, and the *Commonwealth Power Co. v. State*, 104 Neb. 439, was likewise a case to recover from the state money which had been paid to the secretary of the state board of irrigation under a mistake of fact. The court held in each of those cases plaintiff could recover the money so paid to the state, under the facts shown. The sovereignty of the state does not appear to have been questioned in the opinions in those cases. The *Benda* case was decided against him, solely on the ground that the state's agents were trespassers, were not engaged in the state's business at the time the wrong was committed, and therefore the state was not liable. In the *City of Chadron* case, the city water conduit was laid under a state highway and the state's agents in grading the road removed and took and destroyed that part of the water pipes that were within the highway. The city claimed damages for the part taken and destroyed and also other damage that accrued to other parts of its water system, because of the removal of that part in the highway. This court permitted recovery for the value of the water pipes actually taken by the state's agents, but refused to allow any other damage. Thus, that case seems to have been decided upon the principle of the *Lancaster County* cases

that, where state had taken or received property wrongfully, the state was liable for the amount so taken and received. The refusal of the court to allow damages or recovery beyond the value of the water pipes taken is significant.

There is no statute making the state liable for the negligence of its employees. The senate resolution authorized the plaintiff to maintain the suit for the purpose of ascertaining, determining and obtaining an adjudication of his claim and the liability of the state for the payment thereof. Even if one branch of the legislature could by resolution (which is not conceded) render the state liable for the negligence of its agents, the resolution of the senate falls far short of any attempt to make the state liable for such negligence. The resolution simply gave the right to bring the action, but did not create a cause of action. By virtue of its sovereignty, there was no obligation or duty on the state to respond in damages for the negligence of its agents.

The effect of the constitutional provision and section 1100, Comp. St. 1922, and the resolution of the senate is very clearly stated in 36 Cyc. 915:

"By consenting to be sued a state simply waives its immunity from suit. It does not thereby concede its liability to plaintiff, or create any cause of action in his favor, or extend its liability to any cause not previously recognized. It merely gives a remedy to enforce a preexisting liability and submits itself to the jurisdiction of the court, subject to its right to interpose any lawful defense."

It has been contended that when the legislature uses the word "claims," as expressed in section 1100, it included a claim for tort or negligence. The Massachusetts supreme court, in *Murdock Parlor Grate Co. v. Commonwealth*, 152 Mass. 28, which was an action for tort, construing a statute which gave jurisdiction to the supreme court of "all claims against the Commonwealth, whether at law or in equity," uses this language: "While the words 'all claims' may, in their colloquial use, include a

demand for damages occasioned by a tort to person or property, in its more proper judicial sense it is a demand of some matter as of right made by one person upon another for some particular thing, or compensation therefor, or to do or to forbear to do something as a matter of duty"—and the court held in that case that their statute did not permit a recovery against the state for damages resulting from misfeasance or negligence of its officers and agents.

Wisconsin has a statute which provides that it shall be competent for any person deeming himself aggrieved by the refusal of the legislature to allow any just claim against the state to commence an action against the state by filing a complaint, etc., and their supreme court held, in *Houston v. State,* 98 Wis. 482, that the statute relates only to claims which, if allowed, render the state a debtor to the claimant, and does not include a demand based upon unlawful or tortious acts of officers and agents of the state.

Such distinction has been recognized in all those cases where recovery had been permitted against this state, although not directly expressed in the opinions in those cases, and particularly in the *City of Chadron* case, where, if this court had construed the resolution of the House as granting right of recovery for the tort, consequential damages could have been allowed the same as in actions between individuals.

The legislature has not by law granted to any one the right to recover against the state damages for negligence of any of its officers, agents, or employees, and until such legislation is enacted, no recovery against the state can be had for such negligence. A resolution of one branch of the legislature, even if sufficient to permit suit, does not render the state liable for such negligence, and it therefore follows that the district court properly sustained the demurrer and dismissed plaintiff's action, and its judgment is

AFFIRMED.

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2. Editorial commenting on the court in a pending case for the purpose of influencing the decision may be sufficient

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3. Defendant in a prosecution for constructive contempt of court in commenting on pending litigation may testify to his intent, but the issue of guilt is a question of fact. *State v. Lovell* 710

Contracts.

1. Where two clauses of a written instrument are repugnant, the first will be retained and the second rejected, unless the inconsistency voids the instrument for uncertainty. *American Surety Co. v. School District* 6
2. When an instrument consists partly of written or typewritten and partly of printed form, the former controls where the two are inconsistent. *American Surety Co. v. School District* 6
3. Statutes, with reference to which contracts are made, become a part thereof. *American Surety Co. v. School District* 6
4. Deposit of a signed contract in the post office, properly stamped and addressed, completes a contract sent from another state to be signed and returned. *First Nat. Bank v. Ernst* 34
5. Attorney's contract for compensation *held* unambiguous. *Martin v. Reavis* 219
6. Construction of unambiguous written contract is for the court. *Martin v. Reavis* 219

Corporations.

1. It is no defense to a suit to enjoin wrongful and fraudulent use of a trade-name that plaintiff is a foreign corporation doing business without compliance with the Nebraska statutes. *Northwest Ready Roofing Co. v. Antes* 121
2. The state only can complain of failure of a foreign corporation to comply with statutory requirements for doing business, and prescribed penalties are exclusive in so far as third persons are concerned. *Northwest Ready Roofing Co. v. Antes* 121
3. The lien of a holder of corporate stock as collateral is superior to the lien of the corporation under an unposted by-law. *Department of Trade & Commerce v. Bankers Automobile Ins. Co* 388
4. Notice that corporate stock was held as collateral *held* timely. *Department of Trade & Commerce v. Bankers Automobile Ins. Co* 388

5. Constructive notice of corporate by-laws is imputed to third parties only if a copy thereof is posted conspicuously in the corporation's place of business. *Department of Trade & Commerce v. Bankers Automobile Ins. Co*..... 388
6. Equity will deny relief as to consummated purely *ultra vires* acts of a corporation when to grant it will occasion public inconvenience and the defendant serious loss. *Folts v. Globe Life Ins. Co*..... 723
7. Courts in determining whether equitable relief will be granted will consider whether the act challenged is merely *ultra vires*, or wholly void. *Folts v. Globe Life Ins. Co*..... 723

Counties and County Officers.

1. The county board has power to lease realty owned by the county. *Lindburg v. Bennett*..... 66
2. In absence of fraud, county board will not be enjoined from leasing for 99 years realty of the county not actually used nor needed for actual uses, where the consideration is adequate and the lease protects the county's interests. *Lindburg v. Bennett*..... 66
3. A 99-year lease of realty of a county *held* not equivalent to a "sale." *Lindburg v. Bennett*..... 66
4. The option of a lessee to purchase county realty in case of a contemplated sale *held* not operative to void a subsequent lease, no sale being involved. *Lindburg v. Bennett*..... 66
5. Taxpayers may appeal from an order of the county board allowing a claim against the county, though its allowance was the result of a compromise of a disputed claim. *Campbell Co. v. Boyd County*..... 186
6. On appeal from an order of the county board allowing a claim against a county, the district court tries the case *de novo*. *Campbell Co. v. Boyd County*..... 186

Courts.

Decisions of the supreme court commission establish no precedent and are authority only in the particular case. *Burkamp v. Roberts Sanitary Dairy*..... 60

Criminal Law. SEE BAIL. BASTARDY. BONDS. CONTEMPT. EMBEZZLEMENT. FALSE IMPRISONMENT. HOMICIDE. INCEST. INDICTMENT AND INFORMATION. INTOXICATING LIQUORS. RAPE.

1. A petition, as ground for issuance of writ *coram nobis*,

stating only a fact known to applicant before judgment, is insufficient. *State v. Boyd* 320
2. A writ *coram nobis* does not lie to bring into the record facts known to the applicant before judgment. *State v. Boyd* 320
3. A defendant appealing to the district court, who is not brought to trial before the end of the third term, is entitled to discharge. *Abbott v. State* 350
4. Weight of evidence in incest is for the jury, and verdict supported by sufficient evidence will stand. *Purvis v. State* 377
5. Error as to any matter of pleading or procedure in a criminal action violating constitutional rights of the accused will not be disregarded. *Stowe v. State* 440
6. Articles will not be excluded as evidence because obtained in an irregular or illegal manner. *Kuxhaus v. State* 514
7. One who has had experience with mash is competent to testify that a certain mixture is in a state of fermentation and is mash. *Kuxhaus v. State* 514
8. Rule as to consideration of evidence given by informers or detectives *held* inapplicable to county attorneys, sheriffs, or deputies. *Flanagan v. State* 531
9. An order overruling a motion for an involuntary nonsuit is not erroneous where competent evidence is sufficient to sustain a conviction. *Gorton v. State* 556
10. A plea of not guilty waives matters which might have been raised by motion to quash or plea in abatement and must be withdrawn before defendant can urge such matters; but, where there is no complaint, such plea need not be withdrawn before interposing a challenge to the right of the court to proceed. *Lindley v. State* 597
11. It is error to try a misdemeanor case on appeal without a complaint. *Lindley v. State* 597
12. Exclusion of a declaration of doubtful meaning as part of the *res gestæ*, *held* not error. *Denison v. State* 601
13. Remarks of the court relating to necessity for an interpreter *held* not error. *Denison v. State* 601
14. Jurisdiction to pronounce a particular sentence imposed is essential to a valid sentence. *Wilson v. State* 692
15. A sentence void for want of jurisdiction may be first questioned on appeal. *Wilson v. State* 692
16. Instruction as to elements of murder in the first degree *held* not error, in view of other instructions. *Sharp v. State* 304
17. Where instructions as a whole make "felonious intent"

essential to a conviction for embezzlement, a single instruction is not necessarily prejudicial because of use of the words "fraudulently converted." *Gorton v. State*..... 556
18. Instruction in a trial for embezzlement *held* erroneous as eliminating presumption of innocence. *Griess v. State*.... 719

Damages.

1. An instruction that pain and suffering which plaintiff will "probably" suffer in the future may be considered in fixing damages, *held* erroneous. *Burkamp v. Roberts Sanitary Dairy* 60
2. An instruction that the jury in a personal injury suit might consider the need of assistance on the part of persons benefited by a favorable verdict, *held* erroneous. *Emel v. Standard Oil Co*..... 418

Death.

1. Civil remedy by action against one causing death is a creature of statute. *Luckey v. Union P. R. Co*..... 85
2. The civil liability of a third person for negligently causing death is not changed by the workmen's compensation law. *Luckey v. Union P. R. Co*..... 85
3. An action for death must be brought in the name of the administrator of decedent's estate. *Luckey v. Union P. R. Co.* 85
4. The workmen's compensation law does not create a cause of action for negligently causing death, nor authorize a suit by the widow, dependents, administrator, or employer. *Luckey v. Union P. R. Co*..... 85
5. In an action for death, evidence *held* sufficient to raise question for jury and to sustain verdict for plaintiff. *Luckey v. Union P. R. Co*..... 85

Deeds.

1. Courts in construing instruments conveying real estate must give effect to the true intent of the parties so far as consistent with law. *Heiser v. Brehm*..... 472
2. An unwitnessed deed is valid between the parties and others except creditors and subsequent purchasers or mortgagees in good faith. *Mulligan v. Snavely*..... 765

Descent and Distribution.

1. Every deceased person is presumed to have left surviving some kindred, and the burden is on the state to prove failure of kindred or surviving spouse, entitling it to decedent's property by escheat. *In re Estate of O'Connor* 636

2. There is no presumption that any particular person is heir of a decedent. *In re Estate of O'Connor* 636
3. Where two or more groups of persons claim to be heirs of a decedent, each group has the burden of establishing its claim by a preponderance of the evidence. *In re Estate of O'Connor* 636
4. Evidence of general resemblance is not admissible to prove consanguineous relationship; but specific traits and particular or peculiarly marked physical characteristics are admissible for such purpose. *In re Estate of O'Connor* 636

Divorce.

Evidence *held* to sustain decree of divorce to wife. *Taminosian v. Taminosian* 285

Drains.

Construction of a drainage ditch pursuant to proceedings of county supervisors conducted secretly will be enjoined. *Johnson v. Platte County* 453

Easements.

Adverse user for ten years may create an easement to use a vacant strip of an adjoining lot for painting, washing windows, and making necessary repairs. *Dunbar v. O'Brien* 245

Elections.

1. The secretary of state, on objections to a certificate of nomination for a new political party, may determine from extrinsic evidence whether a lawful convention was held. *State, ex rel. Stephens, v. Marsh* 579
2. A certificate of nomination of a new political party cannot be filed, unless accompanied by a petition signed by at least 500 electors. *State, ex rel. Stephens, v. Marsh* 579

Embezzlement.

1. Evidence of a continuous series of conversions may support a conviction for an aggregate sum as a single embezzlement. *Gorton v. State* 556
2. Checks by which accused procured money charged to have been embezzled *held* admissible in evidence, though a bill of particulars gave the date of each check as the date of conversion instead of the date on which the money was received. *Gorton v. State* 556

3. Checks may be admissible in evidence in connection with proof that accused used them to procure money he was charged with embezzling. *Gorton v. State* 556

Eminent Domain.

1. The value of property taken for public use or damage thereto must be ascertained and provision made for payment before taking. *Meyer v. City of Alma* 511
2. The owner of the fee cannot enjoin use of right of way by licensee of railroad without showing special or irreparable damage. *Hall v. Bowers* 619

Equity. SEE BANKS AND BANKING, 41, 42.

1. Courts will use technicalities as instruments to prevent injustice, but not to defeat justice. *Northwest Ready Roofing Co. v. Antes* 121
2. The equity doctrine that a party with unclean hands will be denied relief does not apply unless his wrongdoing has proximate relation to the subject-matter in question. *Northwest Ready Roofing Co. v. Antes* 121
3. Equity will take jurisdiction when unnecessary trials, repeated appeals, delays, and wasteful costs will thereby be avoided. *Rogers v. Selleck* 569

Escheat.

Where there is reason to believe that decedent died without heirs, the state may intervene and assert its right to the property. *In re Estate of O'Connor* 636

Escrows.

An escrow should be made by all parties to the instrument deposited. *Willis v. Sponsler* 1

Estoppel.

1. To constitute an equitable estoppel by silence or acquiescence, it must be shown that the facts were known to the parties against whom the estoppel is urged. *Cech v. Costello* 224
2. Where one of two innocent persons must suffer loss, the one at fault should bear it. *Nebraska State Bank v. May* 262
3. Where facts showing estoppel are admitted, estoppel need not be specially pleaded. *Yates v. New England Mutual Life Ins. Co* 265

Evidence.

1. In an action on a note, parol evidence, generally, is admissible to prove that defendants were accommodation makers, where that defense is an issue. *Willis v. Sponsler* 1
2. The rule excluding parol evidence to vary or contradict a written instrument applies only between parties to such instrument and those claiming under them. *American Surety Co. v. School District* 6
3. Where intent is a direct issue, a married woman may testify as to her lack of intent to bind her separate estate by a note, the weight of such testimony being for the jury. *First Nat. Bank v. Ernst* 34
4. In absence of pleading and proof, statutes of a sister state are presumed to be the same as those of Nebraska. *First State Bank of Herrick v. Conant* 562
5. Testimony as to proper method of stopping a street car *held* admissible. *McCann v. Omaha & C. B. Street R. Co.* 786

Executors and Administrators. SEE BANKS AND BANKING, 43.

1. No authority exists to appoint an administrator in Nebraska, where deceased was a resident of and died in a foreign country, leaving no estate to be administered in Nebraska; but an administrator may be appointed to prosecute a transitory right of action to recover money in the hands of the alien property custodian on behalf of the estate of a decedent. *In re Estate of Buder* 52
2. Funds of a nonresident decedent in custody of the alien property custodian have their situs in any state as regards appointment of an administrator. *In re Estate of Buder* 52
3. The county court may determine the persons entitled to and distribute funds collected from the alien property custodian. *In re Estate of Buder* 52
4. An administrator's lease for a period after the estate is settled is not void and may be ratified by the lessee and the heirs. *Muller v. Harms* 657

Exemptions.

Only residents of state and heads of families are entitled to exemption from attachment; a physician, not the head of a family, is not exempt. *Howells State Bank v. Arps* 110

False Imprisonment.

1. Malice is not a material element in an action for false imprisonment. *Hall v. Rice* 813

2. An instruction in an action for false imprisonment that malice is immaterial except as it affects damages is erroneous, as punitive and exemplary damages are not allowed in absence of statute. *Hall v. Rice* 813

Fraudulent Conveyances.

1. One purchasing a stock of merchandise in bulk, without complying with the statute, becomes a trustee for creditors and liable as garnishee. *Cech v. Costello* 224
2. Ordinarily, in absence of estoppel, a creditor may assert rights under the bulk sales law against a purchaser of merchandise at any time within the general statute of limitations. *Cech v. Costello* 224
3. Evidence *held* insufficient to show existence of valid debts as consideration for conveyance. *Colfax County Bank v. Konvalin* 276

Habeas Corpus.

1. Habeas corpus will not lie to discharge one serving a penal sentence, if the court imposing it had jurisdiction of the offense and the person, and power to impose sentence. *In re Carbino* 107
2. Habeas corpus cannot be used as a substitute for proceedings in error. *In re Carbino* 107

Highways.

1. Improvement of highway will not be enjoined at the instance of one who has seen the work progress, and who has an adequate remedy at law. *Meyer v. City of Alma* .. 511
2. The county surveyor, in viewing and reporting on the expendiency of establishing a road pursuant to resolution of the county board, must form an independent judgment and exercise a judicial function. *Shirley v. Harlan County* 846
3. A county surveyor, voting as a member of the county board for a resolution establishing a highway, disqualified himself from acting as a commissioner to determine the expediency of establishing the road. *Shirley v. Harlan County* 846
4. Where a county surveyor was incompetent to act as a commissioner to determine the expediency of establishing a highway, his attempt so to do was invalid. *Shirley v. Harlan County* 846
5. A county board cannot establish a public road without an examination and report on its expediency, unless written consent of all landowners affected is filed with the county clerk. *Shirley v. Harlan County* 846

Homestead.

1. A suit to foreclose a mortgage on a homestead may be defended on the ground that the note and mortgage were signed by mortgagors as an accommodation to mortgagee and were never unconditionally delivered. *Willis v. Sponsler* 1
2. The statutory homestead, as between mortgagors and mortgagee of an invalid mortgage, is unlimited as to value. *Storz v. Clarke* 488
3. Conveyance of homestead must be executed and acknowledged by both husband and wife. *Storz v. Clarke* 488
4. Instrument *held* void as to homestead. *Storz v. Clarke* 488

Homicide.

1. Evidence *held* to sustain conviction for murder in the first degree. *Sharp v. State* 304
2. Motive is not an essential element of murder, though absence thereof is a circumstance in favor of accused. *Sharp v. State* 304
3. Murder in the second degree and manslaughter are included in a charge of murder in the first degree, and where different inferences may be drawn from the evidence as to the degree, the court should submit the different degrees to the jury. *Denison v. State* 601
4. On plea of guilty to charge of first degree murder, fixing the penalty is vested exclusively in the jury. *Wilson v. State* 692
5. To justify a verdict of murder in the first degree, it must be alleged and proved that the killing was done *purposely*, and with *deliberate and premeditated malice*. *Pembrook v. State* 759
6. The words "purposely," "deliberate," "premeditated," and "malice," defined. *Pembrook v. State* 759
7. Instruction defining "purposely," "deliberate," "premeditated," and "malice," *held* erroneous. *Pembrook v. State* 759

Husband and Wife.

1. A renewal note executed by a married woman as surety without consideration is subject to the same defenses as the original note. *First Nat. Bank v. Ernst* 34
2. A note executed by a married woman as surety for her husband is not binding on her, unless it is shown that she intended to bind her separate estate. *First Nat. Bank v. Ernst* 34

3. The burden is on one suing a married woman as surety to prove that she intended to bind her separate estate. *First Nat. Bank v. Ernst* 34
4. Intent of a married woman to bind her separate estate as surety *held* necessary. *First Nat. Bank v. Ernst* 34
5. Refusal to permit a married woman to show by oral testimony that, at the time she executed a note as surety, it was agreed that her separate estate would not be liable, *held* error. *First Nat. Bank v. Ernst* 34
6. The common-law disability of a married woman to contract is in force except as abrogated by statute. *McRoberts v. Dworak* 342
7. Where coverture is pleaded as a defense to a suit on a note, plaintiff has the burden of establishing that the note was made with reference to and on the credit of her separate estate and with intent to bind same. *McRoberts v. Dworak* 342

Incest.

Information for incest *held* sufficient. *Purvis v. State* 377

Indictment and Information.

1. A person accused of a felony must be charged by an information or indictment which discloses the nature and cause of accusation. *Stowe v. State* 440
2. Failure to state the exact date of embezzlement in an information is not a fatal defect. *Gorton v. State* 556
3. Information *held* sufficient to charge murder in the first degree by administering poison. *Wilson v. State* 692

Insurance.

1. Statute prescribing the classes of insurance which companies may be formed to transact, *held* to act prospectively, and not to limit the classes of insurance which a previously existing company was authorized to write. *State, ex rel. Spillman, v. Federated Merchants Mutual Ins. Co.* 98
2. Life policies will be construed most strongly against insurer. *Yates v. New England Mutual Life Ins. Co* 265
3. Incontestable clause in a life policy as to time for contest upheld. *Yates v. New England Mutual Life Ins. Co* 265
4. An incontestable clause in a policy applies before and after death of insured. *Yates v. New England Mutual Life Ins. Co* 265
5. An incontestable clause in a policy need not be specially

pleaded when attached to, and made a part of, the petition. *Yates v. New England Mutual Life Ins. Co*..... 265
6. Insurer *held* estopped to make defense of suicide. *Yates v. New England Mutual Life Ins. Co*..... 265
7. Whether a policy had lapsed *held* question for the jury. *Yates v. New England Mutual Life Ins. Co*..... 265
8. Whether insured died while the policy was in force *held* question for jury. *Yates v. New England Mutual Life Ins. Co*..... 265
9. Where an insurance company refuses to pay a loss on the ground that the policy had lapsed, it cannot assert different defenses after litigation is begun. *Yates v. New England Mutual Life Ins. Co*..... 265
10. Waiver of terms of a hail insurance policy is an affirmative defense, and must be pleaded. *Summers v. Automobile Ins. Co*..... 318
11. In an action against an insurance company for loss of crop, where there was no evidence of value of the crop, direction of verdict for defendant *held* proper. *Summers v. Automobile Ins. Co*..... 318
12. Where the petition alleged payment of insurance premiums and the answer admitted issuance of policy, *held* that payment of premiums was not put in issue. *Stratton v. Service Life Ins. Co*..... 685
13. Facts showing breach of condition as defense must be specially pleaded. *Stratton v. Service Life Ins. Co*..... 685
14. An incontestable clause, except as to certain matters, excludes all defenses not within the exception. *Stratton v. Service Life Ins. Co*..... 685
15. Limitation of one year to contest a policy for fraud *held* reasonable. *Stratton v. Service Life Ins. Co*..... 685
16. Limitation in policy less than the statutory provision to contest a policy for fraud *held* valid. *Stratton v. Service Life Ins. Co*..... 685
17. Approval of unlawful act by the department of trade and commerce will afford no protection to wrongdoers. *Folts v. Globe Life Ins. Co*..... 723
18. Plaintiffs *held* not estopped, nor precluded by laches, to maintain suit to enjoin unlawful use of funds by a fraternal insurance association. *Folts v. Globe Life Ins. Co.* 723
19. A member of a fraternal benefit corporation may sue the corporation and its officers for himself and others to recover corporate funds wrongfully misappropriated. *Folts v. Globe Life Ins. Co*..... 723
20. A provision voiding certificate of membership in a fra-

ternal association, in case the member sues the association without first submitting his grievances to the proper tribunals, is not applicable to a nonappealable act by the supreme governing body. *Folts v. Globe Life Ins. Co.*.... 723
21. A fraternal benefit corporation cannot write insurance for profit; nor can it incorporate an old line insurance corporation and subscribe for its capital stock under the guise of having it cooperate with the fraternal company. *Folts v. Globe Life Ins. Co*.... 723
22. A fraternal benefit corporation cannot use its surplus in organizing a business corporation under pretext of an investment. *Folts v. Globe Life Ins. Co*.... 723
23. Organization of a stock insurance corporation with funds of a fraternal benefit association *held ultra vires*, against public policy, and void. *Folts v. Globe Life Ins. Co*.... 723
24. Fraternal benefit insurance organizations are restricted in their activities to the objects and purposes of their existence. *Folts v. Globe Life Ins. Co*.... 723
25. Fraternal societies in matters of business, property rights and contracts are answerable to the laws governing their organization. *Folts v. Globe Life Ins. Co*.... 723
26. Organization of a stock company by a fraternal insurance corporation, and subscribing for the entire capital stock, *held* not a consolidation. *Folts v. Globe Life Ins. Co.* 723

Intoxicating Liquors.

1. "Mash" defined. *Kuxhaus v. State*.... 514
2. Evidence *held* to sustain finding that defendant had in his possession mash and necessary equipment for manufacturing liquor. *Kuxhaus v. State*.... 514
3. The offense of possession of mash and equipment for making liquor requires only possession of mash being used in the process of manufacturing liquor. *Kuxhaus v. State* 514

Judgment.

1. A transcript of a judgment filed in another county is not a lien on the debtor's property until entered on the judgment record. *Rathbone Co. v. Kimball*.... 229
2. Statutes governing liens of judgments in state and federal courts *held* to be in conformity. *Rathbone Co. v. Kimball* 229
3. Judgments of federal courts in Nebraska are liens on the debtor's property only in the county where rendered un-

less a transcript is filed and entered of record in other counties. *Rathbone Co. v. Kimball* 229
4. The statute authorizing the district court to vacate or modify a judgment after the term does not apply to a judgment by the supreme court. *Brandeen v. Beale* 291

Jury.

1. A juror having conscientious scruples against returning a verdict for murder, punishable by death, may be excused for cause. *Sharp v. State* 304
2. A juror having formed an opinion *held* not thereby disqualified, in view of his statement that he would disregard the opinion and return a fair and impartial verdict. *Sharp v. State* 304
3. Overruling of challenges to jurors on their *voir dire* approved. *Noonan v. State* 520
4. A jury summoned by a sheriff who testified at the trial is not vulnerable to challenge. *Noonan v. State* 520
5. Parties to proceedings to establish heirship, where questions of fact only are involved, are entitled to a jury trial. *In re Estate of O'Connor* 636

Larceny.

Instruction on evidential effect of proof of unexplained possession of property recently stolen *held* not erroneous. *Flanagan v. State* 531

Libel and Slander.

1. A communication by the manager of a store to the other clerks that one had confessed to embezzlement, *held* qualifiedly privileged. *Hall v. Rice* 813
2. Plaintiff in an action for slander has the burden of proving that slanderous words uttered under circumstances of qualified privilege were uttered with express malice. *Hall v. Rice* 813
3. In an action for slander, proof of slanderous words libelous *per se* raises a presumption of malice, requiring evidence to overcome; but the burden of proving malice remains with plaintiff. *Hall v. Rice* 813
4. Instruction in an action for slander, involving a question of qualified privilege, which ignored the defense of privilege, *held* erroneous. *Hall v. Rice* 813

Licenses.

1. Domestic and foreign corporations are on an equality with reference to occupation tax. *State, ex rel. Case Threshing Machine Co., v. Marsh* 832

2. "Paid-up capital" as applied to occupation tax on domestic corporations means the amount of authorized capital stock employed in the business. *State, ex rel. Case Threshing Machine Co., v. Marsh* 832
3. The occupation tax of a foreign corporation is computed on the basis of the amount of its paid-up capital stock employed in this state. *State, ex rel. Case Threshing Machine Co., v. Marsh* 832

Limitations of Actions.

1. An action to reform an insurance contract for fraud or mutual mistake is barred in four years after discovery thereof. *Shanahan v. Fidelity-Phenix Ins. Co* 132
2. In an action on an insurance policy, an amended petition seeking reformation of the policy declares on a new cause of action, and is barred, unless filed within four years from accrual thereof. *Shanahan v. Fidelity-Phenix Ins. Co.* 132
3. Petition to vacate a judgment for fraud after two years *held* properly stricken. *Brandeen v. Beale* 291
4. Amendment to petition in action for death *held* to introduce a new cause of action, barred by the statute of limitations. *Emel v. Standard Oil Co* 418

Master and Servant. SEE DEATH.

1. An employer, to the extent of his liability for compensation, is subrogated to the rights of the employee and his dependents against a third person who causes injury to, but not death of, the employee. *Luckey v. Union P. R. Co.* 85
2. Where an employer liable for compensation refuses to sue a third person for injury to, but not death of, the employee, the latter may sue in his own behalf. *Luckey v. Union P. R. Co* 85
3. Consent by an employer liable for compensation to an employee's action against a third person for causing injury is equivalent to refusal to sue the wrongdoer. *Luckey v. Union P. R. Co* 85
4. Evidence *held* to establish compensable status of county employee, and that the award and attorney's fee were not excessive. *Davis v. Lincoln County* 148
5. Evidence *held* to sustain finding that deceased was manager of an insurance agency, an independent contractor, not within the workmen's compensation act. *Priest v. Business Men's Protective Ass'n* 198
6. Recovery *held* not barred, where an employee made claim

of his employer for compensation within two months after injury and lodged claim with the commissioner within seven months thereof. *Palmer v. Saunders County* 484

7. An action for compensation by an injured employee, pending at time of his death, may be revived on motion by his dependents on giving bond or by the administrator without bond; the pleadings must state facts sufficient to bring the application within the statute. *Palmer v. Saunders County* 484

8. Appeal from compensation award pending in one county *held* not to deprive the district court for another county of jurisdiction of another appeal from the same award. *Ashton v. Blue River Power Co* 661

9. Where compensation was paid without adjudication or agreement of settlement the statutory limitation *held* not to take effect until one year after the last payment. *Ashton v. Blue River Power Co* 661

10. A minor employee between 14 and 16 years of age may maintain an action at common law for damages against the employer who has no employment certificate. *Benner v. Evans Laundry Co* 701

11. A minor employee between 14 and 16 years of age, not classified, may sue at common law for an injury. *Benner v. Evans Laundry Co* 701

12. Evidence of employer's failure to procure an employment certificate is material only to sustain the right to bring an action at common law for injury. *Benner v. Evans Laundry Co.* 701

13. Original contractor *held* "third party" and liable to employee of subcontractor injured by reason of negligence of original contractor; and that the subcontractor is the only employer of the injured party, all others being "third parties." *Boyd v. Humphreys* 799

14. "Employer", as used in sec. 3039, Comp. St. 1922, does not include an owner who requires his contractor to take out compensation insurance, nor a contractor who requires his subcontractor to take out such insurance. *Matthews v. Crancer Co* 805

15. An owner as to employees of his contractor, and a contractor as to employees of his subcontractor are "third persons." *Matthews v. Crancer Co* 805

16. An owner is liable at common law for damages sustained by his contractor's employees caused by his actionable negligence, and a contractor is likewise liable to employees of his subcontractor. *Matthews v. Crancer Co* 805

17. Surrender of right to prosecute an action at common law for damages arising from actionable negligence of another *held* to apply solely to contractor and injured employee. *Sloan v. Harrington* 809
18. "Third person" as used in sec. 3041, Comp. St. 1922, *held* to signify persons other than contractor and its injured employee. *Sloan v. Harrington* 809

Mortgages.

1. Parties to a mortgage foreclosure suit, wherein irrigation district assessments were given priority over a mortgage, could not challenge the district's right to levy assessments after stipulating that organization of the district was legal and the levy and assessment were duly made. *Flansburg v. Shumway* 125
2. Statutory provisions in force at time of execution of a mortgage enter into and become part of the contract. *Flansburg v. Shumway* 125
3. Allowing bidder to increase his bid on hearing for conformation of sale *held* not error, where owner of property was not injured. *Gordon State Bank v. Hinchley* 211
4. Where the holder of a secured note sold it without disclosing that he was acting as agent, he is liable for deficiency in subsequent foreclosure proceedings. *Thornton v. Farmers & Merchants Nat. Bank* 355
5. One charged with notice of a record may rely on the validity of all instruments not disclosing facts impeaching it or putting him on inquiry. *Mulligan v. Snavely* 765
6. Actual notice of an instrument affecting title to real estate is as binding as constructive notice by record. *Mulligan v. Snavely* 765
7. One who by himself or agent examines a record is charged with actual notice of matters properly of record and of instruments not entitled to record appearing thereon. *Mulligan v. Snavely* 765
8. A subsequent purchaser or mortgagee may rely on an abstract only to the extent that it correctly reflects the record. *Mulligan v. Snavely* 765
9. A subsequent mortgagee in good faith without notice of an assignment of the debt secured by a prior mortgage may rely on a release thereof, of which he has actual or constructive notice. *Mulligan v. Snavely* 765
10. An assignment of a real estate mortgage to the indorsee of a note secured thereby is an instrument affecting title to land within the recording acts. *Mulligan v. Snavely* 765

11. A subsequent mortgagee *held* to have a superior equity to an assignee of a prior mortgage whose assignment was not of record. *Mulligan v. Snavely* 765

Municipal Corporations.

1. A *nunc pro tunc* order by resolution adopted eighteen months afterward may not change a city council record under the guise of correction. *Beverly Land Co. v. City of South Sioux City* 47
2. Paving assessments cannot be sustained on an ordinance other than that specified in the notice of meeting of a city council to determine special benefits. *Beverly Land Co. v. City of South Sioux City* 47
3. Contract with paving engineer executed by city during performance of services, *held* binding on the city. *Morearty v. City of McCook* 113
4. Paving engineer substantially performing services *held* entitled to recover from city on contract. *Morearty v. City of McCook* 113
5. In action on engineer's contract, city may recoup damages from failure to strictly perform contract. *Morearty v. City of McCook* 113
6. A city may ratify a contract irregularly made in its behalf if it had power to make such contract. *Morearty v. City of McCook* 113
7. Paving assessments in excess of benefits are unauthorized. *Munsell v. City of Hebron* 251
8. The owner of property cannot lawfully be assessed for a public improvement beyond present or reasonably prospective benefit. *Munsell v. City of Hebron* 251
9. One who attacks the validity of a paving assessment has the burden of proving its invalidity. *Munsell v. City of Hebron* 251
10. Collection of assessments for improvements will not be enjoined for technical irregularities. *Munsell v. City of Hebron* 251
11. Mere irregularities do not necessarily invalidate paving assessments. *Munsell v. City of Hebron* 251
12. Levying special assessments without a corresponding increase in value is taking private property for public use. *Munsell v. City of Hebron* 251
13. An equipped municipal aviation field is "public service property" and a "public utility" for which bonds may be voted. *State, ex rel. City of Lincoln, v. Johnson* 301
14. A state-wide primary is a "general election" within the Lincoln charter authorizing issuance of municipal bonds

on a majority vote. *State, ex rel. City of Lincoln, v. Johnson* 301
15. City charter *held* to prevail over a conflicting state statute on the same subject applicable to cities of different classes. *State, ex rel. City of Lincoln, v. Johnson*..... 301
16. Under the Lincoln charter, a majority vote is sufficient to authorize issuance of municipal bonds to establish and equip an aviation field. *State, ex rel. City of Lincoln, v. Johnson* 301
17. Charter provisions will govern, as to matters of local municipal concern, over general laws. *Salsbury v. City of Lincoln* 465
18. Improvement of city streets is solely of municipal concern. *Salsbury v. City of Lincoln*..... 465
19. Courts will not inquire as to the wisdom or necessity of legislative acts of municipal boards concerning matters within their power. *Salsbury v. City of Lincoln*..... 465

Negligence.

1. Whether violation of an ordinance or statute requiring vehicles to drive to right of center of highway constitutes negligence is a question for the jury. *Burkamp v. Roberts Sanitary Dairy*..... 60
2. Whether violation of an ordinance requiring vehicles to display lights constitutes negligence is a question for the jury. *Burkamp v. Roberts Sanitary Dairy*..... 60
3. An automobilist driving into an unbarricaded and unlighted excavation in a highway at night *held* entitled to recover. *Kelso v. Seward County*..... 136
4. It is negligence as matter of law to drive an automobile on a highway at night at a speed preventing stopping to avoid a collision with an object within the area lighted by its lamps. *Roth v. Blomquist*..... 444
5. Failure to maintain notices indicating depths of water in public bathing pool conducted for private gain may be evidence of negligence. *Lyman v. Hall*..... 140
6. Proprietors of a bathing resort in exercising ordinary care may be obliged to keep some one on duty to rescue those in danger; and may be held liable for negligence if they are tardy in instituting search for a missing bather. *Lyman v. Hall*..... 140
7. It is the duty of owners of bathing resorts to be prepared to rescue those in danger, and to promptly act, and make every reasonable effort in behalf of those known to be missing. *Lyman v. Hall*..... 140

8. The duty of a bathing resort keeper to make reasonable provision against accidents from engaging in aquatic sports for which he provides facilities may require furnishing an attendant. *Lyman v. Hall* 140
9. Ordinary care to provide a reasonably sufficient number of attendants at a bathing resort is a standard of the owner's duty. *Lyman v. Hall* 140
10. The duty to exercise ordinary care to protect patrons of a bathing resort does not make the proprietor an insurer of their safety. *Lyman v. Hall* 140
11. Plaintiff must prove that negligence pleaded was the proximate cause of the alleged injury. *Lyman v. Hall* 140
12. Instruction on comparative negligence criticized. *Emel v. Standard Oil Co* 418
13. "Wilful negligence" defined. *Ashton v. Blue River Power Co.* 661

New Trial.

1. A new trial will not be granted for newly discovered evidence which is merely cumulative. *In re Estate of O'Connor* 636
2. An excessive verdict may be corrected by remittitur. *McCann v. Omaha & C. B. Street R. Co* 786

Nuisance.

1. Lumber maliciously piled on a lot to shut out light and air from a neighbor's windows is an abatable nuisance. *Dunbar v. O'Brien* 245
2. Denial of injunction against a malicious nuisance because of abatement after suit is begun depends on good faith and attending circumstances. *Dunbar v. O'Brien* 245

Parent and Child.

1. In a controversy between a mother and strangers for custody of a child, the rights of the mother as natural guardian will be considered. *Bradley v. Beckett* 796
2. The mother *held* entitled to custody of child in preference to strangers. *Bradley v. Beckett* 796

Partition.

1. Partition will not lie in violation of restrictions imposed by the grantor in a trust deed. *Heiser v. Brehm* 472
2. Ordering partition of land under an active trust after death of trustee, over objection of some of the beneficiaries, *held* error. *Heiser v. Brehm* 472

Physicians and Surgeons.

1. A physician or surgeon who abandons his patient at a critical stage without reasonable notice, the giving of which was reasonably possible, is liable for damages. *Stohlman v. Davis* 178
2. A physician or surgeon who fails to exercise such reasonable skill and care as is ordinarily exercised by members of his profession in good standing in his or similar localities is guilty of negligence. *Stohlman v. Davis* 178
3. In a malpractice action it is not necessary, to sustain a verdict for plaintiff, that all expert witnesses should consider the treatment improper; nor will agreement of the experts that a portion of the treatment is proper under some circumstances defeat recovery. *Stohlman v. Davis* 178

Pleading.

1. A written instrument made a part of a pleading controls the allegations thereof which it contradicts or which are inconsistent therewith. *American Surety Co. v. School District* 6
2. Motion to strike petition because of insufficient facts is in effect a general demurrer, and admits truth of well-pleaded facts. *Brandeen v. Beale* 291
3. A general demurrer admits well-pleaded facts. *Salsbury v. City of Lincoln* 465
4. One whose authority to prosecute an action is limited by statute must plead facts bringing him within the limitations. *Sommerville v. Board of County Commissioners* 507

Pledges.

Where a pledgee of a mortgage forcloses, without making the pledgor a party, and purchases the property, he holds it as collateral for the principal debt unless a contrary intent appears. *Lincoln Safe Deposit Co. v. Yeast* 344

Principal and Agent.

1. Express authority for an attorney in fact to bind his principal as surety is strictly construed. *Massachusetts Bonding & Ins. Co. v. Nichols* 93
2. A principal is chargeable with knowledge acquired by an agent, when acting for another, only when proof is made that such knowledge was in the mind of the agent at the time of the transaction. *Department of Trade & Commerce v. Bankers Automobile Ins. Co* 388
3. The burden of showing that an agent had in mind knowledge gained in another transaction is on the party seek-

ing to charge the principal with the agent's knowledge. *Department of Trade & Commerce v. Bankers Automobile Ins. Co.* 388

Principal and Surety.

Act of payee *held* to release surety on note. *Nebraska State Bank v. May*..... 262

Railroads.

1. A traveler on a highway on approaching a railroad crossing who fails to look and listen for trains is guilty of negligence. *Moreland v. Chicago & N. W. R. Co*..... 456
2. A freight train standing west of a crossing *held* not to excuse a traveler on a highway from looking toward the east for an approaching train. *Moreland v. Chicago & N. W. R. Co*..... 456
3. Negligence of a traveler on a highway in failing to look for an approaching train *held* to defeat recovery for a a collision at a crossing. *Moreland v. Chicago & N. W. R. Co.* 456

Rape.

1. Sentence reduced. *Slezak v. State*..... 32
2. The unsupported testimony of the prosecutrix may be sufficient to identify the guilty party, if commission of the offense has first been established. *Noonan v. State*.... 520

Schools and School Districts.

1. A school district possesses only statutory powers and may contract only respecting objects, and to the extent, the law permits. *American Surety Co. v. School District*..... 6
2. In an action on a contract against a school district, the petition must affirmatively show that the contract is one which the district may make. *American Surety Co. v. School District* 6
3. Members of a school board, in exacting a bond for the benefit of laborers, mechanics, and materialmen, exercise statutory power for the beneficiaries to be protected thereby, and not for the school district. *American Surety Co. v. School District*..... 6
4. The statutory bond required of a contractor erecting a building for a school district protecting laborers and materialmen affords no basis for a cause of action against the school district in its corporate capacity. *American Surety Co. v. School District*..... 6
5. Covenants and conditions of a contractor's bond are not

to be read into or construed as part of, or to alter, his contract to erect a school building. *American Surety Co. v. School District* 6
6. The intent in enacting the rural high school act regulating the assessment and levy of taxes was to protect the taxpayer. *Howard v. Jensen* 102
7. In construing the rural high school act, the legislative intent and the object to be accomplished will be considered. *Howard v. Jensen* 102
8. The literal meaning of "shall" must be considered in determining the legislative intent of a statute regulating assessment and levy of rural high school tax. *Howard v. Jensen* 102

Specific Performance.

Evidence *held* to sustain decree denying specific performance of contract of adoption with right to inherit. *Johnson v. Kern* 537

States.

1. A resolution by one branch of the legislature authorizing an action against the state to recover damages caused by the negligence of a state employee does not render the state liable therefor. *Shear v. State* 865
2. Recovery against the state for damages caused by negligence of an officer, agent, or employee cannot be had in absence of express statute. *Shear v. State* 865

Statute of Frauds.

1. A written agreement to answer for the debt of another is void as to a person whose name is subscribed thereto by one not authorized by writing. *Massachusetts Bonding & Ins. Co. v. Nichols* 93
2. The statute of frauds cannot be evaded by mere changes in language nor by disguising transactions. *Massachusetts Bonding & Ins. Co. v. Nichols* 93

Statutes.

1. Generally, legislative acts will be held to operate prospectively unless a contrary intent is clearly disclosed. *State, ex rel. Spillman, v. Federated Merchants Mutual Ins. Co.* 98
2. The consequences resulting from construing a statute should be taken into consideration in determining legislative intent. *Howard v. Jensen* 102
3. Statutory provisions regulating assessment and levy of

taxes are mandatory when object is protection of taxpayer. *Howard v. Jensen* 102
4. Statutory provisions for the levy of a tax are imperative. *Howard v. Jensen* 102
5. A statute enacted after an alleged crime was committed, changing the time for appearance of defendant on appeal, relates to procedure, and governs the appeal. *Abbott v. State* 350
6. Law regulating public dances on Sunday and excepting cities of metropolitan class from its provisions *held* invalid as class legislation. *Galloway v. Wolfe* 824

Subrogation.

Subrogation is the substitution of another person to the rights of a creditor, but the person subrogated acquires no greater rights than the creditor had at the time of subrogation. *American Surety Co. v. School District* 6

Taxation. SEE BANKS AND BANKING, 5. LICENSES. STATUTES, 3, 4.

1. Trustees must present estimate for adoption to electors at annual meeting on first Monday of June to make levy of rural high school tax valid. *Howard v. Jensen* 102
2. A rural high school district annual tax levy, based on an estimate adopted by electors at a meeting on the second Monday instead of on the first Monday in June, *held* void. *Howard v. Jensen* 102
3. The lien of taxes regularly levied on realty is ordinarily perpetual, and can be divested only by payment or in some manner authorized by statute. *Flansburg v. Shumway* 125
4. Statute authorizing levy of taxes on stock of banks, loan and trust, and investment companies, in excess of five mills on the dollar valuation, *held* invalid. *State, ex rel. Spillman, v. Ord State Bank* 189
5. The discretion reposed in the board of equalization to determine value of property will not be disturbed unless clearly wrong. *Meridian Highway Bridge Co. v. Cedar County* 214
6. Statute providing rate for publishing notices governs rate for publishing delinquent tax lists, and not the statute providing the amount to be charged back by the county to the taxpayer. *Wisner v. Morrill County* 324
7. The legal rate for printing is only a maximum rate, and a county may show agreement for a lower rate for pub-

lication of delinquent tax notices. *Wisner v. Morrill County* 324
8. A newspaper must publish delinquent tax lists in the form submitted by the county treasurer. *Wisner v. Morrill County* 324
9. The remedy by appeal from the board of equalization is exclusive as to all questions properly before them; but, where land is not subject to taxation, the remedy by payment under protest and claim for refund is applicable. *Morrow v. Farmers Irrigation District* 424
10. Time for appeal by taxpayer from county board of equalization depends on whether appellant had a direct or indirect interest. *Sommerville v. Board of County Commissioners* 507
11. A court to which the law authorizes an appeal from a decision of a board of equalization must keep strictly within the statute defining its power. *Sommerville v. Board of County Commissioners* 507
12. A county treasurer selling real estate for delinquent taxes should include only delinquent taxes previously advertised. *McGerr v. Bradley* 841
13. Land may be sold at private sale for delinquent taxes levied and advertised for the previous year and not sold at public sale for want of bidders, though taxes for another year have become delinquent, but not advertised. *McGerr v. Bradley* 841
14. Private sale of land for taxes must be subject to taxes becoming delinquent after the advertisement for the previous year. *McGerr v. Bradley* 841
15. Cash value of land as of date of owner's death is proper basis for levying inheritance tax. *In re Estate of Fort* 854
16. Interest must be paid on inheritance taxes, unless paid within one year from accrual. *In re Estate of Fort* 854
17. Beneficiaries obtaining a substantial reduction in inheritance tax on appeal from county court are not liable for costs in the district court. *In re Estate of Fort* 854

Tenancy in Common.

1. A cotenant's possession of the property, to become adverse, requires notice that the entire estate is claimed in hostility to his cotenants. *Walter v. Walter* 671
2. Notice of a cotenant's hostile claim may be shown by hostile acts sufficient to put a man of ordinary prudence on guard; but acts reasonably consistent with title in his cotenants are not sufficient. *Walter v. Walter* 671

3. Acts of cotenant *held* not sufficient to give notice to cotenants of a hostile claim. *Walter v. Walter* 671
4. Acts constituting disseisin if done by a stranger may not have such effect against a cotenant when done by a tenant in common. *Walter v. Walter* 671
5. Cotenants are not chargeable with laches where they have no notice of a hostile claim by the tenant in possession. *Walter v. Walter* 671
6. A quitclaim deed of an "apparent interest" by heirs of a deceased cotenant to two coheirs *held* insufficient notice of a hostile claim against cotenants of their deceased ancestor. *Walter v. Walter* 671
7. A "family arrangement" between heirs of a deceased cotenant in possession is not binding on cotenants of deceased taking no part therein. *Walter v. Walter* 671

Trade-Marks and Trade-Names.

1. Mere laches is no defense to a suit to enjoin continuing wrongful and fraudulent use of a trade-name. *Northwest Ready Roofing Co. v. Antes* 121
2. Defendant enjoined from use of trade-name. *Northwest Ready Roofing Co., v. Antes* 121

Treaties.

1. Ordinarily, provisions of a treaty should be given a liberal construction. *Goos v. Brocks* 750
2. A state of war between parties to a treaty abrogates only provisions thereof incompatible with a state of war. *Goos v. Brocks* 750

Trial. SEE APPEAL AND ERROR. CRIMINAL LAW.

1. Where there is evidence which would support a verdict, if uncontradicted, the court should submit the case to the jury; it not being the function of the court to weigh the evidence. *Stohlman v. Davis* 178
2. Where a conspiracy to defraud was the only issue tendered by the pleadings, *held* error to submit the case on the theory of liability under a partnership relation. *Reid v. Brechet* 411
3. In an action for conspiracy to defraud, refusal to direct a verdict for defendants for lack of evidence *held* error. *Reid v. Brechet* 411
4. Special findings to sustain a judgment against a general verdict must establish all the ultimate facts. *In re Estate of Kerr* 630

5. The court may determine the order of proof where judgment would go against each of several parties if no evidence were introduced. *In re Estate of O'Connor* 636
6. The court in contingencies where no rule has been prescribed must adopt a rule. *In re Estate of O'Connor* 636
7. Where the evidence would sustain a verdict for either party, a motion for a directed verdict *held* properly overruled. *McCann v. Omaha & C. B. Street R. Co* 786
8. Plaintiff in a personal injury action may inquire of defendant on cross-examination as to whether he carries liability insurance *Sloan v. Harrington* 809
9. The purpose of inquiries as to whether defendant carries liability insurance is to ascertain the status and interest of parties, and the court on request should, by instruction, limit the jury's consideration of the testimony to such purpose. *Sloan v. Harrington* 809
10. The trial judge without request must instruct on the law applicable to the issues, if supported by evidence. *Hall v. Rice* 813

Trusts.

Where a trust fund consisted of money, failure to find money in the assets of an insolvent trustee is *prima facie* proof that the trust fund had been dissipated, and unless the *cestui que trust* can trace the fund into some particular existing asset, or mass of assets, particular or general, the trust fails for want of a subject. *State, ex rel. Spillman, v. Citizens State Bank* 358

Vendor and Purchaser. SEE MORTGAGES, 5-11.

Joint occupancy of premises as a family home *held* not to impart notice of wife's claim of any interest other than homestead right. *Storz v. Clarke* 488

Waters.

1. Irrigation districts are quasi-public corporations, with power to assess property to raise revenue for irrigation. *Flansburg v. Shumway* 125
2. Irrigation district assessments are taxes within the statute making general taxes a first lien on land, and take priority over an existing mortgage lien. *Flansburg v. Shumway* 125
3. Where a county treasurer executed in favor of an irrigation district a tax sale certificate and receipts for subsequent taxes, but did not deliver them, and no actual payment was made, the tax liens were not destroyed by

expiration of the statutory period for enforcing them, but were entitled to priority over an earlier mortgage lien. *Flansburg v. Shumway* 125
4. An irrigation company incurs no liability by improving an existing drainage course without negligence. *Wiles v. Farmers Irrigation District* 288
5. An irrigation district is only liable for negligent construction or operation of its seep ditches after it obtains right of way. *Wiles v. Farmers Irrigation District* 288
6. "Subirrigation", as used in the law authorizing refund of taxes on lands not benefited by irrigation, embraces all lands that cannot be benefited by irrigation. *Morrow v. Farmers Irrigation District* 424
7. Subirrigated lands in an irrigation district are not taxable for operating expenses. *Morrow v. Farmers Irrigation District* 424
8. Sec. 2878, Comp. St. 1922, providing for refund of irrigation taxes paid under protest, *held* to create a cumulative remedy. *Morrow v. Farmers Irrigation District* 424

Wills.

1. Will *held* to have lapsed on death of sole legatee without issue, and not entitled to probate. *In re Estate of Strelow* 168
2. A legatee seeking probate of a will must allege and prove the testator's capacity, that the instrument is in legal form, and that he is entitled to the legacy. *In re Estate of Strelow* 168
3. "Issue" in the statute substituting issue of legatee or devisee dying before testator, *held* to mean offspring and lineal descendants; and *held* that they take as substituted legatees or devisees, and not as heirs. *In re Estate of Strelow* 168
4. In a will contest, permitting the jury to consider an earlier lapsed will with a later will *held* error. *In re Estate of Strelow* 168
5. A remark by the court that he thought a physician being examined as to testator's competency was telling the truth *held* prejudicial error. *In re Estate of Strelow* 168
6. The intention of the testator must be ascertained from a liberal interpretation and comprehensive view of all the provisions of a will; no particular words or conventional forms of expression are necessary in a will. *In re Estate of Combs* 257
7. In construing a will, the court will place itself in the position of the testator, ascertain his will, and, if lawful, enforce it. *In re Estate of Combs* 257

8. Will construed, and *held*, by implication, to exclude the widow as devisee of the remainder, and to designate heirs of the blood as devisees. *In re Estate of Combs* 257
9. A defeated litigant in a will contest is not entitled to a trial *de novo* on appeal. *In re Estate of Kerr* 630
10. On appeal from a judgment in a will contest, issues of fact are determined by sufficiency of evidence to sustain the verdict or findings. *In re Estate of Kerr* 630
11. Issue of fact as to mental capacity to make a will is for the jury. *In re Estate of Kerr* 630
12. Evidence of insane delusions with respect to ignored kindred *held* admissible as to mental or testamentary capacity. *In re Estate of Kerr* 630
13. The question in case of insane delusions is whether such delusions controlled the testator's actions. *In re Estate of Kerr* 630
14. An instruction referring to kindred who would inherit in absence of a will *held* not prejudicially erroneous. *In re Estate of Kerr* 630
15. The jury must consider unnatural and unreasonable provisions of a will in connection with evidence of testator's mental incompetency. *In re Estate of Kerr* 630
16. In construing a will, intent of testator governs. *In re Estate of Smith* 776
17. A codicil to a will that no devisee addicted to excessive use of liquor or drugs should be a beneficiary is a valid condition subsequent. *In re Estate of Smith* 776
18. Possession and income from a devise on condition withheld until condition performed. *In re Estate of Smith* 776
19. The latter of two irreconcilable provisions of a will will prevail over the earlier, unless a contrary intention is evinced. *In re Estate of Smith* 776

Witnesses.

1. One entitled to present claim for compensation for death under the workmen's compensation act is the representative of a deceased person within the statute relating to competency of witnesses. *Priest v. Business Men's Protective Ass'n* 198
2. In a proceeding by an employee for compensation for death under the workmen's compensation act, the officers and directors of a mutual assessment association *held* incompetent to testify to transactions or conversations between them and the deceased against his legal representative. *Priest v. Business Men's Protective Ass'n* 198
3. Transactions in which a deceased participated are not

incompetent, and evidence thereof may be given by persons not disqualified. *Priest v. Business Men's Protective Ass'n* 198

4. A letter proved by competent evidence to have been written by deceased is competent, though the adverse party is representative of deceased. *Priest v. Business Men's Protective Ass'n* 198

5. Grantee of deceased is legal representative as against an attacking creditor. *Colfax County Bank v. Konvalin*..... 276