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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1924, AND JANUARY AND SEPTEMBER TERMS, 1925.

VOLUME CXIII

HENRY P. STODDART,

OFFICIAL REPORTER

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1926

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By Henry P. Stoddart, Reporter of the Supreme Court,

For the benefit of the State of Nebraska.

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

JUSTICES

ANDREW M. MORRISSEY, CHIEF JUSTICE
CHARLES B. LETTON, ASSOCIATE JUSTICE [1]
WILLIAM B. ROSE, ASSOCIATE JUSTICE
JAMES R. DEAN, ASSOCIATE JUSTICE
GEORGE A. DAY, ASSOCIATE JUSTICE
EDWARD E. GOOD, ASSOCIATE JUSTICE
WILLIAM H. THOMPSON, ASSOCIATE JUSTICE
ROBERT E. EVANS, ASSOCIATE JUSTICE [2]
GEORGE A. EBERLY, ASSOCIATE JUSTICE [3]

OFFICERS

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LLOYD DORT	Assistant Attorney General
HUGH LA MASTER	Assistant Attorney General
LEE BASYE	Assistant Attorney General
HENRY P. STODDART	Reporter
HARRY C. LINDSAY	Clerk
VICTOR SEYMOUR	Deputy Clerk

[1] Term expired January 7, 1925.
[2] Died July 8, 1925.
[3] Appointed July 24, 1925.

JUDICIAL DISTRICTS, AND DISTRICT JUDGES OFFICIATING AT THE ISSUANCE OF THIS VOLUME

Number of District	Counties in District	Judges in District	Residence of Judge
First	Johnson, Nemaha, Pawnee and Richardson.	John B. Raper	Pawnee City
Second	Cass, Otoe and Sarpy.	James T. Begley	Plattsmouth
Third	Lancaster.	Jefferson H. Broady	Lincoln
		Mason Wheeler	Lincoln
		Frederick E. Shepherd	Lincoln
		Willard E. Stewart	Lincoln
Fourth	Burt, Douglas and Washington.	L. B Day	Omaha
		James M Fitzgerald	Omaha
		Charles A. Goss	Omaha
		William G Hastings	Omaha
		Charles Leslie	Omaha
		William A Redick	Omaha
		Abraham L. Sutton	Omaha
		Alexander C. Troup	Omaha
		Arthur C. Wakeley	Omaha
Fifth	Butler, Hamilton, Polk, Saunders, Seward and York.	Lovel S. Hastings	David City
		Harry D Landis	Seward
Sixth	Boone, Colfax, Dodge, Merrick, Nance and Platte.	Frederick W. Button	Fremont
		Louis Lightner	Columbus
Seventh	Fillmore, Nuckolls Saline and Thayer.	Robert M Proudfit	Friend
Eighth	Cedar, Dakota, Dixon and Thurston.	Mark J. Ryan	Pender
Ninth	Antelope Cuming, Knox, Madison, Pierce, Stanton and Wayne.	DeWitt C. Chase	Stanton
		Anson A. Welch	Wayne
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Phelps and Webster	Lewis H. Blackledge	Red Cloud
		William A Dilworth	Holdrege
Eleventh	Blaine, Garfield, Grant, Greeley Hall, Hooker, Howard, Loup, Thomas, Valley and Wheeler	Edwin P. Clements	Ord
		Bayard H. Paine	Grand Island
Twelfth	Buffalo, Custer, Logan and Sherman.	Bruno O. Hostetler	Kearney
Thirteenth	Arthur Banner, Cheyenne, Dawson, Deuel, Keith, Kimball Lincoln and McPherson	Isaac J. Nisley	Lexington
		J Leonard Tewell	Sidney
Fourteenth	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Perkins and Red Willow	Charles E. Eldred	McCook
Fifteenth	Boyd, Brown, Holt Keya Paha and Rock	Robert R. Dickson	O'Neill
Sixteenth	Box Butte Cherry, Dawes, Sheridan and Sioux	William H. Westover	Rushville
Seventeenth	Garden, Morrill and Scotts Bluff.	P. J. Barron	Scottsbluff
Eighteenth	Gage and Jefferson.	William J. Moss	Fairbury

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Admitted Since the Publication of Vol. CXII

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ZACEK, THOMAS

IN MEMORIAM

ROBERT E. EVANS

At the session of the Supreme Court of the State of Nebraska, January 4, 1926, there being present Honorable Andrew J. Morrissey, Chief Justice, Honorable William B. Rose, Honorable James R. Dean, Honorable George A. Day, Honorable Edward E. Good, Honorable William H. Thompson and Honorable George A. Eberly, Associate Justices, the following proceedings were had:

To the Honorable, the Supreme Court of Nebraska:

Your committee, appointed to prepare and submit a testimonial to the life and character of our late Justice Robert E. Evans, respectfully present the following:

MEMORIAL

To those who knew Judge Evans intimately, the simplicity and democracy of his life have been so apparent, they will agree that no other language, or sentiments, than those of the simplest nature, brevity, and sincerity, would properly characterize him. Any other would be out of place on this occasion; and with this in view, we submit this brief memorial:

Judge Robert Emory Evans was born at Coalmont, Pennsylvania, on the 15th day of July, 1856, and died at Lincoln, Nebraska, July 8, 1925.

He was educated in the public schools, and in the state normal schools, at Millersville and Indiana, Pennsylvania, and in 1886 he graduated from the law college at Ann Arbor, Michigan.

After graduation, he practised law about a year in Pittsburgh, Pennsylvania. He moved to Dakota City, Nebraska, in 1887, where he resided until his election as a Judge of the Supreme Court, in 1924.

Except the years 1889 to 1891, during which period he was superintendent of the Winnebago Indian School, at

Winnebago agency, Nebraska; and the years 1896 to 1900, during which time he was Judge of the District Court of the Eighth Judicial District, of Nebraska; and four years, from 1918 to 1922, when he served the Third Congressional District, in Congress; and the last six months of his life, from January to July, 1925, which he spent as a Judge of this Court; he engaged in the active practice of law in Dakota, and surrounding counties, during his entire 37 years of residence in Nebraska.

Before adopting law as his profession, he served an apprenticeship as a machinist in Pennsylvania. In 1877 he moved to Georgetown, Colorado, where he worked as a prospector, and miner, for four years, when he returned to Pennsylvania, where he taught, and attended Normal School, during 1882, 1883 and 1884. He took his law course at Ann Arbor, in 1885 and 1886.

Though he held different offices he never was a voluntary aspirant for any place, until he became a candidate for Judge of the Supreme Court, in 1924. Up to that time he had been drafted for the various positions he filled.

Within two years after coming to Nebraska, he was appointed by the President, superintendent of Indian Schools, at Winnebago agency, which position he filled about three years, when he resigned to return to the practice of law, at Dakota City. He was elected county attorney of Dakota county, in 1894, and resigned that office to accept the position of District Judge of the Eighth Judicial District, to which he was elected in the fall of 1895. He served as Judge one term, and returned to the practice of law in 1900. He was a delegate from the Third Congressional District to the Republican national convention, at Chicago, in 1912. He was a supporter of Ex-President Roosevelt in that convention, and left the convention with the Roosevelt adherents, when the break came. He was elected to Congress from the Third Congressional District, in 1918, and was re-elected in 1902. Upon retiring in 1923, he again took up the practice of law at Dakota City, and was elected a Judge of the Supreme Court in 1924. Providence permitted him to serve but six months of his term, when he was called by death.

He married Annie M. Burkett, of Altoona, Pennsylvania, on January 27, 1887. His wife is still living, and now resides in the home in Lincoln, purchased but a few weeks before his death. Three sons and one daughter were born unto them. Two of his sons, his daughter, and four grand children survive him.

He was deeply religious. He was a member of the Methodist church, and took an active part in all church affairs. He was a lay delegate to the Quadrennial Conference of the Methodist Church at Saratoga Springs, New York, in 1916.

He was a member of the Masonic Lodge, and took a prominent part in the Masonic Grand Lodge of the state. He was Grand Master of the state in 1901 and 1902, and was serving on the board of trustees of the Nebraska Masonic Home at the time of his death. He was Worthy Grand Patron of the Eastern Star in 1900 and 1901. For many years he was one of the leaders of the order in the state.

Judge Evans was of Welsh descent. His ancestors came to America in an early day in the history of our country, and were clean, high-type citizens.

His standards in morals, and honor, and in the ethics of his profession, were of the highest. His loyalty to his country, his church, his lodge, his family, and his friends, was unsurpassed. He was fundamentally honest.

He had a good legal mind, and was well grounded in his profession. He was ready and forceful in argument and debate. He abhorred dishonesty and trickery in every form, and had no patience with, nor use for, an unscrupulous client or litigant. As a trial Judge he was clear, and his grasp of the facts, and ability to apply the law of the case, were unusually keen. He was approachable and kind, genial and sympathetic.

He was an able, sound, and honest lawyer, and in the short time granted him for service as a Judge of this Court he gave exceptional promise.

Judge Evans' experience through life and his nature were such that he was peculiarly fitted and able to appreciate and understand the viewpoints and motives and aspirations of the common citizen, and to consider and approach matters from that standpoint.

He proved himself equal to every demand made upon him in private life, or as a public officer. He was an indefatigable worker in every labor he undertook.

He was modest and retiring, and when associated with others in either private or public matters, he was inclined to, and frequently did, plan and labor effectively in the background, and leave to his associates the lime-light and public approbation and glory that came from the common effort. The consciousness of work well done and of beneficial results achieved were for him a sufficient reward.

Believing that his life was such that a permanent record of his qualities, as a man, a citizen, a lawyer, a congressman, and judge, should be preserved as a part of the archives of the state, and as a mark of our affection for him, and appreciation of him, and of his estimable character, we move that this memorial be filed, and made a part of the records of this court.

WM. P. WARNER
C. F. REAVIS
ALBERT W. JEFFERIS
ARTHUR F. MULLEN
W. J. COURTRIGHT
Committee

Honorable William P. Warner:

May It Please The Court: Just a few words of my personal recollections of, and relationship with, Judge Evans:

I knew him intimately from the time he first came to Nebraska. We were thrown together closely as men are in a small community, and in a professional way; when not opposed in suits we usually assisted each other to the extent of conferences, at least.

I always thought him, and have frequently said he was, one of the best lawyers in the state. His offhand opinion of the law was seldom wrong. He seemed able to intuitively grasp the controlling points of a case.

He was a persistent worker, and never thought of quitting his work and going away for a time on vacations, as others

do. He often chided me for doing so, and seemed to think vacations a waste of time, or worse.

He was wholly unselfish, and frequently when associated with him he insisted upon pushing me forward and giving me more credit than I was entitled to in the matter we were engaged upon. It was a habit of his. He did it with any one he was associated with.

It was an ambition of his, for many years, to some day occupy a seat on the Supreme Bench, and when he was elected it was a realization of that ambition. We, in his community, who knew his ability and industry, hoped much for his career in that place, and when he died so soon after taking his seat felt that the people of the state had met with a distinct loss.

I do not think it was generally known, at least, I never saw mention of it in the press, that the probable cause of Judge Evans' fatal illness was an injury received in an automobile accident near Lyons when he was driving alone from Lincoln to Dakota City about a month before his death. The roads were slippery from a light rain. His car skidded from the highway into a ditch, and he received a severe bump on the head. After the accident he came on to Dakota City. He was at my office but two or three hours afterwards and complained of his injury, but as he had driven the car from the scene of the accident, and did not seem to think seriously of it, other than to complain for a few moments of the pain, and to point out the bump, we thought nothing more of it. He drove back to Lincoln himself either that evening or the next morning.

He always overworked, and his ambition to overcome the tasks ahead of him, with the injury mentioned, I have no doubt was the origin of the trouble that led to his death.

He was impressed with the work ahead of him as a Supreme Judge. After he came to Lincoln to take up his work I saw him frequently, and visited with him from time to time, and remember particularly, on one occasion after he had been here two months, he said: "There are two months of the hardest kind of work piled up ahead of me." And I replied: "Judge, it appears to me there is about

five years and ten months of just such work piled up ahead of you." He laughed, and said he guessed I was right.

Judge Evans' geniality among those who knew him closely was well understood. He enjoyed a joke, and was willing to take the brunt of one if he was the subject.

He lived a wholesome and upright life, and thought much of his friends, his church and his lodge. His industry was outstanding, and was the subject of friendly comment and banter among all who knew him.

We had our little bickerings across the table sometimes, but never to the extent of ill feeling, and nothing marred our close friendship during all the years I knew him.

He was the best friend I ever had; and I can say without hesitation, and in all sincerity, there never was a moment in all the 37 years I knew him so well, and was associated so closely with him, that he did not measure up to the full standard of ideal manhood.

Honorable C. Frank Reavis:

May It Please The Court: I was not personally familiar with Judge Evans in the various activities which he so distinguished and in which he contributed so greatly to his people and to his time. I was privileged to enter but one room of his life and to remain there but a little while. I knew, as all lawyers of the state knew, of his high reputation as a jurist, of his exceptional mental attainments, and the rugged honesty of purpose which marked his every act, and knowing these things I learned with distinct pleasure of his election to Congress in 1918.

His advent into that body was as modest and unpretentious as the man himself. Unlike many who had been previously honored by their people with high office, he claimed nothing because of past performance or local prestige. He was content to do the congressional work assigned him and to be judged solely by its performance. The minor committeeships which were first given him presented no opportunity for service that was either spectacular or picturesque. Such committees reported no great bills of general interest and their work rarely was exposed to public

view, but membership upon them did afford the chance to do relatively small things well and such opportunity was accepted by Judge Evans.

I have always thought that success in life is measured not so much by accomplishment as it is by the use one makes of his opportunity and equipment. One whose contribution to the general welfare is comparatively small, but whose accomplishments are the result of the fullest and best use of the talents God has given him, has made a greater success of his life than one who produces great results, but who could have produced still greater had he utilized all of his attainments. For one who plays a poor hand well, even though he loses, is a greater success than one who plays a good hand badly, even though he wins.

It was not long before the leaders in Congress recognized the high character of work Judge Evans was devoting to the tasks assigned him. There is no body with which I am familiar that is as ready to recognize merit as the National House of Representatives, and it is quite as ready to assess mediocrity. I have frequently heard its judgments characterized as cruel, but my experience has taught me that they are just.

Consequently, it was but a short time before some assignment of greater importance than that previously given him was sought for Judge Evans. As the leader of the Majority once said to me, "Evans is too good a man to be wasted, we must place him where we can use all of him." So eventually, and unusually early in his congressional career, he was placed on one of the three greatest major committees, the Committee on Appropriations. I know of no committee which requires greater courage and honesty than the subcommittee on the Committee on Appropriations having jurisdiction of the District of Columbia. No one who knew him ever doubted the courage of Judge Evans, and during all of his long and useful career in every activity which engaged his attention Judge Evans was an honest man. Honesty, like virtue, is not a thing of degree. One is either honest or dishonest. And after several years of most intimate association with him, after seeing him tested in many and devious ways, I can say that no one whom I ever met

more fully answered the requirements of sincere and rugged honesty than did Judge Evans.

The clash between Congress and the taxpayers of the city of Washington, relative to the proportionate amount that the nation shall pay towards the maintenance of the District of Columbia, is a continuous performance. The demands of Washington taxpayers are persistently vocal. Scarcely an issue of its powerful press that does not give voice to them, and which does not contain arguments presented in an attractive way tending to prove the duty of the nation to bear a larger proportion of the burden than is borne by the taxpayers of the city. The one certain way to figure prominently and favorably in Washington is to become a partisan of the District of Columbia.

The great mass of taxpayers in the nation are inarticulate; they are of necessity dependent upon their representatives to protect them. Their rights are known only to him who sincerely and justly studies the issues, and these rights are enforced by him who is willing to pay the price of unpopularity and misrepresentation for the privilege of dealing justly between the interested parties.

It is not an easy thing to combat and resist propaganda that permeates every contact of your life. It is difficult to resist efforts to betray you away from your desire to protect the interests of those who know little of the struggle and less of your accomplishments in their behalf. It is therefore probably not surprising that there have been members on this committee who have selected the easiest way. When Judge Evans received his appointment he realized that he knew little of the problems; to inform himself he employed that careful and painstaking effort which characterized all of his activities. He began an exhaustive study of the situation in his search for a just and righteous solution. He began at the beginning; away back at the time the problem was first encountered. He studied the many changes of methods and principles which had been utilized in determining the proportionate share the taxpayers of the nation were to bear. He consulted reports and debates that had laid unmolested in pigeonholes for years in his efforts to ascertain the reason for such changes,

and after making himself the master of the subject and with perfect indifference to local criticism he wrote a report so fair, so just to all parties, and therefore so persuasive, that it has formed the basis for this taxation which has endured up to this time. I venture the assertion that very few of those he represented knew of what he had done for them, and that still fewer what it had cost him to do it, for Judge Evans would be the last man to complain of such criticism.

I cite this incident, for it is but an incident, as characteristic of his congressional career.

He left Congress with the unqualified respect and admiration of all its members, regardless of political affiliation. But what is more than that, he tendered his commission back to his constituents retaining in the fullest measure his own self-respect.

As a lawyer I was glad when I learned of his election to your Honorable Body. He would have graced this bench had his life been spared. The judicial history of Nebraska lost grievously by his death. Those of us who were associated with him intimately mourn him as men who have lost a friend and will not be comforted.

I have always thought that life is not its own justification. If all you and I do is just to live, we might as well not have lived at all. The justification of life lies in its accomplishments, and the accomplishments which have enduring value are those which contribute to the general welfare of mankind.

I can look back through the mist of the years to the advancing ranks of the race that are always changing because the individual is always dropping out, but they are never changed because others always step in. What happens to the individual is of little importance, the consequential thing is that the ranks of the race are advancing. Into this advancement has gone the contribution of all that vast "brood of care" who have lived and died and are forgotten. To this advancement to the fullest extent of his talents, Judge Evans in great measure contributed.

Judged by any standard, his life was a success.

Honorable A. W. Jefferis:

May It Please The Court: For four years Robert Emory Evans was my companion and colleague in the Congress of the United States. More recently he was the associate of your Honors — a Judge of the Supreme Court of Nebraska. Our friend, colleague and associate has gone, as all must go.

Patriarchs asked, "If a man die, shall he live again?" We ask, whether our departed friend yet remembers us as we remember him? If the character which he builded is not to be supplemented hereafter, then life on earth is the one great tragedy in all nature.

It seems but yesterday that we journeyed together to the Capitol at Washington, where for some four months we roomed together with a semblance of the spirit of college youths; spent our evenings discussing men and pending measures for the country's welfare. At other times we walked and wandered and for brief periods became lost in what was then to us the strange, beautiful Capital of the nation.

Your Honors, I was impressed by his character. I learned that circumstances had not made him what he was, but that they had given him the opportunity to make himself.

What a delight it is to recall his compact figure, his clear glance, his directness of inquiry, his boldness of avowal, his sterling sense, his strong will, his freedom from affectation and intrusiveness, his industry, his vivacity, his conversation, humorous with anecdote and story, his personal kindness, constant and cordial. A man of conviction, not of pretenses. He was too intense, too earnest to employ mere words to cover his beliefs and conclusions. He was a partisan, but not a bigot, positive, but not perverse. He could look around him to the last with complacency and behind him with pride.

His stout frame, which once thrilled with respirations and impressions with the legitimate play of the passions and generous sweep of the mind, pulseless and prostrate has been borne away. And so his attributes, his merits and distinctions, his silence, his absence and his memory have closed a worthy record, forced new tears from love, preferred new claims for duty, and made new appeals to con-

science. It is for us, the living, to emulate the life of our friend, Robert Emory Evans.

Honorable Arthur F. Mullen:

May It Please The Court: Others have made reference to the intellectual side of Judge Evans. My remarks will be directed to his human side. While the intellectual part of the human life is important and while we admire capacity and ability, still we cherish our friends most because of their human qualities.

That indefinite something that makes one human being differ from all others, that thing we call personality, is largely the product of our human rather than of our intellectual qualities. I mention two of these human qualities of Judge Evans — his honesty and his kindness.

It has been aptly said that "An honest man is the noblest work of God." Judge Evans was an honest man; in his dealings with his neighbors he traveled close to the golden rule, his client's cause received careful and intelligent attention, he dealt fairly with his brothers of the bar. In the courts his aim was to help ascertain a correct understanding of the question involved and to assist the court in applying the proper principles in its decision. As a Judge, he placed his eyes on the pole star of duty and went toward that point without regard to other considerations. He was fair and open minded, but when convinced he was tenacious and firm.

Judges in administering justice cannot be expedient. *Traveling the path of least resistance makes men and rivers crooked.* Judges cannot travel the path of least resistance and keep the scales in the hands of the blind Goddess of Justice equally balanced. Our courts cannot thru the application of what is expedient square their decisions with our state motto of "Equality Before The Law."

Judge Evans was considerate, fair and fearless. He was not expedient. In his life kindness was a large factor. He always kept in mind the rights of others. He respected the views of those with whom he differed. Sincere in his beliefs and opinions, he was blunt and candid, but never

offensive. He was always and everywhere a gentleman. When we mention this attribute of kindness, it calls to mind the thought expressed by John Boyle O'Reilly:

" 'What is the real good',
I asked in a musing mood —

Order, said the law court
Knowledge, said the school
Truth, said the wise man
Pleasure, said the fool
Love, said the maiden
Beauty, said the page
Freedom, said the dreamer
Home, said the sage
Fame, said the soldier
Equity, the seer —

Spake my heart full sadly
'The answer is not here.'

Then within my bosom
Softly this I heard —
'Each heart holds the secret
Kindness is the word.' "

When we look back over the life of our deceased friend, we instinctively call to mind his many acts of kindness.

The early annals of Egyptian history tell us that one of the customs was to place the heart of their dead on one side of the scales and on the other the record of his deeds, both good and bad. If the scales balanced or dipped on the side of the deeds, the deceased was classed as a good man. Applying this primitive standard, or any of the modern standards by which we place an estimate on the life of our dead, we know that Judge Evans was truly an able, honest and kind man.

Honorable W. J. Courtright:

May It Please The Court: While Judge Evans was a member of Congress he, many times, had to change cars at Fremont with a lay-over. At these times he was a very

frequent and welcome visitor at our office. On numerous occasions I discussed with him the problems that were then confronting Congress. Never was there a question, a suggestion, or an inference that he was interested in what would be merely popular. The only matter that he had in mind was to determine what was the right and wise thing to do, whether or not it met with popular clamor.

In the nineties, while Judge Evans was on the District Bench, I became real well acquainted with him, personally and judicially. I remember during those years I frequently referred to him as the right kind of judicial material for the Supreme Bench, and expressed the hope that we would some time be able to get him in that position.

When, something more than a year ago, he became a candidate for Judge of the Supreme Court, it was my pleasure to mail out about a thousand letters advocating support for his candidacy. The favorable responses to these letters were numerous, and I received only one dissenting letter. The burden of that man's objection to him as Supreme Judge was on the ground that he was a Methodist, a republican and a prohibitionist, which the writer seemed to think was good ground for objection.

I shall always remember Judge Evans as one of those genial, whole-souled personalities that one cannot meet without liking, and who equally enjoyed the giving or the taking of a joke. While I knew him well as a man and knew the high esteem with which he was held in general, yet perhaps my more extensive acquaintance was with him as a lawyer and as a Judge, in both of which positions he ranked high.

As a Judge he possessed, in a very high degree, the three essential elements of an efficient and satisfactory Judge of the Court: First, he was an earnest and persistent seeker for the truth of a case. By persistent, I mean that, if necessary to do so, he was able and disposed to dig until the proper result was obtained. Second, the ability to discern and separate the false from the true, and thus understand and determine which story to believe, and which way a case ought to be decided. Third, an unswerving purpose and determination to decide cases as in his judgment they ought

to be decided, wholly regardless of collateral matters or favoritism for any person or interests. It was because so many people recognized that he possessed these exceptional qualifications for the bench, that there was such an interest taken in his candidacy, resulting in his choice to the Supreme Bench, which he honored to such a high degree.

Judge George A. Eberly:

In 1895 Robert Emory Evans convened the January term of the district court of Stanton county. It was the commencement of his judicial labors. At that bar, at that time, I was beginning the practice of law. From thence for almost three decades I knew him as a Judge, honored, an advocate, admired, a man, respected; and a friend, whose qualities and virtues, discovered, developed, time tried, and tested, are enshrined in the sacred recesses of the hearts of those who knew him as he lived.

Then Death beckoned, and he slept. The sundered bond may not be reunited here. We mourn, we sorrow, but in hope. We know another spring, the crushed flower blooms again.

> "'Tis sweet as year by year we lose
> Friends out of sight, in faith to muse
> How grows in Paradise our store."

And him ever "Devout, yet cheerful, pious, not austere. To others lenient, to himself sincere," we leave as he left us. His work continues, his aspirations still survive. Both, intertwined and intermingled with his people's happiness and his country's good, will find full fruition in the better days that are to come.

Andrew M. Morrissey, Chief Justice:

There are varying types of men—there is he who gains honor from his profession, or from his official position; there is still another who reflects honor upon his profession,

or upon his official place, be it ever so high. Judge Evans belonged to the latter class. He rose, step by step, to the head of his profession; he received successive official promotions — honors the highest his fellow citizens had to confer — but we revere him not for the professional success he achieved, nor for the political honors he received, but for his inherent worth. He was an ornament to his profession and an honor to every office that he held.

Our committee has done its work well; we adopt its report, as well as the addresses delivered this morning, as expressive of our own sentiments, and direct that the report and the addresses be spread upon the journal of the court, and that they be printed in the official reports.

During the period covered by these reports, in addition to the cases reported in this volume, there were 97 cases affirmed by the court without opinion.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1924.

S. P. GAINSFORTH, APPELLEE, V. S. C. PETERSON ET AL., APPELLANTS.

FILED DECEMBER 31, 1924. No. 22952.

Appealable Order. "A ruling upon an interlocutory matter is not appealable until the action itself is finally disposed of." *Swift & Co. v. Koutsky*, 73 Neb. 730.

APPEAL from the district court for Keith county: CHARLES E. ELDRED, JUDGE. *Appeal dismissed.*

Hoagland & Carr and *L. A. DeVoe*, for appellants.

Beeler, Crosby & Baskins and *Halligan, Beatty & Halligan, contra.*

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

PER CURIAM.

Plaintiff brought this suit in the district court for Keith county to enjoin defendants from selling property belonging to plaintiff, under an execution which was issued upon a judgment theretofore obtained in the county court in a case wherein the defendant Peterson was plaintiff and the plaintiff in this proceeding was defendant. Defendant Heiser is the county sheriff.

The petition sets out at length the proceedings had in the county court, and alleges that the judgment therein obtained was void, etc. Defendants first demurred to the petition and then answered. After a hearing, the court found

generally for plaintiff and against defendants, and found that defendants should be enjoined from taking any action upon the judgment obtained in the county court "until a reasonable time shall have expired, during which plaintiff may take appropriate proceedings in the county court to determine the validity of the judgment complained of."

Following the finding above set out, it was by the court ordered: "That the plaintiff have an injunction against the defendants from enforcing the collection of the judgment of the county court * * * until a reasonable time shall have expired, during which plaintiff may take appropriate proceedings in the county court to determine the validity of the judgment complained of, and that the defendants herein and each of them are hereby enjoined from enforcing or attempting to enforce the collection of the judgment * * * until a reasonable time shall have expired during which plaintiff may take appropriate proceedings in the county court to determine the validity of the judgment complained of"—and costs were awarded.

Section 9128, Comp. St. 1922, provides: "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."

"A ruling upon an interlocutory matter is not appealable until the action itself is finally disposed of." *Swift & Co. v. Koutsky*, 73 Neb. 730. See, also, *Skallberg v. Skallberg*, 84 Neb. 717, *Marrow v. Gilbert*, 52 Neb. 195, and *State v. Higby*, 60 Neb. 765.

The order herein appealed from shows upon its face that it does not in effect determine the action and prevent a judgment, and is not a final order from which an appeal will lie. The appeal is, therefore,

DISMISSED.

IN RE ESTATE OF BERTHA F. RAMP

FRANK DAFOE, APPELLANT, V. BELLE BERRY, APPELLEE.

FILED DECEMBER 31, 1924. NO. 22937.

1. **Insane Persons:** GUARDIAN: APPOINTMENT: COLLATERAL ATTACK. When, in a suit brought by one claiming to be the guardian of an insane person by virtue of an appointment made by the county court of Johnson county against one claiming to be guardian of the same person under an appointment made by the county court of Seward county, the form of the petition is such as to call for relief other than the impeachment and revocation of the order of appointment made by the county court of the latter county, the action will be held to be a collateral attack upon the judgment assailed.
2. **Judgment:** VALIDITY. The judgment of a court of general jurisdiction will not be held void merely because every jurisdictional fact does not appear upon the face of the record, provided the nonexistence of any fact essential to jurisdiction does not appear thereon, and the record discloses facts sufficient to show that a cause of action within the jurisdiction of the court exists.
3. **County Court:** JUDGMENTS: CONCLUSIVENESS. In this state, county courts have exclusive original jurisdiction of guardianship proceedings, and in matters falling within that jurisdiction, their judgments are as conclusive as those of any other court of record.
4. **Insane Persons:** GUARDIAN: APPOINTMENT: VALIDITY. Record reviewed, and it is *held* that the judgment assailed in this proceeding is not void, and this being a collateral attack thereon, the action was properly dismissed.

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

L. C. Chapman and *Charles A. Dafoe,* for appellant.

Thomas, Vail & Stoner, contra.

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

MORRISSEY, C. J.

This is an appeal from a judgment of the district court for Seward county.

July 5, 1909, an order was made by the proper tribunal of Johnson county under which Bertha F. Ramp was committed to the state hospital for the insane at Lincoln, Nebraska, where she has ever since remained an inmate. December 29, 1918, proceedings were instituted in the county court of Seward county for the appointment of a guardian for Mrs. Ramp. In these proceedings Belle Berry filed a petition in which she alleged: "That Bertha F. Ramp is a resident of the state of Nebraska, and an insane person of the age of 51 years, and for 8 years last past has been and now is an inmate and confined as an insane person in the hospital for insane, at Lincoln, Nebraska; and that petitioner is a sister of said Bertha F. Ramp, and that the sole and only surviving heir of said Bertha F. Ramp is Loyal Ramp, a son of the age of 11 years." It was further alleged that the insane person was the owner of certain property, and that in order to conserve her interests it was necessary that a guardian be appointed to take charge of her estate, etc. Due notice was given of the pendency of this petition, and pursuant thereto, on January 28, 1919, the court found that each of the allegations of the petition were true, and Belle Berry was appointed guardian for the person and estate of the insane person, Bertha F. Ramp. By virtue of such appointment, Belle Berry took possession of the estate of her ward and ever since has held the same.

December 22, 1920, Frank Dafoe filed in the county court of Seward county the petition which is the basis for this suit, in which he pleaded his appointment, by the county court of Johnson county, as guardian of the person and estate of Bertha F. Ramp, insane; set out her commitment to the insane asylum, as heretofore stated; alleged that on June 16, 1919, there was filed with the county court of Johnson county, Nebraska, a petition, "by S. E. Smith, showing that Bertha F. Ramp was a resident of the county of Johnson, state of Nebraska, and is now in the state hospital for the insane at Lincoln, Nebraska, and is an insane person and

mentally incompetent to have the charge of her own person and property;" and that July 8, 1919, in the proceedings mentioned, he was duly appointed guardian of the person and estate of Bertha F. Ramp, insane. Acceptance of the appointment and qualification as guardian are also alleged. The petition specifically pleads that the ward had been a resident of Johnson county since July 5, 1909, "owning and having property therein." This is followed by an allegation reciting the filing in the county court of Seward county of the petition, heretofore mentioned, of Belle Berry, seeking the appointment of a guardian for the insane person in Seward county; the hearing had thereon, and the findings and order made by the county court of Seward county, wherein the court found that Mrs. Ramp was an insane person; that she had been duly served with notice of the hearing in the manner provided by law; that each of the allegations of the petition was true; and that an order appointing Mrs. Berry as guardian of Bertha F. Ramp was made. Let it be noted that in the petition filed by Mrs. Berry praying the appointment of a guardian in Seward county there is no allegation showing the residence of Mrs. Ramp to be in Seward county. The petition alleges that she is a resident of Nebraska, but does not name the county. In plaintiff's petition in this case it is averred that, at the time the proceedings for the appointment of a guardian in Seward county were had, Mrs. Ramp was not a resident in that county, and that she owned no property therein, but was a resident of Johnson county, and owned property therein; and it is alleged that the appointment of Mrs. Berry was null and void. The petition concluded with a prayer: "That the order of the county judge of Seward county be revoked, annulled, and that the appointment of Belle Berry as guardian of Bertha F. Ramp be set aside and that plaintiff have judgment for restitution against defendant, together with costs of this proceeding."

The cause was taken on appeal from the county court to the district court, where it was stipulated that the petition filed in the county court might stand as the petition in

the district court. After the filing and disposition of preliminary pleadings, defendant filed an answer, in which she admitted that proceedings in the matter of a guardianship for Bertha F. Ramp had been had in both Seward county and Johnson county, and that the exhibits disclosing these proceedings, attached to or set out in plaintiff's petition, were true and correct, and denied all other allegations. At the conclusion of the trial, the court found that the insane person, Bertha F. Ramp, at all the dates mentioned in the pleadings, was a resident of Johnson county, as alleged by plaintiff, but found, as a conclusion of law, that plaintiff's petition did not state facts sufficient to constitute a cause of action in favor of plaintiff and against defendant, and dismissed plaintiff's petition with costs. From this judgment plaintiff has appealed.

Section 1129, Comp. St. 1922, provides: "The county court shall have exclusive jurisdiction of the probate of wills, the administration of estates of deceased persons, and the guardianship of minors, insane persons and idiots."

Section 1577, Comp. St. 1922, provides: "The county court in each county, when it shall appear necessary or convenient, may appoint guardians to minors and others, being inhabitants or residents in the same county, and also to such as shall reside without the state, and have an estate within the same."

The attack upon the proceedings had in the county court of Seward county is in fact based upon the failure of the petition in that proceeding to allege, or the court on hearing to find, that the insane person was a resident of Seward county. As before mentioned, the petition merely stated that Mrs. Ramp was a resident of the state of Nebraska, and it was silent as to the county of her residence and the findings of the court make no specific reference to residence, but find each of the allegations of the petition to be true and correct.

We are first confronted with the question as to whether this proceeding is a collateral or a direct attack upon the judgment of the county court of Seward county.

"The term 'collateral' as used in this connection is opposed to 'direct.' If an action or proceeding is brought for the very purpose of impeaching or overturning the judgment, it is a direct attack upon it. Such is a motion or other proceeding to vacate, annul, cancel, or set aside the judgment, or any proceeding to review it in an appellate court, whether by appeal, error, or certiorari, or a bill of review, or, under some circumstances, an action to quiet title. On the other hand, if the action or proceeding has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, then the attack upon the judgment is collateral." 23 Cyc. 1063.

From the prayer of the petition, it is evident that, in this proceeding, the first end to be attained is to collect from Mrs. Berry, or her sureties, the funds now in her hands, the property of the ward, and the annulment of her letters of guardianship is a matter of only secondary consequence.

Was the judgment appointing Mrs. Berry guardian in Seward county void because the record failed to show affirmatively that the ward was a resident of that county? If the county court which made the order of appointment was a court of limited or inferior jurisdiction in guardianship matters, the answer, no doubt, would be in the affirmative, for, in such a case, the record should show the existence of all facts necessary to confer jurisdiction. Jurisdictional facts will not be presumed in favor of the judgments of such courts. *Gloor v. Torczon,* 108 Neb. 402. But in courts of general jurisdiction it is not essential that every jurisdictional fact appear upon the face of the record, provided the nonexistence of such fact does not appear. If a petition sets out facts sufficient to show that a cause of action within the general jurisdiction of the court exists, the presumption of jurisdiction is then indulged.

"Courts of probate in America are entitled to the sanction which every court of record holds; they are not to be classed with those tribunals which have no authority beyond special powers for the performance of specific duties,

little or in no wise relating to the general administration of justice, whose modes of proceeding are prescribed by the statute, but are of that class of courts whose judgments, like those of the federal courts, are held good without a recital of the facts upon which they rest." Woerner's American Law of Administration (3d ed.) sec. 143. See, also, sec. 145, same work, and *In re Estate of Kladivo*, 188 Ia. 471. Both by statute (Comp. St. 1922, sec. 1129) and by the repeated decisions of this court (*Beer v. Plant*, 1 Neb. (Unof.) 372; *Scott v. Flowers*, 61 Neb. 620; *Bennett v. Bennett*, 65 Neb. 432; *In re Estate of Creighton*, 91 Neb. 654; and *Foote v. Chittenden*, 106 Neb. 704) the character of the county court as a court of exclusive, original jurisdiction of guardianship and probate matters is firmly established. In matters falling within their jurisdiction, the judgments of probate courts are as conclusive as those of any other court of record, and the same intendments and presumptions will be indulged in their favor. With this rule in mind, it may be said that, although the record does not show upon its face that the insane person was at the time the guardianship proceedings were had, a resident of Seward county, but, failing to show residence elsewhere, the presumption will be indulged that her residence was within that county. This presumption places the judgment in the same light as if the court, on the question of residence, had made a specific finding that her residence was in Seward county. The finding may be erroneous and subject to reversal on appeal, but it will be binding until reversed, or in some proper proceedings overthrown.

It is suggested in the brief of appellee that the county court of Seward county, having assumed jurisdiction and appointed defendant guardian of the person and estate of the insane person, the county court of Johnson county was without power to act, and that the order of appointment of plaintiff by that court is void. However, for the purposes of this case, it is not necessary to look into that question. Holding, as we do, that the appointment of defendant by the county court of Seward county was not void, and

that this proceeding is in the nature of a collateral attack, it follows that the judgment of the trial court is correct, and it is

AFFIRMED.

Note—See Insane Persons, 32 C. J. sec. 267.

GEORGE W. HALL, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED DECEMBER 31, 1924. No. 22944.

1. Railroads: INJURY AT CROSSING: NEGLIGENCE: QUESTION FOR JURY. In undertaking to cross a line of railroad, a person is bound to exercise caution and be watchful for the approach of a train from any direction from which one may come, yet there may be circumstances which will excuse his 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.
2. Appeal: DIRECTED VERDICT. "In determining whether a peremptory instruction was justified, the party against whom the verdict is directed is entitled to have every controverted question of fact resolved in his favor, and to have the benefit of every inference that reasonably can be deduced from the facts in evidence." *Schmelzel v. Leecy*, 104 Neb. 672.
3. Negligence: QUESTION FOR JURY. The evidence is summarized in the opinion, and *held* that the court did not err in refusing to withdraw the case from the jury, and that the evidence supports the verdict.
4. Trial: INSTRUCTIONS. The instructions have been examined, and *held* free from error.

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

C. A. Magow, T. W. Bockes and *D. F. Smith,* for appellant.

J. C. Cook and *John Gumb, Jr., contra.*

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

MORRISSEY, C. J.

Plaintiff brought this action against defendant to recover

damages sustained in a collision between his automobile and one of defendant's trains at what is referred to as the "Bell street crossing," which is located immediately outside the limits of the city of Fremont. Defendant operated a railroad system consisting of two main-line tracks and two side-tracks, or passing tracks, over and across Bell street. In a general way, these lines of track ran from east to west, while the general course of Bell street is from north to south. The collision occurred about 10 o'clock in the morning. Plaintiff alleges that he drove his automobile down Bell street in the usual way, and that before crossing any of defendant's tracks he attempted to ascertain that the crossing was clear, but that there was then standing upon the north passing track, immediately to the west of the street intersection, a string of freight cars, and that this string of cars so obstructed his view of the main-line tracks that he could not determine whether or not a train was approaching over either of them from the west until after he had driven upon the north passing track; that he then looked to the west, but neither saw nor heard a train coming from that direction, but immediately, and as he was proceeding upon his way, he saw a train coming from the east less than two blocks distant from the crossing; that this train was on the south passing track; that he proceeded on his way with his attention fixed upon the train approaching from the east, and when his automobile reached the south main-line track it was struck by one of defendant's east-bound trains, which inflicted the injuries for which plaintiff seeks a recovery. It is alleged that this train was operated at a high rate of speed; that neither the bell was rung nor the whistle blown to give warning of its approach, and that plaintiff was without knowledge of its approach prior to the collision.

The answer, so far as material, contains a general denial of negligence on the part of defendant coupled with a plea of negligence on the part of plaintiff.

From a verdict and judgment in favor of plaintiff, de-defendant appeals.

The first point to be determined is whether or not the trial court should have directed a verdict in favor of defendant at the close of plaintiff's case. Plaintiff testified that, when he reached a point where by looking he might see, he looked to the west from whence the train causing the injury came, but saw no train coming from that direction; that his attention was immediately attracted by a train approaching from the east, and that as the automobile covered the short distance, approximately 30 feet, if we correctly understand the record, between the point where he looked to the west and the point where he was struck, he did not again look to the west. We do not know, and in fact in such cases it is well-nigh impossible to determine absolutely, the rate at which the automobile was moving, nor the exact time required to cover the distance, but, in any event, it would have to be reckoned in seconds or fractions thereof.

In undertaking to cross a line of railroad, a person is bound to exercise caution and be watchful for the approach of a train from any direction from which one may come, yet, there may be circumstances which will excuse his 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.

The testimony of plaintiff and his witnesses shows that the train was operated at a high rate of speed, and, although in a negative form, that no bell was rung nor whistle blown.

"In determining whether a peremptory instruction was justified, the party against whom the verdict is directed is entitled to have every controverted question of fact resolved in his favor, and to have the benefit of every inference that reasonably can be deduced from the facts in evidence." *Schmelzel v. Leecy*, 104 Neb. 672.

Under this rule, before the court could have withdrawn the case from the jury, it would have to accept as true plaintiff's story as to the approach of a train from the east which might, or might not, be sufficient to excuse him for

his failure to have kept a more constant watch for the approach of a train from the west, and that the train was operated, as alleged by plaintiff, without a bell being rung or a whistle blown to give warning of its approach, which would be sufficient evidence to sustain a finding that defendant was guilty of negligence in the operation of its train. The court would then have had to find that reasonable minds could not differ on the question as to whether or not the negligence of plaintiff, if any, in failing to look to the west as well as to the east for the brief period mentioned was more than slight, and the negligence, if any, of defendant in operating its train without ringing a bell or blowing a whistle to give warning of its approach to the street intersection was gross in comparison. *Francis v. Lincoln Traction Co.*, 106 Neb. 243. We are constrained to hold that the court did not err in submitting the case to the jury for its determination, and that the evidence is sufficient to sustain the verdict returned.

Complaint is made of certain of the instructions given, but, when the whole charge is read, it is apparent that there is no reversible error to be found therein.

For the reasons stated, the judgment is

AFFIRMED.

PERRY M. KENNEY, APPELLEE, V. JOSEPH BRAUN, APPELLANT.

FILED DECEMBER 31, 1924. No. 22919.

Damages: PROOF. In an action by a lessee to recover damages for a wrongful eviction from a theatre leased by him for motion-picture shows, he may recover loss of profits for the unexpired portion of the term, if proved with reasonable certainty, and for that purpose correct book entries made from original accounts and showing receipts and expenses before eviction may be admitted in evidence with the consent of defendant and considered by the jury.

APPEAL from the district court for Pierce county: WILLIAM V. ALLEN, JUDGE. *Affirmed.*

H. C. Brome and *M. H. Leamy*, for appellant.

William L. Dowling, Earl J. Moyer and *C. B. Ellis, contra.*

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

ROSE, J.

The petition contains two counts, one to recover $3,805 in damages for the wrongful eviction of plaintiff from a leased theatre in Pierce, including an illegal forfeiture of the lease, and the other to recover $2,000 in damages for an assault and battery. For the purpose of conducting a motion-picture business, plaintiff leased the theatre from defendant June 24, 1921, for a period beginning July 1, 1921, and ending June 30, 1922. Plaintiff was in possession of the treatre under his lease until November 8, 1921, when the building was damaged by fire. Thereafter defendant was engaged in making repairs until January 2, 1922. At that time plaintiff visited the building to discuss with defendant the progress of repairs and the condition of the building and fixtures. Plaintiff pleads that he was then and there assaulted and violently evicted by defendant, who wrongfully declared a forfeiture of the lease. In his answer defendant admitted he owed plaintiff $46 for rent paid in advance until December 1, 1921. Defendant admitted the cancelation of the lease, but alleged that plaintiff had forfeited his rights thereunder by failure to comply with its terms. Defendant also denied the unlawful assault charged, and pleaded that he used only such force as was necessary to defend and protect himself. The reply was a general denial. Upon trial of the issues raised by the pleadings, the jury rendered a verdict in favor of plaintiff on the first count for $532.12 and on the second count for $1. Defendant has appealed.

The verdict included in effect a finding that defendant waived any forfeiture which he had a right to declare under the terms of the lease. This issue was fairly submitted to the jury and their finding thereon is sustained by the evidence. In the verdict, however, the jury allowed an item

of $480 for loss of profits in the motion-picture business for the unexpired portion of the term of the lease. This item presents the controlling question on appeal. It is argued by defendant that loss of profits is not properly shown. There is proof of receipts amounting to $2,118.54 for four months while plaintiff managed the theatre, but defendant insists that there is no competent evidence of the expenses during the same period, and that therefore there is nothing to show loss of profits from the date of eviction January 2, 1922, until the expiration of the lease by its own terms June 30, 1922. The position does not seem to be well taken. There is testimony tending to prove that an account of both receipts and expenses was kept; that the items were first noted on slips of paper and later entered in a book; that the items on the slips and book were correct; that the period covered was four months prior to the fire; that the remainder of the term was at least as favorable for the motion-picture business as the time covered by the account. The book was admitted in evidence with the consent of defendant and shows receipts of $2,118.54 and expenses of $857.40. Under the circumstances the jury properly considered the entries in the account as evidence, and from them, in connection with other proofs, the loss of monthly profits exceeding in the aggregate more than $480 after eviction was fairly inferable. In this view of the record, there does not seem to be any error in giving or in refusing instructions. There is no serious complaint of damages of $1 for assault and battery. Error prejudicial to defendant has not been pointed out or found. The judgment is, therefore,

AFFIRMED.

ORIN J. LATHROP, APPELLANT, V. HENRY SCHLAUGER: FIRST NATIONAL BANK OF BAYARD, APPELLEE.

FILED DECEMBER 31, 1924. NO. 22939.

Chattel Mortgages: SALE BY MORTGAGOR: ASSIGNMENT OF PROCEEDS. Where mortgagee authorizes mortgagor to sell a crop of sugar

beets on which the mortgage is a lien, with the understanding that the proceeds of the sale shall be applied on the mortgage debt, it being the duty of the purchaser as a party to the arrangement to turn such proceeds over to mortgagee, the transaction, after the authorized sale has been made and the beets delivered, if conducted in good faith, may amount to an equitable assignment of the purchase money, a fund not thereafter subject to garnishment for the satisfaction of a judgment in favor of another creditor of mortgagor.

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

Fred T. Nichols, for appellant.

E. F. Carter, contra.

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

ROSE, J.

This is a controversy between a judgment creditor and a mortgagee over proceeds of the sale of mortgaged chattels. In the county court of Morrill county Orin J. Lathrop, plaintiff, procured a judgment August 12, 1920, against Henry Schlauger, defendant, for $490.10 on a promissory note. An execution on the judgment was returned unsatisfied August 27, 1920. Plaintiff summoned the Great Western Sugar Company, garnishee, December 23, 1920, for the purpose of subjecting $444.13 in its hands to the payment of the judgment. The garnishee paid the money into court. The First National Bank of Bayard, intervener, claimed the fund. The claim arose in the following manner: Defendant owed intervener $1,200.31, evidenced by two promissory notes maturing November 15, 1920, one for $889.05 and the other for $311.26. Defendant had secured these notes by chattel mortgage. One species of property mortgaged was a growing crop of sugar beets. When the crop was ready for market, intervener authorized defendant to sell and deliver the beets to garnishee with the understanding that the proceeds should be applied on any unpaid in-

debtedness evidenced by the notes. Defendant sold and delivered the crop of beets to garnishee. Intervener received a considerable portion of the proceeds, but there remained in the hands of the garnishee December 23, 1920, $444.13, the subject of plaintiff's garnishment. The county court found that intervener was owner of the fund and dissolved the garnishment. Plaintiff appealed to the district court with the same result, and from there he has appealed to the supreme court.

The question presented by the record is the ownership of the fund when the garnishee was summoned December 23, 1920. Assuming, but not deciding, that the mortgage lien did not follow the crop into the proceeds of the sale and that intervener waived the lien and substituted the personal obligation of defendant for the mortgage, the judgment from which the appeal is taken is not necessarily erroneous. There is another principle involved. Did defendant in good faith part with, and intervener legally acquire, the right to the purchase price of the beets before the purchaser was summoned as garnishee? The judgment in favor of plaintiff was not a lien on the crop or on the proceeds of the sale of the beets. He did not levy his unsatisfied execution on any property of defendant before proceeding by garnishment. Prior to service of the latter process, defendant and intervener, acting in good faith without any intention to defraud others, were free to dispose of the proceeds of the sale by contract. It may be inferred from the evidence in its entirety that, before the writ of garnishment was served, defendant and intervener entered into an agreement to apply the purchase price of the crop on the unpaid notes which the chattel mortgage had been given to secure, and that garnishee had agreed to this arrangement. Defendant, therefore, did not own the proceeds of the sale of his crop, and it was the duty of garnishee, a party to the transaction, to turn the unpaid purchase money over to intervener. In this view of the evidence, the transaction, conducted in good faith, as it was, amounted to an equitable assignment of the purchase

price to intervener. It did not thereafter belong to defendant and was not subject to garnishment in the hands of the purchaser. The transfer occurred when defendant had a right to make it. Lack of knowledge on the part of plaintiff did not make the garnishment effective. The process of the court was used to impound property which the defendant, the judgment debtor, did not own. The decision of the district court conforms to these views.

AFFIRMED.

WILLIAM HEESE, APPELLEE, V. ORVILLE H. PLANTZ, APPELLANT.

ALFRED BEAUMONT, APPELLEE, V. ORVILLE H. PLANTZ, APPELLANT.

FILED DECEMBER 31, 1924. No. 22951.

Searches and Seizures: SEARCH-WARRANT. Under statutory authority of a magistrate to issue a warrant for a search in the nighttime as well as in the daytime a search-warrant commanding an officer to search the premises of accused "any time" may be sufficient to authorize a search at night. Comp. St. 1922, secs. 10018, 10019.

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

Crofoot, Fraser, Connolly & Stryker, for appellant.

Dolezal, Spear & Mapes, contra.

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

ROSE, J.

William Heese, plaintiff, brought this action against Orville H. Plantz, defendant, to recover $10,000 in damages for a malicious prosecution and an unlawful search. In a proceeding before a justice of the peace for Dodge

county, Plantz accused Heese of stealing and concealing 25 chickens belonging to the former. As a result the magistrate issued a search-warrant. Officers under the direction of Plantz searched the premises and home of Heese. Not finding the stolen chickens, Plantz directed the dismissal of the criminal prosecution. In the present action for damages Heese pleaded that the false charge was malicious and without probable cause, and that the search was unlawfully made in the nighttime under a search-warrant authorizing a search in the daytime only. Plantz denied malice on his part, and alleged that he made the complaint in good faith, that his chickens had been stolen, and that he had probable cause to believe Heese had committed the offense charged. Upon a trial of the issues the district court directed the jury that the search was unlawful and that Heese was entitled to recover resulting damages. The jury returned a verdict in his favor for $800, and from a judgment thereon Plantz has appealed.

Did the trial court err in directing the jury that the search was unlawful? This is the controlling question presented by the appeal. A search-warrant was regularly issued on a sufficient showing. The instruction limiting the inquiry of the jury to the amount of damages sustained by Heese was based on the propositions that the magistrate in his writ authorized a search in the daytime only, and that consequently the search at night was unlawful. The instruction seems to be erroneous. There are two sections of the statute relating to the issuance of search-warrants. One provides for a form commanding the officer to whom the search-warrant is directed to make the search in the daytime. Comp. St. 1922, sec. 10018. Another authorizes the magistrate to order the search in the nighttime. Comp. St. 1922, sec. 10019. In the present instance the magistrate obviously used a form intended for a search in the daytime. It shows on its face that it was partly printed with appropriate blanks for names, dates and other matter varying with each individual case. Part of one printed line reads thus: "You are hereby commanded to enter in

the daytime." Above the words, "the daytime," which were not erased, the magistrate inserted with a pen, "any time." The purpose to change the printed form directing a search in the daytime to one for a search at "any time" is clear. Inserting the words "any time" added nothing to the writ, if intended to order a search in the daytime only. The written words inserted by the magistrate added to or changed the printed matter from "daytime" to "any time" and the latter fairly included "nighttime." This is shown on the face of the search-warrant issued, and the trial court was in error in holding that the search at night was unlawful because the search-warrant authorized a search in the daytime only.

On account of a similar charge and search, Alfred Beaumont also recovered a judgment against Plantz in another action. The cases were consolidated, tried, and appealed together. The error pointed out is common to both cases. The judgments are therefore reversed and the causes remanded for further proceedings.

REVERSED.

PAUL B. WALKER V. STATE OF NEBRASKA.

FILED DECEMBER 31, 1924. No. 23938.

1. **Criminal Law: REVIEW.** Affidavits submitted to the district court for the purpose of showing error during the trial of a case cannot be considered in the supreme court on review unless preserved in the bill of exceptions.
2. **Intoxicating Liquors: INFORMATION: FORFEITURE OF AUTOMOBILE.** A duly verified information charging an individual defendant with the unlawful transportation of intoxicating liquors by means of an automobile which is properly described, stating the time and place of the offense and designating the automobile as an additional defendant, may be sufficient to support a forfeiture of the automobile.
3. **Criminal Law: EVIDENCE UNLAWFULLY OBTAINED: ADMISSIBILITY.** In a prosecution for the unlawful transportation of intoxicating liquors, evidence procured by an unauthorized search of defendant and by seizure of his property without a search-warrant is not for that reason inadmissible.

4. ———: STATUTE: CONSTITUTIONALITY. The statute prohibiting the transportation of intoxicating liquor is not unconstitutional as authorizing cruel or unusual punishments.

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

George W. France and *Charles F. Stroman*, for plaintiff in error.

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

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

ROSE, J.

In the district court for York county a jury found Paul B. Walker, defendant, guilty of transporting intoxicating liquor in violation of law by means of an automobile. Sentence on the verdict was suspended conditionally, but forfeiture of the automobile was ordered. As plaintiff in error, Walker presents for review the record of his conviction.

In one of the assignments of error the information is challenged on the ground that it does not contain any charge against the automobile. The information was filed in the police court of York. Originally it contained three counts. In the second the use of the automobile by Walker for the unlawful transportation of intoxicating liquor in York county was specifically charged and the automobile itself was declared to be a nuisance. This count, however, was eliminated by a *nolle prosequi* before the verdict of guilty was returned. Irregularity on the part of the county attorney in abandoning the second count during the trial is made the subject of an assignment of error which is unavailing for the reason that the affidavits relating to this subject were not preserved in the bill of exceptions. In the third count Walker was accused of having unlawful possession of intoxicating liquor, but he was convicted of that offense in the police court of York and paid therefor a fine of $100. It was under the first count, therefore, that

forfeiture of the automobile was ordered. Was the charge sufficient? In addition to Walker, "One Durant Six Automobile, Engine No. DX11405," was designated as a defendant. The time and place of the unlawful transportation by Walker were specifically stated. The first count concludes as follows:

"Paul B. Walker, then and there being, did then and there unlawfully transport intoxicating liquor along, over and upon the public highways of and in said county of York and state of Nebraska, in and by means of one Durant Six Automobile, Engine No. DX11405, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of Nebraska."

The unlawful acts were stated. Comp. St. 1922, sec. 3274. The failure to charge the conclusion that the automobile was a common nuisance was not a fatal defect. Walker was fully apprised of his offense and of the use of his property for an unlawful purpose. The first count in connection with the formal parts of the information, duly verified, was sufficient. *Smith v. McNulty*, 107 Neb. 505. This assignment of error is therefore overruled.

The evidence is assailed as insufficient to sustain the conviction. Walker drove into the city of York and parked his car in a public street near a club-house. As he alighted a police officer searched him and took from his person a pint of intoxicating liquor. He was arrested and his automobile seized. The evidence is sufficient to sustain a conviction for unlawful transportation of the liquor. In this connection it is argued, however, that all the evidence of guilt was the result of a search of Walker's person and property without a search-warrant, in violation of his constitutional rights, and that therefore there is no competent proof to sustain the verdict. In this state the law has been declared to be otherwise. Evidence procured by an unauthorized search and seizure is not for that reason inadmissible. *Billings v. State*, 109 Neb. 596. It is shown by the testimony that Walker transported intoxicating liquor in his automobile. That he did so in violation of

statute is inferable from the evidence. The conditions authorizing a forfeiture were proven.

It is argued further that the statute permits the imposition of unusual or cruel punishment and is for that reason void. The law is otherwise. *Robinson Cadillac Motor Car Co. v. Ratekin,* 104 Neb. 369.

In giving or refusing instructions no prejudicial error has been found. There does not seem to be any ground for a reversal.

AFFIRMED.

Note—See Criminal Law, 17 C. J. sec. 3470; 16 C. J. secs. 1110, 3192.

HANNAH C. KRAUSE, APPELLANT, V. EUGENE W. KRAUSE, APPELLEE.

FILED DECEMBER 31, 1924. NO. 22906.

1. Wills: CONSTRUCTION: POWER TO DEVISE. A testator's will provided for (1) payment of his debts out of his personal estate, and (2) the expenses of his last illness, and (3) his funeral expenses, and (4) giving and bequeathing all of his personal estate to his wife. This was followed by the following specific provisions:

"Third. I also give and bequeath to my beloved wife, Susana Krause, all the real estate owned by me and of which I am seised, at the time of my demise, hereby intending and making her, the said Susana Krause, owner in fee, with full title, of all property, personal and real, of which I may be the owner at the time of my death, with full power and authority to sell and convey the same, and by deed convey a title in fee to her grantees."

"Fifth. I furthermore give and bequeath to my beloved sons and only heirs at law, Eugene W. Krause and Amandus J. Krause, share and share alike, all of the real estate owned by me at the time of my death, which my beloved wife, Susana Krause. has not sold or disposed of during her lifetime."

Held, that under the third paragraph of her husband's will, when construed in connection with the fifth paragraph, in respect of real estate, the testator's widow was vested, solely and only, "with full power and authority to sell * * * and by deed con-

vey a title in fee to her grantees," in and to the real estate owned by her husband when he died; and, *held*, that her husband's will did not vest her with power to give, devise, or dispose of any part of such real estate by her will.

2. ———: ———. "When * * * there are different provisions in the same will as to the disposition of specified property, they must be construed together to ascertain the intention of the testator. * * * The devise and the attempt to devise over must be construed together to ascertain whether the testator intended to convey a life estate to one and remainder to another." *Grant v. Hover*, 103 Neb. 730.

3. ———: ———. "No particular words, no conventional forms of expression, are necessary to enable one to make an effective testamentary disposition of his property. The court, without much regard to canons of construction, will place itself in the position of the testator, ascertain his will, and, if lawful, enforce it." *Weller v. Noffsinger*, 57 Neb. 455.

4. ———: ———. In the construction of a will, "that which the statute expressly requires shall be consistent with the general rules of law, is not the construction of the instrument, but the intent of the parties." *Albin v. Parmele*, 70 Neb. 740.

5. ———: ———: JURISDICTION. "The district court has jurisdiction in an action of partition to construe a clause in a will determining the rights of the parties to the land under the will." *Mohr v. Harder*, 103 Neb. 545.

APPEAL from the district court for Cuming county: WILLIAM V. ALLEN, JUDGE. *Reversed, with directions.*

Hainer & Flansburg and *Zacek & Nicholson*, for appellant.

Moodie, Burke & Moodie and *Burkett, Wilson, Brown & Wilson, contra.*

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

DEAN, J.

William E. Krause, late of Cuming county, died testate, February 19, 1908, leaving him surviving, as his next of kin and only heirs at law, his widow, Susana Krause, and his adult sons, Eugene W. Krause and Amandus J. Krause.

Decedent left no issue of any deceased child him surviving. Amandus J. Krause died intestate, September 13, 1914, leaving him surviving, his widow, Hannah C. Krause, plaintiff herein. Eugene W. Krause is the sole and only defendant. Plaintiff alleges that, when her husband died she and Eugene W. Krause, and Susana Krause, were the "sole and only heirs at law and next of kin" of her deceased husband, Amandus J. Krause, and that her husband left no issue, nor the issue of any deceased brother or sister him surviving.

When William E. Krause died, he was the owner of certain city lots in Omaha, and in West Point, where he resided, and some farm lands in Cuming and Box Butte counties. The ownership of an undivided one-fourth part of such real estate as was not sold and conveyed by Susana Krause, in her lifetime, and under the terms of her husband's will, hereinafter discussed, is the subject of this suit.

The third and fifth paragraphs of the Krause will read:

"Third. I also give and bequeath to my beloved wife, Susana Krause, all the real estate owned by me and of which I am seised, at the time of my demise, hereby intending and making her, the said Susana Krause, owner in fee, with full title, of all property, personal and real, of which I may be the owner at the time of my death, with full power and authority to sell and convey the same, and by deed convey a title in fee to her grantees."

"Fifth. I furthermore give and bequeath to my beloved sons and only heirs at law, Eugene W. Krause and Amandus J. Krause, share and share alike, all of the real estate owned by me at the time of my death, which my beloved wife, Susana Krause, has not sold or disposed of during her lifetime."

Plaintiff alleges that she, as the "widow of Amandus J. Krause, deceased, is the absolute owner of an undivided one-fourth interest" in and to the real estate owned by William E. Krause when he died, except so much thereof as was sold by Susana Krause, under the terms of her husband's

will. She prays for partition and for confirmation of the shares of the parties as their respective interests may be established. Plaintiff concedes that defendant is the owner of an undivided three-fourths interest in and to the real estate in suit.

A little over 13 years after the death of the testator, namely, April 1, 1921, Mrs. Susana Krause died, testate. Her will is dated September 25, 1914. The first and second paragraphs of her will provide for the payment of her debts, funeral expenses, and the like, and for a trifling bequest in money, and in the third paragraph she gives, devises and bequeaths "all the rest, residue and remainder" of her property, "both real and personal," to her son Eugene W. Krause.

Defendant bases his claim to the real estate in question upon the foregoing will of Susana Krause.

Upon final submission the court found that plaintiff is not the owner of the real estate in controversy, or any part thereof, and has no interest therein, and is not entitled to maintain this suit. Thereupon her suit was dismissed at her costs. From the judgment so rendered against her plaintiff has appealed.

It may be here noted that the evidence, in respect of the merits herein, is almost exclusively documentary, and consists of certified copies of the respective wills of William E. Krause and Susana Krause, and certified copies of the probate proceedings pertaining to each will. The main question before us, aside from questions in respect of the pleadings and the like, has to do, first, with the construction of the William E. Krause will; and, second, does his widow's will convey any of the real estate owned by her husband when he died?

In respect of the construction of wills and other written instruments which have to do with conveyance of real estate, the statute 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 interest (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." Comp. St. 1922, sec. 5594.

Plaintiff concedes, as well she must, that Mrs. Susana Krause was clearly within her rights, under the will of her husband, when she sold and conveyed by deed a quarter-section of land in Cuming county and four or five city lots in Omaha and a number of lots in the city of West Point. She concedes that the will expressly vests authority in her to sell and convey real estate. But she persistently protests that the will did not vest in Mrs. Susana Krause "power and authority" to give and devise any portion of the real estate described therein to any person or persons whomsoever; and on the ground, as alleged, that the testator had already by his will provided for the disposition of the real estate which remained unsold at his wife's death.

The record discloses substantially these pertinent facts in addition to those already related:

When William and Susana Krause were married he was 24 and she was 20 years of age. When he executed his will he was 54 and his wife 50 years of age, and their two sons, Eugene and Amandus, were then 25 and 23 years of age respectively and unmarried. Only three persons, then, were the lawful and natural objects of the testator's bounty when his will was written. And these three were, of course, through all the years, the special objects of his solicitude and care.

From the language of his will it is apparent that the testator realized that his first obligation was to provide for the wife of his youth who was now in middle age. Naturally his first concern, so far as humanly possible, would be to provide for her comfort so long as she should live, even though it took his lands to the last rood. Evidently with this thought in mind the third paragraph of his will was written.

The language of the first part of the third paragraph reads:

"Third. I also give and bequeath to my beloved wife, Susana Krause, all the real estate owned by me and of which I am seised, at the time of my demise, hereby intending and making her, the said Susana Krause, owner in fee, with full title, of all property, personal and real, of which I may be the owner at the time of my death."

The foregoing language, if construed alone, without reference to what follows in the same paragraph, and without reference to the fifth paragraph, would of course be held to convey a fee title. But the will must be considered in its entirety. And paragraph three, continuing, reads:

"With full power and authority to sell and convey the same, and by deed convey a title in fee to her grantees."

When all the language of this paragraph is construed together, it is apparent that the "full power and authority" which the testator vested in his wife is limited so that she could only "sell and convey * * * by deed * * * a title in fee to her grantees."

And besides, if, as defendant contends, the testator intended to, and did, by the language of the third paragraph, vest a fee title in his wife, clearly it was not necessary for him to insert, in the closing part of paragraph three, power to sell and convey the real estate. If she was already vested with the fee, she clearly had the power to sell. But, by the latter words, her estate was limited, as hereinbefore pointed out.

Under this power, as above noted, she sold the Cuming county farm, 4 or 5 city lots in Omaha, and about 16 city lots in West Point; so that she was not put to the delay, the annoyance and the expense of obtaining leave of court to sell such real estate as her needs might require from time to time.

In the probate proceedings of the estate of Mrs. Krause, it was disclosed that her personal estate consisted of about $5,000, notwithstanding the sale of the farm and the city lots. From this it is perhaps a reasonable deduction that, when Mr. Krause died, his personal estate was inconsiderable as compared with his real estate, and he therefore

realized the necessity of vesting in his wife a life estate in his lands, but with "power to sell and convey," to the end that the exigency of present needs might be presently met so long as she should live.

In respect of the fifth paragraph of his will, it is clear that it need not have been written, had the testator not contemplated that there would be a remainder of his real estate, unsold, when his wife died. The language of the fifth paragraph, when construed with that which precedes it in the third paragraph, clearly discloses that the testator contemplated that a remainder would be left over after his wife's death. Hence, with unmistakable language, he provided that such remainder should become the property of his sons. For reasons that are obvious, this would be the natural thing to do. Ordinarily it would be the thing that a normal man would do.

Clearly, the testator's will does not contravene any rule of law, and it seems to come within the language of a great law-writer, who defines a will to be "the legal declaration of a man's intentions, which he wills to be performed after his death." 1 Blackstone's Commentaries (Cooley) (4th ed.) *499. See *Albin v. Parmele*, 70 Neb. 740.

The rule to which we adhere in the construction of wills is well stated in *Weller v. Noffsinger*, 57 Neb. 455, wherein Sullivan, J., says:

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

The foregoing rule receives substantial support in the following cases: *Albin v. Parmele*, 70 Neb. 740; *Lesiur v. Sipherd*, 84 Neb. 296; *Grant v. Hover*, 103 Neb. 730; *Hill v.*

Hill, 106 Neb. 17; *Hiles v. Benton*, 111 Neb. 557, and cases there cited.

In the will under discussion the testator did not use an ambiguous word, nor, from its inception to its close, does it contain an involved sentence. We think that his meaning is clear, and that there can be no doubt, from the words he used, that it was his intention to dispose of his real estate, subject to his wife's use and life estate, with remainder over, at her death, to his two sons, in all respects as hereinbefore pointed out.

Defendant's contention that, under the will of Mrs. Susana Krause, he succeeds to the title and ownership of all the real estate which was owned by William E. Krause, in his lifetime, and which remained unsold by Mrs. Krause when she died, cannot be upheld in view of our construction of the will of her husband. Under this construction Mrs. Krause had no right or authority to give, or to devise, to any person, by will, any of the real estate formerly owned by her husband and which remained unsold when she died. It follows that the will of Mrs. Krause is ineffectual to disturb the rights of plaintiff to the real estate in question, and that defendant can take, under his mother's will, no part of the real estate which his father owned in his lifetime and which was not sold and conveyed by deed of conveyance by his mother in her lifetime.

Defendant complains because plaintiff did not file a motion for a new trial. But this is a suit in equity and, as hereinbefore noted, in her petition plaintiff prays "for judgment confirming the shares and interests of plaintiff and defendant in the said real property as herein set forth, and for a partition of the same according to the respective rights of said parties."

Plaintiff's title depends upon the construction of the will of William E. Krause, and the court having erroneously construed the Krause will, and having denied her right to a partition and the general relief for which she prayed, a motion for a new trial was not necessary. *Mohr v. Harder*, 103 Neb. 545. In the *Mohr* case we cited *Fisher v. Fisher*,

80 Neb. 145, wherein it is expressly held: "The district court has jurisdiction in an action of partition to construe a clause in a will determining the rights of the parties to the land under the will." The *Fisher* case is cited with approval in *Gotchall v. Gotchall*, 98 Neb. 730.

Defendant finally argues: "The will in this case makes the widow 'owner in fee, with full title,' and this cannot be limited or cut down by any later provision."

Cases are cited from other jurisdictions which seem to support this view. Plaintiff has likewise cited authorities from other states which hold to the contrary. By virtue, therefore, of the untiring industry of learned counsel, on each side of the controversy, we are again reminded that authorities are to be found which hold to directly conflicting views on the question immediately before us. But this court is thoroughly committed to the proposition that the intention of the testator, as gathered from all the language used in his will, shall be, in the language of the older writers, the polar star which shall guide in the construction of his will, provided that, in so doing, no rule of law is violated.

The construction contended for by defendant, however, appears to be an outgrowth of the antiquated common-law rule, since obsolete in Nebraska, and therefore it is without force here. *Hill v. Hill*, 106 Neb. 17; *Lesiur v. Sipherd*, 84 Neb. 296. Other questions are discussed in the voluminous briefs of the parties, but, in view of our conclusion, we do not find it necessary to give them further attention.

The judgment of the district court is reversed and the cause remanded, with directions that the prayer of plaintiff's petition for partition be granted, and that the real estate in question be awarded to the parties as their respective rights may appear, or, if this cannot be done, that the property be sold and the proceeds be divided in accordance with this opinion.

REVERSED.

Note—See Wills, 40 Cyc. 995, 1091, 1386, 1388, 1392, 1414, 1582.

MARY BROZ, APPELLEE, V. FRANK BROZ, APPELLANT.

FILED DECEMBER 31, 1924. NO. 22914.

1. **Divorce**: EXTREME CRUELTY. "There may be extreme cruelty justifying a decree of divorce without physical injury or violence. Unjustifiable conduct on the part of husband or wife, which utterly destroys the legitimate ends and objects of matrimony, may constitute extreme cruelty." *Bristol v. Bristol*, 107 Neb. 321.
2. ———: ALIMONY. Evidence examined, and *held* that the allowance of alimony to plaintiff is not excessive.

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

Grant G. Martin and *Bartos & Bartos*, for appellant.

Thomas J. Dredla and *G. E. Hager, contra.*

Heard before LETTON, DEAN, GOOD and THOMPSON, JJ.

DEAN, J.

Mary Broz, plaintiff, sued for divorce in Saline county on the grounds of extreme cruelty, drunkenness, and profligacy. She also prayed for the custody and control of their two minor children, Leonard and Irene, now aged seven and five years, respectively, and for alimony and attorney fees. Plaintiff was awarded a divorce; the custody of the children; $25 a month in advance for maintenance of the children from May 1, 1922, until the further order of the court, and $4,000 alimony. Defendant appeals.

From the first year of their married life, and until some time before this suit was begun, the parties lived on a farm in Saline county. On plaintiff's part, the evidence discloses an appalling state of moral delinquency on defendant's part. According to his wife's, and other, evidence in the record, her husband's bestiality and the cruelties he practiced toward her are so revolting that they are quite beyond the bounds of decent expression in words. Hence, the major iniquities charged against defendant, as related by his wife, and other witnesses in her behalf, will not be recounted here.

Defendant seems to be possessed of an ungovernable and vicious temper. Plaintiff testified that he unmercifully beat and abused his livestock; that he killed one horse by sticking a pitchfork into its head and eyes; that he killed an old sow by beating her with a stick; another he viciously killed with a gun; that, when she remonstrated with him about his cruelty toward animals, he told her to shut up or she would get it, instead of the animals; that defendant was addicted to the intemperate use of intoxicating liquors; that after the Volstead act was adopted he had at one time two wagon loads of beer and other liquors in the cellar that he brought home in the nighttime; that he sold a cow for $75, that her parents gave her, and with the money he bought moonshine whiskey, and other brands of booze, and that, when he could not get liquors, he made "potato whiskey" in the kitchen; that, drunk or sober, he often called her the vilest name that can be applied to a virtuous woman; that he delighted in the use of vulgar and basely obscene language in the presence of her young brothers and a sister and other persons of tender age, and that he had a few vile letters and some indecent poetry, all in the record, that he frequently read to the young people and to entertain other of his friends when they called at their house; that he accused her of infidelity and of illicit conduct with the hired men and others; that, when she was taken to a hospital to undergo a serious operation, he accused her of remaining there longer than necessary that she might have improper relations with the doctors and attendants; that before her eldest child was a month old he said he would kill him if he looked like her people; that he often boasted of his conquests of "other women or girls in other towns. He always said he went after other girls," and that when she told him she would leave him if he continued his immoral practices, "he said I can do the same thing;" that defendant compelled her to work in the field and about the stable yard like a hired man, and to soak grain for the hogs and feed and take care of them, and milk the cows, besides doing her housework. Two young

girls who helped with the housework, for brief but separate periods, testified that he made indecent proposals to them. One of the girls testified that he took her home one day, and that he told her "that I shouldn't say anything to my mother."

Two hired men who worked for defendant on the farm were called in his behalf. They testified, in substance, that they never saw plaintiff doing any outside work on the farm, and another testified to the same effect, and added that he never saw defendant under the influence of liquor.

Defendant denied the truth of the statements of all the witnesses who testified against him. He further testified that, before the suit was begun, plaintiff condoned his acts of which she has made complaint.

Defendant's plea of condonation is not supported by the record. That plaintiff ever condoned his cruelties in the manner contended for by defendant is not established. On the contrary, his cruelties continued up to almost the very moment of her enforced separation from him. Defendant cites *Dunn v. Dunn*, 26 Neb. 136. But this case does not support his contention. In the *Dunn* case it was disclosed that, for some time before the action was commenced, plaintiff and defendant had freely cohabited together as husband and wife. But this fact does not appear in the present case, but, as above noted, his cruelties were continuous to the end.

Defendant also complains that the court allowed plaintiff excessive alimony. We do not think so. It was shown that $2,000 was given to plaintiff by her parents and this money was used to buy some of the land which is now defendant's property. Her parents also furnished the young people with a good deal of household goods and other property when they were married.

The evidence, in respect of defendant's financial worth, is conflicting. But it is sufficient to support the findings of the court, and the judgment will not therefore be disturbed. *Nathan v. Nathan*, 102 Neb. 59.

The judgment is

AFFIRMED.

AUGUST BRANDEEN, APPELLEE, V. JOHN D. LAU ET AL., APPELLANTS.

FILED DECEMBER 31, 1924. No. 24134.

1. **Judgment:** COLLATERAL ATTACK. "The sufficiency of the petition," in a court of record, "is not a test of jurisdiction, as the court may commit an error in holding it sufficient; but this, if the court had jurisdiction, will not render the judgment subject to collateral attack." *Taylor v. Coots*, 32 Neb. 30.
2. ———: JURISDICTION. The omission of an allegation of a jurisdictional fact, in a judgment of a court of record, is cured by proof of the existence of such fact, and where, in such court, a judgment is rendered, and is silent with respect to a jurisdictional fact, it will be presumed that the court acted within its jurisdiction. Woerner's American Law of Administration (3d ed.) secs. 143-145.
3. **Courts:** JURISDICTION. Jurisdiction of the subject-matter, in a court of record, is to be tested by the authorized extent of the powers of the court in respect of the cause of actio.. before it. Woerner's American Law of Administration (3d ed.) sec. 144.
4. ———: ———. In a court of record, it is not essential that every jurisdictional fact appear upon the face of the record, and if a petition sets out facts sufficient to show a cause of action within the general jurisdiction of the court, and no facts appear upon the face of the record establishing that no jurisdiction exists, all presumptions are resolved in favor of the power of the court to act.
5. **Judgment:** NUNC PRO TUNC ENTRY. The county court, as a court of record, "may enter a judgment *nunc pro tunc* on motion and notice, and the fact that the application therefor is not made for a considerable time after the judgment was rendered does not deprive the court of jurisdiction." *Phelps v. Wolff*, 74 Neb. 44.

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

Claude S. Wilson, Albert S. Johnston and *Sterling F. Mutz*, for appellants.

C. C. Flansburg and *John S. Bishop, contra.*

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

DEAN, J.

This is the second appearance of this case in this court. The former opinion, under *Brandeen v. Beale,* is reported in 110 Neb. 686, to which reference is had for a statement of the material facts, which do not need to be repeated here.

When the mandate was issued from this court, after argument on the first submission, defendants Beale and Lau filed a motion in the county court, January 7, 1924, wherein they jointly moved "for an order *nunc pro tunc*" that a substituted decree be filed for the decree appointing the guardian, which was "filed June 22, 1921, to conform to the actual findings of said court and judgment rendered at said time, for the reason that said original decree appointing the guardian was not complete and did not conform to the actual findings of fact and judgment rendered by the court at said time." Incorporated in and as a part of the same motion was an application to the county court "for leave to amend the original petition of J. D. Lau filed herein on June 6, 1921, to conform to the proof, by inserting after the word 'creditor' in the fourth line of said petition the words 'and friend.'"

January 14, 1924, the county court sustained the motion, and, pursuant thereto, the petition was amended and a substituted decree was filed to conform to the actual findings of the court which were made and pronounced at the time the case was heard and the decree of the court was rendered. The substituted decree bore the date of June 22, 1921, that being the date when it was rendered. In this substituted decree it is shown that, at the second hearing August Brandeen was "represented in county court by his attorneys."

April 28, 1924, August Brandeen, by the same counsel which formerly appeared for him in the county court, and also appear for him now in this court, filed a petition in error in the district court in and for Lancaster county.

Upon submission the district court found: "That there was error in the proceedings of the county court of Lancaster county, Nebraska, as set forth in said transcript, and

which appears upon the face of the record, in this: First, the court had no jurisdiction, power or authority to permit the amendment of the petition by adding the allegation 'and friend;' second, that, the court having no jurisdiction of the proceedings, it had no authority or power to permit the amendment *nunc pro tunc* of its former judgment and decree, and that its action in so doing was void."

From the judgment so rendered in the district court, defendants Beale and Lau have brought the record here to have it reviewed.

The former opinion of this court in this suit, which is above cited, would be, ordinarily, the law of the case. *Donnelly v. Sovereign Camp, W. O. W.*, 111 Neb. 499, 508. But the former opinion herein had to do with the record in this suit as it then was, and as the record and facts were presented at that time. At the last hearing in the district court, however, we think the court erred in reversing the judgment of the county court, for the reasons hereinafter appearing.

Plaintiff admits that the substituted decree of the county court, which is involved here, "found all of the necessary facts which the original decree lacked." With this admission by plaintiff there is no need for further reference to the recitals in the substituted decree.

But, in the former opinion, this "substituted decree" was not, of course, before the court. Nevertheless, as above noted, it "found all of the necessary facts." And this is the decree which was pronounced, and rendered, by the court in the first instance, but, by inadvertence or mistake, it did not so appear in the record. Hence, on application, this substituted decree, which conformed to the facts, was properly filed and dated as of June 22, 1921, as above noted.

The decree passed on by this court, when it was first before us, did not reflect the findings of the county court, and the former opinion holds that the recitals in that decree were insufficient to constitute a valid decree. And in the former opinion the sufficiency of the petition was passed on, but this was not necessary to a determination of the

case. So that the "law of the case" rule does not apply to an immaterial fact which is passed on but which was not necessary to be decided. But, in all other respects the former opinion herein is the law of the case, by which we are bound, and it need not be further discussed here.

The amendment of the petition in the county court was a superfluous act. It was not necessary to amend the petition to confer jurisdiction because, as hereinafter pointed out, the court already had jurisdiction. It follows that it is immaterial whether the original petition was amended or left as it was when it was filed. The real point in the case is: What judgment did the county court render at the close of the hearing in the first instance?

"The sufficiency of the petition is not a test of jurisdiction, as the court may commit an error in holding it sufficient; but this, if the court had jurisdiction, will not render the judgment subject to collateral attack." *Taylor v. Coots*, 32 Neb. 30. See, also, *Howell v. Ross*, 69 Neb. 1; *In re Estate of Nelson*, 81 Neb. 363.

In this state county courts are courts of record vested with general jurisdiction in probate and guardianship matters, and in a court of record it is not essential that every jurisdictional fact appear upon the face of the record. If a petition sets out facts sufficient to show a cause of action within the general jurisdiction of the court, and no facts appear upon the face of the record establishing that no jurisdiction exists, all presumptions are resolved in favor of the power of the court to act. The substituted decree, in the present case, evidences the existence of all the necessary jurisdictional facts. The evidence upon which the county court acted, both at the time of the original hearing and at the hearing upon the motion, has not been preserved. That the case when first heard was tried upon the theory that Lau was a friend of the incompetent affirmatively appears in the substituted decree.

The *nunc pro tunc* order merely sets forth the actual facts and the proofs, as presented at the hearing, and, there being no evidence to the contrary, this court must

presume that the facts are as stated in that order, and that the findings and order as made at the time of the *nunc pro tunc* entry speak the truth as to what actually occurred at the original hearing. It was not the amendment to the original petition, granted at the time when the *nunc pro tunc* order was made, which conferred jurisdiction, as above noted. The fact is that jurisdiction actually existed at the first hearing but the record did not fully set this forth.

In respect of the conclusiveness of the judgments of probate courts, it has been said by a recognized authority: "If it be found that the tribunal is one competent *to decide* whether the facts in any given matter confer jurisdiction, it follows with inexorable necessity that, if it decides that it has jurisdiction, then its judgments within the scope of the subject-matters over which its authority extends, in proceedings following the lawful allegation of circumstances requiring the exercise of its power, are conclusive against all the world, unless reversed on appeal, or avoided for error or fraud in a direct proceeding. * * * Thus it is denied by the federal courts that courts of probate are in any technical sense *inferior* courts, and their judgments within the sphere of their jurisdiction are as conclusive as those of the circuit or any other general court, and entitled to the same intendments and presumptions in their favor." Woerner's American Law of Administration (3d ed.) sec. 145. In the same work, in section 143, this is said: "It is held that federal courts, although of limited jurisdiction, are not inferior courts in the technical sense; and that their judgments, although reversible by writ of error or appeal, are binding, although the facts conferring jurisdiction be not alleged in the pleadings. * * * It has also been held that the omission of an allegation of a jurisdictional fact on the record is cured by proof of the existence of such fact. And a distinction has been made between cases falling within the usual or general powers of the probate court, in which case if the record is silent with respect to any fact necessary to give jurisdiction, it will be presumed that

the court acted within its jurisdiction." And in section 144 the author says: "Jurisdiction of the subject-matter is to be tested by the authorized extent of the powers of the court in regard to the alleged cause of action; and if the court had power to try that, did try it, and pronounced judgment thereon, the question cannot again be tried in another court."

Counsel contend that they should be given an opportunity for another hearing in the county court. In view of the record before us we do not think so. The decree of June 22, 1921, is a final decree and was unappealed from. It may be observed that some confusion has crept into the record from the fact that counsel refer to the decree which was passed on in the former opinion herein as the first decree and to the substituted decree as the second decree. But the county court rendered only one decree herein, namely, the substituted decree, and it was properly entered under date of June 22, 1921, that being the date of its actual rendition.

The rule seems to be that a court of record, and the county court is a court of record, may enter a judgment *nunc pro tunc* on motion and notice, and the fact that the application therefor is not made for a considerable time after the judgment was rendered does not deprive the court of jurisdiction. *Phelps v. Wolff*, 74 Neb. 44. Comp. St. 1922, sec. 1129. In the *Phelps* case in the body of the opinion this is said of a decree that was entered in the journal approximately eight years after its pronouncement: "It is beyond question that the district court had jurisdiction to order the decree, which was actually rendered by Judge Marshall on the 7th of December, 1895, entered upon the journal of the court as of that date." And this was done in the present case. See *Hyde v. Michelson*, 52 Neb. 680.

The record seems fairly to disclose that the main object of defendant's motion in the county court was to the end that the substituted decree should truthfully declare the findings of the court, which was made June 22, 1921, and that its judgment, based on the proved facts, was pro-

nounced and rendered when the case was first heard. But the original decree failed to show this. Hence, the substituted decree, pursuant to the *nunc pro tunc* order of the court, was properly filed as of June 22, 1921, to conform to the actual findings and decree of the court made on that date, all as hereinbefore pointed out.

The judgment is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED.

MORRISSEY, C. J., and ROSE, J., dissent.

Note—See Courts, 15 C. J. secs. 35, 146, 158; Judgments, 34 C. J. secs. 841, 860, 861.

MINNIE A. BRAYTON, EXECUTRIX, APPELLEE, V. EDNA FISHER JACKSON, ADMINISTRATRIX, ET AL., APPELLANTS.

FILED DECEMBER 31, 1924. No. 24327.

Tenancy in Common: ACCOUNTING. Evidence examined, and *held* to support a finding and judgment for plaintiff for $2,298.09.

APPEAL from the district court for Cherry county: WILLIAM H. WESTOVER, JUDGE. *Remanded, with directions.*

John M. Tucker, Allen G. Fisher and *Charles A. Ruby,* for appellants.

James C. Quigley, Oliver M. Walcott and *J. J. Harrington, contra.*

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

DAY, J.

This is an action for an accounting for rents alleged to have been collected by Walter S. Jackson upon certain real estate held as tenants in common by Walter S. Jackson and Frank Brayton. The action was commenced by Minnie A. Brayton, executrix of the estate of Frank Brayton, deceased, against Walter S. Jackson and his wife, Edna Jack-

son. While the case was pending, Walter S. Jackson died, and the action was revived in the name of Edna Fisher Jackson, administratrix of his estate. The trial resulted in a judgment in favor of the plaintiff and against the defendant, Edna Fisher Jackson, administratrix, for $2,350. Defendant appeals.

The record shows that Frank Brayton and Walter S. Jackson were tenants in common, each owning an undivided one-half in certain business property in Valentine, Nebraska. After the death of Brayton on August 10, 1918, Jackson continued to collect the rents from the several occupants of the premises, and in addition for several years occupied seven rooms in one of the store buildings as a dwelling. In addition to the ownership of the real estate as above described, Brayton and Jackson had been partners in a mercantile business which later was incorporated under the name of the Red Front Mercantile Company, in which corporation Brayton and Jackson were stockholders. A good deal of confusion has arisen in the present action by the introduction of evidence pertaining to the accounts of the partnership business and the business of the corporation. The case is before us for a trial *de novo*.

From an examination of the record we conclude that Jackson should be charged with the following items:

Rent collected up to April 1, 1923	$18,164.21
Rent collected after April 1, 1923, from Red Front Mercantile Co.	990.00
Rent from Dr. Meer	220.00
Rent from Dr. Ulrich	30.00
Rent from Dr. Johnson	60.00
Rent of premises occupied by Jackson for 68 months at $25 a month	1,700.00
Total	$21,164.21

Jackson should be credited with the following items:

Payment of taxes	$ 2,348.35
Janitor services $38 and $60	98.00
Certain checks described as unindorsed	1,900.97

Certain checks described as indorsed....	4,603.83
Note paid to Farmers Nat. Bank.....	1,016.89
Total	$9,968.04

Deducting the amount of the credits from the amount collected would leave a balance belonging to each of the parties of $5,598.09. Of the rents so collected Jackson paid to Mrs. Brayton during the period $3,300, leaving a balance of $2,298.09, for which the plaintiff is entitled to judgment.

Some reference has been made in the evidence and in the briefs to a note of $1,500 in favor of Mrs. Brayton in her individual capacity. This note has no place in this accounting. The fact that an attempt was made to have it considered should not prejudice the rights of Mrs. Brayton in a proper action on the note.

The cause is remanded, with directions to enter a judgment in favor of the plaintiff and against the defendant for $2,298.09, each party to pay half the costs in both courts.

REMANDED, WITH DIRECTIONS.

JOHN CAREY ET AL., APPELLEES, V. HERMAN ZABEL, APPELLANT.

FILED DECEMBER 31, 1924. No. 24335.

1. **Bills and Notes:** BONA FIDE PURCHASER. "The indorsee of negotiable paper before due and without notice of defenses, as collateral security for an antecedent debt, is a *bona fide* holder thereof for value within the meaning of the law merchant." *Lashmett v. Prall*, 2 Neb. (Unof.) 284.
2. ———: COLLATERAL: RIGHTS OF INDORSEE. "If a note is valid between the original parties, an indorsee who holds it as collateral may recover the face thereof with accrued interest, retaining any surplus as trustee for the party beneficially entitled thereto after his own claim is satisfied; but, if the note is invalid between the immediate parties, one who holds it as collateral

security may only recover the amount of his claim to which said note is collateral." *Benton v. Sikyta*, 84 Neb. 808.

3. ———: ———: RIGHT TO SUE. Where a promissory note is assigned by a vendee in due course as collateral security for the performance of an executory contract for the sale of land, the assignee may maintain an action on the note without first resorting to specific performance or an action for damages.

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

Holmes, Chambers & Mann and *Hartigan & Fouts*, for appellant.

Burr, Brown & Dibble and *Stewart, Perry & Stewart, contra.*

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

DAY, J.

This case was before this court on a former occasion, wherein a directed verdict for the defendants was reversed and the cause remanded for further proceedings, with permission to defendant Zabel to amend his answer if so advised. The ground of reversal was that no defense to the note sued on was pleaded in the answer of defendant Herman Zabel, and there was no competent evidence to support the judgment. Our former opinion is reported in 112 Neb. 16.

The action was based on a promissory note for $8,000, dated August 28, 1920, and due March 1, 1921. Zabel was the maker and the States Realty Investment Company, hereinafter called the realty company, payee and indorser. Plaintiffs are John Carey and Herbert G. Dyar, who pleaded in their petition that they were purchasers of the note in good faith in the regular course of business for a valuable consideration before maturity; that the payee indorsed the note and delivered it to them; that they are the owners and holders of it; and that it is unpaid. The maker and indorser were made parties defendant.

In addition to many of the allegations contained in the answer of Zabel on the former trial, he pleaded in an amended answer that the plaintiffs held the note as collateral security to an executory contract existing between plaintiffs and the realty company; that the plaintiffs have never enforced the said contract; that the plaintiffs still hold and have in their possession the consideration of said executory contract; and that no liability has accrued for which said note is held and pledged as collateral security. The answer further alleged that the consideration of the note was a contract between the realty company and Zabel for the purchase of certain real estate; that the realty company refused upon the date stipulated in the contract to perform the contract, whereby the consideration for the note has failed; and that the contract between the defendant Zabel and the realty company was rescinded by Zabel. The answer also alleged that the amount due upon the contract between the plaintiffs and the realty company on their contract had never been ascertained, and that it was less than the amount of the note.

The reply denied the allegations of the answer, except the admission of the defendant Zabel that he executed the note and the contract for sale between himself and the realty company.

At the close of the evidence upon the second trial, the court peremptorily instructed the jury to return a verdict in favor of the plaintiffs for the amount due upon the note, which was done, and judgment was entered on the verdict. Defendant Zabel appeals.

On the trial it developed that on August 23, 1920, the plaintiffs entered into a contract of sale with the realty company for certain lands in Perkins county, Nebraska, for a consideration of $22,400 of which $500 was to be paid in cash on the date of the contract; $4,000 on or before October 15, 1920; $9,900 on or before March 1, 1921; and $8,000 to be carried back on a mortgage on the land. The evidence also showed that on August 28, 1920, the realty company entered into a contract with the defendant

Zabel to sell the same tract of land for a consideration of $28,800, payable as follows: Cash receipt acknowledged $7,500; assignment of corporate stock $2,500; credit for indebtedness $2,800; note payable on March 1, 1921, $8,000; and assumption of a mortgage of $8,000 on the land.

The evidence shows that the realty company was unable to meet the payment due in October, 1920, and after some negotiation, and in January, 1921, it turned over to the plaintiffs the $8,000 note given by Zabel. This note was taken by plaintiffs as collateral security for the performance of the contract of the realty company with plaintiffs. At the time the note was indorsed and turned over to the plaintiffs, they had no knowledge of the consideration for which the note was given, and were innocent holders of the note for value before maturity.

It has been held by this court: "The indorsee of negotiable paper before due and without notice of defenses, as collateral security for an antecedent debt, is a *bona fide* holder thereof for value within the meaning of the law merchant." *Lashmett v. Prall,* 2 Neb. (Unof.) 284; *Lashmett v. Prall,* 93 Neb. 184. See Comp. St. 1922, sec. 4663.

It is argued, however, that the plaintiffs cannot maintain the action until it is first determined in an action of specific performance or in damages for a breach of the contract what amount is due upon the contract between the plaintiffs and the realty company. The argument is made that it would be unjust to permit the plaintiffs to collect the note and also keep the title to the land. The argument is persuasive, but not convincing. It appears, however, that the plaintiffs are not attempting to hold the title to the land and at the same time collect the note.

The record shows that in July, 1921, and before the suit was brought, the plaintiffs executed a deed to the lands sold by them to the realty company, and delivered the same to one Bair to be held in escrow and delivered to the realty company on the payment of the Zabel note. This deed appears to have been made in conformity to some modifications of the contract between the plaintiffs and the realty

company. Some months after the deed was executed and delivered to Bair, this action was commenced, and upon the trial the deed was tendered in court.

There is no privity between the contract of plaintiffs and the realty company, and the contract of Zabel and the realty company. The two contracts are entirely independent. After the plaintiffs sold the land to the realty company, they took the note in question as collateral security for part performance of the contract price. That they were innocent holders of the note before maturity for value is not denied. The realty company indorsed the note and delivered it to the plaintiffs. Under these circumstances it would seem that the plaintiffs' rights must be determined under the ordinary rules which govern the holders of collateral security. While it is true that the realty company was a party defendant in the action, it was made defendant because of its liability as indorser of the note, rather than as a party to the contract of purchase. Assuming that the note was invalid as between the immediate parties thereto, the rule is settled that one who holds a negotiable note as collateral security for a debt may recover only the amount of his claim to which said note is collateral. *Benton v. Sikyta,* 84 Neb. 808. In this case, however, the testimony is undisputed that at the time of the trial the amount due upon the contract was more than the amount due upon the note.

In support of his contention the defendant cites *Prichard v. Mulhall,* 127 Ia. 545. That action was a direct suit between the vendor and the vendee based upon an executory contract for the sale of land. The case turned upon the point that the record failed to disclose that the vendor tendered or produced in court a proper deed of conveyance for the use of the vendee. The court, however, used this language: "Assuming that upon breach of an executory contract for the sale of land the vendor may bring an action at law to recover the purchase price, it can only be maintained on a tender and production in court of a proper deed of conveyance for the use of the vendee." Defendant

also relies upon *Rumney v. Coville,* 51 Mich. 186. An examination of the facts in that case discloses an entirely different situation from the facts in the case at bar. Other cases cited by defendant are easily distinguishable.

In this view of the case, no defense being either pleaded or proved, the trial court did not err in directing a verdict for the plaintiffs, it having been shown that plaintiffs were *bona fide* holders of the note.

The judgment is, therefore,

AFFIRMED.

Note—See Pledges, 31 Cyc. 888, 889.

GEORGE AULT, APPELLANT, V. BERT STEWART ET AL., APPELLEES.

FILED DECEMBER 31, 1924. No. 23690.

Process: SUMMONS: RETURN: IMPEACHMENT. The return of a sheriff on a summons by him served is presumed to be correct and cannot be impeached except by clear and convincing evidence.

APPEAL from the district court for Scotts Bluff county: P. J. BARRON, JUDGE. *Affirmed.*

J. M. Fitzgerald, B. M. Shumway and *Robert G. Simmons,* for appellant.

F. J. Reed, contra.

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

GOOD, J.

George Ault brought this action to enjoin the enforcement of a judgment obtained against him by default in the county court of Scotts Bluff county. Said judgment was in favor of Bert Stewart, defendant herein. Plaintiff in this action alleges that said judgment was void for lack of jurisdiction over his person by the county court of Scotts

Bluff county. The trial resulted in a finding against the plaintiff and judgment of dismissal. Plaintiff appeals.

The plaintiff in this action resides in Sioux county, which adjoins Scotts Bluff county immediately on the north. There is a highway on the county line between the two counties. The sheriff of Scotts Bluff county served the summons upon Ault while he was on this county highway between the counties, and made return on the summons, showing service in Scotts Bluff county. Plaintiff in this action attacks the return of the sheriff as false and claims that the summons was served on him while he was in Sioux county. The county line is supposedly the center of this highway and Ault claims that he was north of the center of the highway when the summons was served. The evidence shows that there is but one traveled track upon this highway and that it is located about the center thereof; that Ault was traveling eastward upon this highway and in the main-traveled track. He was sitting on a wagon seat in the center of a beet wagon, or beet rack, which was about six feet wide. The sheriff went to the south side of this wagon and handed the summons up to Ault, who reached to the south and down to the officer to receive it.

The evidence on behalf of the plaintiff in this action tends to indicate that he was in Sioux county when the summons was handed to him, while the evidence on behalf of defendant tends to show that the sheriff, at least, was in Scotts Bluff county, and that Ault reached across and into that county when he received the summons from the sheriff.

The rule is well established in this state that a sheriff's return on a summons is *prima facie* proof of the service therein indicated. *Walker v. Stevens*, 52 Neb. 653. It is also held in *Connell v. Galligher*, 36 Neb. 749: "To impeach the return of an officer of the due service by him of a summons, the evidence must be clear and satisfactory." And in *Wilson v. Shipman*, 34 Neb. 573, it is held: "The return of an officer on a summons, that he had personally served a copy of the same on the defendants, may be contradicted and disproved by the defendant; but it must be

clear from the evidence and circumstances that the return is untrue, otherwise it is the duty of the court to sustain it." In *Unangst v. Southwick*, 80 Neb. 119, it is held: "The return of an officer cannot be impeached except by clear and convincing evidence."

It is apparent that the burden of proof was upon the plaintiff in this action to show the falsity of the officer's return by evidence that was clear and convincing. The most that may be said for the plaintiff in this action is that his evidence may raise a doubt as to the correctness of the officer's return. It falls short of being clear and convincing that the return is false.

The judgment is also attacked upon the ground that Ault was not within Scotts Bluff county when the petition was filed and the summons issued, but the evidence upon this question preponderates strongly in favor of the defendant.

The judgment of the district court seems to be in accordance with well-established rules of law and supported by sufficient evidence, and is, therefore,

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT, V. PLATTE VALLEY DRAINAGE DISTRICT, APPELLEE.

FILED DECEMBER 31, 1924. No. 24161.

Drains: ASSESSMENTS. Evidence examined, and *held* insufficient to sustain the special assessments complained of.

APPEAL from the district court for Colfax county: FREDERICK W. BUTTON, JUDGE. *Reversed, with directions.*

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

Dolezal, Spear, Mapes & Stevens, Albert & Wagner, John C. Sprecher and *George W. Wertz, contra.*

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

REDICK, District Judge.

The case involves the validity of a drainage district assessment and the apportionment of benefits. Some preliminary matters require disposition.

Objection is made by appellee to the jurisdiction of the district court and of this court, upon the ground that the transcript filed in the district court did not contain a copy of the apportionment of benefits. The first certificate of the clerk was defective in this particular, but we think it substantially appears from an amended certificate that the apportionment appearing in the transcript was a copy of the record thereof required to be filed in the office of the county clerk.

It is further objected that appellants have no right of appeal, because they did not appear before the board of the district and make their objections prior to the apportionment, and further, in this connection, that the objections now made to the apportionment cannot be urged because not made before the board. Cases from Iowa are cited in support of this contention, but the statute of that state is different from ours, which, at the time of these proceedings, contemplated merely the filing of a protest with the county clerk against such apportionment within 20 days from the third publication thereof, with a bond, whereupon the county clerk was required to file a transcript of the proceedings in the district court, which would then become possessed of the appeal. Rev. St. 1913, sec. 1878. These requirements were complied with.

Appellee also moves to dismiss the cross-appeal of the county of Colfax for failure to file a præcipe therefor within four months from the date of the judgment. The judgment was dated April 21, 1924, and the præcipe on behalf of the county July 16, 1924. We are unable to discover any foundation for this motion, unless counsel rely upon the fact that the præcipe is not signed. However, it contains the name of the cross-appellant and complies with the rule in all respects, and, that the præcipe should be signed is not one of the requirements. We now proceed to the merits of the case.

In 1917 the Platte Valley Drainage District was duly organized and its boundaries defined. It comprised 7,985 acres included in a strip of territory about eight and one-half miles long and varying in width from about one-half mile at the west and coming to a point at the east end. The southern boundary was the north bank of the Platte river; the northern boundary was irregular, with a number of offsets, but following the lines of governmental subdivisions. As frequently happens in this part of the country, and particularly the Platte river valley, the channel proper of the river lies some distance from the bench lands on either side which at one time formed the river banks, the action of the current cutting the channel and forming the banks which in ordinary stages confine the waters to the channel thus formed. In the Platte river there are generally several channels between these later formed banks, which may be in one place today and another tomorrow, that is, the channels wander about between the banks, adopting different courses, but in the ordinary stages of the water do not overflow the banks. The bed and banks of the river are composed of sand and silt, and, as the engineers put it, the waters of the Platte carry an overburden of this material, the amount of such burden being determined by the velocity or sluggishness of the current; when the current is swift the sand and silt is carried in suspension, and when the current is retarded the foreign matter is deposited in proportion. The above describes in general terms the conditions in the Platte river adjoining the drainage district. Between the northern boundary of the river and the northern boundary of the district, which conforms generally with the line of the bench land, is a swale or slough, through the northern portion of which runs a channel referred to in the evidence as Leech creek. It starts at the western boundary about half a mile from the river, and proceeds in a northeasterly direction for about four miles, where it is about a mile and three-quarters from the river, and then passes eastwardly, maintaining that distance for over two miles,

and thence northeasterly to the eastern boundary of the district, where it empties into the Platte. The bottom of this channel is on an average four feet below the level of the water in the Platte river, but from seven to nine feet above the bed of the Platte. There is some water flowing through Leech creek at all times, but in times of high water the Platte overflows and enters the creek, which then becomes an important factor in the situation. The north bank of the Platte is higher than the territory between it and the creek, but not uniformly so, varying from three to eight or nine feet, and even though the water of the river is not high enough to overflow the entire bank, it enters the slough at various points along the north boundary, so that the slough is generally subject to overflow, regardless of the structure, hereinafter mentioned, placed in the river by the drainage district. In fact, it is conceded that the operations undertaken by the district were not for the purpose of preventing overflow of the lands therein, and that in times of high water overflows occur the same as before. The channel of Leech creek approaches the north bank of the river at its closest point about 400 feet, a quarter of a mile east of the western boundary of the district, about the center of the southwest quarter of section 31. At the time of the government survey the river bank was represented by an irregular line beginning on the west line of section 31 extended south 500 feet, and running northeasterly to a point a short distance east of the quarter-section line, along the line for about one-third of a mile, and thence southerly, crossing the east line of the section extended about 300 feet. The bank thus described was eroded by the action of the water until in 1920 the north bank was represented by a curved line, beginning near the southwest corner of section 31, crossing the quarter-section line about 750 feet, the half-section line at 1,250 feet, the next quarter-section line at 950 feet, and the east section line at 600 feet north of the former survey. That process of erosion continued until it was feared by the authorities of the district that it would destroy the high

ground intervening between the river and the channel of Leech creek, upon the junction of which it was thought the river would adopt the channel of the tributary, casting a large volume of water therein and destroying the lands along Leech creek and causing great damage to county roads and the railroad, to which reference will now be made.

About the center of the district east and west, appellant railroad company maintains its line across the district north and south for a distance of about one and two-thirds miles, including three bridges of trestle work, one at the north about 370 feet long, crossing Leech creek, which it was thought might be destroyed by a change of channel of the river, and one about 250 feet south thereof, and a third about midway between the creek and the river, which do not enter seriously into the problem. The county of Colfax maintains a main highway across the slough paralleling the railroad at about three quarters of a mile west, on which are three bridges, and other highways in the district, all totaling nine and one-half miles, with six bridges.

The authorities of the district employed an engineer, who expressed the opinion that there was danger that the Platte river would continue eroding the north bank in section 31 until it broke through into the channel of Leech creek, throwing a great volume of water therein which would follow its course to the creek's outlet at the eastern end of the district, being unable to return to the river by reason of the high elevations; that it would cut a channel all the way about 1,000 feet in width, would destroy a great many acres of land and cause great damage to the roads and bridges of the county and the railroad. To prevent further erosion, he advised the construction of a barrier about 1,500 feet in length extending from the north bank of the river in an easterly direction to an island, and composed of huge concrete blocks connected by cables, to which should be strung about 300 trees, which would float

and form a screen tending to retard the current and thus induce the deposit of the foreign matter carried by it to form a sand-bar, and thus turning the course of the river away from the threatened bank. The plans and suggestions of the engineer were adopted by the district, and the work was constructed at an expense of $18,000, and the assessment in question levied upon the lands in the district and upon the railroad and county to pay the same, according to the supposed benefits received. Section 1876, Rev. St. 1913, requires the board to "apportion the benefits thereof accruing to the several tracts of land within the district which will be benefited thereby, on a system of units. The land least benefited shall be apportioned one unit of assessment and each tract receiving a greater benefit shall be apportioned a greater number of units or fraction thereof according to the benefits received." In compliance with this statute the board determined that a certain two-acre tract would receive the least benefit, which it fixed at $20. It then proceeded to apportion the benefits to the other tracts of land in the district, the total number of units so apportioned being 6,832. As to the reasonableness of this apportionment we will have something to say a little later on. To the railroad company it apportioned 2,500 and to the county 3,525 units, the total number of units being 12,857, which applied to the cost of the work, $18,000, determined the amount of each unit at $1.40, and the assessment upon each tract or property was obtained by multiplying the number of units assigned thereto respectively by $1.40. The assessment of the railroad company, therefore, was $3,500, and that of the county $4,935, and to the lands $9,554.80. It will thus be observed that, while the district contains 7,985 acres worth about $700,000, and the damage threatened the railroad and county according to the highest estimates in the evidence was $240,000, nearly 47 per cent. of the expense of construction was apportioned to the railroad and the county, whose appeals therefrom are now being considered.

The railroad company presents three propositions: (1)

That it received no special benefits from the construction; (2) that the units of benefits apportioned to the other lands in said district are less than those by each separate tract received; (3) that the plans and specifications of the work to be done will be ineffective as to the lands, railroad-bed and bridges of the railroad; and presents these questions by proper assignments of error. The county presents substantially the same questions and they may be generally considered together.

It is suggested that the second objection is insufficient to call into exercise the judgment of the court as to the amount of the apportionment to the railroad, on the ground that the railroad may not complain that other property is assessed too low, but may only object that its property is assessed too high in proportion. This principle has greater application to proceedings before boards of equalization of assessments for taxation for general purposes, but we think in connection with the first proposition it is sufficient, especially in view of the fact that the question was fully tried in the district court without objection to the evidence offered thereon.

The claim of the appellant presented by the first and third propositions is that the possibility of the Platte river adopting the course of Leech creek as one of its main channels is purely a matter of conjecture and speculation so far as the opinions of appellee's witnesses are concerned, and that the testimony of appellant's witnesses is sustained by reason, scientific propositions and actual experience. The engineer of the district and two others called by appellee expressed the opinion that there was grave danger of the Platte adopting the channel of its tributary, but concede they have no knowledge of such an occurrence having taken place. These witnesses do not show themselves possessed of any special qualifications to form an opinion upon the subject; they present no knowledge of any instance where the parent stream connecting with a tributary above the point of confluence had adopted the course of the tributary, and their conclusions are based principally upon

the fact that the bottom of the tributary channel is lower than the surface of the water of the parent stream at ordinary stages, and a special study of the local situation and conditions, aided by their general education as engineers. On the other hand, the railroad company produces three engineers showing special qualifications in the way of education and experience to form an opinion on the subject, who testify that there is no possibility of the river changing its channel in the manner feared. And they support their opinions by citing several instances in which a junction between the parent and tributary streams was accomplished by erosion, and in every instance it resulted in the tributary entering the parent stream at the new point and abandoning its former channel, which thereafter was either filled with silt or became a succession of sloughs, and that such would be the result in case of a junction of the river with Leech creek. They support their conclusions with reference to the particular situation by the facts that the Platte river carries an overburden of silt, that when the current is retarded a part of the organic matter carried is deposited, thereby forming a bar, that this has happened in a number of instances where an irrigation canal has been filled up and a cross-bar formed across its mouth. They therefore conclude that if the Platte river by erosion should reach the channel of Leech creek, while in high-water stages a considerable quantity of water might pass down the creek, the action of the water would have a tendency to erect a bar across Leech creek, thereby causing the waters of the river to return to their former course in a very short time.

While this conflict in the evidence presents a question which, considered in the abstract, might compel us to hold that the weight of the evidence favors the appellant, still as a practical question upon the determination of which boards of supervisors and other agencies of government must exercise their judgment and base their action, the solution is not so easy. While in the opinion of appellant's witnesses a junction of the two streams would have no in-

jurious effect upon the railroad and county properties, still it may be fairly inferred from the evidence that a volume of water considerably in excess of normal would be thrown into the creek and thus subject such properties and the adjacent lands to increased chances of injury by the event, as well as in subsequent times of overflow. The dispute is as to the permanence of that situation. Notwithstanding the fact that the evidence seems to preponderate in favor of appellant, the matter remains one of opinion. No one can assert with certainty what the action of the waters of the Platte will be when nature takes the stage to put on a deluge. The authorities of the district, in adopting the plan they did, appear to have acted in perfect good faith, upon advice of an engineer, for the purpose of forestalling an apprehended danger, which, though probably not so serious as it appeared to them, was nevertheless of such doubtful character as to call for action of some kind. The adoption of the plan was committed by the statute to the judgment and discretion of the board, and their finding should not be upset unless it is so lacking in reasonable foundation as to warrant an inference of bad faith, or of a total failure to exercise their judgment. The fact, if conceded, that they adopted a plan involving greater expense than some other, as suggested by appellant's evidence, the effectiveness of which plan likewise rested upon opinions of experts, will not render void their judgment. It would not be the first time that mistakes of official judgment resulted in loss to the property owner. We are, therefore, of the opinion that the finding of the board to the effect that the properties of the railroad and county would receive some benefit is not unreasonable, and that the cost of the improvement may be properly laid upon the lands and property in the district to the extent of special benefits accruing thereto.

We will now examine the basis and apportionment of benefits and the assessment thereof. A benefit may consist of an increase in value or the prevention of damage or loss, and the assessment in question was based upon that

proposition. It was thought that the prevention of an increased flow of water through Leech creek would benefit the lands of the district by increasing their value for farming purposes, and would benefit the railroad and county by reducing the danger of damage to roadways and bridges with consequent increase in the expense of maintenance and repairs. This was a reasonable basis for the assessment.

The apportionment of benefits, however, presents the most difficult problem, and we must not lose sight of the fact that the amount of special benefit in almost every case is to a great extent based upon theory, and absolute equality cannot be attained. The most that can be demanded is that the apportionment be fair and reasonable among the different tracts. The engineer of the board found that a certain tract of two acres was least benefited, and that it was increased in value $20, which was the unit of assessment. He then assigned to the different tracts of land the number of units which in his judgment they were respectively benefited, to the extent of 6,832 units. The number of units assigned to each tract was determined by a consideration of its assessed value, approximately one-fifth of its market value, which he places at $50, $75, and $100 an acre. The only exceptions to this rule of apportionment are a few tracts in sections 31 and 32 which are subject to erosion by the river. No question of the apportionment as between the respective tracts of land is before us. The board adopted the plan of the engineer. Assuming that a new channel 1,000 feet wide would be cut through Leech creek, about 1,200 acres would be destroyed, of the value of $120,000; the assessment on these lands was about 1.25 per cent. to 1.40 per cent. of their value. The engineer then allotted 2,500 units of benefit to the railroad, or a total benefit of $50,000, resulting in an assessment of $3,500. It will thus be apparent that, the lands being charged as a rule with benefits upon the basis of one-fifth their value, it follows, the value of a beneficial unit being $20, 2,500 units equals $50,000, from which would be de-

rived a total value of $250,000, but by the evidence the greatest value placed upon the one and two-thirds miles of track and bridges is $90,000; and the maximum cost of constructing a bridge 1,000 feet long over the "phantom stream," as appellant's counsel characterizes it, is $90,000. While evidence on the part of the railroad was to the effect that it could be built for $20 a foot, the evidence shows that two spans of 14 feet each erected after the flood of 1912 cost $1,500 or an average of $54 a foot. We think it fairly appears that the board fixed the probable total damage saved the railroad at $50,000; 3,525 units were assessed against the county, a total of $70,500 benefits, resulting in an assessment of $4,935. The engineer testified that he fixed the value of the lands for the purpose of the apportionment at one-fifth their market value, and that he assessed the county on a different theory, *i.e.*, "what the benefits would be." He also testified the damage to the county which would result from a change of channel he would estimate at $150,000, that the county would have to build a bridge 1,000 feet long and rebuild a number of other bridges and roads. The figure given is without support in the evidence, except that it is the opinion of a reasonably competent engineer, but one who has not made any figures which would dignify it as an estimate. Perhaps the figure $70,500, adopted as the total benefit, may be accepted as a good guess. But this last figure is five-fifths of the saving to the county, which corresponds to five-fifths of the value of the land saved, but which was charged benefits on the basis of one-fifth only.

We think it appears from the record that the lands were charged on the basis of one-fifth their value, while the railroad and the county were charged on the total value of the losses saved, and that this has resulted in an unequal apportionment; that the railroad should be charged with 500 units and the county with 705 units. The assessment of the railroad is reduced to $700, and that of the county to $987.

The judgment of district court is reversed, with instructions to enter decree in conformity with this opinion.

REVERSED.

SARAH A. DOW, APPELLEE, V. LULU HUTTON GOTCH, APPELLANT.

FILED DECEMBER 31, 1924. No. 24343.

1. Contracts: VALIDITY. In order to be valid and enforceable, a contract in restraint of trade, if unlimited as to time, must be limited as to space, and the conditions thereof must appear to be reasonable.
2. ———: ———. *Held*, in this case, that the contract was fairly entered into and that its conditions are reasonable, and, hence, though limited as to space and unlimited as to time, it is valid and enforceable.

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

Horth, Cleary & Suhr, for appellant.

B. J. Cunningham and *Prince & Prince, contra.*

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

SHEPHERD, District Judge.

In this case the appellee brought suit in injunction to prevent the appellant from practicing her calling as a beauty parlor expert in the city of Grand Island. She was successful, and the appellant appealed.

The one question in the case is whether or not the contract entered into between the parties is valid and enforceable.

Stripping the case from what is immaterial, this court has no difficulty in determining from the evidence, as the trial court did, that the appellee entered into the contract with full knowledge of its terms. Her contention is that when she signed the contract she did not understand that

she was precluded by it from further practicing her calling in the city of Grand Island. A clause of the contract is as follows: "It is hereby expressly agreed by the said party of the second part that she will not leave the employ of the said party of the first part for at least a period of twelve months after her return from taking said postgraduate course at Chicago, and that she will not engage in the business of hair or facial treatment or as a manicurist in the city of Grand Island either for herself or for another party, except as an employee of the party of the first part, hereafter." It appears, however, that she had the contract, or a copy of it, in her possession and that she read the same and fully understood and appreciated all of its conditions, including the paragraph quoted. This is clearly shown, not only by the fact that she read it and signed it under the circumstances above mentioned, but by the testimony of two credible witnesses. One swore that she referred to the fact in conversation with a friend in Chicago, and told the latter in her hearing that she had signed a contract whereby she could no longer pursue her trade in Grand Island. And the other testified to a personal conversation with her in which she stated, in substance, that she was not perturbed about the provision in question, because if she once got away from the town of Grand Island she never cared to return to it.

Mrs. Dow, the appellee, was running a beauty parlor in Grand Island, and Mrs. Gotch, the appellant, was working for her as an operator. Mrs. Gotch was considering going to Chicago to take a postgraduate course in the Marinello school, and Mrs. Dow offered her $100 to defray her expense in so doing, if she would work for her for a year upon her return, and agree not to engage in the business thereafter in Grand Island, either on her own account or for any other person. Mrs. Gotch accepted the offer, signed the contract, received the money, went to Chicago, took her postgraduate course, returned to Grand Island, and continued in the employ of Mrs. Dow for five or six months. At the end of that time she had an offer to go to

Cheyenne at a considerably greater salary than she was receiving from Mrs. Dow, and thereupon the latter, at her request, released her from the provision of the contract requiring her to remain in Grand Island and to work for her for the full year. Mrs. Gotch went to Cheyenne, remained there for several months, and then returned to Grand Island and entered the employ of a rival beauty parlor concern.

The early history of jurisprudence, particularly in England, shows that courts were loth to enforce contracts of this nature. The general rule was that agreements of this kind, in order to be valid, must be limited both as to space and time. But the later cases in this country have been decided upon the theory that such contracts will be enforced if they are ancillary to a main contract and limited either as to time or space, provided that they are also reasonable in their terms and operation. We think this is the law in the state of Nebraska.

The case of *Farmers State Bank v. Petersburg State Bank*, 108 Neb. 54, discloses a finding as follows: "That defendants, at the time they sold their banking business in Petersburg to plaintiffs, and as part consideration therefor, promised not to enter into the banking business again in said town." And the holding of the court was that this contract should be enforced. Again, in the case of *Roberts v. Lemont*, 73 Neb. 365, the court stated the general rule as follows: "A contract in restraint of trade, which is not limited either in time or space, is against public policy and void." And in the body of the opinion the following statement appears: "The general rule is that a contract in partial restraint of trade should be reasonable in its terms and limited in its extent, both as to time and space, but where the conditions appear to be reasonable and the contract is limited as to space, it is held that it may be enforced, even though unlimited as to time. *Gill v. Ferris*, 82 Mo. 156; *Smith v. Brown*, 164 Mass. 584. The test is whether the restraint is only such as is necessary to afford a fair protection to the interest of the party in whose favor

it is given, and not so much as to interfere with the interest of the public. *Mandeville v. Harman,* 42 N. J. Eq. 185." The court denied an injunction in that case, saying that the proof was unsatisfactory, and that, if the evidence proved a contract at all, it established one which would prevent the defendants from engaging in business, not only at Norfolk, but at any other place in Nebraska or in the United States. In the opinion of the writer, however, it clearly established the doctrine which was applied in the later case of *Farmers State Bank v. Petersburg State Bank, supra,* and which is contended for by the appellee in the case at bar.

Now it is obvious that the appellee drew a contract which was very favorable to herself and not very favorable to the appellant. Appellant was to go to Chicago and get the latest wrinkle in Marinello work, and then give appellee the benefit of it by a year of service in her shop; and incidentally thereto she was to assure appellee that she would never become a competitor of hers in Grand Island. But it is clear from the record that Mrs. Gotch had ample time to consider, and was well advised of what she was doing. It is very plain that she wanted the post-graduate course, and was confident that she could secure remunerative employment elsewhere if she did not care to work for Mrs. Dow at the very excellent salary which she was receiving from her. There was no fraud or duress practiced upon her. She was not forced by circumstances to enter into the contract. There was no importunity to induce her to do so. She had been about the world a good deal, and was well able to take care of herself. Her little daughter was domiciled in Iowa. She had worked in many other places, and doubtless felt, as the event proved when she went to Cheyenne at an increased salary, that she could better herself in other cities. There was a good consideration and a main contract involved, and we are constrained to believe that the agreement thus fairly entered into should be observed by her, and held to be valid and enforceable by the court.

Times have changed since the day when an English court, upon being advised that a contract of this nature had been entered into, declared that if he had the employer present he would impose a fine upon him to be paid to the king. In that early day men did not go from place to place as they do now. The habit of covering a wide territory had not become prevalent. A journeyman stayed where he had been raised and where he had learned his trade. A removal to a place 50 miles or more away was a great undertaking. People did not go away from home, they stayed where they were put.

The situation is different here and today. A removal to another state is easy and comparatively inexpensive. Men and women of all employments go from one end of the country to another, and quickly find new places, and more advantageous places, in which to practice their vocations. With the development of railroad service and the automobile, people do not remain rooted to their native soil. Without danger to themselves and without detriment to the public, men and women may, and do, contract not to engage in particular work in a particular place. Modern living has extended the range of the individual. Mrs. Gotch realized that she could find employment or engage in business for herself in any one of a thousand towns quite similar to Grand Island, and not hard to reach. She had no consuming love for the city named, and said so. It was not the home of her youth or of her married life, nor the place where she domiciled her child. Nor did the city suffer. It had beauty parlors a plenty, a number of them. "A contract to be against public policy must have a mischievous tendency, and in some way militate against the public welfare and the rights of the public." The reason for the old rule has departed, and we fail to see why the more modern rule approved by this court should not be applied.

There is also an equity in the instant case which works strongly in favor of the appellee. While we recognize the principle that estoppel does not serve to give relief to one who relies upon a void contract, it seems well-nigh in-

tolerable that a party should be permitted to take a sum of money from another, upon solemn agreement not to compete with such other, and then use what she has received in doing the very thing which she agreed not to do, while still retaining the money so paid.

We are of opinion that the district court made no mistake, and committed no error in the decree which was entered. The fact that it put a term to the operation of the contract cuts no figure in the case. It is true that it could not read life into a void contract by limiting its operation. But in any event its holding in this regard did no harm to the appellant. The contract was valid and enforceable as it stood. The judgment appealed from ought to be, and is,

AFFIRMED.

MORRISSEY, C. J., dissenting.

In my opinion, the terms of the contract are so unconscionable that a court of equity ought not to aid in their enforcement, and I, therefore, dissent.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1925.

THOMAS HOWARD v. STATE OF NEBRASKA.

FILED JANUARY 22, 1925. No. 24169.

1. **Homicide**: DYING DECLARATIONS: ADMISSIBILITY. When on the trial of one charged with the commission of a homicide objection is made to the introduction, by the state, of declarations made by the deceased, because not shown to have been made in the belief of approaching dissolution, such belief may be shown by the testimony of any competent witness having knowlege of the fact, and, when such belief is shown, if otherwise pertinent, it is proper to admit the declarations in evidence.
2. ———: EVIDENCE: SUFFICIENCY. The evidence has been examined; is briefly outlined in the opinion, and is *held* to sustain the verdict.
3. **Criminal Law**: SENTENCE. The court, under the authority of section 10186, Comp. St. 1922, imposes a sentence on defendant of three years confinement in the penitentiary on the same terms and conditions as fixed in the sentence pronounced by the district court, the term to run from the date that judgment was pronounced.

ERROR to the district court for Lincoln county: GEORGE C. GILLAN, JUDGE. *Affirmed.*

George N. Gibbs, E. G. Maggi, and *Halligan, Beatty & Halligan,* for plaintiff in error.

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

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

MORRISSEY, C. J.

Defendant prosecutes error from a conviction for manslaughter.

The charge was that defendant, on October 17, 1923, shot and wounded one Chester Porter, who, as result of such wound, died three days later. The state was permitted to prove statements made by Porter a few hours before his death, which statements charged defendant with having fired the fatal shot. It was claimed by the state that these statements were dying declarations. Defendant assigns as error the admission of this testimony and asserts that the record fails to show that the statements, if made, were made by Porter with a knowledge of impending death, etc. We do not deem it necessary to review at length the foundation for this testimony. Were we limited solely to the testimony of the witnesses who testified as to the substance of Porter's statement, there might be merit in defendant's contention; but the testimony of these witnesses, so far as the foundation for the introduction of a dying declaration is concerned, is supplemented by the testimony of the nurse who was in attendance upon the wounded man. Porter died at 2 o'clock in the afternoon. The declarations admitted in evidence were made at 11:30 a. m. The nurse testified that, when Porter was denied a hypodermic injection at about 10 o'clock a. m., he said: "What is the difference whether I die now or six hours from now? I am going to die anyway." She testified that he talked about dying only a short time before the statements in evidence were made and that he was, during the forenoon, conscious of the fact that he was about to depart this life. This testimony is not disputed. The foundation for the admission of the testimony was sufficient.

Defendant makes a general assignment that the verdict is not sustained by sufficient evidence. Porter, the victim of the unfortunate affair, was a farmer residing with his family some distance from North Platte. Defendant was his friend and had visited the Porter home from year to year. Before the shooting, defendant had been staying at Porter's home, whether merely making a visit or there for the purpose of hunting game does not clearly appear. The fatal shooting occurred on the road between Porter's home

and the city of North Platte. There was no person present but Porter and defendant. The statements of the occurrence made by Porter are incomplete and in some respects conflicting. Defendant did not testify and the record does not make a clear presentation of all that occurred between the two men. However, the testimony of those who saw them immediately before the shooting shows that they had with them a bottle of liquor and that they were more or less under the influence of liquor. They were friends; there was no cause for a quarrel between them; and were it not for their indulgence in liquor, the tragedy would never have occurred, but the evidence makes it clear that defendant fired the fatal shot. The evidence sustains the verdict.

We are asked to enter sentence under section 10186, Comp. St. 1922, and we accordingly fix the term of penal servitude at three years in the state penitentiary on the same terms and conditions as fixed in the judgment of the district court, the term to run from date of that judgment. With the term thus fixed, the judgment of the district court is

AFFIRMED.

Note—See Criminal Law, 17 C. J. sec. 3744; Homicide, 30 C. J. secs. 504, 561.

FRANK I. OLSEN V. STATE OF NEBRASKA.

FILED JANUARY 22, 1925. No. 24226.

1. **Criminal Law:** ARGUMENT. "It is highly improper for the prosecuting attorney in a criminal case to declare to the jury his personal belief in defendant's guilt, unless such belief is given as a deduction from the evidence." *Reed v. State*, 66 Neb. 184.
2. ———: NEW TRIAL. Harmless error is not a ground for a new trial in a criminal prosecution.
3. ———: ———. In a criminal prosecution errors not necessarily prejudicial to defendant may be considered in connection with other errors in ruling on the assignment that the trial court erred in overruling the motion for a new trial.
4. ———: MISCONDUCT OF PROSECUTING ATTORNEY. In connection

with a series of incidents amounting to misconduct on the part of the prosecuting attorney, a conviction may be reversed on a record showing that, after the case had been submitted and before the jury had agreed upon a verdict, the bailiff, before closing the door to the jury-room, announced that he had been requested by the county attorney to tell one of the jurors, naming him, that the juror's wife was at the home of the county attorney, where she would spend the night, and that the juror named could meet her there, if the jury should return a verdict in the meantime.

ERROR to the district court for Valley county: BAYARD H. PAINE, JUDGE. *Reversed.*

J. C. Cook and *Munn & Norman,* for plaintiff in error.

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

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

ROSE, J.

In a prosecution by the state in the district court for Valley county Frank I. Olsen, defendant, was convicted of procuring the burning of an insured barn owned by him in Ord with intent to prejudice the insurer. Comp. St. 1922, sec. 9591. For that offense he was sentenced to serve a term of not less than one nor more than five years in the penitentiary. As plaintiff in error defendant presents for review the record of his conviction.

It is insisted that the district court erred in refusing to grant a new trial for conduct of the county attorney in expressing to the jury his personal belief of defendant's guilt and in sending a personal message to a juror while in the jury-room after final submission of the case and before a verdict had been reached. Irregularity in these respects is manifest, but the trial court held that the county attorney did nothing to prejudice the rights of defendant in the eyes of the jury.

The insured property was a barn in Ord. Defendant was the owner and was protected by a fire insurance

policy issued by the Sun Insurance Office of London. A malefactor named Anderson set fire to the insured building, confessed his guilt and testified in substance that he had been induced by defendant to commit the felony charged. Defendant himself denied any part in or connection with the unlawful act of Anderson. It was largely on the testimony of the self-confessed criminal that defendant was convicted. The county attorney and some of the jurors had resided in the same community and were on friendly terms. With the advantage thus implied he said to the jury in his opening statement: "I personally believe that the defendant is guilty." There is at least a logical inference that the county attorney's belief of guilt may not have been based wholly on evidential facts, because the presiding judge told the jury at the time to pay no attention to the remark. The law on this subject has been stated as follows:

"It is highly improper for the prosecuting attorney in a criminal case to declare to the jury his personal belief in defendant's guilt, unless such belief is given as a deduction from the evidence." *Reed v. State*, 66 Neb. 184.

It does not necessarily follow that a violation of this rule requires the reversal of a conviction, where the trial court promptly directs the jury to disregard the county attorney's expression of a belief in defendant's guilt, but it may become an important factor when other objections of a similar nature are considered. A county attorney in good standing may by inadvertent remarks unduly influence acquaintances on the jury, notwithstanding an admonition of the trial court to disregard them.

In his closing argument to the jury, the county attorney, referring to defendant and his friends, inquired: "If he had such a large number of friends in this city, why did they leave him in jail twelve days?" It may be inferred also that the trial judge considered this suggestion improper under the evidence, his reproof being: "The jury will not let that statement prejudice the rights of defendant." Statements of the character indicated cannot always

be prevented. If the jury are properly instructed to disregard them they may not be prejudicial, but they may be considered in connection with other conduct of a similar nature.

The principal assignment of error is based on a communication by the county attorney to a juror. After the case had been submitted to the jury and after they had retired in the evening, the bailiff, before closing the door to the jury-room, announced in substance that he had been requested by the county attorney to tell one of the jurors, naming him, that the juror's wife was at the home of the county attorney, where she would spend the night, and that the juror named could meet her there if the jury should return a verdict in the meantime. This message implied mutual friendship and an offer of hospitality. The parties to the communication were the prosecuting attorney and a juror. The former had shown his interest in a conviction and his vigor and zeal as a prosecutor. The juror, when he received the message, was about to consider the merits of the county attorney's charge against defendant—an issue involving a penitentiary sentence. The juror, after the returning of a verdict, was expected as a guest of the county attorney. When delivered, the message was a direct violation of the statute declaring:

"When a case is finally submitted to the jury, they must be kept together in some convenient place, under the charge of an officer, until they agree upon a verdict or are discharged by the court. The officer having them in charge shall not suffer any communication to be made to them, or make any himself, except to ask them whether they have agreed upon a verdict, unless by order of the court; nor shall he communicate to anyone, before the verdict is delivered, any matter in relation to the state of their deliberations." Comp. St. 1922, sec. 10150.

By affidavit on motion for a new trial the county attorney explained that delivery of his message before the rendering of a verdict was not intended or anticipated, but his purpose, considered from the standpoint of innocence,

did not prevent the precipitate action of the bailiff. In like manner the juror expressed the opinion that in performing his duties he had not been influenced by the communication. A new trial on this ground was refused because the presiding judge was of the opinion that defendant had not been prejudiced by the misconduct described. A statutory right of the defendant was invaded. He did not have the kind of a trial the law requires. Pending deliberation on the verdict no juror was invited to become the guest of defendant's attorneys. The state had a forbidden advantage. The prospect of accepting the hospitality of the county attorney after participating in a verdict may have created an unconscious bias in the mind of the juror, notwithstanding his affidavit to the contrary. In any event he was subjected to a temptation condemned by law. Prejudice may be assumed where a material, statutory right granted by the legislature for the purpose of securing a fair and impartial trial has been destroyed by the misconduct of officers of the court. A finding that the misconduct was without prejudice should be based on a substantial ground—a basis not found in the present record. When the series of incidents mentioned are considered together they require a new trial, and in overruling the motion therefor the district court erred to the prejudice of defendant. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED.

Note—See Criminal Law, 16 C. J. sec. 2257; 17 C. J. secs. 3600, 3638, 3718, 3751.

IN RE ESTATE OF WILLIAM H. HALLEY. LAVONIA HALLEY, PETITIONER, APPELLEE, V. GEORGE M. GATES, EXECUTOR, APPELLANT.

FILED JANUARY 22, 1925. No. 22920.

Executors and Administrators: ACCOUNTING. When an executor, in his representative capacity, receives the proceeds of the sale

of real estate belonging to the estate of the decedent, he is required to account therefor, and, if he fails to do so, his bondsmen will be liable.

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

Burkett, Wilson, Brown & Wilson, for appellant.

George H. Risser, contra.

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

DEAN, J.

William H. Halley died testate, in Lincoln, March 26, 1914. His will named George M. Gates as executor. When the will was admitted to probate, May 7, 1914, Mr. Gates accepted the office and qualified as executor. In the due course of probate administration, in Lancaster county, the judgment of the probate court was that Mr. Gates, as executor, had failed to account to the estate, or to the widow of Mr. Halley, as residuary legatee, for $3,100, that being a part of $4,500 received by the executor for a deed to the Halley residence property in Lincoln. On the part of the vendee, as a precautionary measure, which is not questioned here, the deed was executed and acknowledged by Mrs. Halley and her two daughters, and their respective husbands, but was delivered to the vendee by the executor at the time he was paid the purchase price. On appeal to the district court the judgment of the probate court was affirmed, and the executor, being dissatisfied, has brought the record here to have it reviewed.

Mr. Halley left only a modest estate. It consisted of the proceeds of certain life insurance policies aggregating about $4,000 and additional cash in a sum approximating $400, some household goods and a few shares of stock in a coffee company. The real estate consisted of the Halley residence property, of the undisputed value of $4,500. Mrs.

Halley, the testator's widow, as residuary legatee became the owner of the real estate upon her husband's death.

Practically the sole contention between the testator's widow and the executor has to do with his failure, as executor, to account for the $3,100, above referred to. The latter sum was a part of the $4,500 received by the executor for the residence property which he sold to the regents of the state university, in 1915, pursuant to the campus extension project. This feature of the case is briefly outlined in the following excerpt from the findings of the trial court:

"The question involved in this case, broadly stated, is whether or not the executor of the will of William H. Halley, deceased, shall be required to report as a part of his receipts coming into his hands as executor the proceeds of the sale of the family homestead which was sold to the regents of the university, at the time the campus was extended, under private negotiations carried on preliminary or in lieu of condemnation proceedings. * * * The purchase price ($4,500) was paid to and received by George M. Gates in the form of two warrants, one for $250 payable to George M. Gates as 'administrator' and one for $4,250 payable to George M. Gates as 'executor.'" Comp. St. 1922, secs. 6749, 6750.

Both of the checks referred to in the court's findings, as originally drawn, and indorsed, are in the record. The $250 check is payable to George M. Gates, administrator Halley Estate, and is indorsed "Geo. M. Gates, Admstr." The $4,250 check is payable to Geo. M. Gates, executor W. H. Halley Estate, and is indorsed "Geo. M. Gates, Executor." The checks were drawn and delivered to the executor by the treasurer of the campus extension project, the vendee, and both indorsements were made by the executor. The undisputed evidence shows that the $3,100, for which the executor failed to account, consisted of two loans made by him out of the $4,500 which came into his hands from the sale of the Halley property. One of the loans was made

to the executor's son, in the sum of $1,600, and the other loan, in the sum of $1,500, the executor made to himself. Both loans were secured on land in northern Colorado which, besides being practically worthless, was for the most part, already covered by prior mortgages.

The cause was heard in the district court, as disclosed by the court's findings, "on the pleadings filed in the county court and the objections filed therein as amended" in the district court. In affirming the judgment of the probate court, the district court held that Mr. Gates received the money for the real estate, in his representative and official capacity as executor, and not as agent for Mrs. Halley, as he contends, and that, as such executor, he and his bondsmen are holden and should be required to pay to Mrs. Halley, the residuary legatee, the aforesaid sum of $3,100, which, with interest at the rate of 7 per cent. per annum from January 2, 1919, amounts to the sum of $3,814.30. The court found, however, that there should first be deducted from this sum the remainder of unpaid costs in the probate court of $25 or $30, more or less. It was further decreed that the costs of all the proceedings had on appeal in the district court, whether incurred by the executor or Mrs. Lavonia Halley, should be taxed to and paid by George M. Gates, and should not be charged against nor paid out of the sum of $3,814.30, which was found by the court to be properly chargeable to the executor in his official and representative capacity as executor.

The executor is insistent in his contention that the proceeds of the sale of the Halley residence property did not come into his hands as executor of the estate, as hereinbefore noted, but as agent for Mrs. Halley. He testified at considerable length to the effect that he talked the entire situation over with Mrs. Halley, and she agreed that the loans referred to in the court's findings should be made to his son and to himself, and that she appeared to be entirely satisfied with all that he did in respect of the money so loaned. He further testified that he had been acquainted

with the Halleys for eight or nine years and that his relations with them were quite intimate. He admitted that Mrs. Halley was practically blind and crippled and unable to transact business when Mr. Halley died, and that he, Mr. Gates, at Mr. Halley's request drew up the will wherein he, the witness, was named as executor. On the cross-examination Mr. Gates was asked if, when he made the loans, he understood that he was acting as executor. He testified: "I was signing myself as such. Q. And you understood it all during the years, didn't you, Mr. Gates, until within a year or so ago, until you made your final report? A. I knew I was acting in that capacity. Q. You thought you were, didn't you? A. Why certainly; I said I knew I was acting in that capacity. Q. As executor? A. Yes, sir. Q. And you so reported to any one you had dealings with that you were the executor of this last will of Mr. Halley, didn't you? A. Executor and agent." The last answer appears to be an afterthought and, when considered in connection with all of his evidence, lacks much of being persuasive, and the trial court was justified in holding it of no probative value except as another admission of responsibility as executor. Another witness, Mr. J. H. Humpe, who held a responsible position with the campus extension committee, testified that Mr Gates, in the presence of the committee, said "that he was the executor of the estate and would carry on the negotiations for the transfer of the property."

It seems that the personal property of the estate of the value of approximately $400 and also certain shares of corporate stock in a coffee company, the value whereof was not established, were voluntarily delivered to the widow by the executor and without any order of the court, and that, as the court points out, if he had not done so, there might have been enough to pay the costs of administration therefrom, and that, besides, the widow's allowance would have been more than enough to consume all of such personal property, and in such event the costs of administration

would then have been a proper charge against the proceeds of the sale of the real estate. It also appears that the widow paid the funeral expenses and the expenses attendant upon the last illness of Mr. Halley. The court properly held that, inasmuch as the executor had surrendered the personal effects to the widow, without authority, he was not now, of course, in position to apply any of such assets, or their proceeds, to the payment of the remainder of unpaid costs and expenses of administration, and that the administration proceedings could not be properly closed, and the executor discharged, until all the court costs were paid. *Willier v. Cummings*, 91 Neb. 571; *City of Detroit v. Schilling*, 93 Mich. 429; *Barlage v. Detroit, G. H. & M. R. Co.*, 54 Mich. 564.

That Mr. Gates received the money in his representative capacity, and that Mrs. Halley was mentally incompetent to bind herself to any agreement in respect of an important business transaction clearly appears, not only from the evidence of Mr. Gates, but of other disinterested witnesses as well. The testator's widow was 66 when the case was heard in the district court and she was then, and for many years had been, so enfeebled in mind and decrepit in body that she was incapable of transacting any business. And Mr. Gates admitted that she was in practically the same condition when her husband died. In respect of the widow's condition when the case was heard the court found: "The widow came into court at this hearing blind and crippled, and wheeled into court in an invalid chair, so crippled that she could not take the witness-stand nor lift her hand for the oath to be administered to her." From all the evidence it sufficiently appears that Mrs. Halley's condition, both mental and physical, from the time when her husband died, until the case was heard, was such that she was incapable of transacting business.

Counsel for Mr. Gates contend that he was deceived as to the character of the soil and the value of the Colorado land which he and his son purchased and which was given as security for the two loans in question. Even so, this

does not excuse the executor's conduct in the premises, upon which comment may be spared. He accepted the trust and his bondsmen vouched for his good conduct. They placed him in a position where his incompetence, and apparent ignorance of business affairs, caused an aged and helpless widow to be harrassed with tedious and expensive litigation and a large part of her deceased husband's modest estate to be jeopardized. And not only jeopardized but irretrievably lost if she is compelled to look to Mr. Gates alone for redress, because, as the district court in its findings very aptly observed: "As if to make the loss all the more complete, he (the executor) has, pending the administration, taken the benefit of the bankruptcy act, seeking to render himself immune from personal liability."

It is a fundamental principle of the law that a person who occupies a position of trust shall be held to the highest degree of honor and of rectitude in his dealings with the beneficiary. And particularly is this true where the estate of a deceased person is in question and the interests of helpless widows or dependent children are concerned. In such case the courts will not permit the trustee, by whatever name, or title, he may be known, to profit, beyond his lawful fees, at the expense of those whom he represents or for whom he assumes to act.

The judgment of the district court is supported in reason and in law. In *De Valengin's Admrs. v. Duffy,* 39 U. S. *282, Chief Justice Taney delivered the opinion of the court and among other things said: "Whatever property or money is lawfully recovered by an executor or administrator, after the death of his testator or intestate, in virtue of his representative character, he holds as assets of the estate; and he is liable therefor, in such representative character, to the party who has a good title thereto." In the body of the opinion, at page *290, the learned jurist said: "There are, doubtless, decisions which countenance the doctrine that no action will lie against an executor or administrator, in his representative character, except upon some claim or demand which existed against the testator

or intestate in his lifetime; and that, if the claim or demand wholly accrued in the time of the executor or administrator, he is liable therefor only in his personal character. But upon a full consideration of the nature, and of the various decisions on the subject, we are of the opinion that whatever property or money is lawfully recovered or received by the executor or administrator, after the death of his testator or intestate, in virtue of his representative character, he holds as assets of the estate and he is liable therefor, in such representative character, to the party who has a good title thereto. In our judgment, this, upon principle, must be the true doctrine."

It may here be observed that the will herein provides that if the personal property is insufficient to pay the debts that so much of the real estate as may be necessary for that purpose may be sold.

In *Lewis, Admr., v. Carson,* 93 Mo. 587, it was held that, in case of a deficiency of personal assets, the real estate must be resorted to, and the heir or devisee takes subject to the payment of the debts, and that, even though an administrator or executor takes possession of real estate and collects the rents arising therefrom without an order of the probate court, he and the sureties on his bond must account therefor. In the same case it is further observed: "When an administrator and others, as residuary legatees, sell, as individuals, their interest in land, and the administrator receives the money arising from the sale and applies it in his official capacity, he and his sureties are accountable for its proper application, although it was not raised by virtue of his office as administrator."

Finally, the executor complains because Mrs. Halley has not tendered nor offered to tender back to him the notes and mortgages of the executor and his son. In the brief it is argued that "under these circumstances Mrs. Halley has ratified the actions of Mr. Gates, and he, therefore, cannot be held liable." The argument cannot be upheld. The notes and mortgages are now and always have been

worthless. But, aside from all this, Mrs. Halley's mental and physical condition was such that, when the $3,100 was obtained from her by the executor and the notes and mortgages of the executor and his son, which were given pursuant to a loan therefor, were delivered to her by the executor, she knew nothing about their utter worthlessness. She placed implicit and childlike reliance upon the representations made to her by Mr. Gates, the trusted family friend, her sole advisor, and the executor of her husband's estate, that the security was good. And continuously, throughout the years, this mental and physical condition remained unchanged.

In view of the record before us, it is unthinkable that this aged and infirm widow should now be caused to suffer the additional hardship which the executor seeks to impose upon her. And this through no fault with which she is chargeable, but merely because of advanced age and its attendant infirmities she lacked the mental capacity, from the first, to withstand his blandishments, and, later, was unable to escape from the unhappy plight into which she was thrust by his conduct. The argument of counsel does not appeal to us.

We conclude that when an executor, in his representative capacity, receives the proceeds of the sale of real estate belonging to the estate of a decedent, he is required to account therefor, and, if he fails to do so, his bondsmen will be liable. It is ordered, however, that when restitution is made to Mrs. Halley, pursuant to this opinion, the notes and the mortgages in question be returned to the parties to whom they of right belong.

The judgment of the district court must be, and it hereby is, in all things

AFFIRMED.

STATE, EX REL. CLARENCE A. DAVIS, ATTORNEY GENERAL, APPELLEE, V. FARMERS STATE BANK OF ALLEN: W. L. MOTE, RECEIVER, APPELLEE: FIRST NATIONAL BANK OF LEIGH, CLAIMANT, APPELLANT.

FILED JANUARY 22, 1925. No. 22961.

1. **Banks and Banking**: LOAN TO BANK. The sale or discount of some of its bills receivable by a solvent state bank to one of its stockholders does not, necessarily, imply the effecting of a loan to the bank.
2. ——: GUARANTY FUND: DEPOSITOR. A stockholder of a state bank who has, in good faith, purchased from such bank some of its bills receivable may, in the absence of fraud or collusion, resell them to the bank, accept in payment therefor certificates of deposit, and thereby become a depositor of such bank, within the meaning of the bank guaranty law.
3. ——: ——: DEPOSITS. Where a state bank in good faith receives negotiable paper from one of its stockholders and, instead of paying the money to him at the time the notes are negotiated, issues to him a certificate of deposit payable at a future date, no fraud or collusion being shown, the legal effect is the same as if the money itself had been actually placed upon deposit, and, as respects the guaranty fund, the deposit, evidenced by the certificates so issued, stands upon the same footing as any other deposit.
4. ——: PRIORITIES: PURPOSE OF STATUTE. One of the purposes of the legislature, in enacting section 8033, Comp. St. 1922, was to deny to a stockholder of a state bank the right of priority upon a claim, based upon evidence of indebtedness, which represents money obtained by such stockholder from himself or others for the purpose of effecting a loan of funds to such bank; but it was not the design, in enacting such statute, to prevent a stockholder of a state bank from becoming a depositor therein.

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

Courtright, Sidner, Lee & Gunderson, for appellant.

J. J. McCarthy and *C. M. Skiles, contra.*

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

GOOD, J.

In this action the First National Bank of Leigh seeks the allowance against the depositors' guaranty fund of a claim on a certificate of deposit, issued by the Farmers State Bank of Allen, now insolvent and in the hands of a receiver. The defense interposed by the receiver of the failed bank is that the certificate of deposit was originally issued to a stockholder of the failed bank and represents a loan made to the bank and not a deposit, within the meaning of the statute relating to the depositors' guaranty fund. The trial resulted in a finding and judgment allowing the claim as against the bank, but disallowing the claim as against the guaranty fund. Claimant appeals.

The evidence consists of certain stipulations and the oral evidence of Fred Rabeler, Jr. It appears that on December 17, 1920, Fred Rabeler, Jr., a stockholder in the Farmers State Bank of Allen, sold to that bank two promissory notes, which he had previously purchased from the same bank, and that for the notes he received two certificates of deposit, each for $2,813.46, due March 8, 1921. On the 8th of March, 1921, these two certificates were surrendered, and in lieu thereof he received ten certificates issued by the same bank for $500 each, and a cashier's check for the balance. The ten certificates were due at intervals of two weeks, beginning March 30, 1920. Between March 8 and March 12, 1921, the cashier of the Farmers State Bank visited Mr. Rabeler at his home in Leigh, and informed him that the cash reserve of the bank was low, and thereupon it was agreed that the ten certificates and the cashier's check should be returned to the bank, and a new certificate of deposit issued for the full amount. On March 12 the new certificate for $5,690.12, due October 1, 1921, was issued to Mr. Rabeler. This is the certificate in controversy, and it was later assigned by Mr. Rabeler to the First National Bank of Leigh.

Counsel for the receiver contends that, under the provisions of section 8033, Comp. St. 1922, the claim of the First

National Bank, in this case, was not entitled to that priority which was requisite to an allowance as against the guaranty fund. In so far as applicable, said section provides:

"The claims of depositors, for deposits, and claims of holders of exchange, shall have priority over all other claims, except federal, state, county and municipal taxes, and subject to such taxes, shall at the time of the closing of a bank be a first lien on all the assets of the banking corporation from which they are due and thus under receivership. * * * and, upon proof thereof, they shall be paid immediately out of the available cash in the hands of the receiver. If the cash in the hands of the receiver, available for such purpose, be insufficient to pay the claims of depositors, the court in which the receivership is pending or a judge thereof, shall determine the amount required to supply the deficiency and cause the same to be certified to the department of trade and commerce, which shall thereupon draw against the depositors' guaranty fund in the amount required to supply such deficiency and shall forthwith transmit the same to the receiver, to be applied on the said claims of depositors. * * * 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."

Counsel for receiver insists that the facts in this case show that the certificate of deposit in question represents money obtained by Rabeler, a stockholder, from himself in lieu of, or for the purpose of effecting, a loan of funds to the failed bank, and that, therefore, he is not entitled to that priority essential to an allowance of the claim against the guaranty fund.

There is no evidence in the record which shows the condition of the failed bank at the time that Rabeler purchased

the notes from it, except the inference that might be drawn from the fact of its discounting its notes. It is argued that this fact alone is sufficient to indicate that the bank was in need of funds, and that it was, in effect, a loan by Rabeler to the bank when he purchased these notes. On the other hand, the fact that the bank was subject to state inspection and continued in business for many months after this transaction tends to indicate that the bank was not in a failing or unsound condition at that time. The discount of commercial paper by a bank is recognized in the commercial world as a legitimate transaction, and properly incident and necessary to the exercise of a sound banking business. We apprehend that practically every banking institution in existence, as a part of its regular business, from time to time discounts some of its paper. We do not think we would be justified in holding that the sale or discount by a bank of some of its bills receivable necessarily implies the effecting of a loan to the bank. Moreover, in this case, the evidence of Rabeler is to the effect that no such intent or purpose existed; that at the time he purchased the notes he had idle funds and purchased them as an investment. By purchase Rabeler became the owner of the notes and had the same right to sell and dispose of them as any other lawful holder of negotiable paper. When these notes were nearing maturity he sold them to the bank from which he had purchased them, and received in payment two certificates of deposit. So far as disclosed, this was a *bona fide* transaction. It is not shown that the notes were worth less than their face value; nor is it shown that they were not paid. For aught that appears, the notes have been paid, and the bank has received full value in cash for the two certificates of deposit.

It is not essential to a deposit, within the meaning of the bank guaranty law, that actual money be placed in or at the command of the bank. *State v. American State Bank*, 112 Neb. 272; *State v. American Exchange Bank*, 112 Neb. 834. In *State v. Farmers State Bank*, 111 Neb. 117, it is

held: "In order to create a deposit which will be protected by the guaranty law, as the term 'deposit' is understood in section 8033, Comp. St. 1922, it is necessary that money or its equivalent shall in intention and effect be placed in or at the command of the bank under circumstances which do not transgress specific limitations of the bank guaranty law." See, also, *State v. Farmers State Bank*, 112 Neb. 474, and *State v. Farmers State Bank*, 112 Neb. 380.

In *State v. American State Bank*, 112 Neb. 182, it is held: "Where a bank in good faith receives negotiable paper from a customer and, in place of paying the money over the counter at the time the notes are negotiated, issues to him a certificate of deposit payable at a future date, no fraud or collusion being shown, the legal effect is the same as if the money itself had actually been placed upon deposit, and, as respects the bank guaranty fund, the deposit evidenced by the certificate so issued stands upon the same footing as any other deposit." See, also, to the same effect, *State v. Banking House of A. Castetter*, 110 Neb. 584, and *State v. South Fork State Bank*, 112 Neb. 623.

Since no fraud or collusion has been shown, we are clearly of the opinion that the receipt by Rabeler of the two certificates of deposit, in payment of the notes sold and transferred by him to the bank, constituted him a depositor, within the meaning of the bank guaranty law. It was not the design or purpose of the legislature, in enacting section 8033, Comp. St. 1922, to prevent a stockholder in a state bank from becoming a depositor therein, but one of the purposes was to deny to a stockholder the right of priority upon a claim, based upon evidence of indebtedness which represents money obtained by such stockholder from himself or others, for the purpose of effecting a loan of funds to such bank. There is no evidence of any intent or design on the part of Rabeler to effect a loan to the bank of which he was a stockholder. Since Rabeler became a depositor by the issuance to him of the two certificates of deposit in December, 1920, he was not deprived of that character by reason

of the renewal of the same certificates of deposit. The new certificates of deposit were evidence of his continued relation to the bank as depositor. By his transfer to the First National Bank of the certificate of deposit, it became subrogated to all the rights of the original depositor.

It follows that the judgment of the district court should be and is reversed, and the cause remanded, with directions to order the payment of the claim of the First National Bank out of the depositors' guaranty fund.

REVERSED.

GEORGE MARCHAND V. STATE OF NEBRASKA.

FILED JANUARY 22, 1925. No. 24106.

1. **Criminal Law:** HARMLESS ERRORS. Under section 10186, Comp. St. 1922, any error occurring in the trial of a criminal case which does not cause a substantial miscarriage of justice should be disregarded.
2. ———: INDICTMENT. In a prosecution for rape upon a chaste female child between the ages of 15 and 18 years, the failure to allege in the indictment that defendant is a male person, when the evidence discloses that fact without dispute, is not an error that causes a substantial miscarriage of justice.
3. **Rape:** CHASTITY: QUESTION FOR JURY. Where, in a prosecution for rape upon an alleged chaste female child between the ages of 15 and 18 years, the evidence as to her previous chastity is in conflict, the question as to whether she was previously chaste is for the jury to determine under proper instructions.
4. **Cases Distinguished.** The decisions in *Bailey v. State*, 57 Neb. 706, *Blair v. State*, 72 Neb. 501, and *Nabower v. State*, 105 Neb. 848, distinguished.
5. **Rape:** DEFENSE. In a prosecution for rape upon an alleged previously chaste female child between 15 and 18 years of age, acts of voluntary illicit intercourse between prosecutrix and defendant in another county, previous to the commission of the act on which the prosecution is based, is a complete defense.

ERROR to the district court for Nemaha county: JAMES T. BEGLEY, JUDGE. *Reversed.*

Lambert & Hawxby, for plaintiff in error.

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

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

GOOD, J.

From a coviction for rape upon a previously chaste 17 year-old female child, with her consent, plaintiff in error (hereinafter called defendant) prosecutes error.

Error is assigned because the indictment failed to charge that defendant was a male person. Instead, it charged that he was a married person over the age of 18 years, etc. It is evident that a clerical error was made in drawing the indictment. Defendant was before the jury. The evidence disclosed th t he was a male person, and the court instructed the jury that it must find from the evidence that defendant was a male person over the age of 18 years.

Conceding that the indictment was faulty in not describing the defendant as a male person in substantially the language of the statute, we fail to perceive how he was prejudiced thereby. That he was at the time a male over 18 years is conceded. Under section 10186, Comp. St. 1922, any error complained of, which does not cause a substantial miscarriage of justice, should be disregarded.

Defendant insists that the evidence shows that prosecutrix was unchaste previous to the time of the alleged offense. The evidence as to previous unchastity is the direct testimony of the defendant to previous illicit intercourse with prosecutrix in another county, and inferences that might be drawn from letters written by prosecutrix previous to the time of the alleged offense. These letters, which were admittedly written by prosecutrix, are not such as would be written by a pure-minded maiden. They teem with vulgarity and immodest expressions, but contain no direct admissions of former illicit intercourse. Prosecu-

trix, while admitting that she wrote the letters, explicitly denied that she had had any previous intercourse with defendant or with any other person. As we view it, the question was one for the jury, and if it had been submitted to the jury by proper instructions their verdict would be conclusive.

This brings us to the most serious question presented in the record. The trial court refused to give an instruction requested by defendant which, in effect, told the jury that if they believed from the evidence that prosecutrix, prior to the time of the alleged intercourse set forth in the indictment, had sustained unlawful sexual intercourse with defendant in another county, then prosecutrix was not chaste at the time set forth in the indictment, and defendant should be acquitted. Instead, the court, after giving a correct abstract definition of a chaste female, instructed the jury:

"And in this case, if, from the consideration of all the evidence in the case, you believe that Grace Ramel, prior to the time of the offense charged in this indictment, had had unlawful sexual intercourse with any other person than the defendant or if, upon consideration of all the evidence in this case, there is a reasonable doubt in the mind of the jury as to whether she was chaste previous to said time, then you should give the defendant the benefit of such doubt and say by your verdict that he is not guilty."

Whether, in a prosecution for rape upon a female child between the ages of 15 and 18 years, previous acts of illicit intercourse with the defendant are a defense, is a question upon which the decisions of this court are not entirely harmonious. In *Bailey v. State*, 57 Neb. 706, a chaste female, within the meaning of section 9551, Comp. St. 1922, is defined as "one who has never had unlawful sexual intercourse with a male prior to the intercourse with which the prisoner stands indicted." It was further held in that case that the object of the statute was to protect those girls who are undefiled virgins, and that a female over 15 years

and under 18 years of age who has been guilty of unlawful sexual intercourse with a male is not within the act. In that case the evidence disclosed that, previous to the time charged in the indictment, the prosecutrix had sustained illicit relations with the defendant in the state of Iowa, and it was held that the conviction could not be sustained because the prosecutrix was not chaste at the time of the act complained of. It was further said in that case that in such an indictment may be included all acts of sexual intercourse which occurred between the prisoner and the prosecutrix in the state of Nebraska after she became 15 years of age, and which were not barred by the statute of limitations. The latter holding is evidently pure dictum, as that question is not involved in the case. Th dictum was followed in the case of *Blair v. State*, 72 Neb. 501, but in that case the defendant was charged with three separate acts of intercourse on three separate dates. On motion, the state elected to stand upon the third count, which was the last of the three acts charged in the information. A careful reading of that case does not disclose that there was any evidence tending to show a prior act of intercourse between the prosecutrix and the defendant, and the holding upon that point was unnecessary and should be likewise regarded as dictum.

In *Nabower v. State*, 105 Neb. 848. which was a prosecution for rape upon an alleged chaste female between the ages of 15 and 18 years, the *Bailey* and *Blair* cases are cited, and it is held: "In such an action proof that the defendant, on the day previous to the act charged, had committed a similar act upon prosecutrix is not available to him to show that at the time of the act charged prosecutrix was not a chaste and virtuous character, since the defendant is precluded from setting up his own crime to avoid the application of the statute." In that case it appeared from the evidence that the intercourse previous to that charged in the information occurred on the previous day, in the same county, and in the same building. While the holding was

right under the facts in that case, we think a wrong reason was given. Under the law in this state, which, we think, generally prevails in this country, while a criminal act may be charged in the indictment or information to have occurred on a particular day, yet, if the evidence shows that the act was committed on a previous day but within the jurisdiction of the court and within the period of the statute of limitations, a conviction may be sustained; and in the *Nabower* case, while the allegation was that the act occurred upon a certain day, evidence of illicit intercourse on the day previous, as well as on the day charged, could be held to relate to the first act, and thereby properly sustain a conviction.

In the instant case, the parties were both residents of Richardson county and, so far as the evidence discloses, they had never been together in Nemaha county until the day on which the offense was charged to have been committed. It is evident that the defendant could not be prosecuted in Nemaha county for an act which occurred in Richardson county. Under the rule announced in *Nabower v. State, supra,* if the defendant, at the time and place alleged in the indictment, carnally knew the prosecutrix, he was guilty of rape, and if at the same time and place any other man than defendant had so carnally known prosecutrix, he would not be guilty of rape. Why? Because she was not then chaste. Can it be said that as to all the world but one she was unchaste, but as to the one she was chaste? Chastity of a female has reference to her condition. If she has not been voluntarily previously defiled, she is chaste. If she has been previously voluntarily defiled, she is no longer chaste. If the evidence of defendant is true, she was not chaste at the time the criminal act is alleged to have occurred.

In *State v. Patterson,* 88 Mo. 88, in the course of the opinion, it is said (p. 96): "Evidence of prior specific acts of unchastity with the defendant himself is now universally received, as well in cases of seduction as in cases of

rape. What for? To show that in the latter class of cases there was less likelihood of absence of consent; and that in the former, in consequence of a prior act of the defendant, there was no chastity left to seduce. Can it be material by whom the prior act be performed, whether by the defendant, or whether by any one else?"

In *People v. Nelson*, 153 N. Y. 90, in which the defendant was charged with seduction upon a female of previously chaste character, many acts of intercourse between the parties were testified to as occurring prior to the offense charged in the indictment. It was held that the conviction could not be sustained, upon the ground that, having indulged in frequent sexual intercourse with the defendant, the complaining witness was on the day charged not an unmarried female of previously chaste character.

State v. Dacke, 59 Wash. 238, 30 L. R. A. n. s. 173, was a prosecution for rape wherein the evidence showed previous acts of intercourse between the defendant and the prosecutrix. It was held that the prosecutrix was not then a female child of previously chaste character. This ruling was somewhat modified in the subsequent case of *State v. Sargent*, 62 Wash. 692, 35 L. R. A. n. s. 173.

In 22 R. C. L. 1190, sec. 22, it is said: "The object of these acts being to protect virtuous maidens, it is held that it is not a crime thereunder to have intercourse with a woman within the prescribed ages who has theretofore had sexual intercourse, and that the fact that she was first deprived of her virginity by the prisoner does not strengthen the state's case; but such prior unchastity is a complete defense, provided such prior act was not punishable in the jurisdiction and at the time the act charged was committed."

We are of the opinion that in a prosecution of this kind, if the evidence shows previous acts of illicit intercourse between the prosecutrix and defendant in another jurisdiction, a conviction cannot be properly sustained. If we are right in this conclusion, then the instruction requested by defendant, or one similar to it, should have been given, and

the instruction given by the court, of which complaint is made, had a tendency to limit the jury's consideration of the previously chaste character of prosecutrix to her relations with other men than defendant. Under the peculiar circumstances in this case, the instruction should not have been given. It tended to prejudice the substantial rights of the defendant and was prejudicial error.

Defendant contends that the testimony of prosecutrix is not sufficiently corroborated to justify a conviction. We do not deem it necessary to set out the evidence, but suffice it to say that a careful consideration leads us to the conclusion that there was sufficient evidence in that respect on which to found the verdict. There are other assignments of error which, in view of the conclusion that we have reached, it seems unnecessary to consider.

Because of the error in the giving and refusal of instructions, as pointed out in the opinion, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

STATE, EX REL. CLARENCE A. DAVIS, ATTORNEY GENERAL, ET AL., APPELLEES, V. HOME STATE BANK, APPELLEE: FIRST NATIONAL BANK ET AL., APPELLANTS.

FILED JANUARY 22, 1925. No. 23230.

1. **Banks and Banking:** GUARANTY FUND: "DEPOSIT." A number of the stockholders of D. bank, for the purpose of securing a certificate of deposit of that bank with which to pay their note to X., executed their individual notes payable to C. bank indorsed with recourse by D. bank, and delivered them to the C. bank, which thereupon entered upon its books in favor of the D. bank credit "not subject to check" for the amount of the notes, the agreement being that the credit should not be withdrawn by D. bank. *Held*, that such credit did not constitute a deposit in or at the command of D. bank within the protection of the state guaranty law.
2. ———: ———: ———. A claimant against the state bank

guaranty fund is not entitled to protection as an innocent purchaser under the negotiable instruments law, but must establish the existence of a deposit within the meaning of the act providing liability of such fund.

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

Burkett, Wilson, Brown & Wilson, for appellants.

O. S. Spillman, Attorney General, Lloyd Dort, C. M. Skiles and *N. T. Gadd, contra.*

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

REDICK, District Judge.

Applications of various persons holders of certificates of deposit issued by the Home State Bank of Dunning for allowance of the same against the state guaranty fund.

Applicants show that they became the owners of the certificates in good faith and for value before due, and claim that they are entitled to the protection of the law as applied to good faith purchasers of negotiable instruments, and a good proportion of their brief is devoted to a discussion of that question. But, while there is no doubt that certificates of deposit are negotiable instruments entitled to the protection of the law governing the same as between private parties dealing therewith, since the filing of the briefs in this case we have decided in *State v. Farmers State Bank,* 111 Neb. 117, that, where the question is of the allowance of such claim against the guaranty fund, the law of merchants or the negotiable instruments law have no application. As was said in that case by Day, J.: "The circumstances under which the guaranty fund may be liable are entirely apart from the law pertaining to negotiable paper. A holder of a certificate of deposit in a bank who seeks to hold the guaranty fund liable for its payment must show that the transaction leading up to the issuance of the certificate was such that the law holds the guaranty fund liable for its payment." See, also, *Fourth Nat. Bank*

v. Wilson, 110 Kan. 380. The final and decisive question presented for our decision, then, is whether or not the certificates of deposit in question were lawfully issued against deposits in the Dunning bank, which must be determined by a consideration and analysis of the facts and circumstances surrounding their issuance, about which there is little dispute, and which may be summarized as follows:

From the date of its organization up until about April 24, 1920, C. C. Cooper was president of the Dunning bank, and about said date sold all of his stock to six other stockholders of the bank, to wit, Wilson, McGinn, Wegner, Rankin, Hankins, and Ocher, who, in payment for said stock, gave their joint note to Cooper for $20,000 due October 1, 1920. On that date Cooper demanded payment, but the makers were unable to make it. Cooper refused to renew the note, but suggested that if the makers could procure certificates of deposit of the Dunning bank for the amount, due in 12 months, he could handle such certificates in California, where he was then living, but could not handle individual notes. As the makers were not permitted by law to borrow the money from the Dunning bank, being stockholders therein, upon the suggestion of Cooper that they procure the money on their notes from some other bank, one C. E. Wilson, cashier of the Dunning bank, caused to be prepared and signed by the six purchasers, above named, a note for $20,000 payable to the Citizens State Bank of University Place, Nebraska, and on or about October 7, 1920, took the same to the Citizens State Bank, and explained the situation to its president, Mr. Bair, and requested a loan of $20,000 upon the note as security. Being informed by Bair that the bank did not have that much money to loan, Wilson suggested that the money need not leave the bank, but should remain there to the credit of the Dunning bank. Bair replied that that put a different aspect upon the matter, and it was finally arranged that credit should be given upon the books of the Citizens bank, which was accomplished in the following manner: Bair

made out a deposit slip in favor of the Home State Bank of Dunning for $20,000, marking same "Not subject to check," and credited the same to the Dunning bank. Wilson says this deposit slip was made out upon his first visit to the bank, October 7 or 8, but the only deposit slip in evidence is dated the 16th of October, and the credit was entered on the bank books October 16, and not before. As a part of the transaction, however, it was further agreed that Wilson should procure separate notes for $3,333.33 each, signed by one maker and indorsed by the five others, which was later carried out on October 27, 1920, under the same understanding that the fund was not to be drawn out of the bank. Bair required that these notes be indorsed by the Dunning bank with recourse, which was done, the intention of Bair being to charge out the notes against the credit if they were not paid. On the afternoon of the same day, October 7 or 8, 1920, C. E. Wilson met Cooper at the First National Bank in Lincoln and, having brought the blank certificates of deposit with him, issued to C. C. Cooper three certificates of deposit dated October 7, two for $5,000 each, and one for $10,000, due in 12 months, with interest at 5 per cent. per annum, in consideration of which Cooper delivered to Wilson his $20,000 note and the shares of stock of the Dunning bank which he had sold and held as collateral to the note. The two $5,000 certificates were assigned to the First National Bank of Glendale, California, and represent their claim herein. May 2, 1921, the $10,000 certificate of deposit was exchanged for ten certificates of deposit of $1,000 each, due six months after date, which were assigned by Cooper to one E. U. Emery, who filed claim herein, but whose interest has been transfered to C. C. Cooper, intervener. Another certificate of deposit upon which claim is made is dated May 2, 1921, for $282, and represents the interest due upon the $10,000 certificate of deposit at the time of the exchange above related, and assigned by Cooper to claimant A. A. Rezac for attorney's fees.

Notwithstanding the agreement between Wilson and Bair that the funds should not be withdrawn from the Citizens bank the Dunning bank drew drafts against the credit, which were refused payment, and the Citizens bank thereupon, on December 10, 1920, charged the Dunning bank with $15,000, and later, January 11, 1921, with $1,666.66, thus canceling the credit to that extent by charging the notes against it, and returned the notes to the Dunning bank. They also charged the Dunning bank with $150 and $41.80 interest. The McGinn note was not charged off, but no drafts upon this credit were permitted; and later this note was renewed and is now held by the Citizens bank. This condition of the account was maintained until May 20, 1921.

On May 20, 1921, new notes were executed by Rankin and Hankins, and July 8, 1921, by Ocher, Wilson, and Wegner, each for $3,333.33, and indorsed, respectively, by the other five stockholders and deposited with the Citizens bank, and thereupon the credit of the Dunning bank was reinstated in the sum of $16,666.66, and was later drawn out upon drafts of the Dunning bank upon the advice of the state bank examiner. These notes were not indorsed by the Dunning bank, but were secured by second mortgages on real estate of the signers. The Citizens State Bank continues to hold the five notes and that of McGinn, or renewals thereof, aggregating $20,000.

The question then recurs whether upon the above facts the claimants have shown such a deposit in the Dunning State Bank as is entitled to the protection of the state guaranty fund. A number of facts have been referred to occuring after the issuance of the certificates in question, but the legal status of the certificates of deposit must be determined as of their date, the subsequent occurences being of material consideration only as they may tend to characterize the original transaction. The subsequent deposit of notes secured by real estate mortgages and withdrawal of the funds thereby secured, while it might

have enabled the bank finally to pay its certificates of deposit, could not give validity to the original transaction as against the guaranty fund if it had not before. To recapitulate the situation: October 7, 1920, the stockholders desired to borrow money with which to pay their debt to Cooper. They were unable to do so on their notes, but Cooper was willing to accept certificates of deposit of the Dunning bank at 12 months, so the arrangement was made whereby the Citizens bank agreed to accept their notes indorsed by the Dunning bank and give credit to the latter for $20,000, with the express understanding that the money should not be withdrawn. Did this transaction constitute a deposit against which the Dunning State Bank might lawfully issue its certificates of deposit? It has been so often stated as to become a truism, that no definition of a deposit is possible which will cover all the situations arising in financial transactions, and, therefore, it has not and will not be attempted. Perhaps as broad a definition as any is contained in *Fourth Nat. Bank v. Wilson,* 110 Kan. 380, in the following language: "Speaking generally, to create a deposit within the meaning of the statute, money or the equivalent of money must 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." This language was approved by this court in *State v. Banking House of A. Castetter,* 110 Neb. 584, and in *State v. Farmers State Bank,* 111 Neb. 117. It will be noted that under this definition the money or its equivalent must be placed in or at the command of the bank. In the instant case the money was not placed in the bank. Now, was it placed at the command of the bank? The evidence shows that the condition of credit being given was that the money remain in the Citizens bank, and that when the Dunning bank attempted to draw it out the credit was canceled and the notes upon which it was based were returned to the Dunning bank. Under this state of affairs we are unable to perceive any control that the Dunning

bank had over the money. The moment they attempted to draw it out the Citizens bank applied against the supposed credit the notes which the Dunning bank had indorsed. The transaction appears rather to be a loan of the credit of the Citizens bank to the Dunning bank upon which the latter drew its certificates of deposit. It was an attempt on the part of Cooper and the stockholders to charge the guaranty fund with the payment of Cooper's note for $20,000. The giving of such restricted credit to the Dunning bank upon the security of the indorsement of that bank added nothing to its assets, the credit simply being absorbed by the obligation. The transaction assumes all the characteristics of a loan, but not of a deposit. No doubt a deposit may be effected by depositing money in one bank to the credit of another *(American State Bank v. Bank Commissioner,* 110 Kan. 520), but it presupposes that control of the fund is vested in the bank to whom credit is given. And no doubt if the stockholders had arranged with the Citizens bank for a loan and deposited the same in that bank to the credit of the Dunning bank without condition, but in the ordinary course, it would have constituted a deposit entitled to protection. But we are of opinion that the undisputed facts established by the evidence did not constitute the fund in question a deposit. The certificate of deposit for $282, being for interest upon the $1,000 certificate of deposit, must fall with it.

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

AFFIRMED.

Note—See Banks and Banking, 7 C. J. sec. 15.

JOHN KINNAN ET AL., APPELLANTS, v. J. N. FRANCE ET AL., APPELLEES.

FILED FEBRUARY 17, 1925. No. 24438.

Waters: IRRIGATION DISTRICT: FORMATION: REFUSAL TO APPROVE. This proceeding was taken by petitioner under chapter 26 (sec-

tions 2857-2995) Comp. St. 1922, for the purpose of procuring a decree validating the proceedings under which petitioner was organized as an irrigation district, and validating and approving an issue of bonds voted by petitioner. A synopsis of the record is set out in the opinion, and it is *held* that a feasible plan of irrigation is not presented, and, therefore, the trial court did not err in refusing to approve and validate the issue of bonds.

APPEAL from the district court for Dawson county: GEORGE C. GILLAN, JUDGE. *Affirmed.*

Beeler, Crosby & Baskins, for appellants.

Halligan, Beatty & Halligan and *R. W. Devoe, contra.*

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

PER CURIAM.

The Gothenburg South Side Irrigation District, organized and existing under the provisions of chapter 26 (sections 2857-2995), Comp. St. 1922, instituted this proceeding in the district court for Dawson county for the purpose of procuring a decree validating and confirming proceedings theretofore taken by the petitioner, including its proposed issue of bonds in the sum of $408,000. Petitioner was organized for the purpose of bringing the lands within the boundaries of the district under irrigation, and the proceeds of the bonds were to be applied on the purchase of certain water rights and in paying for the construction and maintenance of irrigation works to carry out the purposes of the organization of the district.

This is a special proceeding based upon the provisions of chapter 26, Comp. St. 1922, which, among other things, vests the court with jurisdiction "to examine and determine the legality and validity of, and approve and confirm, or disapprove and disaffirm, each and all of the proceedings for the organization of said district under the provisions of this chapter from and including the petition for the organization of the district, and all other proceedings

which may affect the legality or validity of said bonds and the order of the sale and the sale thereof." Section 2919. That the necessary steps for the organization of the district were taken is either admitted or fully established. That a majority of those voting on the issue of bonds voted in favor of their issuance is also admitted, but it was contended by those objecting to such issue that certain parties who had voted in the affirmative were not duly qualified to vote upon that issue. As to some of the parties whose eligibility to vote was challenged, the court found in favor of the district, and, as to certain other parties, found in favor of the objectors; but, after having sustained objections to certain persons who had voted, the court found that the illegal votes cast did not change the result, and that a majority of those legally entitled to vote, and exercising the privilege, voted in favor of the issuance of the bonds, and that the illegal votes cast did not change the result of the election. The court found generally for the objectors and against the petitioner, and specially, that the purpose of the organization of the district was to purchase the canal, works, rights and franchises of a former irrigation district, known as "The Gothenburg South Side Irrigation Company," which included its water appropriation of 357.14 cubic feet per second of time, with priority dated September 26, 1894, and to build a canal to carry the water to be obtained from and under said alleged water right; that the bonds were voted for "the purpose of purchasing the works of the Gothenburg South Side Irrigation Company, including its canal, franchises, water appropriation, and property, and constructing a canal which should carry the water obtained by, through and under said appropriation to the lands included in said irrigation district;" and that it had been represented to the electors, "at and before said election, that said water right was a valid water right, and had a priority dated September 26, 1894, and was for 357.14 cubic feet per second of time." It was further found that the electors, in casting their ballots, believed

that the water right heretofore mentioned was a valid and subsisting right for the amount of water specified, and as of the date given, and that many of the electors would not have voted in favor of the bond issue had they known that the water right had been abandoned and that no right could be acquired thereunder. The court specifically found: "That at the time said district was organized and at the time said bond election when said bonds were voted was held, said water right was dead, and of no force and effect, and said canal and water right had been abandoned for many years prior to said election." And the court made the further finding that there is no unappropriated water in the river, except flood water, and, because of the facts found, refused to validate the issue of bonds proposed.

The district has prosecuted an appeal from so much of the decree as refused to validate the issue of bonds, and the objectors have prosecuted a cross-appeal from the finding of the court that a majority of those entitled to vote had voted in favor of the issuance of the bonds.

Section 2869, Comp. St. 1922, in dealing with the issuance of bonds, among other things, provides: "For the purpose of ascertaining the cost of any such construction work, the board shall cause such surveys, examinations and plans to be made as shall demonstrate the practicability of such plan."

On the hearing before the trial court, the main controversy seems to have been the validity of the water right, or claim to an appropriation of water originally made in 1894 by the Gothenburg South Side Irrigation Company, on which petitioner held an option to purchase. It is stipulated that there is no unappropriated water in the river, except flood water, and it is a matter of common knowledge that the flood water would not supply the needs of irrigators in the district.

If we understand the attitude of the parties, it may be said to be conceded that, unless the water appropriation of the now defunct Gothenburg South Side Irrigation Company, which petitioner purposes to purchase, is valid and

water may be appropriated from the Platte river under that appropriation, there is not before the court a feasible plan of irrigation and the bonds should not be validated. On the other hand, if the appropriation mentioned is, or may become, available to petitioner (laying aside for the present the questions raised by appellees' cross-appeal), the court erred in refusing to enter a decree validating the bonds, as prayed by petitioner.

It is claimed by the petitioner that this ancient appropriation is valid. By the objectors it is said to be invalid, and that subsequent appropriators have the first call upon the waters of the river. We think this case may be determined solely with reference to this issue.

There is little, if any, conflict in the evidence. It is taken mainly from official records or presented by stipulation. The right to appropriate water from the river, upon which right petitioner has an option of purchase, arises by virtue of certain filings made in compliance with the statute, then in force, by the Gothenburg South Side Irrigation Company in 1894. Under the proceedings then had, that company claimed the right to appropriate 357.14 cubic feet of water per second. Following its application for water, the company constructed a headgate and 12 or 15 miles of ditch. But no work was done toward the construction or completion of the canal after 1894, and no water has been run in the ditch since 1902. The headgate was washed out during the season of 1902 and has never since been repaired or replaced. In 1901 one of the bridges across the ditch was taken out and the ditch filled in to make a roadway across the ditch. This practice continued throughout the years of 1902 and 1903, when substantially all the bridges had been removed and the ditches filled with dirt. In 1902 the farmers through whose land the ditch ran began to fill in the ditch and to plant the ground to crops and, ever since that time, the land has been used and occupied by the respective owners of the adjacent banks. No meeting of the board of directors of the old company was held after 1902. In December, 1900,

the irrigation company filed an application with the board vested with the administration of the irrigation statutes for an extension of time in which to complete the works. On this application an extension of time was granted to September, 1902. Nothing further appears to have been done by the irrigation company. In 1905, in the district court for Dawson county, in an action wherein certain creditors of the irrigation company were plaintiffs and the irrigation company was defendant, the company was declared insolvent and a receiver was appointed to take over its property of every kind and character. The receiver thus appointed sold the property of the company, including its right to appropriate water, if any right it had, and its interest, if any it had, in the canal and right of way. The purchaser at that sale subsequently conveyed whatever interest he acquired to one Hinckley, who has since agreed to sell and convey to the petitioner in this action. Subsequent to the sale of the property by the receiver, nothing further was done by any person in connection with the irrigation project until 1914, when the purchaser at the receiver's sale wrote the state engineer, who was then the officer charged with the duty of administering the irrigation law, requesting information as to the probable cost of procuring a new water right, and stating, "We do not expect to be able to get water only in the fall and spring." Here the matter was permitted to rest until 1922, when the department of public works, acting under the provisions of section 8428, Comp. St. 1922, instituted proceedings to determine whether or not the water right now before us should be canceled. Notice was given, as by statute provided, and at the appointed time, on request of some of the interested parties, hearing was continued to January 18, 1923. At the adjourned meeting, an attorney representing some of the landowners within the district asked that the hearing be continued, and that the landowners be given a period of 90 days within which they might be permitted to show to the department that they had acquired the water right then

under investigation, together with the ditches, etc. In compliance with this request, an order was made giving such landowners 60 days from February 1, 1923, to complete the formation of an irrigation district, and an additional period of 6 weeks within which to go through the necessary proceedings to organize a district and vote bonds. It was also ordered that, should a district be organized and bonds voted, the time for completing the works would be determined at a subsequent hearing, but, should the landowners fail to organize an irrigation district, or should the district, if organized, fail to provide funds sufficient to complete the works, the water appropriation would then be declared canceled.

The proceedings heretofore outlined, covering the organization of the new district and the adoption of a proposition to issue the bonds now before the court, were then had, with the results already noted, and, on March 26, 1924, the department of public works dismissed "the cancelation proceedings" and directed that the work should be carried on as provided in section 8432, Comp. St. 1922; that the time for completing the work of construction should be extended to July 1, 1925, and the time for applying the water to a beneficial use should be extended to April 1, 1926. Defendants contend that this order is final and concludes the petitioner herein.

In determining the validity of the claim to the prior right to appropriate the waters of the Platte river under the proceedings had in 1894, it may be here remarked that we have not been furnished with proof of any final adjudication, entered at any time, by the department authorized to administer the irrigation laws of the state, wherein or whereby such right was confirmed either in the original irrigation company or in the petitioner. But this is only one of the defects in petitioner's claim to a valid appropriation of water. If it be conceded that the original irrigation company acquired the right to an appropriation, and that for a time it exercised the right by applying the water to

a beneficial use, still its subsequent conduct was such as to call the present validity of that right in question. It never completed its works according to the original plans, and for approximately 20 years it did not use its system of irrigation. It permitted, without protest or warning, others to construct irrigation systems and to apply for, and receive, permits to take water from the river and apply it to their lands.

Our statute on irrigation is substantially the same as that of California and other western states, and, without stopping to collate these statutes or the construction placed upon them by the various courts, it may be said that the general, if not the universal, policy of the states is to deny to one who has made an application for an appropriation from a stream, the right to retain indefinitely the first call upon the waters of the stream, while failing to apply the same to a beneficial use. It appears that the original appropriator abandoned any right it had under its application for a period far in excess of the time fixed by statute to constitute abandonment, and during this period the rights of other appropriators seem to have accrued. Whether we deal with this subject under the term of abandonment, or of nonuser, seems to be immaterial, under the facts presented, for there was no beneficial use made of the water during the long term of years when others, more diligent, erected their works and made a beneficial use of the water to their lands. For cases somewhat in point see *Kersenbrock v. Boyes*, 95 Neb. 407; *Farmers Canal Co. v. Frank*, 72 Neb. 136; *Smith v. Hawkins*, 110 Cal. 122.

But it is claimed by the petitioner that the action of the department of public works in dismissing the proceedings it had instituted for the cancelation of the claim is a final adjudication binding all parties to this suit. This is beside the question. It is the duty of the court, under the statute, and this duty was recognized by petitioner itself in presenting its cause, to inquire into all the proceedings, and to

ascertain whether or not a feasible plan of irrigation is presented.

Without determining, for it is not necessary here to determine, the effect upon the parties to this proceeding of the order of the department of public works in dismissing its proceedings brought for the purpose of canceling the claim of the original company to an appropriation of water, we may say that the proceeding was not binding upon the appropriators who were not before the tribunal.

"The rights of a person who is not a party to a suit, nor in privity with a party, are not affected by the judgment rendered therein; as between him and a party to the action, their rights are to be determined as if the judgment had never been rendered." 34 C. J. 1043, sec. 1480.

The mere failure of the department of public works to carry to final judgment the proceedings it had instituted to cancel the original application for an appropriation could not affect the rights of parties who, during the many years when the Gothenburg South Side Irrigation Company was dead, or dormant, acquired rights in the flow of the stream.

It is apparent that the only source of water supply available to petitioner is that claimed under the proceedings had in 1894, and the subsequent acts thereunder. If this source of supply is not available, the work now proposed to be done by petitioner would be in vain, and those owning land within the district would find their property burdened with a debt in excess of $400,000 for an irrigation system that will be valueless because of the lack of a water supply. No doubt one of the purposes of the statute is to guard against such contingency.

The record fails to show that petitioners presented a feasible plan of irrigation, and therefore, the trial court was warranted in refusing to validate the bonds presented. The judgment is

AFFIRMED.

KATHERINE NISSEN, APPELLEE, V. SILAS H. BURNHAM, JR., ET AL., APPELLANTS.

FILED FEBRUARY 17, 1925. No. 22979.

1. **Rescission**: AFFIRMANCE. In this, an action in rescission, the substance of the evidence is outlined in the opinion, and it is *held* that the evidence supports the verdict.
2. **Trial**: APPROVAL OF INSTRUCTION. The instruction criticised has been examined, and it is *held* that it was properly given.

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

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

Stewart, Perry & Stewart, contra.

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

MORRISSEY, C. J.

This action was brought by plaintiff to rescind a contract which she alleges was made between her and defendants. The cause was tried to a jury, and from a verdict and judgment in favor of plaintiff, defendants appeal.

The petition alleges that defendants were partners doing business under the firm name of Burnham & Deane; that on February 24, 1920, one Ingles, the agent of defendants, made certain false and fraudulent representations to plaintiff, and that she, relying upon these representations, was induced to enter into the contract, or contracts, in suit, and to pay over to defendants, or their agents, the money in this suit sought to be recovered. The issues presented are in substance the same as are set out in detail in *Hager v. Burnham*, 111 Neb. 481. The defendants in that case being the same parties who are defendants here, and the contract forms in the two cases being those employed by the defendants in their business and substantially the same in both cases, we shall refrain from setting them out with particularity here.

The chief assignment of error asserts that the proof is insufficient to support the allegations of the petition and to entitle plaintiff to recover a judgment against defendants. From the argument, we infer that this assertion is made on the theory that defendants, in doing the things complained of in the pleadings, were acting as mere agents, and that as agents they are not proper parties to this proceeding, which is in rescission. We are cited to the recent case of *Huffman v. Bankers Automobile Ins. Co.*, 112 Neb. 283, wherein it is held:

"Ordinarily, in an action against a corporation to rescind a contract for the purchase of its capital stock and to recover the purchase price paid therefor, on the ground of fraudulent representations of the agent in inducing the purchase of such stock, such agent is not a necessary or proper party defendant."

We are in entire accord with the rule just quoted, but it does not apply to the case before us. The answer of defendants did not call especially to the attention of counsel for plaintiff, or to the trial court, the point just mentioned, although it may be said, under our rule of liberal construction of pleadings, that it is contained within the answer. In the instructions given by the trial court the question was not specifically presented. Counsel for defendants did not call this feature of their defense to the attention of the court and request the court to submit to the jury the question as to whether or not defendants were acting as principals or as agents. The trial was conducted on the theory that they were principals, and we may add that, from the evidence adduced, the jury would not have been justified, had the issue been specifically presented, in reaching any conclusion other than that they were principals, and that the contracts in suit were made with them as principals, and not as agents for other parties.

By instruction No. 1 the court undertook to state the issues to be determined by the jury. Appellants claim this instruction is erroneous, in that it submitted questions

which were wholly lacking support in the evidence, and others in no wise in issue. The criticism is based upon the interpretation appellants put upon the evidence. The trial court properly put a different interpretation upon it. The court did not err in giving the instruction.

Other assignments of error are made, but they do not go to the substantial merits of the controversy. We have made a careful examination of the record, but find no prejudicial error therein. The judgment is

AFFIRMED.

HINDS STATE BANK, APPELLEE, V. G. D. LOFFLER ET AL., APPELLANTS.

FILED FEBRUARY 17, 1925. No. 22968.

Garnishment: SUMMONS. After judgment, a summons in garnishment from one county to another in aid of execution is unauthorized.

APPEAL from the district court for Gage county: LEONARD W. COLBY, JUDGE. *Reversed and dismissed as to garnishee.*

Fawcett & Mockett, F. V. Robinson and *Hall, Cline & Williams,* for appellants.

Hazlett, Jack & Laughlin, contra.

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

ROSE, J.

This is a proceeding in garnishment. The Hinds State Bank of Odell is plaintiff. The defendants are G. D. Loffler and Ben A. Saathoff. The First National Bank of Lincoln is garnishee. In the district court for Gage county plaintiff recovered a judgment against defendants February 1, 1922, on a promissory note for $2,176.05. An execution was issued to the sheriff of Gage county February 18, 1922, and returned *nulla bona* the same day. There was a similar return February 25, 1922, on an execution issued February

23, 1922, by the clerk of the district court for Gage county to the sheriff of Lancaster county. By summons in garnishment issued by the clerk of the district court for Gage county February 23, 1922, to the sheriff of Lancaster county, the First National Bank of Lincoln was notified as garnishee to appear for the purpose of applying bank deposits of defendant Loffler on the judgment against him. There was a special appearance objecting to the jurisdiction of the district court for Gage county, on the ground that garnishee did not reside in Gage county, and was not lawfully summoned in Lancaster county. By affidavit in support of the special appearance, it was shown that defendant Loffler was a depositor when the summons in garnishment was served to the extent of $795.95, which was paid out on his check March 23, 1922. The district court for Gage county overruled the objection to jurisdiction, rendered judgment against garnishee for $795.95 and ordered it to pay that sum into court for the benefit of plaintiff. The garnishee and defendant Loffler have appealed.

The question presented is one of law. Did the district court for Gage county acquire jurisdiction over garnishee by service of process in Lancaster county?

Garnishment is a statutory remedy, and a litigant seeking such relief must find his authority in the statute. Provisions relating to attachment before judgment in a civil action require a garnishee, upon proper notice, to appear and disclose the amount and character of any property or credits of defendant in the former's possession, but process from one county to another is unauthorized. Comp. St. 1922, secs. 8685, 8699; *South Omaha Nat. Bank v. Farmers & Merchants Nat. Bank*, 45 Neb. 29. Plaintiff, however, as stated, recovered a judgment in the district court for Gage county, and is seeking payment by impounding a deposit of defendant in the First National Bank of Lincoln, a resident of Lancaster county. In this connection it is argued that, after judgment, summons in garnishment from

Gage county was properly issued to and served in Lancaster county under another statute authorizing a summons in garnishment in aid of execution after judgment "as in other cases." Comp. St. 1922, sec. 8729. Another section provides: "The summons shall be served as a summons in an original action is served." Comp. St. 1922, sec. 8731. In connection with the statutory term, "as in other cases," there is a reference to a general statute declaring that, "when the action is rightly brought in any county," summons for any one or more of the defendants may be issued to any other county. Comp. St. 1922, sec. 8570. In construing this statute the following rule was recently approved:

"To authorize summons to another county in a merely personal action for money, there must be an actual right to join the resident and nonresident defendants." *Stull Bros. v. Powell*, 70 Neb. 152; *Smith v. Atlas Refining Corporation*, 112 Neb. 6.

In the present instance, garnishee, a banker in another county, was not a party to the original suit nor jointly liable with defendants on their note. It was the duty of the bank to pay the check of its depositor unless there was a legal justification for refusing to do so. The bank was not required to answer as garnishee in another county in absence of a statute imposing that duty upon legal notice. In *South Omaha Nat. Bank v. Farmers & Merchants Nat. Bank*, 45 Neb. 29, the opinion reads:

"A garnishee is an innocent party not interested in the suit. The whole policy of the law is to protect him from expense, damages, costs, or unnecessary annoyance."

After calling attention to statutes authorizing the issuance of attachments, executions, and summonses to other counties, it is argued that jurisdiction to issue and serve a summons in garnishment after judgment in aid of execution should not be limited by construction to the county in which the principal action was brought. A fallacy in plaintiff's argument is the failure to recognize the necessity for and the nonexistence of a legislative grant of power

authorizing the issuance of such a process from one county to another. This remedy is not the same as an execution on a judgment, or an attachment before judgment, or a summons for defendants in a civil action. There is a distinction between a remedy by attachment before judgment and a remedy by garnishment after judgment. While the action is pending and undetermined in one county, there is no judgment removable by transcript to another county for the purpose of collecting a debt. The remedy by garnishment after judgment is available in any county to which the judgment is removed by transcript. The judgment creditor is an active litigant with a pecuniary interest in the result, while the garnishee is not a party to the principal action and may have no interest in it. The distinctions observed in the statutes, therefore, were not made without reason. In any event, after judgment, authority to issue a summons in garnishment in aid of execution from one county to another has not been pointed out or found. The judgment against the garnishee is reversed, the garnishee discharged, and the proceeding against it dismissed.

REVERSED AND DISMISSED AS TO GARNISHEE.

GOOD, J., dissents.

THOMAS H. BARNES ET AL., APPELLEES, V. EARL C. BARKER ET AL., APPELLANTS.

FILED FEBRUARY 17, 1925. No. 23387.

1. **Election of Remedies:** FORFEITURE AND FORECLOSURE. On account of nonperformance by vendees of a contract to purchase land, forfeiture by vendors and foreclosure of the same contract as a mortgage are inconsistent remedies which cannot be pursued concurrently.
2. ———: ———: PLEADING. A petition by vendors to forfeit a contract for the purchase of land on account of a default on the part of vendees and to foreclose the same contract as a mortgage is demurrable and subject to a motion for an election between

remedies, unless a cause of action is pleaded in the double aspect of pursuing one remedy if the other should fail.

3. Vendor and Purchaser: TIME OF PAYMENT. A contract to purchase land, but failing to state when the purchase price shall be paid, implies payment within a reasonable time.
4. ———: ———: PLEADING. In a suit for the foreclosure of a contract to purchase land, but not stating the time for payment of the purchase price, it is incumbent on plaintiffs to plead that the consideration was to be paid on request, which has been made and refused, or within a reasonable time, which has elapsed.
5. ———: SEVERABILITY OF CONTRACT. In an undertaking to purchase two separate tracts of land, severability of the contract for the purposes of performance may be inferred from the apportionment of the consideration to each tract, where there is nothing to indicate a mutual intention to the contrary.

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

Frost & Kinsinger and *Eugene Burton*, for appellants.

Lee Basye, contra.

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

ROSE, J.

According to the petition, this is a suit to forfeit and cancel a contract for the purchase of land and to foreclose the same contract for failure of vendees to comply with its terms. The two inconsistent remedies were not pleaded in the double aspect of pursuing one if the other should fail. The contract was dated July 30, 1918. The vendees were Earl C. Barker and C. L. Ward. The vendors were Thomas H. Barnes and Rose Barnes, his wife. Vendees agreed to purchase two separate quarter-sections of unimproved land in Box Butte county, Nebraska. The purchase price for both tracts was $8,000, but no time for payment thereof was fixed. Cultivation and improvements were declared to be essential elements of the contract. On or before April 1, 1919, vendees were to begin the making of improvements

consisting of a frame house, a barn, and a well, all of the value of $1,500, on each quarter-section, the time for completing the improvements not being specified An option to pay $1,250 on each tract on or before April 1, 1919, in lieu of the improvements was granted. Vendees were entitled to a warranty deed conveying a good title upon payment of $4,000 and execution of a mortgage due on or before July 30, 1928, to secure the remainder of the purchase price, but the time to make the payment and to execute the mortgage was not stated. Vendors, Thomas H. Barnes and Rose Barnes, were named in the contract as parties of the first part, and vendees, Earl C. Barker and C. L. Ward, as parties of the second part. One paragraph of the contract provides:

"It is mutually agreed that time is an essential element in this contract, and in case of failure of the said second parties to make either of the payments, or to perform any of the covenants on their part hereby made and entered into, this contract shall be, at the option of the parties of the first part, forfeited and determined, and the parties of the second part shall forfeit all payments made by them on this contract, and such payments shall be retained by the first parties in full satisfaction of all damages by them sustained and they shall have the right to reenter and take possession of said premises aforesaid."

Vendors are plaintiffs. They began this suit against vendees and other interested parties September 26, 1919. A copy of the agreement is a part of the petition. Vendors pleaded that vendees did not begin the making of improvements April 1, 1919, or at any subsequent time, or in lieu thereof pay $1,250 on each separate tract, though more than a reasonable time for such performance elapsed after April 1, 1919; that vendees failed to pay the purchase price of $8,000, and that vendors exercised their option to declare a forfeiture of the contract. There was a prayer for a cancelation of the contract and for a foreclosure thereof as a mortgage.

A motion to require vendors to elect between forfeiture and foreclosure and a general demurrer to the petition were overruled.

Vendees filed an answer, in which they admitted the execution of the contract, but denied generally unadmitted allegations of the petition; pleaded compliance by vendees with the terms of the contract, and that they were not in default when sued; alleged that vendors were unable to convey a good title and prevented vendees from making profits to the extent of $8,400 on rentals and resales. The answer also contained a plea that the contract was severable as to each quarter-section of land, that vendees made the stipulated improvements on one tract, and that the time for improving the other tract had been extended and had not expired. The demurrer to the petition was renewed, and there was a prayer for a dismissal of the action and for judgment in favor of vendees for damages in the sum of $8,400.

The district court made findings in favor of vendors, and entered a decree canceling the contract and at the same time foreclosing it as a mortgage. Vendees have appealed.

The judgment below is challenged on the ground that the petition fails to state facts sufficient to constitute a cause of action. This point is of course well taken. It is elementary that forfeiture by vendors of a contract to purchase land on account of nonperformance by vendees and foreclosure of the same contract as a mortgage are inconsistent remedies which cannot be pursued concurrently. In the petition there was no attempt to plead the facts in a double aspect or in the alternative form, or to pursue one remedy if the other should fail. The two remedies were concurrently invoked. In the petition thus drawn the plea for one remedy destroyed the other. Vendees should not have been required to defend two causes of action where one only was possible on the face of the petition. This anomaly in procedure was carried into the trial and is apparent in the decree, notwithstanding the demurrer to the

petition and the motion to require an election between forfeiture and foreclosure.

The petition, considered as a pleading for the forfeiture or the foreclosure of the entire contract, is fatally defective in another respect. The contract did not fix a date for payment of the purchase price of $8,000. While the law implied payment within a reasonable time under the circumstances, it was incumbent on vendors to plead that payment was to be made upon request, which has been refused, or within a reasonable time, which has elapsed,— omitted allegations. The law on this subject has been stated as follows:

"A declaration in an action on a contract which does not state the time at which defendant should have performed it is bad on demurrer. Where no time of performance is specified in a contract, it should be averred that it was to be performed on request or within a reasonable time, and that such request has been made or that a reasonable time has elapsed." 13 C. J. 729, sec. 857.

While it was alleged in the petition that the agreement to commence and complete the improvements was not performed within a reasonable time, this was not equivalent to a plea that a reasonable time for the payment of $8,000 had elapsed before the bringing of the suit. The contract did not provide, nor the petition allege, that the completion of the improvements and the payment of the purchase price were contemporaneous events. There is no tenable ground on which the petition can be sustained.

Even if the allegation that vendors exercised their option to declare a forfeiture of the contract could be disregarded and the action treated as a foreclosure proceeding, the evidence would not sustain the judgment rendered. Improvements on one quarter-section were made according to contract. The evidence so shows and the trial court so found. The right to foreclose the contract as to this tract would not necessarily arise from a failure to make the improvements on the other tract within a reasonable time. The

two quarter-sections were not contiguous. The contract contains on its face inferences of a mutual intention to make it severable as to tracts. After specificially providing for improvements consisting of a house, a barn, and a well, there is a declared purpose to require improvements for "a general farm home on each of the above described tracts of land." In addition, portions of the consideration in the form of improvements, or in lieu thereof payment of $1,250 on each quarter-section, are apportioned to the tracts separately. In connection with the entire contract this may be considered a test of severability. 13 C. J. 563, sec. 528. Another test has been stated as follows:

"Generally speaking, the test is that where there are several undertakings, each supported by a distinct consideration, the contract is severable." *Burwell & Ord I. & P. Co. v. Wilson,* 57 Neb. 396, cited with other cases in 13 C. J. 563, sec. 528.

As to one tract at least there was no sufficient evidence of nonperformance to sustain a judgment for a foreclosure. There was a lack of proof that a reasonable time for payment of the purchase price elapsed before vendees were sued. There is, however, testimony that vendees tendered the purchase price to vendors June 4, 1920, before trial, at a time when the petition failed to state a cause of action, that the tender was refused, and that, if insufficient, a legal tender would have been unavailing. There is no ground in pleading or proof on which the judgment can be sustained. It is therefore reversed and the cause remanded.

REVERSED.

Note—See Election of Remedies, 20 C. J. secs. 10, 41 (1926 Ann.)—Pleading, 31 Cyc. 292; Vendor and Purchaser, 39 Cyc. 1305, 1332, 1896—Contracts, 13 C. J. secs. 528, 857.

THOMAS H. BARNES ET AL., APPELLEES, V. EARL C. BARKER ET AL., APPELLANTS.

FILED FEBRUARY 17, 1925. No. 23528.

Moot Appeal: DISMISSAL. A moot appeal may be dismissed at the costs of appellant.

APPEAL from the district court for Box Butte county: WILLIAM H. WESTOVER, JUDGE. *Appeal dismissed.*

Frost & Kinsinger and *Eugene Burton,* for appellants.

Lee Basye, contra.

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

ROSE, J.

This is a proceeding by vendees to vacate a decree foreclosing a contract for the purchase of land and to grant a new trial on account of fraud perpetrated by vendors in procuring the foreclosure. The trial court sustained a demurrer to the petition and dismissed the proceeding. Vendees have appealed.

The judgment which vendees allege was procured by fraud has been reversed on a direct appeal in the principal action. *Barnes v. Barker, ante,* p. 113. It follows that this is a moot appeal and consequently is dismissed at the costs of appellants.

APPEAL DISMISSED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. GROSS STATE BANK: EDGAR R. JOHNSON, RECEIVER, APPELLEE: E. A. OEHLERKING, INTERVENER, APPELLANT.

FILED FEBRUARY 17, 1925. No. 24132.

1. **Banks and Banking:** GUARANTY FUND: DEPOSITS. "In order to create a deposit which will be protected by the guaranty law,

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

2. ———: ———: ———. "The law will look through all semblances and forms to ascertain the actual facts as to whether there has been a *bona fide* deposit, and, if not, the guaranty fund does not protect the transaction, no matter how it may be evidenced." *State v. Farmers State Bank*, 112 Neb. 380.

APPEAL from the district court for Boyd county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

Hainer & Flansburg, for appellant.

Fred S. Berry, W. T. Wills and *C. M. Skiles, contra.*

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

DEAN, J.

The Gross State Bank, hereinafter called the Gross bank, closed its doors January 26, 1923, and a receiver was subsequently appointed pursuant to a petition filed therefor, in the district court in and for Boyd county, by the attorney general. The claimant, E. A. Oehlerking, hereinafter called claimant, filed a petition in intervention to compel the payment of five certificates of deposit, from the bank depositors guaranty fund, which were issued by the Gross bank in the sum of $1,000 each, bearing 5 per cent. annual interest. The court allowed the claim as a general claim against the bank, but disallowed it as a claim against the bank depositors' guaranty fund, on the ground that the certificates did not represent a deposit within the meaning of the bank depositors' guaranty fund act. Comp. St. 1922, section 7982. From this judgment claimant has appealed.

During all the time material to the issues involved in this suit, Frank W. Woods was president of the Gross bank, and also president of the First National Bank of Spencer,

hereinafter called the Spencer bank. L. G. Kloke was vice-president of the Gross bank and cashier of the Spencer bank. E. C. Hamilton was cashier of the Gross bank. Both banks were located in Boyd county, about ten miles apart, and both subsequently failed. Herbert, Jurgensen & Woods is a partnership engaged in the insurance business at Lincoln. Clayton Woods, a member of the firm, is a son of Frank W. Woods, who is the above named president of both banks. The facts disclose that the banks were closely interlocked in business affairs. And this may readily be seen from the duplicate roll of officers.

March 13, 1922, eight $500 certificates of deposit were issued by the Gross bank and made payable to Herbert, Jurgensen & Woods. On the same day additional certificates of deposit were issued by the Gross bank, making in all, for that date, a total issuance of $10,000 in such certificates.

In respect of the facts attendant upon the actual issuance of the certificates, Mr. Hamilton testified that Mr. Kloke called him up by telephone and asked him if he wanted a $10,000 deposit, to which Hamilton says he made this reply: "I asked him if he wanted me to fall dead." From Hamilton's evidence it appears that Kloke, as Hamilton's superior officer, thereupon directed him to issue the above eight certificates, in sums of $500 each, and to make them payable to Herbert, Jurgensen & Woods, hereinafter called the Lincoln firm, "and charge First National Bank of Spencer's account," and that he, Kloke, "would credit our account over there." Pursuant to the foregoing instructions, Hamilton issued the certificates of deposit, bearing date of March 13, 1922, payable to the Lincoln firm, as directed by Mr. Kloke. The eight certificates were forwarded to the payee firm by mail, at Lincoln. The first or second day thereafter the Gross bank received a "credit advice" card from the Spencer bank, dated March 14, 1922, and Hamilton says he "considered" the above credit as the "deposit" fund against which he was instructed to issue the certificates of deposit. The advice card reached the

Gross bank the evening of the 14th or the morning of the 15th of March, 1922.

The Lincoln firm disposed of the eight $500 Gross bank certificates, above mentioned, and an additional $1,000 Gross bank certificate, to claimant. Thereupon the Lincoln firm requested the Gross bank to issue five $1,000 certificates to claimant, the eight original $500 certificates being returned by the Lincoln firm. The five above $1,000 certificates were duly issued and bear date of March 17, 1922.

Mr. Kloke corroborated Mr. Hamilton's evidence, in that he testified that he "told him (Hamilton) to issue $10,000 in certificates of deposit to Herbert, Jurgensen & Woods." When Kloke was asked if the Lincoln firm placed any money in the Spencer bank, March 13, 1922, he answered: "Not any cash directly in the First National Bank of Spencer. No, sir. * * * Q. Do you know (claimant) A. E. Oehlerking? A. I do not. Q. Did A. E. Oehlerking ever place any money in your bank on March 17, 1922? A. Not any cash directly. No, sir. Q. Now, then, on March 14 you made a book entry credit of $10,000 on the books of the First National Bank of Spencer to the Gross State Bank, didn't you, Mr. Witness? A. I wouldn't swear to the date; I suppose the records will show that. Q. Well, do you remember of a credit being made on the books of the First National Bank (of Spencer) to the Gross State Bank in connection with the $10,000 in certificates that were issued for Herbert, Jurgensen & Woods by the Gross State Bank on March 13, 1922? A. I suppose our books were closed on that day's business, and from the testimony I heard that date was on the 14th, which indicates it went over into the next day's business. Q. Now, then, in giving the Gross State Bank credit on your books for $10,000, what other charge did you make on your books to balance your books in connection with that transaction? A. Charged the Omaha National Bank, our correspondent. Q. With $10,000? A. Yes, sir. Q. Did the Omaha National Bank on that date put any money in the First National Bank at Spencer? A. I couldn't say on that date; I don't

know what the date of their advice was. Q. This $10,000 you charged the Omaha National Bank with was in connection with these certificates aggregating $10,000? A. Yes, sir. Q. Did you inform the Omaha National Bank anything about that at that time? A. No; that wouldn't be the usual transaction to inform them. Q. Now, answer the question, I don't care anything about the usual transaction. You simply made that charge of $10,000 to the Omaha National Bank without advising them you had made it? A. Yes, sir."

It was stipulated that the claimant paid $4,875 to the Lincoln firm for the certificates, a day or two before March 17, 1922, and that the Lincoln firm sent this money to the Omaha National Bank, and the Omaha bank in turn credited this amount to the Spencer bank March 21, 1922. It was also stipulated that claimant had no agreement with the Gross bank whereby such bank should directly or indirectly pay any interest other than indicated on the certificates of deposit, nor was claimant to pay any of "the discounts that were allowed by Herbert, Jurgensen & Woods," and that such discounts were taken care of by the Spencer bank by its transferring credit to the Gross bank in the amount thereof.

It may be noted that the Lincoln firm, in disposing of the certificates to claimant, allowed a discount of $125. There was a controversy on this point, but the matter was disposed of, under date of March 29, 1922, by the Spencer bank crediting on its books, the discount to the Gross bank.

As tending to show the manner of conducting business, by the Spencer bank and the Gross bank, it may be noted that, after the $10,000 certificates had been issued, March 21, 1922, Mr. Frank W. Woods, as president of the Spencer bank, forwarded to the Gross bank bills payable in a sum approximating $12,000. These notes were practically valueless, except as to a note in the sum of $2,500. In respect of the above notes, the receiver of the bank testified: "Q. Well, what is the fact as to your endeavoring to collect the notes, and whether or not you have been able to col-

lect any of them? A. With the exception of the Woods Credit Company note of $2,500 on which we held a certificate of deposit payable to the credit committee of the Woods Credit Company, which we claim, not any of the notes have been paid or any part of them."

The above notes were owned by the Spencer bank and, by order of its president, Frank W. Woods, were charged on the Spencer bank books against the account of the Gross bank. The attorney general contends, and the proofs sustain him, that this dubious transaction "more than exhausted the paper credit made by the Spencer bank to the Gross bank shortly subsequent to the issuance of the various certificates."

Mr. Hamilton, cashier of the Gross bank, on this point, in answer to interrogatories from the bench, testified:

"Q. Now, Mr. Hamilton, I want to know something. Frank Woods was president of the First National Bank of Spencer at the time you bought these notes. Were you president of the Gross State Bank? A. No, sir. Q. Was Frank Woods its president? A. Yes, sir. Q. And Mr. Kloke was its vice-president? A. Yes, sir. Q. Now, here was a transaction involving $12,000 or $15,000. Now, just what did you have to say about that? Is it true or isn't it true, did Frank Woods send the notes down to you and tell you to take them and you took them? A. Yes. Q. That was it? A. That was the start of it. Q. He simply sent the notes down to you and said give us credit for the notes? A. Yes; he called me over the 'phone, he says I have got some loans, they are a little in excess, I would like to have you carry them. Q. And you took them? A. Yes, sir; and he sent me over $11,675, I think. Q. And you were not supposed to use any independent judgment as cashier of the Gross State Bank about them? A. No; I thought he was president of the bank and wouldn't send me anything that wasn't right. Q. Yes, sir; and he sent them down? A. Yes, sir; and I didn't know anything about the condition of the bank or of Woods until in May when Mr. Guggenmos came there. I had some loans with

them, and he wanted to go over matters, and in going through the notes Guggenmos laid them out. He says, these things are not good, you are broke. Q. Frank Woods had sent them down to you? A. That is the sum and substance of it."

The evidence discloses that both banks were managed, dominated, and controlled by Mr. Frank W. Woods, who was president of both. They were managed much the same as an owner of noncontiguous farms would operate and control his several properties. The business was carried on solely over a private telephone wire. Letters were seldom, if ever, exchanged. The manner of business carried on is disclosed by the transfer of the Spencer bank's worthless notes, under Mr. Woods' orders, from the Spencer bank to the Gross bank. From all the evidence it is apparent that the purported exchange of credits, and collaterals, was ony a thinly veiled pretense, and in no sense did it constitute a deposit within the meaning of the depositors' bank guaranty law. Section 8033, Comp. St. 1922; *State v. Home State Bank, ante,* p. 93.

In respect of the essentials which are required to constitute a deposit, we said in a recent case: "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 the present case the facts, when considered in their entirety, clearly disclose an unlawful design to spoliate the bank depositor's guaranty fund. It is not even pretended that the claimant, or that Herbert, Jurgensen & Woods, made a deposit in the Gross bank at any time. The credit which was pretended to be extended by the Spencer bank to the Gross bank, even if it was at any time a valid credit, was promptly exhausted when Mr. Woods ordered the cashier of the Spencer bank to unload a col-

lection of worthless notes, upon the crippled and failing Gross bank, which were taken from the already depleted coffers of the Spencer bank. And this under the personal order of the man who was president of both banks, at a time when both were about to break on the rocks by reason of culpable mismanagement. It seems to us that the scheme, device, or plan of the officers of the two banks, working under Woods' orders, was one entire, continuous and connected transaction, and was unlawful from its inception to its close.

The record, when viewed impartially, discloses a state of facts which demonstrates that the guaranty fund is not liable. *Iams v. Farmers State Bank,* 101 Neb. 778; *State v. Banking House of A. Castetter,* 110 Neb 564. See, also, *Fourth Nat. Bank v. Wilson,* 110 Kan. 380. A deposit may be effected by depositing money in one bank to the credit of another bank, but it presupposes that absolute control of the fund is vested in the bank to which credit is given. *State v. Home State Bank, ante,* p. 93.

In a recent case this was aptly said: "The law will look through all semblances and forms to ascertain the actual facts as to whether there has been a *bona fide* deposit, and, if not, the guaranty fund does not protect the transaction, no matter how it may be evidenced." *State v. Farmers State Bank,* 112 Neb. 380.

Reversible error has not been shown. The court did not err in overruling the application for a new trial. The judgment is right and is

AFFIRMED.

CENTRAL NATIONAL BANK OF LINCOLN ET AL., PLAINTIFFS, V. ALFRED E. SUTHERLAND, TREASURER OF LANCASTER COUNTY, ET AL., DEFENDANTS.

FILED FEBRUARY 17, 1925. No. 24487.

1. **Taxation: SHARES OF STOCK IN BANKS.** The Nebraska revenue law, classifying property as tangible and intangible, and providing that shares of stock in banks, banking associations

and trust companies shall be listed at their true value and assessed upon the full mill-rate levy, while other intangible property, with certain exceptions, is required to be listed at its true value and assessed at 25 per cent. of the mill-rate levy, is invalid as to national banks, because it conflicted with an act of congress, as then existing, forbidding states to tax shares of stock in national banks at a greater rate than is assessed on other moneyed capital, and with national banks eliminated is, as to state banks, unconstitutional, because it conflicts with our state Constitution requiring taxes to be uniform as to class. Comp. St. 1922, sec. 5887; Rev. St. U. S. (1878) sec. 5219, p. 1009; Nebraska Const., art. VIII, sec. 1.

2. **Constitutional Law**: INVALID STATUTE. If a legislative act when enacted is violative of the provisions of our Constitution, it cannot subsequently become a valid law merely because the reason for its invalidity has been removed, without being subsequently reenacted by the legislature.

Original suit to restrain collection of taxes. *Injunction allowed.*

Hainer & Flansburg, Charles H. Kelsey, W. A. Prince, Good & Good and *Arthur W. Richardson*, for plaintiffs.

O. S. Spillman, Attorney General, George W. Ayres, Hugh LaMaster and *Charles E. Matson, contra.*

Edgar M. Morsman, Jr., amicus curiæ.

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

DAY, J.

This is an original action in this court brought by the plaintiffs, a national bank, a state bank, and a trust company, against the defendants as tax collecting officers of Lancaster county, Nebraska, to enjoin them from collecting certain taxes assessed against the shares of stock of the plaintiff corporations for the year 1923.

The taxes sought to be enjoined were assessed against the shares of stock of the plaintiff corporations under the provisions of the revenue law passed by the legislature in 1921, and particularly under the provisions of section 4,

art. VIII, ch. 133, Laws 1921, being section 5887, Comp. St. 1922, and which will be hereinafter referred to as section 5887.

Acting upon authority of the provisions of the Constitution, the legislature of 1921 passed an act which made some important changes in the revenue laws of the state. Speaking generally, it classified property subject to taxation into two groups, viz., tangible and intangible. With respect to tangible property, the act provided that it was to be listed for taxation at its true value and assessed upon the full mill-rate levy. With respect to intangible property, the act provided that it was to be listed at its true value, and with certain exceptions was to be assessed at 25 per cent. of the mill rate levied upon tangible property. Section 4, art. VIII of the act, now section 5887, provided a basis for the taxation of shares of stock in banks, banking associations, loan and trust, or investment companies. After providing the method of listing the shares of stock of such corporations or associations, at their true value, it was provided that the shares of stock be assessed at the same rate as other tangible property in the taxing district where the principal place of such bank or company is located.

The act contained other provisions respecting the manner of collecting the tax, which provisions are not now material to the questions being considered. It will at once be observed that the class of intangible property mentioned in section 5887 is assessed at four times the mill-rate levy assessed upon other intangible property.

It is the theory of the plaintiffs that the provisions of section 5887, under which the taxing authorities acted in levying the assessment, are unconstitutional and void and were so held to be in *State Bank v. Endres*, 109 Neb. 753, and that therefore the pretended assessment is of no force or effect.

At the time of the enactment of section 5887 by our legislature, section 5219 of the United States Revised Statutes, as then existing, was in full force and effect, and

provided, in substance, that the legislature of each state may determine the manner and place of taxing shares of national banks located within the state, subject to the restriction that "the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state."

Subsequent to the passage of section 5887, the supreme court of the United States, in *Merchants Nat. Bank v. City of Richmond,* 256 U. S. 635, pointed out more clearly than theretofore the meaning of the phrase "moneyed capital" as used in section 5219. In passing upon that question the court said:

" 'Moneyed capital in the hands of individual citizens' includes bonds, notes and other evidences of indebtedness in the hands of individuals, which are shown to come materially into competition with the national banks in the loan market."

After the decision in the *Merchants Nat. Bank* case, the State Bank of Omaha commenced an original action in this court to enjoin the collection of taxes assessed against it under the provisions of section 5887, upon the ground that the provisions of the section relating to the taxation of banks was unconstitutional. Our decision in that case, *State Bank v. Endres,* 109 Neb. 753, was filed February 27, 1923.

On March 4, 1923, congress amended section 5219 by inserting, among other things, the words: "Provided that bonds, notes or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments, not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section." 42 St. at Large, ch. 267, sec. 5219, 1b, p. 1499.

Subsequent to the amendment of section 5219 by congress, the taxing authorities of Lancaster county, acting upon the provisions of section 5887, assessed the shares of stock of plaintiff corporations for the year 1923 upon

the same basis as tangible property. It was evidently the theory of the taxing authorities that the act of congress of March 4, 1923, gave to the state the right to tax national banks upon the same basis as state banks, and that by reason of the act of congress, section 5887, in its entirety, became fully operative.

The plaintiffs thereupon tendered to the treasurer of Lancaster county an amount based upon the mill-rate levy of intangible property in payment of the taxes assessed, which the treasurer refused to accept. Thereupon the plaintiffs instituted the present action.

On the other hand, it is contended by the attorney general for the defendants that the effect of our decision in the state bank case was to hold that section 5887 was merely inoperative because the provisions of section 5219 prevented its operation as against national banks. The argument is made that when the disability was removed by congress, by the amendment of March 4, 1923, the provisions of section 5887 again became fully operative.

There is authority for the rule that, when a statute of a state is rendered inoperative by virtue of an act of congress, such statute comes into full operation after the removal of the objections thereto. *Tinker v. State,* 90 Ala. 638; *In re Rahrer,* 140 U. S. 545; *In re Van Vliet,* 43 Fed. 761; *Smyth v. Ames,* 171 U. S. 361.

We are of the view, however, that this rule cannot be invoked as applying to the present situation because the provisions of section 5887 complained of were unconstitutional at the time of their enactment, and no subsequent act of congress could give them life.

In *State Bank v. Endres,* 109 Neb. 753, the opinion declares that section 5887, in so far as it prescribes a method for taxing shares of stock in a national bank, is invalid, because it conflicts with an act of congress forbidding states to tax shares of stock of a national bank at a greater rate than is assessed upon other moneyed capital. While it is true that section 5887 does not use the term "national banks" in referring to the assessment of shares of stock,

it seems clear that it was the intention of the legislature in using the word "banks" to include all banks, national as well as state.

The court further held that, with national banks excluded from the operation of the section, the portion of the section complained of would be invalid as to state banks, because the latter would then be taxed at a higher rate than national banks, and therefore the provisions of the section referring to this basis of taxation would conflict with section 1, art. VIII, of the Constitution, requiring taxes to be uniform as to class.

Under the situation existing at the time of the passage of the provisions of section 5887 respecting the taxation of banks, the legislative action was unconstitutional from the date of its passage.

An act which is forbidden by the Constitution at the time of its passage is null and void.

In *Whetstone v. Slonaker*, 110 Neb. 343, it is held: "An act of the legislature that is forbidden by the Constitution at the time of its passage is absolutely null and void, and is not validated by a subsequent amendment to the Constitution authorizing it to pass such an act." See *Finders v. Bodle*, 58 Neb. 57.

It was held by the supreme court of the United States in *Norton v. Shelby County*, 118 U. S. 425: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection, it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

The provisions of the section complained of, being unconstitutional, could not be revived by an act of congress. The only method by which it could become the law of the state is by affirmative action by the legislature, which is the law-making body under the Constitution. Our Constitution provides that laws, except those passed with an emergency clause, become operative three calendar months after the adjournment of the legislature at which they were passed. If the theory of the defendant is to be adopted, the

law in question became operative after congress amended section 5219 on March 4, 1923, more than a year and a half after the adjournment of the legislature in 1921. Such position is untenable.

The plaintiffs have offered to do equity by tendering to the treasurer an amount equal to an assessment upon the basis of other intangible property. An injunction is allowed enjoining the defendants from collecting from the plaintiffs upon the assessment any sum in excess of 25 per cent. of the mill-rate levy.

INJUNCTION ALLOWED.

THOMPSON, J., dissenting.

I dissent for the reason, among others, that this case is controlled by the rule announced and followed in *Smyth v. Ames*, 169 U. S. 466; *Century Oil Co. v. Department of Agriculture*, 112 Neb. 73. The law in question does not contravene the Constitution, but simply became inoperative because of a condition then existing. On removal of the condition, the law automatically became operative.

EVANS, J., concurs in this dissent.

KEYSTONE INVESTMENT COMPANY ET AL., APPELLANTS, V. METROPOLITAN UTILITIES DISTRICT, APPELLEE.

OMAHA NATIONAL BANK, APPELLANT, V. METROPOLITAN UTILITIES DISTRICT, APPELLEE.

CITY NATIONAL BANK BUILDING COMPANY, APPELLANT, V. METROPOLITAN UTILITIES DISTRICT, APPELLEE.

SOVEREIGN CAMP, WOODMEN OF THE WORLD, APPELLANT, V. METROPOLITAN UTILITIES DISTRICT, APPELLEE.

FILED FEBRUARY 17, 1925. NOS. 24273, 24274, 24275, 24276.

1. **Waters: WATER-WORKS: CHARGES.** In being ready to furnish a supply of water from its mains through a service-pipe for a stand-pipe in a private building, the Metropolitan Utilities District renders a valuable service to the owners of such building, and enables such owners to enjoy an added measure of fire pro-

tection not enjoyed by the public generally, for which service the district is entitled to make a reasonable charge.

2. ———: ———: ———. The rule of Metropolitan Utilities District, fixing an annual charge of $60 for a 4-inch pipe connection with its service water-mains for the supply of a stand-pipe for private fire protection, in the light of the evidence set out in the opinion, is *held* reasonable and not discriminatory.

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

Stout, Rose, Wells & Martin, for appellants.

John L. Webster, contra.

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

GOOD, J.

In each of the above entitled actions the plaintiffs sought to enjoin defendant from the enforcement of its rules and regulations, requiring plaintiffs to pay an annual charge for a stand-pipe service for fire protection in the office buildings owned or operated by them. The four actions, by stipulation of the parties, were consolidated for trial in the district court, but a separate decree, denying the injunction, was entered in each case. Plaintiffs in the several actions have appealed, and all of the cases have been submitted together in this court, and, as substantially the same questions are involved, the disposition of the appeal in each case will be governed by this opinion.

It appears without controversy that each of the plaintiffs either owns or operates one of the following buildings in the city of Omaha, viz.: Peters Trust Company building, Omaha National Bank building, City National Bank building, and Woodmen of the World building. In each of said buildings there is installed and maintained a water-pipe, reaching from basement to roof, known as a stand-pipe, and maintained for fire protection of said building and its contents. The stand-pipe in each case is, by means of a 4-inch private main, connected with defendant's ser-

vice water-mains in the street adjacent to the building. There are hose connections with the stand-pipe on two or more floors of each of the buildings. The domestic supply of water for each of the buildings also enters the building through the same private service main, and all the water entering the stand-pipe goes through a meter and is measured. However, no charge is made for any water actually used for fire protection, save the annual charge for stand-pipe service. The rules of the defendant, the enforcement of which plaintiffs seek to enjoin, are, in part, as follows:

"Section 68. Rates for Automatic Sprinkler Systems and Stand-pipes. Service pipe connections with service mains for the supply of stand-pipes or automatic sprinkler systems shall be charged for at the following annual rates, payable in equal monthly instalments, viz.:

"For Supply of Standpipes

2½-inch connection	$24.00
3 -inch connection	36.00
4 -inch connection	60.00
6 -inch connection	90.00

"For Supply of Automatic Sprinkler Systems

4-inch connection	$24.00
6-inch connection	36.00"

"Section 70. Relating to Collection of Charges for Fire Hydrants and Fire Service Lines. All charges for fire hydrants and fire service lines shall be collected as herein provided, whether metered or not; Provided, however, that all water used for the extinguishment of fires shall be estimated by the water office and deducted from respective bills for water used."

All of the buildings in controversy are located in the congested business district of the city of Omaha. Each of the plaintiffs has refused to pay the charge fixed by the rules of the defendant, and the latter has threatened to shut off the water supply unless the charges are paid.

The defendant is a municipal corporation created by statute to take over, control and operate the water-plant,

formerly owned by the city of Omaha, and certain other public utilities. Its territorial limits include the city of Omaha and some adjacent territory. The cost of the water-plant controlled and operated by defendant is slightly in excess of $10,000,000, and its present reproduction value, less depreciation, is approximately $16,000,000. Generally speaking, the water-plant consists of pumping stations, water-mains, settling basins, filtering plants, and other machinery and equipment for increasing the water pressure. The entire water-plant has a capacity to furnish daily 51 million gallons of water. The maximum required for domestic purposes is 34 million gallons daily and 17 million gallons a day is the maximum required for public and private fire protection. The evidence fairly discloses that a capacity of 11 million gallons daily is the maximum requirement for public fire protection, and that 6 million gallons daily capacity is required to meet the possible demand for the private fire protection afforded by private fire hydrants, stand-pipes, sprinkler service and for leakage.

As stated by plaintiffs, the issue for determination is whether the regulations and the charges are so unreasonable and discriminatory as to be unconstitutional and void.

The evidence shows that the stand-pipe and automatic sprinkler systems installed in the larger buildings afford an added measure of fire protection to the owners and occupants of such buildings that is not enjoyed by the public at large and is not enjoyed by the property owners in whose buildings such systems are not installed; that the installation of such private systems of fire protection lessens the cost of fire insurance on such buildings and their contents to an amount equal to or in excess of the charge of defendant for stand-pipe service, and that such added fire protection makes offices in the buildings more desired by tenants and enhances the rental value of such buildings. The evidence further shows that, in the event of a fire or other casualty which destroys one of these buildings, in which a stand-pipe or sprinkler system has been in-

stalled, there is a probability of the breaking of the stand-pipe and a large waste of water before access can be gained to the shut-off valve adjacent to the building; that, because of this liability to breakage, the defendant is required to maintain larger mains and larger pumping capacity and appliances, so as to be able to furnish the necessary water for domestic use and public fire protection, in addition to that which may be lost by such leakage. It necessarily follows that the installation of either the sprinkler or stand-pipe system for private fire protection materially adds to the burden of defendant in maintaining its water-system. In order to be prepared to supply this extraordinary amount of water, it must have larger pumps, settling basins, and mains. As above indicated, the evidence tends to show that, because of the maintenance of these private fire hydrants, sprinkler and stand-pipe systems in the city of Omaha, defendant is required to have an added daily capacity for furnishing water to the amount of 6 million gallons. The evidence fairly shows that one-third of the capacity of defendant's water-plant is required for public and private fire protection.

Defendant has no other substantial source of income than the charges for domestic water-service, the water tax for hydrant rentals, and the rates and charges for private fire protection. Defendant has a bonded indebtedness of approximately $7,000,000, bearing 4½ per cent. interest. It must receive a sufficient revenue to cover the cost of the operation of the plant and necessary extensions and replacements, allowance for depreciation, together with a sufficient amount to pay the interest upon its bonded indebtedness and to raise a sinking fund to pay the bonds as they mature. The total income of defendant from the maximum public water tax, which represents the amount paid by the public for fire hydrants, is approximately $189,000, from private fire hydrants approximately $12,000, and from sprinkler systems and stand-pipe service approximately $17,000, or a total annual income for fire protection of approximately $218,000. The annual expense

of operation of the plant is in excess of $500,000. The annual interest charge on bonds is approximately $315,000. These two items alone aggregate $815,000. If one-third of these two items is allocated for fire protection, it will be seen that the total income for fire protection is not sufficient to pay the allocated portion of these two items alone. This amounts to a demonstration that the charges generally received for fire protection are not exorbitant, but are, in fact, unreasonably low.

Plaintiffs, however, contend that there is a discrimination because the annual charge for a 4-inch connection for a stand-pipe is $60, and the annual charge for a public fire hydrant is $60. In this connection it may be observed that the statute fixes the maximum charge for public fire hydrants at $60 per annum; therefore, no greater sum can be obtained from that source. Moreover, it appears from the evidence that the revenue received by defendant for public fire protection, viz., $189,000 per annum, for being able to furnish a maximum of 11 million gallons of water daily, is a much greater rate than that paid for private fire protection, since the toal amount received for private fire protection aggregates but $29,000 per annum for being able to furnish a maximum of 6 million gallons of water daily.

Plaintiffs further contend that there is a discrimination because a less charge is made for an automatic sprinkler service than for a stand-pipe service, where the connection is of the same size, but the evidence also shows that the automatic sprinkler service is more efficient in preventing a fire in the building where installed, and therefore makes less liable the burning and collapse of the building, with the consequent breaking of the water-pipes and loss of water occasioned thereby. The liability of defendant to loss of water through the breaking of pipes where a sprinkler system is installed is therefore less than where a stand-pipe system is installed, and appears to justify a lesser charge.

After a careful reading and examination of the entire bill of exceptions, we are convinced that the evidence justifies each of the findings made by the trial court, to the effect that defendant renders to the plaintiffs a valuable service other and different from that furnished to the public at large, and that the charge made for such service is reasonable and is not discriminatory.

The judgment in each of the cases is

AFFIRMED.

Note—See Waters, 40 Cyc. 802, 803 (1926 Ann.).

WILLIAM L. PHEGLEY V. STATE OF NEBRASKA.

FILED FEBRUARY 17, 1925. No. 24283.

1. **Homicide**: INFORMATION. An information charging murder in the first degree in language bringing it within the rule announced in *Nichols v. State*, 109 Neb. 335, is sufficient.
2. ———: LAWS CONTINUED IN FORCE. Defendant's contention that no crime of murder existed in this state at the time the crime charged was committed is not well taken in view of section 1, art. XVII, of the present Constitution, which provides: "All laws then in force, not inconsistent with the Constitution as amended by such proposals as may be adopted at such election, shall continue in force until amended or repealed."
3. ———: INTERVENING CAUSE OF DEATH. The law applicable to the evidence tending to prove an intervening cause of death, announced in *Hamblin v. State*, 81 Neb. 148, approved and followed.
4. ———: INSTRUCTIONS. The jury were instructed that, if they found defendant did the act charged, they were to determine "whether or not" he did such act with malice and intent, respectively. *Held*, use of these words was inapt, but, taking the charge as a whole, reversible error was not committed.
5. **Criminal Law**: NEW TRIAL: NEWLY DISCOVERED EVIDENCE. A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court, and ordinarily, unless an abuse of discretion is shown, its determination will not be disturbed.
6. **Evidence** examined, and *held* sufficient to support the verdict.

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

J. E. Willits, for plaintiff in error.

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

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

THOMPSON, J.

Defendant, plaintiff in error, was charged in the district court for Adams county with murder in the first degree. Trial was had, verdict of murder in the second degree found, and sentence of 12 years in the penitentiary imposed. To reverse this judgment defendant prosecutes error.

Defendant interposed a motion to quash the information, for the reason, in substance, that it does not set forth the location, nature and extent of the wounds on the body of deceased; that the words in the information, "as a result thereof she died," and "defendant thus committed murder in the first degree," are not statements of fact, but mere conclusions. This motion also states: "That the present Constitution of the State of Nebraska went into effect on January 1, 1921, and there is no common-law crime of murder in the state of Nebraska, and no statutory enactment or law has been passed by the legislature of said state defining murder." The motion was overruled, and a plea in abatement was then filed, containing the same grounds, which was also overruled. At the close of the evidence defendant filed a motion requesting the court to instruct the jury to return a verdict of not guilty of murder in the first degree. This was followed by a similar motion regarding murder in the second degree, and one as to manslaughter. Each in its order was overruled. After verdict, motion for a new trial was had and overruled.

As to overruling the motion to quash the information, and the plea in abatement, it is sufficient to say that this court in *Nichols v. State,* 109 Neb. 335, considered the statutes and our previous decisions with a view to har-

monizing them and outlining the form and allegations necessary to be set forth in an information charging murder in the first degree, so that such a pleading might be stripped of verbiage and brought more clearly within the modern rules of procedure. This information is in harmony with the rule there announced.

As to the other contention, it is sufficient to state that section 1, art. XVII, of the present Constitution, provides, among other things: "All laws then (January 1, 1921) in force, not inconsistent with the Constitution as amended by such proposals as may be adopted at such election, shall continue in force until amended or repealed." Hence, it is held that both the motion and plea are without merit, and the overruling thereof was not error.

Defendant contends that the court erred in giving certain instructions on its own motion, and in refusing to give certain ones requested by him. We first notice instruction No. 18½ given, which is as follows:

"If a new and independent cause of death intervenes and of itself takes the life of one who has been wounded, then it will be considered the cause of death, and the person inflicting the first wound could not be held accountable for murder however subject he might be to a prosecution for felonious assault, and therefore if there is any reasonable doubt as to whether the death of Laura B. Phegley was caused solely by the operation performed upon her, then the defendant would not be accountable for such death, unless such operation was deemed by the physician attending her necessary and proper in treating her for injuries claimed to have been made by the defendant."

Defendant criticises this instruction because "there is no evidence that an operation was deemed necessary by the physician attending her, and the court assumes that the injuries were made by defendant, or that it would be sufficient if they were claimed to have been made by defendant." The following testimony of Dr. Uridil, who attended Mrs. Phegley after the shooting, shows the lack of foundation for this criticism. "Q. Just what was the

trouble with her when she was brought in, and the nature of her wounds, is what I want, Doctor. A. There was another one (Dr. Uridil had previously testified that there was a gunshot wound in the right breast; another in the lower quadrant of the right breast; and another in the forearm) in the upper abdomen; another one in the back, on the right side of the buttocks, and that was all the visible wounds externally. Q. What do you say, Doctor, as to whether or not these wounds were fatal wounds? A. One cannot tell until an exploration is made. Q. Did you make an exploration? A. Yes, sir. Q. What conclusion did you arrive at then? A. The wound over the abdomen was found to be involving the liver. She had a large puncture wound in the liver, and the stomach was explored, and the small intestines were explored, and there were three lacerated wounds in the jejunum, and the peritoneal cavity was full of blood. These were of course all repaired. From this I would say that they were mortal wounds." And on cross-examination he testified: "Q. How long after you were called to see her was it that you operated, Doctor? A. I think we operated just as soon as we could prepare ourselves, after seeing her the first time." The giving of this instruction was not error. *Hamblin v. State,* 81 Neb. 148.

Instruction No. 22 reads as follows: "Under the laws of this state, one who threatens another in a menacing manner commits an unlawful act, and if you are convinced by the evidence beyond a reasonable doubt that the defendant at the time and place stated in the information was threatening said Laura B. Phegley, and while in the commission of such unlawful act and by reason thereof said revolver was discharged, accidentally or otherwise, whereby said Laura B. Phegley was shot and killed, then the defendant would be guilty of manslaughter."

Defendant contends that there is no evidence showing that he threatened Mrs. Phegley at the time and place stated in the information, and this instruction led the jury to believe that there was. This contention does not reflect

the facts proved. Evans, at whose farm Mrs. Phegley was employed when she was shot, testified as follows: "Q. And were the people all there yet? A. No, sir; they had started home; they had just started when Mrs. Phegley and I heard a car start up back of the barn, and the car drove around to the barn—to the west side of the barn—and some one got out when it was about two-thirds of the way up to the walk, and the Mrs. says, 'That is Will.' Q. How far was he from Mrs. Phegley and yourself when she recognized him? A. He was probably 16 or 18 feet—16 probably. Q. What else was said or done at that time and place? A. Well, she said, 'Don't let him in.' The gate stood a little ajar, and I pulled that shut, and he came up within 6 or 8 feet and drawed a gun on me. She stepped in front of me, and said, 'Don't shoot.' She was on the right side of me, and she stepped over and told me to go; and I ran around the mill, and then there was some shots fired. * * * Q. You say that Mr. Phegley said, 'What do you mean?' when you closed the gate. How soon after he said that was it that he drew the gun? A. Just about the same time." The evidence further shows, and the jury so found, that Mrs. Phegley died from the effects of those shots which Evans heard. This testimony, taken in connection with the facts and circumstances leading up to and surrounding the tragedy, warrant the instruction.

Instruction No. 23, on the presumption of defendant's innocence and necessity for proof of guilt beyond a reasonable doubt, and No. 24, defining reasonable doubt, are complained of. While these instructions are not couched in the same language, they come within the rule approved in *Goemann v. State*, 100 Neb. 772. The giving thereof was not error.

Instruction No. 13 charged the jury as follows: "You are instructed that the intent with which an act is done is a mental process and as such generally remains hidden within the mind where it is conceived, and it is rarely, if ever, susceptible of proof by direct evidence, but may be inferred or gathered from outward manifestations, by the words or

acts of the party and the facts and circumstances surrounding or attendant upon the offense with which it is charged to be connected. It is for you to determine from all the facts and circumstances in evidence before you whether or not the defendant at the time he committed the acts complained of, if you find from the evidence that he did commit them, had the intent so to do."

And instruction No. 14 charged the jury that "Malice is an essential element of the crime of murder in the first degree; also of murder in the second degree; and before you can find the defendant guilty of either of these offenses, you must be convinced beyond a reasonable doubt from all the facts and circumstances in evidence whether or not the defendant at the time he committed the acts complained of, if you find from the evidence beyond a reasonable doubt that he did commit them, did so with malice on his part."

Defendant contends that the use of the words "whether or not" in these two instructions was prejudicial to him, in that such use placed a burden on him to prove that he did not have intent and malice, and robbed him of the presumption of innocence. While the words were not apt in the connection used, and while we do not approve of their use, yet, taking the court's charge as a whole, we cannot say that, by their inclusion, prejudicial error was committed. "The true meaning and effect of instructions are not to be determined by the selection of detached parts thereof, but by considering all that is said on each particular subject or branch of the case." *St. Louis v. State,* 8 Neb. 405; *Murphy v. State,* 15 Neb. 383; *Debney v. State,* 45 Neb. 856; *Junod v. State,* 73 Neb. 208; 14 R. C. L. 817, sec. 76. Then we are convinced that, from the use of these words, "No substantial miscarriage of justice has actually occurred." Comp. St. 1922, sec. 10186.

A number of witnesses were sworn and examined, and numerous letters showing a correspondence between defendant and Mrs. Phegley, covering several years prior to the tragedy, some going back to the time before she obtained a divorce, were introduced in support of the motion

for a new trial, as newly discovered evidence, the overruling of which motion defendant assigns as error. We have considered this additional evidence and find it to be merely cumulative to that introduced at the trial, and which might have been furnished at that time if proper diligence had been shown. We find further that the evidence of what took place between these two after the divorce militated against defendant, and which if introduced would have been detrimental to him. To illustrate, the evidence of the county attorney was taken, in which he testified, in substance, that he made a careful investigation of the garments worn by Mrs. Phegley at the time of the shooting, and that powder marks were not to be found thereon. This would have been additional evidence on the part of the state tending to disprove defendant's claim of accidental discharge of the pistol while he and Mrs. Phegley were scuffling for the possession of it, he having it in his hand. Further, a letter was introduced which had been written by Mrs. Phegley, dated January 8, 1923, in which she told of defendant's threats toward her, and of her intention to put him under heavy bonds unless he desisted, which also would serve to strengthen the state's case as to his intent. Then, such ground for a new trial is addressed to the sound discretion of the trial court. Where, as in this case, an abuse of discretion is not found, the conclusion of the trial court will not be disturbed. Overruling of the motion for a new trial on this ground was not error. *Hamblin v. State, supra.*

Defendant contends, also that the evidence is insufficient to sustain the verdict. After a careful examination of the entire record, we are convinced that this contention is not well taken, and that the verdict rendered is amply supported thereby. The record shows that the jury's considerations were clothed with that candor and impartiality which excludes every suspicion of passion, bias, or prejudice, and that the court tempered its judgment with mercy. A further detailed statement of the contents of this voluminous record would serve no useful purpose. The jury

are the triers of fact and, as we have often held, their conclusions will not be disturbed unless clearly wrong.

We have carefully considered every alleged error presented, whether such error has been expressly mentioned in this opinion or not, owing to the importance of the case, and find that reversible error has not been committed. Therefore, the judgment of the district court is

AFFIRMED.

Note—See Homicide, 30 C. J. secs. 275, 531, 560; 29 C. J. secs. 54, 56; Criminal Law, 16 C. J. secs. 2493, 2708; 17 C. J. sec. 3589; Constitutional Law, 12 C. J. sec. 105.

OSCAR R. LOVELACE, APPELLEE, V. JOHN BOATSMAN, APPELLANT.

FILED FEBRUARY 17, 1925. No. 22987.

1. **Constitutional Law**: ACT CHANGING PROCEDURE. A litigant has no vested right in the mode of procedure, and an action commenced before an enactment changing the procedure in the court where the action is pending, after the enactment becomes effective, is properly triable under the changed method.
2. **Appeal**: VERDICT. The presumption is, in the absence of proof to the contrary, that the proceedings of a court of general jurisdiction are regular, and a verdict by a five-sixths jury will not be set aside because the verdict or record does not affirmatively show that their deliberations had continued for not less than six hours.
3. **Instructions** given examined and approved.
4. **Rulings** on admission and exclusion of evidence examined and approved.
5. **Appeal**: AFFIRMANCE. The case presents a disputed question of fact properly submitted to the jury, and its verdict will not be disturbed.

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

Morrow & Morrow, for appellant.

Mothersead & York and *Floyd E. Wright, contra.*

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

EVANS, J.

This is an action to recover $5,000 with interest as money had and received by the defendant for the plaintiff's assignor. The plaintiff alleges the execution of a note for $10,000 by his assignor, Noyes, secured by mortgage on real estate in Nebraska and Wyoming, from the proceeds of which loan $5,000 was paid to persons designated by Noyes, and the remaining $5,000 was converted by the defendant, and the defendant thereby became indebted to Noyes in the sum of $5,000 with interest thereon for money had and received, which claim was assigned to the plaintiff, who is the owner thereof. The answer is a general denial. There was a verdict by a five-sixths jury for the amount prayed, $6,071.38. The motion for a new trial was overruled and judgment rendered for the amount of the verdict. From this judgment the defendant appeals to this court.

The circumstances out of which the loan of $10,000 arose was a sale to Noyes by one Gonser of mining stock at the agreed consideration of $5,000. The loan of $10,000 was negotiated through the defendant Boatsman, who was, at that time, president of the Farmers & Merchants Bank at Morrill. The defendant had also been an officer in the mining corporation whose stock was sold to Noyes, and it would seem from the evidence that he got $2,000 out of the Noyes transaction as his share in the deal.

The errors upon which the appellant relies will be considered in the order of their assignment. Assignments 1 and 2 insist the verdict is not supported by evidence. Noyes, the payor of the note, testified that there was to have been retained, in the Farmers & Merchants Bank, for him, out of the proceeds of the $10,000 loan, the sum of $5,000. The defendant denies that he promised to hold the $5,000 in the bank for Noyes, and the defendant and his wife testified that the arrangement at the time of the loan was that the entire $10,000 was to be placed to the credit of one Gonser. The deposit slip of the bank and its

ledger page show that it was so credited. While the execution of the papers incident to the loan was completed on March 6, 1919, it appears on the books of the bank as of the following day, March 7, and on that day, although, including the $10,000, Gonser received credit in the bank for $16,000, his balance at the close of the day's business was $4,916.12. On March 14, following, his balance was $2,704.51. On March 6, 1919, Noyes received a check from Gonser for $3,000, which, he testifies, Gonser requested him not to present for a time. The existence of the check is unexplained, except, he testifies, that it was the way that Gonser and the defendant wished "to have it done." When he presented the check for payment to the bank, there was not sufficient funds to pay it, and Noyes testifies that the defendant informed him that it had been used in the mine. The $10,000 loan of March 6, 1919, was paid off by Noyes before it was due, by the negotiation of a new loan secured by the same land. The negotiations therefor being conducted by Fred Remender as to the principal sum of $7,500, and apparently jointly by Remender and the defendant as to the remaining $2,500. The issue presented to the jury was the one raised by the pleading, and there was a clear-cut contradiction between the testimony of Noyes, called on behalf of the plaintiff, and Boatsman, the defendant, in his own behalf. Page 20 of appellant's brief, attempting to set forth the evidence in narrative form, does not accurately reflect the same. We quote the evidence: "Q. You and Mr. Gonser were jointly interested in certain business enterprises? A. No; I don't know as we were. Q. Wasn't there some kind of a gold mine down in Colorado that you and Mr. Gonser were both officers of, that is the Nature Products Refining Company, and you one of the directors of that company? A. I don't know whether I was or not, at that time. Q. You had been before? A. Yes; I was a director. Q. What was Mr. Gonser in that company? A. I don't know whether he was president, secretary or treasurer. Q. You and Mr. Gonser were jointly interested

in the selling of stock in that company in Morrill and vicinity? A. I wasn't. Q. And you went on a trip down to that mine with Mr. Gonser, and other persons went, and Mr. Noyes was along? A. Yes, sir. Q. You talked to Mr. Noyes about the mine? A. I don't know whether I talked with him until we got back; that is the first time I ever made— Q. But you interested him in the purchase of stock in the mine? A. No; I don't know as I ever interested anybody in the selling of stock in mines."

It was a proper case to go to the jury, and a finding for either party should be allowed to stand.

The defendant complains that neither the verdict nor record shows that the jury deliberated at least six hours, and assigns this as prejudicial error. The presumption is, in the absence of proof to the contrary, that the proceedings of a court of general jurisdiction are regular, and that presumption should prevail in this case. *Saxon v. Cain*, 19 Neb. 488; *Parsons v. State*, 61 Neb. 244; *Armstrong v. Great N. R. Co.*, 131 Minn. 236; *Daly v. Falk & Co.*, 131 Minn. 231.

This case was commenced on April 25, 1921, and before the act of February 19, 1921, which authorized the return of a verdict by five-sixths of the members of a jury, went into effect. The return of this verdict by that number is assigned as error. "A litigant has no vested right in the mode of procedure." *Norris v. Tower*, 102 Neb. 434; *Miami Copper Co. v. State*, 17 Ariz. 179, Ann. Cas. 1916E, 496; *Roenfeldt v. St. Louis & S. R. Co.*, 180 Mo. 554.

Assignments 9 to 17 are based upon rulings of the court as to the admission and exclusion of evidence. They have each and all been examined and disclose no prejudicial error.

The judgment is

AFFIRMED.

Note—See Constitutional Law, 12 C. J. sec. 583—Statutes, 36 Cyc. 1216.

LOUISE YOUNG, APPELLANT, V. JOHNSON & BLIND ET AL., APPELLEES.

FILED FEBRUARY 17, 1925. No. 24361.

1. Appeal: BILL OF EXCEPTIONS. Where the party excepting has served the proposed bill of exceptions upon the adverse party within the time fixed by law, the adverse party, by holding the bill until the expiration of the 100 days within which the same may be settled, is estopped to move that the bill of exceptions be quashed for the reason that it was not settled within 100 days, if the party excepting has, in no way, been negligent.
2. ———: CONFLICTING EVIDENCE. "Where the case is heard in court before a judge of the district court upon conflicting evidence, and where there is competent evidence sufficient to sustain the finding, the judgment rendered by the district court will not be set aside on appeal unless it is clearly wrong." *Anderson v. Kiene*, 103 Neb. 773; *Miller v. Morris & Co.*, 101 Neb. 169.

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

Millard B. Conklin and *Verne E. Chatelain*, for appellant.

John W. Battin and *Kennedy, Holland, De Lacy & McLaughlin, contra.*

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

EVANS, J.

This is an action to recover compensation under the employers' liability law. The claim was presented to the commissioner and hearing had, whereupon the cause was dismissed. It was then appealed to the district court and there tried and the "claim and cause of action" dismissed. Notice of appeal to this court was filed in due time and the cause is here for review.

The defendants move to quash the bill of exceptions because it had not been settled within 100 days from the adjournment of the term of court at which the case was tried and decided. The motion was submitted with the arguments on the merits.

The term of court at which the case was decided adjourned *sine die* on October 4, 1924. The appellant's brief was served on appellees' attorneys on November 12, 1924, and with it was served the proposed bill of exceptions, and thereafter until January 12, 1925, the appellees' attorneys retained possession and control thereof, although the appellant's attorney frequently requested that the bill be returned to him. Upon such requests the appellees' attorneys asked that they be permitted to retain the bill of exceptions until they had prepared their brief, which requests were acceded to by the appellant's attorney. On January 12, 1925, the appellant's attorney demanded and received the bill of exceptions from the appellees' attorneys without suggested amendments thereto, but because of the absence of the trial judge from the district was unable to have the same settled until January 14, 1925. On that day it was settled, filed in the office of the clerk of the district court, certified to by him, and filed in this court. From October 4 to January 14 following is 102 days. The appellees had held the bill of exceptions from November 12 until January 12 following, or 61 days, and until the last day within which the bill should have been presented. It is under such a record the appellees move to quash the bill of exceptions. This court has held:

"A district judge has no authority to settle a bill of exceptions more than 100 days after adjournment of the term in which the appealable judgment in the case was rendered and entered on the journal." *Lincoln Land Co. v. Commonwealth Oil Co.*, 109 Neb. 652; *Walker v. Burtless*, 82 Neb. 211. In the latter case the delay was the fault of the party excepting. It does not appear who occasioned the delay in the former.

It has also been held that the time within which a proposed bill of exceptions may be served cannot be extended beyond the time fixed by law for serving the same. *Stock v. Luebben*, 72 Neb. 254; *Mathews v. Mulford*, 53 Neb. 252. In none of these cases, so far as appears, was the

delay occasioned by the act of appellee, nor was the question of appellee's negligence in any way involved.

It should be borne in mind that the statute (Comp. St. 1922, sec. 8823) gives the party excepting 40 days to prepare and submit the proposed bill to the adverse party. This, upon good cause shown, may be extended by the judge to 80 days. This is the time within which the party excepting may submit his proposed bill to the adverse party. The adverse party, within 10 days (not 61) *"shall return said bill* * * * to the other party or his attorney of record," and the latter then has 10 days to present the same to the judge for settlement. The provision, "It shall be competent for the judge who tried the cause, upon due showing of diligence, and not otherwise, to extend the time herein allowed, but not beyond 40 days additional to that herein provided," relates entirely to the preparation and submission to adverse counsel in the first instance.

In this case the appellees are in the position of asking this court to quash the bill of exceptions because they retained the same for 61 days, when they should have returned it in 10 days. In other words, they move the court to quash the bill of exceptions because they retained the bill more than six times as long as the law permitted, and they seek to, and will, if successful, deprive the party excepting of the 10 days given by law within which the bill may be presented to the judge for settlement.

In *Deck v. Smith,* 12 Neb. 205, 207, the court say: "It is the duty of the adverse party to propose amendments if the bill is incorrect, and return the bill with the proposed amendments to the party excepting or his attorney. * * * He cannot close his office, or place the bill where it will be overlooked or forgotten, and then plead his own neglect to deprive the party excepting of his rights."

In the case of *Saxton v. Harrington,* 68 Neb. 446, the court say: "The bill of exceptions might have been settled and error proceedings commenced after it was found and returned to the appellant's counsel. The delay being the fault of appellee, he could not have procured a dismissal of

the cause, and an application to quash the bill of exceptions, if made by him, would have been overruled." The delay in both cases was occasioned by the appellee, and the court refuses to permit appellee to profit by his own wrong.

The appellees by failure to return the proposed bill of exceptions within ten days after its service upon them are in default, and having, by their own default, made it impossible for the appellant to present the bill to the trial judge for settlement, are estopped to ask that the bill of exceptions be quashed. The motion is overruled.

The first assignment of error is that the court rejected competent, material, and relevant evidence offered by the plaintiff. This assignment of error is based upon the sustaining of objections to questions calling for statements of the deceased made to his wife after his arrival at the family home on the evening of the alleged accident.

The theory upon which the plaintiff presented her case was that the deceased was injured while at work in the defendants' place of business some time between 10 and 3 o'clock; that he continued working and arrived at home some time about 8 o'clock, and then informed her as to the cause of the alleged injury, and the statements so made are sought to be introduced as a part of the *res gestæ*. "The term *'res gestæ'* means things done in and about, and as a part of, the transaction out of which the litigation in hand grew and on which transaction said litigation is based." *Collins v. State*, 46 Neb. 37. If we assume the accident to have occurred in this case, as suggested, the presumption should not be raised that the report to the wife, hours after, was the unpremeditated account thereof so as to make it a part of the *res gestæ*. There was no error in sustaining the objection to this line of questions.

The second assignment of error is to the effect that the documentary evidence offered and received in the case, together with evidence of conversations, transactions, conduct, and representations before the death of the deceased, constitute admissions of law or fact which are *prima facie*

evidence of an accident of the deceased growing out of and in the course of his employment. It is undisputed that the cause of the death of the deceased was cancer, and that it was present and developing in the early part of January, 1920. The theory of the plaintiff is that the injury which produced the disease occurred in October, 1919. There is not in the record evidence which goes to establish or prove an injury in October of 1919, and much of the evidence referred to tends to disprove such an injury.

The third assignment of error is that the defendants were estopped to deny the alleged accident. We have read the record and have been unable to discover anything in the conduct of the defendants which would raise an estoppel as to either of the defendants.

Under the employers' liability act (Laws 1913, ch. 198 as amended by Laws 1917, ch. 85): "Where the case is heard in court before a judge of the district court upon conflicting evidence, and where there is competent evidence sufficient to sustain the finding, the judgment rendered by the district court will not be set aside on appeal unless it is clearly wrong." *Anderson v. Kiene*, 103 Neb. 773. *Miller v. Morris & Co.*, 101 Neb 169.

This case was so tried. There is no error in the record, and the judgment of the district court should be affirmed.

AFFIRMED.

HARRY FISCHER, APPELLANT, V. GEORGE W. MARSH, AUDITOR, APPELLEE.

FILED FEBRUARY 17, 1925. No. 24419.

1. States: PAYMENT OF CLAIMS. Funds which have been covered into the state treasury and which may be used in payment of claims against the state by warrant of the auditor of public accounts can be withdrawn therefrom only pursuant to an appropriation by the legislature.
2. ———: ———. The auditor of public accounts is authorized to issue warrants only when there has been an appropriation for the specific purpose for which the warrant is drawn, and

when his investigation shall have established that the warrant is for that specific purpose, and that the claim to be paid is just.

3. ———: PURCHASE OF GASOLINE. There has been neither authorization for, nor appropriation of funds to permit of, the purchase of gasoline by the state or its officers for sale to the public, and warrants drawn to pay for gasoline so to be disposed of are unauthorized.

4. ———: ILLEGAL EXPENDITURES: INJUNCTION. "A resident taxpayer, without showing any interest or injury peculiar to himself, may enjoin illegal expenditures by a public board or officer." *Woodruff v. Welton*, 70 Neb. 665.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed: Decree entered.*

Battelle & Sugarman, for appellant.

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

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

EVANS, J.

In this action the plaintiff, the appellant herein, seeks to enjoin the auditor of public accounts "from issuing or delivering any warrant upon" the equipment and material fund, "or upon any other fund, for the payment of gasoline or oils or supplies or materials of any kind in carrying on and conducting" a gasoline station in the city of Lincoln in which gasoline is sold to the public.

On final hearing the trial court found there was "no equity in the petition" and dismissed the action.

There is no controversy as to facts, which are as follows: The department of public works has conducted in the city of Lincoln under its immediate supervision a gasoline station from which the public has purchased gasoline at retail. The retail price has been such that a profit from two to four cents a gallon has been realized. The gasoline has been purchased by the state purchasing agent upon requisition of the department signed by the deputy secretary of

the department. The vouchers for the gasoline were approved by the governor, the secretary of finance, and the acting secretary of the department of public works. There has been an appropriation for the "state equipment and material fund." There has been neither appropriation nor authorization for the purchase or sale of gasoline by the state or any of its departments to the public.

The defenses are: (1) That, as the state could and did lawfully purchase gasoline to use in its various authorized activities, the irregularity, if any, was in the sale, and not in the purchase; (2) that the auditor had no official knowledge that the warrants were to pay for gasoline to be sold to the public; (3) that, the purchase being lawful, the seller is entitled to his compensation; (4) that, the plaintiff being merely a taxpayer and having suffered no pecuniary loss by reason of such sales, cannot maintain this action.

The provisions of the Constitution material to this controversy are:

"Each legislature shall make appropriations for the expenses of the government until the expiration of the first fiscal quarter after the adjournment of the next regular session, and all appropriations shall end with the fiscal quarter." Const., art. III, sec. 22.

"No allowance shall be made for the incidental expenses of any state officer except the same be made by general appropriation and upon an account specifying each item. No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, and on the presentation of a warrant issued by the auditor thereon, and no money shall be diverted from any appropriation made for any purpose or taken from any fund whatever, either by joint or separate resolution. The auditor shall within sixty days after the adjournment of each session of the legislature, prepare and publish a full statement of all moneys expended at such session, specifying the amount of each item and to whom and for what paid." Const., art III, sec. 25.

The latter section makes necessary a specific appropriation for a particular purpose, and forbids the drawing of a single dollar from the state treasury unless authorized by an appropriation. *State v. Cornell,* 54 Neb. 647. And there can be no implied appropriation under the Constitution. *State v. Wallichs,* 15 Neb. 609.

Under the Constitution it is not within the province of executive or administrative officers to determine the purpose for which the state's funds may be expended. Only the legislative branch of the government may declare for what purpose and within what amounts state funds may be expended. Any other expenditure than that authorized by the Constitution and valid enactments thereunder is unlawful.

Gasoline might lawfully be purchased for carrying on the state's authorized activities. It could not be lawfully purchased for sale to the public, as such purchase and sale were unauthorized by law.

It is urged that the auditor had no official knowledge that the gasoline that was to be paid for by the warrants, the issuance of which is sought to be enjoined, was for sale to the public.

The Constitution provides: "The legislature shall provide by law that all claims upon the treasury, shall be examined and adjusted by the auditor and approved by the secretary of state, before any warrant for the amount allowed shall be drawn: Provided, that a party aggrieved by the decision of the auditor and secretary of state may appeal to the district court." Const. art. VIII, sec. 9.

Among the duties of the auditor of public accounts are the following:

"First. To audit, adjust and settle all claims for services rendered or expenditures made for the benefit of the state. Provided, such services are rendered or expenditures made by authority of law, except only such claims as may be expressly required by law to be audited and settled by other officers or persons.

"Second. To draw all warrants upon the treasurer for money, except only in cases otherwise expressly provided

for by law, and each warrant so drawn shall bear upon its face a reference to the law authorizing the drawing of the same, naming the fund out of which it shall be paid, and shall be countersigned by the state treasurer before it is delivered to the party in whose favor it is drawn: Provided, that said warrants need not be drawn for at least ten days from the date the claim is presented to the auditor."

"Eleventh. To examine books, accounts, vouchers, records, and expenditures of all state officers, state bureaus, state boards, state commissioners, state library, and all societies and associations supported by the state, state institutions, state normal schools and the University of Nebraska and to report promptly to the governor the fiscal condition shown by such examinations, including any irregularities or misconduct of officers or employees, and any misappropriation or misuse of public funds or property, and any improper system or method of bookkeeping or condition of accounts." Comp. St. 1922, sec. 4848.

"All persons having claims against the state shall exhibit the same, with the evidence in support thereof, to the auditor to be audited, settled and allowed within two years after such claims shall accrue; and in all suits brought in behalf of the state, no debt or claim shall be allowed against the state as a set-off, but such as has been exhibited to the auditor and by him allowed or disallowed, except only in cases where it shall be proved to the satisfaction of the court that the defendant at the time of trial is in possession of vouchers which he could not produce to the auditor, or that he was prevented from exhibiting the claim to the auditor by absence from the state, sickness or unavoidable accident: *Provided,* the auditor shall in no case audit a claim or set-off which is not provided by law." Comp. St. 1922, sec. 4850.

"The auditor, whenever he may think it necessary to the proper settlement of any account, may examine the parties, witnesses or others, on oath or affirmation, touching any matter material to be known in the settlement of such account." Comp. St. 1922, sec. 4851.

It is therefore the duty of the auditor to allow no claim and issue no warrant until he shall have satisfied himself: (1) That there has been an appropriation therefor within the biennium; (2) that the claim is for a specific purpose for which the appropriation has been made; (3) that it is a just claim against the state within these limitations. It is not sufficient that the auditor does not know, he is required to know, that these facts exist before he is authorized to issue the warrant, and to this end he has been authorized to inquire of the parties interested, call and examine witnesses under oath "touching any matter material to be known in the settlement of such account."

It is claimed by the defendant that the claim for gasoline sold to the public is a just debt owed by the state and should be paid. Waiving the question as to the justice of the debt, there must have been an appropriation from which it might be paid. Neither the executive nor the auditor are authorized under our laws to expend the state's money but for the purpose for which it was appropriated.

The statutory inhibition is as follows:

"In all cases of grants, salaries, pay and expenses, ascertained and allowed by law, found due to individuals from the state when audited, the auditor shall draw warrants upon the treasury for the amount; but in cases of claims, the adjustment and payment of which are not provided for by law, no warrant shall be drawn by the auditor, or countersigned or paid by the state treasurer, but all such claims shall be reported to the next legislative assembly, with such recommendation as the auditor may deem just." Comp. St. 1922, sec. 4853.

The legislature has provided a remedy for the dissatisfied claimant:

"If any person interested shall be dissatisfied with the decision of the auditor on any claim, account or credit, it shall be the duty of the auditor, at the request of such person, to refer the same, with the reason of his decision, to the legislative assembly." Comp. St. 1922, sec. 4854.

There remains the question as to the plaintiff's right to

maintain this action. It has been held in a number of courts in other jurisdictions that to entitle a taxpayer to the extraordinary relief of injunction as against an officer in his official capacity there must be an injury to the taxpayer. This rule was announced by this court in *Normand v. Otoe County*, 8 Neb. 18, a case where the sureties on a county treasurer's bond sought to restrain an action on the bond they had signed. In *Woodruff v. Welton*, 70 Neb. 665, it is held: "A resident taxpayer, without showing any interest or injury peculiar to himself, may enjoin illegal expenditures by a public board or officer." We quote from pages 667, 668, of the opinion: "The defendant urges that the plaintiff ought not to be permitted to prosecute his suit because it is not shown that he has suffered, or will suffer, any special or peculiar damage by reason of the conduct of which he complains; but in this jurisdiction the law has long been settled beyond debate that a resident taxpayer, as such, and without proof of peculiar interest or injury to himself, may enjoin the illegal expenditure of money by a public board or officer. *Follmer v. Nuckolls County*, 6 Neb. 204; *Grand Island Gas Co. v. West*, 28 Neb. 852; *McElhinney v. City of Superior*, 32 Neb. 744; *Poppleton v. Moores*, 62 Neb. 851, reaffirmed, 67 Neb. 388.

"In such cases, says Judge Dillon, 2 Municipal Corporations (4th ed.) sec. 922, the court should regard the action as 'in the nature of a public proceeding to test the validity of the corporate acts sought to be impeached, and deal with and control it accordingly.' It is evident that, if, in such cases as the present, a taxpayer cannot intervene, no one else can except one who is a participant in the illegal proceedings, and who, according to the defendant's first contention, will be estopped from so doing.

"Finally, it is insisted that the action ought not to be entertained, because it is not made to appear that the public has suffered, or is in danger of suffering, any injury from the proceeding complained of, it not being shown that, if the statute had been obeyed, a lower bid for furnishing the supplies in question would have been obtained. So to hold

would be, practically, to repeal the statute. No one can say what would have happened if something which did not occur had taken place."

It is therefore ordered that the judgment of the district court be reversed and a judgment pursuant to the prayer of the petition be entered in this court.

REVERSED: DECREE FOR PLAINTIFF.

Note—See States, 36 Cyc. 888 (1926 Ann.), 890, 891, 895.

THOMPSON, J., dissenting.

I find myself unable to agree with the majority opinion, either in the statement as to the issues of fact, or the conclusions of law. Plaintiff Fischer brings the action against George W. Marsh, auditor of public accounts, as sole defendant, alleging, in substance, that he is a resident taxpayer; that the state, through its officers, in May, 1924, established a gasoline station in the city of Lincoln, and ever since has been, and now is, selling gasoline to the public generally at retail, and intends to continue to do so; that defendant has and will issue warrants to different persons (designating each by name, and specifying the amount of each warrant in dollars) who have furnished oil and will furnish it, which warrants are drawn on the "equipment and material fund" of the public works department, appropriated for this department in maintaining public bridges, automobiles and trucks used by such department; that there was not included in such appropriation any sum for the purpose of buying and selling gasoline to the public, or for maintaining such station; that the issuing of such warrants diverted the money in that fund from the purpose for which it was appropriated; that the issuance of such warrants is a violation of section 25, art. III of the Constitution.

Plaintiff further alleges that he has no adequate remedy at law, and prays "that defendant be permanently enjoined from issuing or delivering any warrants upon said 'equip-

ment and material fund,' or upon any other fund, for the payment of gasoline or oils or supplies or materials of any kind in the carrying on and conducting of said business."

Defendant, for answer, admits that plaintiff is a resident taxpayer; that the state is selling gasoline at retail to the general public; that warrants for payment of gasoline, including that so sold, have been drawn upon the equipment and material fund, and paid by the state treasurer, and denies each and every other allegation.

Further answering, defendant alleges that warrants were issued in payment of gasoline purchased by the department of public works for use by that department, and by other departments of the state, long before it was sold to the public, and that said department uses gasoline for purposes other than retail; that all vouchers for warrants were approved by the acting secretary of public works, acting secretary of finance, and governor; that there was nothing on such vouchers indicating that they were for the payment of gasoline sold at retail, or for what purpose it was used by the state.

The answer further states, as follows: "The defendant says further the equipment and material fund on which said warrants were drawn is a revolving fund; that no part of it is raised by taxation; that it is a fund derived almost entirely from the sale of equipment and material donated to the state of Nebraska by the United States government, and that if any gasoline purchased with money from said fund is sold at retail the proceeds of such sales are immediately turned back into said fund so that at no time is the fund depleted by the sale of any gasoline at retail."

The reply is a general denial.

It will be seen from the pleadings, as well as from evidence hereinafter quoted, that the majority opinion is wrong wherein it states: "There is no controversy as to facts." It is not admitted that the vouchers cover gasoline bought for retail purposes only, nor that they are for gasoline sold only at retail. It is not admitted that no appropriation was had covering these claims. It is not alleged by plaintiff

nor admitted by defendant that the gasoline station was established for the purpose of selling gasoline at retail. It is not admitted that this gasoline was purchased other than in the ordinary course of the state's business. It is not alleged that claimants seeking vouchers are those who had received vouchers, or those who would in the future receive vouchers, or would have knowledge of the purpose of the state in buying gasoline, and that the purpose was to retail the same. These vendors were, and are, without fault. Bad faith on their part is not even charged. Under the pleadings, evidence, and the law applicable, these vendors are entitled to the protection of this court, and are necessary parties to this action.

We shall now see what the evidence shows. Defendant Marsh, on behalf of plaintiff, after the usual preliminary questions, was interrogated as follows: "Q. Now, you are familiar with the fact that the state was purchasing and selling gasoline at retail, weren't you? A. I was never officially notified. The state was buying gasoline and had been for years and selling it to the different departments of the state. * * * Q. And you have other warrants for the payment of gasoline that has been purchased and sold by the state, have you not? A. No, sir; I have vouchers. Q. And you have vouchers ready for your signature? A. Presented to us. Q. And were it not for this injunction, it is a fact, is it not, that you would issue those vouchers? A. Yes, sir." On cross-examination he testified: "Q. They merely show that the vouchers were for so much gasoline, and each voucher is approved by the governor, is it? A. Yes, sir. Q. And by Mr. George Hall, the acting secretary of the department of finance, and by Mr. Cochran, the acting secretary of the department of public works? A. Yes, sir. * * * Q. And they are drawn on the material and equipment fund? A. Yes, sir. Q. Have you in prior years drawn warrants for vouchers drawn on this same material and equipment fund for gasoline? A. I have. * * * Q. The voucher is issued for gasoline? A. Yes, sir. * * * Q. Now, the material and equipment fund is a fund that the

state uses, is it not, to pay the purchase price of different articles and supplies that different departments and also counties require? A. It is a revolving fund and they use it for different purposes. Q. And do you know whether or not this money taken in for the sale of gasoline at retail goes back into that fund? A. Yes; it is a revolving fund, and not only has the fund been kept intact but a profit returned for that which has been sold." The following questions were asked this witness on redirect: "Q. Now, Mr. Marsh, don't you know that the treasurer does report the amount of sales, and has exhibited to you from time to time the amount of sales and the amount of money realized from the sale of gasoline by the state at retail? A. Yes; I think they issue a daily receipt, I guess, for the amount of money received, and probably mentions in there what it is for. Q. Now, these warrants when drawn for the payment of gasoline as purchased include the amount of the cost of the gasoline so sold at retail, does it not? A. Yes; I think so. Q. You know that fact when you issue these warrants? A. Yes; I know that when received the money was for the purchase of the gas."

Mr. J. R. Farris, then state purchasing agent, testified as follows: "Q. When you purchase more or less in carload lots, or considerable quantities, is it purchased primarily or solely for the sale at retail? A. As far as the purchasing agent knows it is simply bought on the requisition of the department without any reference to what use is made of it. Q. Do you know, Mr. Farris, whether or not gasoline is used by the department of public works itself and by other departments of the state government? A. It has been customary for a long time for the department to buy gasoline through this fund and sell it to the other agencies of the state, so that the state would get all of its gasoline at wholesale prices."

Mr. Hiss, superintendent of equipment, testified as follows: "Q. What do you do with the money which you receive from the sale of gasoline at retail for the state? A. Deposit it with the state treasurer. * * * Q. On that

deposit with the state treasurer is there anything showing to him that this is the proceeds of the sale of gasoline by the state at retail? A. We make a deposit slip, and I think in every case it is shown where the money is derived from. * * * Q. If you deposited $500 with the treasurer from the sale of gasoline you give him a slip showing so many gallons sold and the amount? A. That would be an item—that would be on the same sheet.

The following testimony is that of Mr. J. M. Davey, a bookkeeper in the state treasurer's office: "Q. Are you able to state in what funds they deposit that money? A. In the material and equipment fund; the money is thrown into the general fund and distributed on the fee ledger and then distributed. * * * Q. That is the fund from which the payment for gasoline is made by the state? A. Yes, sir. * * * Q. The equipment and material fund is a revolving fund? A. Yes, sir. Q. It is not raised by taxation? A. No, sir."

I submit that it is not shown that the gasoline for which the warrants in question were issued in payment was not purchased in the ordinary course of business. This burden was on the plaintiff and he did not meet it. Every presumption inures in behalf of the state's legally constituted authorities, and in behalf of legal and honest dealing. From the majority opinion, one is led to infer that the onus is on those selling gasoline to the state, who are not even parties to the suit.

The supreme executive power is vested in the governor, and by statute the departments of finance and public works are established to aid the governor. Section 7266, Comp. St. 1922, provides: "Each department shall have exclusive supervision, regulation, and general control over the enforcement, execution and administration of the laws relating to the several subjects and matters assigned in this act to the departments respectively." And section 8500, Comp. St. 1922, provides: "Wherever, by this act, any executive authority is vested in, or any duty imposed upon a department, the word 'department' or the words 'department of

finance' * * * or 'department of public works' shall be construed to mean the governor of the state." From the foregoing it will be seen that the governor and acting secretaries of finance and public works are necessary parties defendant. In *Century Oil Co. v. Department of Agriculture,* 110 Neb. 100, and *Century Oil Co. v. Department of Agriculture,* 112 Neb. 73, suits were brought to enjoin the secretary of agriculture from collecting certain fees, and the governor and oil inspector were joined with him as defendants.

The third paragraph of the syllabus of the majority opinion reads as follows: "There has been neither authorization for, nor appropriation of funds to permit of, the purchase of gasoline by the state or its officers for sale to the public, and warrants drawn to pay for gasoline so to be disposed of are unauthorized." This is answered by sections 35 and 38, ch. 28, Laws 1923. Section 35 provides: "The receipts for the biennium ending June 30, 1925, together with any unexpended balance on hand June 30, 1923, are hereby appropriated in the following revolving funds: * * * and state engineer's department, state equipment and material fund." Section 38 reads as follows: "All unexpended balances of funds herein appropriated, for any department or office when any reorganization plan adopted at this session becomes effective, are hereby appropriated to the respective departments which will administer or discharge the functions or duties now administered or discharged by the departments or officers for which appropriations are made by this act."

Thus, it will be seen that the word "receipts" used in the 1923 enactment includes proceeds from multitudes of transactions and sales, amounting to thousands of dollars yearly, sales necessary to be made of things purchased and repurchased and sold and resold to all other departments of the state, counties, and individuals, including gasoline, by the department of public works, from which the revolving fund is maintained. The majority opinion holding that the proceeds of such sales should be placed in the general

fund, not to be used again until an appropriation is made of such "receipts," annuls this legislative provision above quoted, and leaves the equipment and material fund a revolving fund which does not revolve.

It is admitted in the majority opinion that the state sold this gasoline at a profit. Yet this same opinion precludes the unpaid vendors of the gasoline from receiving any remuneration whatever for it. Before plaintiff is entitled to equity, he must do equity, and in order that he may do so, a finding should be had in favor of the vendor claimants to the extent of the fair market value of the oil received by the state. And having sold the gasoline at a profit, the price at which it was furnished is at least the fair market value, and each claimant is entitled to a warrant for that amount drawn on the equipment and material fund. In *Grand Island Gas Co. v. West,* 28 Neb. 852, we held that, although the contract was illegal, yet, "inasmuch as the city has accepted the benefits of the contract, it must do equity, and to do equity the city must pay to the Light & Fuel Company, not exceeding the contract price, * * * with 7 per cent. interest thereon." To the same effect, see *Clark v. Lancaster County,* 69 Neb. 717; *Stickel Lumber Co. v. City of Kearney,* 103 Neb. 637; *Miles v. Holt County,* 86 Neb. 238; *Lincoln Land Co. v. Village of Grant,* 57 Neb. 70; *Nebraska Bitulithic Co. v. City of Omaha,* 84 Neb. 375.

Then, as hereinbefore stated, the record is without evidence showing, or tending to show, that the gasoline, payment for which the majority opinion enjoins, was purchased solely for sale, or was sold, at retail. On the other hand, the evidence does show that the state buys large quantities of gasoline for its own use.

It must be remembered that Auditor Marsh is the sole defendant in this case. It is an elementary rule in equity that all persons materially interested, either legally or beneficially, in the subject-matter of a suit should be made parties to it, so that all matters involved may be determined and all rights protected, and a decree entered meting out justice to all, thus avoiding a multiplicity of suits, instead

of giving rise to a multiplicity of suits. Each party to this suit, being a citizen, would be benefited by the state not paying the debt. The officers who know of the transaction, and are the moving factors, as well as those to whom the debt is owing, are not before the court. Their acts are being impugned, and evidence presented affecting their standing as men and as officers; the validity of the vendors' contracts are being determined, and yet they are not before the court. The parties necessary to a determination of questions directly involved must be present in a law action. The extraordinary remedy of injunction demands the presence of all who will be affected thereby. The majority opinion holds that the original purchase of the gasoline was for the purpose of sale at retail, and this without either vendor or purchaser being present.

In *Walrath v. Board of County Commissioners,* 18 N. M. 101, the court held: "Where a county has contracted with a party to construct a courthouse and jail, and a taxpayer seeks to enjoin the board of county commissioners from paying said contractor, * * * the contractor is an indispensable party to the suit, and where such contractor was not made a party, the court properly dismissed the petition." See, also, *Minnesota v. Northern Securities Co.,* 184 U. S. 199, 235; *State v. Anderson,* 5 Kan. 90; *Smith v. Crissey,* 66 How. Pr. (N. Y.) 112; *Hoppock v. Chambers,* 96 Mich. 509. Quoting from the last-cited case: "The contractor is a necessary party to a bill filed by taxpayers against the president, clerk, treasurer, and trustees of a village, to restrain the payment of moneys under a contract entered into by the village council for furnishing a water supply." In every case cited herein, as well as the case of *Woodruff v. Welton,* 70 Neb. 665, cited in the majority opinion, the contracting party to be affected by the injunction, if one were granted, was made a party defendant.

The judgment of the district court in dismissing the action at plaintiff's costs was right, and should be affirmed.

AUGUST F. WITTE, APPELLANT, V. JOHN J. BROZ ET AL., APPELLEES.

FILED FEBRUARY 17, 1925. No. 24111.

1. **Bills and Notes: FRAUD: BURDEN OF PROOF.** When evidence has been produced tending to prove that a negotiable instrument was procured by fraud, or delivered to the payee upon a condition not fulfilled, the burden is upon a purchaser of the note, before due and for value, to prove that he is a *bona fide* holder.
2. ———: **TRANSFER: GOOD FAITH.** Upon an issue of the good faith of the transfer of a negotiable promissory note, evidence that the same remained in the possession of the transferor, and that he treated the same as his own after the alleged transfer, are competent and material facts for the consideration of the jury.
3. **Evidence** detailed, and *held* sufficient to support the verdict for defendants.

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

Dort & Witte, for appellant.

Grant G. Martin, Bartos & Bartos and *H. W. Baird, contra.*

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

REDICK, District Judge.

Action by August F. Witte against John J. Broz and Adela Broz upon a promissory note for $3,000, dated June 16, 1920, due March 1, 1921, executed by defendants to one B. R. Hendrix, acting for the "Realty Investment & Holding Company, a corporation," in connection with a contract for the sale of a farm of 160 acres to defendants by said corporation. Two other notes of the same date and maturity for $3,000 and $4,000, respectively, were executed in the same connection. Hendrix had no interest in the notes and immediately indorsed them to the corporation. Plaintiff purchased the note in question from the corporation July 6, 1920, for full value, and claims to have made

the purchase in good faith, without knowledge of any defense thereto between the original parties, the note being indorsed to plaintiff in ordinary course. The defendants allege in their answer, and present evidence tending to sustain the same, that the notes were procured by fraud of the corporation and its agents in that, as a consideration thereof, the corporation agreed to sell a farm belonging to defendants for $240 an acre by March 1, 1921, and that if they failed to do so defendants' notes, which they agreed would be held with the contract in the bank at Swanton until that date, would be returned to defendants. It was further alleged and evidence offered in support that plaintiff was not a *bona fide* purchaser of the note in suit. The case was tried to a jury, verdict returned for the defendants, and from the judgment thereon plaintiff appeals.

This is the second appearance of this case in this court, the decision on the former appeal being found in 111 Neb. 76, in which a verdict and judgment against the indorser was set aside and action dismissed as to the indorser for want of due presentment of the note, and verdict and judgment against the plaintiff reversed for want of sufficient evidence to impeach the good faith of plaintiff in the purchase of the note. It was there held, rightly as we think, and is therefore the law of the case, that, under the issues as presented, evidence of fraud in the original transaction was competent, and, if established, we held in *Lahrman v. Bauman*, 76 Neb. 846, that the burden of proof is upon the plaintiff to show that he is a *bona fide* holder.

The evidence upon the question of fraud is quite fully set forth in the former opinion and was substantially the same on the second trial, and will not here be repeated. Suffice it to say that it was amply sufficient to support the findings of the two juries of the existence of fraud, or that the notes were executed upon condition, which leaves but one question for decision on this appeal as to the facts, viz., whether the evidence is sufficient to support the finding of the jury against the plaintiff. Some questions of law

arising upon the rulings and instructions of the court will be discussed later.

The evidence presented by plaintiff as to the facts and circumstances connected with his purchase of the note in question are set forth in detail in the former opinion, to which we refer as a correct summary of that produced at the second trial, and dismiss the consideration thereof with the remark that it seems on its face to satisfy all the requirements of the statutes and law relating to *bona fide* purchasers of negotiable instruments, and would require a finding for the plaintiff unless impeached by other evidence sufficient in law to warrant contrary inferences.

Upon the first trial the evidence of plaintiff's bad faith was very meager, that principally relied upon by defendants being an admission or statement by plaintiff, positively denied by him, that plaintiff was "Hendrix's partner." It is stated in the opinion that "there is further evidence which is material as bearing upon the question whether Witte is a holder for value," but the same is not referred to in detail, and, as stated, we held it was insufficient to sustain a finding of bad faith. Upon the second trial further evidence on this branch of the case was received, which we will now detail.

The defendant John J. Broz testifies that on February 28, 1921, Hendrix came to his house, unbuttoned his overcoat, and said, "See, I have got your notes right in my pocket here and I will make you pay for them," and that he saw the notes in his pocket. Adolph Pivonka, who was cashier of the bank at Swanton and one of the agents of Hendrix in negotiating the contract of sale with Broz, and whose bank purchased one of the notes through Hendrix, testified that on July 16, 1920, ten days after the alleged purchase by plaintiff, Hendrix had the note in suit and the $4,000 note in his possession at the bank trying to sell them to the bank or have the bank dispose of them to its customers, and that the note in suit did not at that time bear the indorsement from the corporation to Witte; that again, on November 18, 1920, Hendrix asked witness to buy or

place the notes, offering him a commission of $400 or $500, and that he had the note in suit and the $4,000 note in his possession at that time, but cannot say whether the $3,000 note then bore the indorsement to Witte. Defendant Adela Broz is the "step-aunt" of this witness.

Joseph Pivonka, father of Adolph and step-brother of Adela, testifies that on March 1, 1921, he saw the note in question and the two other notes lying on a table in the back room of the bank when only Hendrix and his son Adolph and himself were present. The testimony of these facts was not produced upon the first trial. It was directly disputed on rebuttal by Hendrix who testified positively that he had never had possession of the note in suit since its transfer to plaintiff, nor the other $3,000 note since its sale to the bank, July 16, 1920, nor the $4,000 note since its sale to the Nebraska State Bank, according to his testimony, on November 30, 1920. The plaintiff testified that the note in suit had never been out of his possession, that he had never given it back to Hendrix for any purpose, that it was in his pocket at the Swanton bank on March 1, 1921, and never shown to anyone or laid on the table. And witness Coe of the Nebraska State Bank testified that the $4,000 note had never been out of the possession of the bank or given to Hendrix after its purchase, and that no action had been taken for the collection of the note, although it was three years past due. The second trial was had in March, 1924.

A sharp conflict is thus disclosed in the evidence upon the pivotal question of fact in the case. If the jury believed the testimony for the plaintiff, it should have found in his favor; on the other hand, if they believed the evidence for the defendant, and the same is material, it is sufficient to support the verdict.

It is earnestly contended by the plaintiff that the new testimony received at the second trial and above detailed is immaterial and adds nothing to the case made by the defendants on the first trial; but it seems to us that the facts, if found by the jury, that the note in question was in the

possession of Hendrix after the alleged purchase thereof by the plaintiff, and that on July 16 it had not been indorsed to the plaintiff, and that Hendrix on two occasions offered to sell the note to the bank at Swanton, together with the fact that the plaintiff had been an officer of the realty corporation up to a date within three months of his purchase, and that about half of the consideration was paid by the redemption of plaintiff's preferred stock in the corporation, and that plaintiff and Hendrix had had other dealings together, were all matters proper to be considered by the jury upon the question of the good faith of the transaction between plaintiff and Hendrix resulting in the transfer of the note. That question was peculiarly one for the determination of the jury, and the evidence and circumstances do not present a case upon which reasonable minds might not differ. It is further suggested by plaintiff that possession of the note by Hendrix was not inconsistent with the purchase and ownership of plaintiff, because he would have a perfect right to entrust the same to Hendrix for collection or sale; but the difficulty here is that no explanation was offered by the plaintiff, but both he and Hendrix testified positively that Hendrix had never had possession of it after the supposed transfer. We do not feel warranted in disturbing the verdict upon the ground discussed.

A great many objections were made to the introduction of testimony at the trial, most of them being directed against the evidence tending to establish fraud in the original transaction; these have been disposed of by the law of the case, as above stated. We have examined all the other objections of this nature and find no error in the rulings of the court. We have also considered objections urged to the instructions of the court, but find them without error.

Also plaintiff urges that the court erred in refusing certain instructions offered by him. With two exceptions the principles of law stated in those requests were covered by the charge of the court on its own motion. The first exception is the fifth request, whereby the plaintiff asked the

court to charge the jury in effect that no duty rested upon the plaintiff to inquire of the maker of the note or investigate in any manner the consideration for the note, inasmuch as there was nothing upon the face of the note to excite suspicion of any defects therein. This request stated the law and might properly have been given, but its refusal was not prejudicial error, in view of the fact that by instruction No. 4 the court told the jury: "The mere fact that the circumstances surrounding the purchase of the note may be such as to excite suspicion in the mind of a prudent man is not sufficient to impugn the title of an innocent purchaser or *bona fide* holder." And by instruction No. 5: "If you find by a preponderance of the evidence that the plaintiff bought the note for a valuable consideration before it was due, and without notice of any circumstances under which it had been obtained, and without any bad faith or lack of honesty on his part, then and in that case you should find that he became an innocent purchaser and *bona fide* holder of the paper." We may further remark that the questions on this subject, upon the cross-examination of plaintiff, were not objected to at the trial. The second exception is request No. 3, which contained the erroneous statement that "it is incumbent upon the defendants to convince you by a preponderance of the evidence that the plaintiff had knowledge of said fraud," etc., whereas the burden was upon the plaintiff to show that he was an innocent purchaser.

The judgment of the district court is

AFFIRMED.

C. A. SHERMAN V. STATE OF NEBRASKA.

FILED FEBRUARY 17, 1925. No. 24284.

Conspiracy: ACQUITTAL OF COCONSPIRATORS: EFFECT. Upon an information charging two defendants with conspiracy to commit a felony, separate trials were granted; the defendant first tried was convicted, and the second one acquitted. *Held* error to sentence the defendant first tried, as he was entitled to be discharged upon acquittal of his alleged coconspirator.

ERROR to the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Reversed, with directions.*

R. J. Greene, for plaintiff in error.

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

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

REDICK, District Judge.

Information was filed against the defendant, Sherman, and one Lowe charging them with the crime of conspiracy to commit a felony, viz., blackmail. Separate trials were demanded and allowed, and, defendant being tried first, was found guilty by the jury and fined, from which judgment of the court he appeals. A number of interesting questions are presented by the record, but we find it necessary to consider but one.

After defendant had been convicted and before sentence, his alleged coconspirator was tried and acquitted, which the record shows was brought to the attention of the district court by motion in arrest of judgment, which was overruled and sentence pronounced.

We have, therefore, a peculiar situation not met with in any of the adjudicated cases of a charge of conspiracy against two persons only, the first of whom tried being convicted and the second acquitted. The judgments of courts of record import absolute verity, but if both these judgments can stand an absurdity is presented, the one asserting the existence of the conspiracy and the other denying it, and thus the judgments are robbed of that sweet aspect of consistency and truth which is one of their most admirable attributes.

We are cited by defendant to a number of cases discussing the subject, one of which, *State v. Tom,* 13 N. Car. 569, contains a very interesting and learned opinion, citing a large number of English authorities, and announcing the

conclusion: "On an indictment for conspiracy against two, the acquittal of one is the acquittal of the other." In that case the trial of the first conspirator resulted in an acquittal, but the reasoning of the court is equally cogent as applied to the present circumstances. In addition to the cases cited by defendant, we have found that of *Casper v. State*, 47 Wis. 535, which holds that, where separate trials are had of persons charged with conspiracy and the first trial results in a conviction, sentence should be suspended until enough convictions are secured to equal the number of persons necessary to the commission of the crime; and that, if the other defendants are acquitted, the one first convicted should be discharged. This seems to be common sense and in consonance with the principles of law. See 8 Cyc. 689, 690. If both conspirators had been tried together and verdict rendered finding one guilty and the other not, it seems perfectly apparent that the court would have no authority to sentence the one and discharge the other.

The judgment of the district court is reversed and cause remanded, with instructions to discharge the prisioner.

REVERSED, WITH DIRECTIONS.

HOWARD CREMENS V. STATE OF NEBRASKA.

FILED FEBRUARY 17, 1925. No. 24346.

1. **Embezzlement**: CONVERSION AS BAILEE. Before one may be convicted of the crime of conversion as bailee, it must be shown that the defendant was in the rightful possession of the subject of the crime.
2. **Evidence** examined, and *held* insufficient to support the verdict.

ERROR to the district court for Lancaster County: JEFFERSON H. BROADY, JUDGE. *Reversed.*

W. C. Parriott, for plaintiff in error.

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

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

REDICK, District Judge.

Defendant was convicted upon an information attempting to charge the felonious conversion of an automobile with intent to steal the same while it was in his possession as bailee, the charging part of the information being as follows: That the defendant, "then and there being bailee of certain personal property, to wit, one Ford roadster, * * * of the value of $233.55, the personal property of the Singer Sewing Machine Company, a corporation, and while said property was so held by him as such bailee, then and there unlawfully and feloniously did steal, take and carry away said property." Sentence having been pronounced upon such conviction, the defendant appeals to this court.

While there may be some question as to the sufficiency of the information because of its failure to charge conversion of the automobile with intent to steal the same, in the language of the statute, the only question presented for decision is whether or not the evidence is sufficient to sustain the verdict. It appears without dispute that the automobile in question was put into the possession of the defendant as bailee, but it also appears that a few days prior to the taking of the car by the defendant he had been discharged by the bailor, and on the day of the taking the bailor retook the possession thereof from the defendant; later on the defendant took the car and drove it away. It is perfectly apparent, under this evidence, that the defendant did not commit the crime of larcency or conversion as bailee, because a necessary element of the crime is that the defendant be in the rightful possession of the property. The defendant may have been guilty of larcency, or stealing, or taking the automobile, but he was not charged with either of those crimes. It follows that the judgment of the district court is erroneous and must be reversed.

REVERSED AND REMANDED.

HOWELLS STATE BANK, APPELLANT, V. ESTATE OF GEORGE E. MULLER, APPELLEE.

FILED FEBRUARY 17, 1925. No. 22964.

Banks and Banking: ESTOPPEL. Upon the death of M., his brother acting with the acquiesence of M.'s widow, went to the bank, which was the largest creditor of the deceased, for advice. The president of the bank, professing knowledge of the law and assuming to advise, directed summary collection of assets and payment of debts, which was immediately proceeded with by M.'s brother, who paid funeral expenses through an account opened in the bank for the purpose, and also a considerable number of claims against the estate, including one preferred by the bank for overdraft. Afterward, an administration having been begun in the county court, and the estate appearing insolvent, the bank complained of said payment of funeral expenses and claims, contending that they were unauthorized and illegal. *Held*, that the advice of the bank's president was in connection with the bank's business, and that the bank was thereby estopped to maintain its objections.

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

George W. Wertz and *W. C. Hronek*, for appellant.

John C. Sprecher, contra.

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

SHEPHERD, District Judge.

George E. Muller, who was farming on a comparatively large scale in partnership with his brother Frank, died November 19, 1919, leaving a girl wife and an infant daughter, and leaving about $6,000 worth of personal property, the major portion of which consisted of crops, live stock and farm machinery held in conjunction with his said brother. His debts, together with funeral expense and costs, amounted to a little more than this, as it finally proved.

He had always depended upon the bank in his lifetime and to the bank, which was also his largest creditor,

straightway went his brother Frank, with at least the passive acquiescence of the young widow, for advice and direction in regard to his estate. The president of the bank, who stated at this juncture that he was as good as a lawyer, does not seem to have considered the matter of an administration, but promptly advised his visitor to collect the assets, pay the debts, and so settle up the affairs of the deceased.

Frank proceeded accordingly. Funeral expense, five or six times as great as the law could prefer in the settlement of an insolvent estate, was incurred and paid. Labor was employed. Crops were gathered, divided and sold. Horses, cattle and and hogs were disposed of. Debts and claims were speedily paid without passing under the scrutiny of the court, among them a debt on overdraft to the appellant bank. Frank would deposit money collected in the bank in the name of the widow, and check it out on checks signed by himself thus: "Mrs. Geo. E. Muller, by Frank J. Muller." In all this he appears to have acted honestly and in good faith, with a regrettable lack of knowledge consequent upon poor legal advice. The widow charges him with no fault in the premises. And, though maintaining in her testimony that she did not authorize this checking and paying, or even know that it was being done, she frankly states that she attaches no blame to the bank or to its president, Mr. Quesner.

On or about the 29th day of December, 1919, perhaps a month and a half after the death of the decedent, the widow consulted a lawyer and applied for letters of administration. She was duly appointed on or about the 26th day of January, 1920. Only two claims were filed against the estate, one on behalf of Frank J. Muller in the sum of about $800 for a debt in connection with the partnership. This claim appears to have been preferred as a partnership debt and was subsequently duly allowed in the sum of $615.47. The other was a claim of the bank in the sum of $4,445, and was allowed by consent. About the 20th day of January, 1921, the court, upon petition of the bank

for a *pro rata* application of the funds in the hands of the administratrix, ordered a payment of $3,000 to the bank and a payment of $300 to Frank J. Muller. And a few days later the administratrix paid the remainder of the Muller claim in the sum of $315.47. Subsequently thereto, the bank asked for an accounting on the part of the administratrix, and she filed her final account, claiming credit for all payments made by Muller and herself under the advice of the president of the bank, showing some further payments by her on account of labor and funeral expense, and claiming fees as administratrix in the sum of $160.98, widow's statutory allowance in the sum of $200, and exemptions in the sum of $755. And though the bank made specific and vigorous objection to practically the whole of the account, and particularly to the funeral expenses, a settlement with Nick Muller in the sum of $75, the payment of the final $315.47 to Frank J. Muller, the claim of exemptions in the sum of $755 and the allowance of administratrix' fees in the sum of $160.98, the county court approved the account and settled the estate upon it. The account showed $6,097.69 collected and $6,391.80 paid out, leaving the sum of $294.11 due the estate, and the court entered a decree requiring the bank to repay to the estate this balance. The district court, upon appeal, sustained the findings and decree of the county court. An appeal followed to this court.

Though a considerable sum in the aggregate, including maintenance money during the settlement of the estate, fees of the administratrix, widow's statutory allowance, and exemptions, was allowed the widow, it would seem that the allowance was properly made. The appellant argues with some force that there could be no exemptions to the widow under the statute (Comp. St. 1922, sec. 1222) because the property selected was held in partnership at the time of the death of the decedent, and therefore could not be said to be exempt from execution or attachment. But it is probable that the provision of the statute referred to was simply to protect partnership property from a claim

of exemptions to the detriment of the partnership, and that it was not the intention of the legislature to deprive the widow of such exemptions after the property of the deceased had been duly segregated from the partnership holdings.

Be that as it may, the district court held with the county court and approved the final account, on the theory that the bank was estopped to maintain its objections, though recognizing that the proceedings were highly irregular. We feel, upon examination of the case, that it was justified in so doing. While the appellant insists that there are no facts in the record sufficient to support a plea of estoppel, it cites no authority to maintain its position. True, the advice of its president, however hurtful and expensive it might be to the estate, could hardly be charged to the bank if the latter had no interest in the premises. But the bank was the largest creditor, and vitally interested. It received immediately from Frank payment of the overdraft of the deceased, thus participating with many other creditors in the benefits of the unauthorized paying advised by its own chief officer. With full knowledge of all the facts, except possibly that the estate was insolvent, it paid the unauthorized check given by Frank J. Muller for funeral expenses. The advice of its president became its advice because of its interest and its action, and subjected it to the doctrine of estoppel.

Our court said in *Campbell v. Nesbitt*, 7 Neb. 300: "Generally, whether acts or admissions of a party shall operate by way of estoppel, or not, must depend upon the circumstances of each case, and therefore there can be no fixed and settled rules of general application to regulate estoppel *in pais*, as in technical estoppels." And in a later case, *Burke v. Utah Nat. Bank*, 47 Neb. 247, it used this language: "To constitute an estoppel *in pais* the person sought to be estopped must have conducted himself with the intention of influencing the conduct of another, or with reason to believe his conduct would influence the other's conduct, inconsistently with the evidence he proposes to

give." Though the facts in the case cited differ from those in the case at bar, the principle is clearly applicable. An appellant should not be permitted to advise the estate to pay claims without administration, and then contest the payment of said claim after an administration has been found necessary.

The judgment of the district court must accordingly be held to be upon sound ground, notwithstanding that otherwise the final account of the administratrix must have been disallowed on the authority of *Huebner v. Sesseman*, 38 Neb. 78, and a number of later cases approving the general rule therein stated.

AFFIRMED.

HOWELLS STATE BANK, APPELLEE, V. MARY ANN PONT ET AL., APPELLANTS.

FILED FEBRUARY 17, 1925. No. 22984.

1. **Wills: DEVISE: CONSTRUCTION.** A charge upon land is distinguished from a devise of land in trust, in that in the former the land is devised generally for the beneficial enjoyment of the devisee, subject to the payment by him of a specific sum of money on the performance of a particular duty, while in the latter the devise is limited to some particular purpose, with no beneficial interest in the devisee, at least before the expiration of the trust.
2. **Trusts: CREATION.** Precatory expressions are to be given their ordinary significance, and will not be held to create a trust, unless it clearly appears from the terms and dispositions of the will and the circumstances, relevant to proper construction, that such expressions were used in an imperative sense, and that the creation of a trust was intended by the testator.
3. **Wills: DEVISE: CONSTRUCTION.** *Held*, in this case, that the will did not create a trust, but that title to the land therein devised vested in the devisees immediately upon the demise of the testator subject to a stated charge for the support of the latter's widow.
4. **Mortgages: VALIDITY.** The mortgagor having by the will a vested interest in the land in question, his mortgages to the bank were valid and were subject to foreclosure upon condition broken.

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

George A. Eberly, for appellants.

George W. Wertz, contra.

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

SHEPHERD, District Judge.

Samuel Pont died testate many years ago, leaving him surviving his widow, Mary Ann Pont, his two sons, Alfred and William, and his two daughters, Elizabeth Loughrey and Ann Sobota. His will, which was probated in 1898, contained the following provisions, to wit:

"Second, I give, devise and bequeath to my wife, Mary Ann Pont, all my household furniture, and the use of my dwelling house and lot being a part of out lot B in Howells, Nebraska, as it now stands in my name during her natural life, and I also give her for her support and use eight dollars ($8.00) from the income of my farm, the west half of the northeast quarter and the east half of the northwest quarter of section twenty, township twenty, and range four east of the 6th P. M. in Colfax county, Nebraska, to be paid to her monthly by my executor during the term of her natural life."

"Fifth. I give, devise and bequeath to my daughter, Ann Sobota, two hundred dollars as soon as same can be realized from the income of my estate by my executor, or out of the estate, after my wife's death.

"Sixth. I give, devise and bequeath to my son, William Pont, six hundred dollars to paid to him by my executor as soon as same can be realized from the income of my estate, or if same cannot be realized from the income, then same shall be paid to him, out of my estate after my wife's death.

"Seventh. All the rest and residue of my estate, real, personal or mixed of which I shall die seised or possessed,

or to which I shall be entitled at my decease, I give, devise and bequeath to be equally divided between and among my three children as follows: Alfred Pont, Ann Sobota and William Pont.

"It is further my intention that none of my land shall be sold until after the death of my wife, Mary Ann Pont, but should it be necessary to sell any of it, to pay any of my debts, then I direct that only the east eighty acres, being the west half of the northeast quarter of section twenty, twp. twenty, range four, east, be sold and no more."

The widow has received all that was provided for her in the will and is now deceased, her demise occurring subsequent to the filing of the briefs in this case, and counsel suggesting her death upon argument of the cause. It is also probable that William Pont and Ann Sobota have received the legacies provided for them in the will, though that is perhaps immaterial. It appears from the record that William Pont has given mortgages from time to time upon his interest in the land left by the deceased, and in 1913 and 1914 Alfred Pont gave three mortgages on his interest in said land to the Howells State Bank. Petition to foreclose these mortgages was filed in the district court for Colfax county in January, 1921. Decree of foreclosure was entered in said cause on the 3d day of May, 1922, which decree contains a finding that said Mary Ann Pont was entitled to an annuity of $96 a year as a charge imposed upon the land by the will, and also that it was agreed by stipulation of the parties that she should have the entire rent and income from said land during the term of her natural life. And the decree directs a sale of the premises subject to her rights as so found and stipulated.

The case was vigorously contested in the trial court upon the theory that according to the terms of the will, and according to the provisions of an agency agreement made by Mary Ann Pont, William Pont, Ann Sobota and Alfred Pont on the 1st day of February, 1904, Alfred Pont had no vested right whatever in the land, and that the

mortgages made by him were invalid; that the will impounded the land as trust property, not to be divided and not to vest in Alfred and William Pont until after the death of Mary Ann Pont. This contention was set forth in lengthy answers filed by Mary Ann Pont, and by Edward E. Dickenson, as administrator of the estate of Alfred Pont, deceased; the demise of Alfred Pont having occurred subsequent to the making of said mortgages and before the beginning of said foreclosure suit. Replies were filed in which the Howells State Bank denies that it ever had any notice or knowledge of said agency or trust agreement. Said agency agreement recites, among other things, that the estate is solvent; that the heirs are all of legal age and sound of mind; that the heirs desire that the property be taken charge of, properly managed, and finally divided according to the will among the children; that Alfred Pont is therefore appointed to take charge of the estate and to so manage and distribute it, paying taxes and upkeep, paying Mary Ann Pont the sum of $96 a year, and such other sums not exceeding the net rentals and income from the estate, as may be necessary for her comfort and welfare, and applying the surplus, if any, to the legacies; that said agency agreement terminate with the life of Mary Ann Pont.

The contention urged in the district court is brought here upon appeal, appellants insisting that a trust was established both by the will and by the agency agreement described; that no title vested in Alfred Pont, and that he could make no mortgage to the bank. They contend that the district court was in error in entering a decree of foreclosure. They urge that such mortgages were at most only agreements by which the said Alfred Pont or his representatives could be required to execute a mortgage upon his undivided portion upon or after the death of Mary Ann Pont.

The appellee denies that it had any notice or knowledge of the agency agreement which was entered into. And we must so hold, because there is no evidence in the

record upon which a counter conclusion can properly be arrived at. The question then, as the court views it, is simply whether or not the will established a trust under which title to the land in question was to be held until after the death of the widow of the deceased, or whether the interest of the widow was a charge imposed upon the land, subject to which the title vested in said sons upon the death of their father.

There is an essential difference in the law of wills between a trust and a charge imposed upon property devised. In the one the title to the real estate vests in the trustee, while in the other it vests in the devisee. In the former the devisee has no title at all until the trust is terminated. In the latter his title is not suspended, though the enjoyment of the gift may be postponed by the power or charge to which the land is subject. "A 'charge' upon land by will is distinguished from a 'trust' of the land, in that in the case of the former the land is devised generally for the beneficial enjoyment of the devisee, subject, however, to the payment by him of a specific sum or specific sums of money, or the performance of a particular duty, while in the case of a 'trust' the devise is limited to some particular purpose, with no beneficial interest in the devisee." *Lang v. Everling,* 3 Misc. (N. Y.) 530.

The distinction is well pointed out in Alexander on Wills, an authority much quoted in the briefs of both appellant and appellee: "In order to create a trust by the use of precatory expressions, three things are essential: First, that by the use of such expressions the testator intended to impose an imperative duty upon the devisee and to create a trust." "To create trusts by the use of words of recommendation, desire, entreaty, or the like, it is necessary to give such words a different meaning from their common acceptance. For this reason the modern tendency is to limit the application of the doctrine of precatory trusts, and words of desire, recommendation, and the like, will be given their ordinary significance and will not be held to create a trust unless, from the terms and dispositions of

the will and the circumstances, relevant to proper construction, it clearly appears that said expressions were used in an imperative sense, and that the testator intended to create a trust." 2 Alexander, Wills, secs. 1090, 1091.

We search the will in vain for words clearly indicating that the testator intended to establish a trust. In the cases of *Clark v. Fleischmann*, 81 Neb. 445, and *Snyder v. Collier*, 85 Neb. 552, cited and relied upon by the appellant, the language of the will is pretty nearly express in establishing a trust. The will constantly speaks of "executor and trustee." Here no language akin to that is employed. On the contrary, after giving his wife his household furniture, a life estate in his dwelling house and $8 a month from the income of his farm, and after two specific bequests of money to his children, the testator says in the seventh article of his will: "All the rest and residue of my estate, real, personal or mixed of which I shall die seised or possessed, or to which I shall be entitled at my decease, I give, devise and bequeath to be equally divided among my three children as follows: Alfred Pont, Ann Sobota and William Pont." These words import a gift and a vesting of title, though the enjoyment of the same be postponed to the carrying out of the charge upon the estate.

It is true that the next article of the will recites that the testator intended that none of his land should be sold until after his wife's death, with the proviso that, should it be necessary to sell any of it to pay any of his debts, then only the east 80 acres should be sold. The testator did not provide in his will, as in the case of *Hiles v. Benton*, 111 Neb. 557, that his son should not alienate the interest devised to him. What he had in mind was to make his wife's support the first charge upon the land during her whole life so that neither she nor any one else, nor all together, could by any agreement or by any manner of conveyance so alienate the land that it would be relieved from the charge of her maintenance. But it does not appear that he intended to deprive his children from using their portions as they chose so long as they did not deprive

their mother of the certainty of support that a charge upon the land provided. And he meant to bind his wife so that she could not deprive herself of that security. The doctrine of the *Hiles* case does not apply in the case at bar. In that case it was the intention of the testator to give his son an estate with a limitation that should take the place and perform the function of a spendthrift trust.

It would also seem that the contention of the appellants that the administrator is estopped is entirely sound. Alfred Pont in his lifetime took the position in executing the mortgages in question that he had a vested interest in the land, and neither he nor his representatives can well take the opposite view in this proceeding. Nor does it seem that the representatives of Mary Ann Pont, now that she is dead and now that she has had every use of the land that could possibly accrue to her under any view of the meaning of the will, should be heard to complain in her behalf.

The intention of Samuel Pont, as we arrive at it upon a careful consideration of the language of his will and of the testimony, was to vest the title to his land in his children in undivided portions. This being the case, and the will so being construed, an interest in the fee was vested in Alfred Pont at the time that he made the mortgages foreclosed in this action.

It follows that the judgment of the district court is right, and the same is

AFFIRMED.

SCOTTSBLUFF DRAINAGE DISTRICT, APPELLEE, V. SCOTTS BLUFF COUNTY, APPELLANT.

FILED FEBRUARY 17, 1925. No. 23726.

1. Drains: SPECIAL ASSESSMENTS: PUBLIC HIGHWAYS. In the apportionment of a drainage district lying wholly in a certain county, the roads of that county within the district are sufficiently described by the words "public highways," such words,

by proper construction of the drainage act, excluding railroads and city streets and applying only to roads under the county's jurisdiction.

2. ———: ———: RELIEF. While special taxes, as for a drainage district, are not to be levied in excess of benefits conferred, property owners aggrieved on that ground are ordinarily confined to the direct proceeding for relief; and, if they fail to make objections upon the hearing provided for that purpose, they will not be afforded a remedy in a collateral proceeding.

3. ———: ———: ———. If timely objection is not made, even serious irregularities which do not affect the jurisdiction of the board cannot be made matter of effectual defense after apportionment and assessment duly made.

4. ———: ———: INTEREST. *Held*, in this case, that the district court did not err in entering judgment for interest at the rate of 10 per cent. per annum from the first day of May, respectively, following the assessments for the several years in question.

APPEAL from the district court for Scotts Bluff county: P. J. BARRON, JUDGE. *Affirmed.*

William H. Heiss, for appellant.

Morrow & Morrow, contra.

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

SHEPHERD, District Judge.

The Scottsbluff Drainage District was organized under article V, ch. 17 (secs. 1813-1862) Comp. St. 1922, in the year of 1917. The district, wholly within the limits of Scotts Bluff county, took in numerous highways which were charged against the county as lands for which it must pay. They were figured as 3,600 units in an actual total for the entire district of about 29,000 units, the description in the apportionment being in these words: "Scotts Bluff county on public highways within Scottsbluff Drainage District * * * units 3,600." The county made no objection, and took no appeal from the order of apportionment finally made. Assessments were made on these units as follows: Year of 1918, $4,320; year of 1919, $2,160; year of 1920,

$1,800. The county failed and refused to pay and on the 5th day of November, 1921, the district filed a claim for such assessments with interest at 10 per cent., respectively, from May first following assessments. The claim was disallowed, appeal was taken to the district court, where judgment was entered in favor of the district for principal and interest in the sum of $10,798, and the case is now here for a review of such judgment.

In the first place, the county contends that its highways are not sufficiently described to meet the requirement of the statute. But we think and hold that the words "public highways" found in the drainage act apply only to roads under the jurisdiction of the county, as distinguished from city streets, railroads and street car lines. A careful reading of the sections pertinent so indicates. No misunderstanding could have arisen from the description employed. It was sufficiently accurate, as measured even by the standards of *Cuming County v. Bancroft Drainage District*, 90 Neb. 81.

It is settled law in Nebraska, as elsewhere, that a special tax for drainage or the like cannot be imposed in excess of benefits conferred, and that such a tax so laid is void. *Hanscom v. City of Omaha*, 11 Neb. 37. But the county did not raise this defense upon the meeting of the board to hear complaints and objections, though it had notice of said meeting, and it cannot now litigate the question in this collateral proceeding. When the method provided by the statute for arriving at benefits has been followed by apportionment without objection, that apportionment cannot be collaterally attacked in an action for the collection of assessments based upon it. It was so held in *Omaha & N. P. R. Co. v. Sarpy County*, 82 Neb. 140, the court declaring, in regard to the injunction there sought, that the board acted judicially, and that its judgment could only be reviewed in a direct proceeding. We have held similarly in a number of cases following.

In making statement to show what tracts of land had not made payment, as required by section 1833, Comp. St.

1922, the board failed to mention these highways and failed to certify that the county was in default. Also, in the notice of apportionment filed with the county clerk, and subsequently published in order that interested owners might be advised of the facts and have opportunity to present objections, the units of the whole district were summed up at 41,211, when in fact they totaled not more than 29,000, and possibly considerably less. These were matters of serious mistake and omission, but not such as to deprive the court of jurisdiction. The notice was given, and the true total of units was ascertainable by computation. In the other case the statement required by the law was duly made, though the omission occurred. In neither case does the law provide for the invalidation of notice or statement by what happened or by circumstance of like character. It is probable that the county did not lack knowledge because of this error in addition or because of the omission in question. But if it did, such lack must be charged to its own neglect to exercise care. The errors which we are considering are irregularities not affecting jurisdiction. This view finds support in *White v. Papillion Drainage District*, 96 Neb. 241.

The same may be said as to the errors which the appellant charges were made by the board in levying the assessments for the years of 1918, 1919, and 1920. We think that the board substantially apportioned the amounts due from the several tracts in dollars and cents, as prescribed by the statute, though in 1918 the board provided by resolution or motion that the amount levied be 60 cents a unit, and that the president and secretary certify the same to the county clerk. The minutes recite that the statement of the engineer upon which this action was taken showed as necessary 6 cents a unit to pay bonds, 5 cents a unit to pay interest thereon, and 49 cents a unit for other purposes. Assuming all necessary computations, the levy made did not fail to show in dollars and cents the amount chargeable to each unit and to each and all of the tracts. And when the statement of the engineer and the return of president and

secretary are considered, it is apparent that the apportionment to bonds, interest and general fund was certain. *White v. Papillion Drainage District, supra.* It is stated in the opinion of the cited case: "The board is required to 'determine the amount of money necessary to be raised,' but if they 'apportion the same in dollars and cents against the tracts,' and the amount so raised is easily ascertainable by computation, the assessment will not be held void because of a failure to state specifically the amount of the assessment or the amount so raised." On principle, therefore, the assessment for 1919 cannot be said to be invalid.

The record shows, as we read it, that the board estimated for 1919 $29,000 for maintenance, $3,000 to apply on bonds, and $3,000 for interest on bonds, and made the levy, accordingly, 120 cents a unit, 10 to pay bonds, 10 to pay interest, and 100 to pay other expenses. This was apportionment in substantial compliance with the act, and the fact that the president and secretary of the board made the necessary computations and extended the figures is immaterial. So it was, also, in the matter of the levy for 1920.

Finally, it is contended by the county that it should not be obliged to pay interest, except from November 5, 1921, when the claim was filed. It was doubtless considered by the trial court that, inasmuch as the drainage act provides that its assessments shall be treated in the same manner as general real estate taxes and shall draw the same rate of interest (Comp. St. 1922, sec. 1836), interest was computable at 10 per cent. on each assessment from the first day of May following its levy. Upon first impression this seems sound.

We fail to find anything in *Bancroft Drainage District v. Chicago, St. P., M. & O. R. Co.*, 102 Neb. 455, or in *State v. Farrington*, 80 Neb. 628, cited by appellant, to contradict this conclusion. The particular doctrine of *Wittenberg, v. Mollyneaux*, 59 Neb. 203, is stated in the second paragraph of the syllabus as follows: "If the right to damages for breach of a contract is matter of reasonable litigation, and the amount to be recovered, if any, is unliquidated and must be fixed, not by mere computation but by suit,

interest may not be allowed for time precedent to the settlement of the right to a recovery and the ascertainment of the amount."

The *Wittenberg* case is not this case in point of fact. Here was a definite charge by way of special tax, the amount ascertained or easily ascertainable by computation. The trial court was not in error, in our opinion, in entering judgment for interest as it did.

No reversible error appears in the record, and the judgment of the district court is, accordingly,

AFFIRMED.

Note—See Drains, 19 C. J., secs. 232, 238 (1926 Ann.), 248, 261, 272.

CLARENDON E. ADAMS, JR., APPELLEE, V. GUTHRIE & COMPANY ET AL., APPELLANTS.

FILED MARCH 6, 1925. No. 22947.

1. **Venue.** An action at law was brought against A., B., C. and D., in Douglas county, which was the legal residence of D., and he was there served with process, issued by the district court of that county. A., B. and C. were residents of Nuckolls county, and they were served with process in that county, which was issued by the district court for Douglas county. A., B. and C. appeared specially and objected to the jurisdiction of the court over them on the ground that D. was not liable as a defendant, and had no lawful interest in the subject of the controversy as against the plaintiff. *Held*, that the objections to jurisdiction should have been sustained.
2. **Statute Construed.** Section 4699, Comp. St. 1922, construed and applied.
3. **Appearance.** The rule announced in *Gaines v. Warrick*, p. 235, *post*, as to a special appearance objecting to the jurisdiction of the court, approved and followed.

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

J. H. Agee, Arthur F. Mullen and *Frank H. Stubbs*, for appellants.

Bernard McNeny and *John F. Moriarty, contra.*

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

PER CURIAM.

This is an action to recover on two promissory notes, brought by plaintiff Clarendon E. Adams against defendants Guthrie & Company, the Southern Nebraska Power Company, David Guthrie, and C. E. Adams, in the district court for Douglas county. The latter-named defendant is charged as indorser, and the others as makers. The amended petition alleges, in substance, that Guthrie & Company was a Nebraska corporation, organized for the purpose of operating a milling business at Superior, of which David Guthrie was owner and manager; that some time after December 3, 1913, this concern was reorganized into the defendant Southern Nebraska Power Company, of which David Guthrie continued to be owner and manager; that on December 3, 1913, defendants Guthrie & Company and David Guthrie made and delivered to defendant C. E. Adams the two notes sued on, one in the amount of $2,204 and the other in the amount of $1,725; that "before said note became due the same was indorsed by the said C. E. Adams (in blank) to this plaintiff, who thereupon became the holder in due course of said note. When said note became due, to-wit, on the 3d day of December, 1914, payment thereof was duly demanded of the payees, who failed and refused to pay the same. The defendant C. E. Adams was duly notified of such demand and failure and that he would be required by the plaintiff to pay the same. Said defendant C. E. Adams is liable on said note as indorser, and Guthrie & Company and David Guthrie are liable as makers." Prayer is for the full amount of the note with interest.

Defendant C. E. Adams filed no pleading, and a default judgment was entered against him. Each of the other defendants interposed a special appearance, objecting to the jurisdiction of the court over their respective persons;

alleging, in substance, that each is a resident of Nuckolls county and not of Douglas; that each was served in Nuckolls county; that defendant C. E. Adams, though a resident of Douglas county and served there, is only a nominal defendant, made defendant in order to enable plaintiff to prosecute this action in Douglas county rather than in Nuckolls county, and that he has no interest in the case adverse to plaintiff, but is, in fact, acting in collusion with him. Plaintiff filed no answer to the special appearances. Upon hearing, each was overruled.

Each defendant, excepting C. E. Adams, then filed an answer, into which this objection to the jurisdiction of the court was carried, alleging, substantially, the same grounds as are set out above. The answer alleged also, in substance, that the notes had been materially altered without the knowledge or consent of the makers, and that the consideration for the original notes, of which notes in question were renewals, had been paid. Reply is a general denial of new matter in answers. Trial had to jury. At close of testimony for plaintiff, motion by answering defendants was interposed for an instructed verdict in their behalf, which was overruled. Then, at close of the case as to evidence, defendants, other than Adams, requested the court to enter judgment in their favor as to plea to jurisdiction, and plaintiff asked judgment in his favor on cause of action pleaded. Court held, as each had asked judgment by such respective requests on question of jurisdiction, trial thereof to jury had been waived, and defendants' motion on that question was overruled, and finding that it had jurisdiction was entered. Then case was submitted to the jury, on question of alteration and payment, verdict for plaintiff for amount claimed returned, motion for new trial on part of these defendants overruled, and judgment entered, to reverse which answering defendants prosecute this appeal.

Among the errors presented, the overruling of each special appearance and plea to jurisdiction, contained in the respective answers, is alleged. As to whether the district court for Douglas county had jurisdiction of the answering

defendants, it is necessary to determine whether C. E. Adams is a real defendant in the case, or a nominal one only.

Section 4699, Comp. St. 1922, provides, so far as applicable to this case: "Except as herein otherwise provided, when a negotiable instrument has been dishonored by * * * nonpayment, notice of dishonor must be given to the drawer and to each indorser, and any * * * indorser to whom such notice is not given is discharged."

Plaintiff's petition is without an allegation of presentment or demand upon the makers or any of them. He does allege that he made a demand upon the "payees." This may have been a mere clerical error, yet an amendment changing this word to "payors," or "makers," could not have been had without materially affecting defendant Adams, against whom a default judgment had been entered. Such amendment would have necessitated a reservice of summons upon him. 34 C. J. 164, sec. 375. The same rule would apply were an amendment sought in this court, as defendant Adams is not a party to the appeal. However, the petition upon this point states the truth, for the evidence plainly shows, as is later noted, that the demand for payment was actually made on the payee, and not on the payors, or makers.

Granting, for the moment, that this is a mere clerical error, or that plaintiff might have amended his petition and changed this word "payees" to "payors" or "makers," yet his own witness testified that no demand was ever made upon the payors, or any of them, and the case is without evidence of such demand. Thus, if the plaintiff's petition read "payors" or "makers," instead of "payees," his own evidence would negative the allegation.

There was some evidence tending to prove a waiver by the indorser, C. E. Adams, of such demand. Timely objections were interposed by defendants to such evidence, two of the grounds being that it was irrelevant and immaterial. The objections were overruled. As no waiver was

pleaded, such evidence was both irrelevant and immaterial, and the court erred in admitting it.

As to the objection to jurisdiction. At the close of the evidence, these answering defendants moved the court for judgment in their favor, and, as one ground, alleged that "the petition filed herein does not state a cause of action against the defendant C. E. Adams." From plaintiff's own evidence, no presentment, demand and notice were had which would render the indorser liable under section 4699, *supra.* And, as this case does not come within the exceptions referred to in this statute, the indorser, C. E. Adams, was discharged. He had no interest in this case adverse to plaintiff, and was a mere sham defendant. This being true, the trial court erred in not sustaining the objection to jurisdiction presented by each of the defendants other than C. E. Adams, by way of special appearance, and in not sustaining the motion for judgment on that part of defendants' answers wherein objection to jurisdiction over their respective persons was pleaded. *Miller v. Meeker,* 54 Neb. 452; *Cobbey v. Wright,* 23 Neb. 250; *Stewart v. Rosengren,* 66 Neb. 445; *Seiver v. Union P. R. Co.,* 68 Neb. 91. *Gaines v. Warrick,* p. 235, *post,* approved and followed.

For the foregoing reasons, it is considered by us that the trial court was without jurisdiction of defendants Guthrie & Company, David Guthrie, and Southern Nebraska Power Company, and that the case should be, and hereby is,

REVERSED AND REMANDED.

DIVISION NO. 1, RAILWAY EMPLOYEES' DEPARTMENT OF AMERICAN FEDERATION OF LABOR, APPELLANT, V. AMERICAN STATE BANK ET AL., APPELLEES.

FILED MARCH 6, 1925. NO. 22956.

1. **Principal and Agent:** TORTS OF AGENT: LIABILITY OF PRINCIPAL. "A principal is liable to third persons for the torts of his agent when committed in the course and within the scope of the agency, although the principal never authorized, participated in

or ratified the tort; but he is not liable where the tortious act was committed, not in furtherance of the principal's business, but for a purpose personal to the agent himself." *Larson v. Fidelity Mutual Life Ass'n*, 71 Minn. 101.

2. Banks and Banking: AUTHORITY OF CASHIER: PRESUMPTION. "While a cashier of a bank is presumed to have all the authority he exercises in dealing with executive functions legally within the powers of the bank, or which are usually done, or held out to be done, by such an officer, still the test is whether the transaction is with the bank and in its business, or with the cashier personally and in his business. As to the former, all presumptions are in favor of its regularity and binding force. As to the latter, no such presumptions arise." *Campbell v. Manufacturers Nat. Bank*, 67 N. J. Law, 301.

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

James E. Rait, for appellant.

Brogan, Ellick & Raymond, Congdon & Finlayson and *I. J. Dunn, contra.*

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

PER CURIAM.

On and before February 19, 1920, the plaintiff association had a deposit of $65,000 in the American State Bank of Omaha. In respect of the controversy herein, plaintiff's allegations follow:

"Plaintiff charges that, on or about the 19th day of February, 1920, the defendants, American State Bank as aforesaid, and Marion F. Shafer, Roy E. Karls, Guy Liggett, and Ward E. Shafer, and each of them, with full knowledge of plaintiff's ownership of said money, unlawfully converted the same to their own use and benefit, without the knowledge or consent of the plaintiff and against its will, and thereby the defendants and each of them damaged this plaintiff in the sum of $65,000, no part of which has been

paid except $17,500, leaving a balance of said damage and indebtedness unpaid of $47,500."

Defendants Marion F. Shafer, Ward E. Shafer, and Roy E. Karls, filed separate answers, and each separately, in effect, denied the material allegations of alleged wrongdoing as charged in plaintiff's petition. Defendant Guy Liggett likewise filed a separate answer, wherein he alleged, in substance, that he had no knowledge of the existence of the plaintiff association other than as derived from its petition, and therefore denied all and singular the allegations contained therein, and prayed to be hence dismissed with his costs.

The American State Bank of Omaha, hereinafter called defendant bank, in its separate answer made the same allegation as that pleaded in the petition, as to date and amount of the deposit in defendant bank by S. H. Grace, treasurer, and further pleaded that all of the money so deposited was subsequently withdrawn from defendant bank, in the regular and usual course of business, by S. H. Grace, as treasurer as aforesaid.

When the taking of testimony was concluded, the jury, under the court's direction, returned a verdict in favor of the defendants American State Bank of Omaha and Guy Liggett. The question, however, of the liability of the remaining defendants was properly submitted to the jury, and it returned a verdict against them, namely, Marion F. Shafer, Ward E. Shafer, and Roy E. Karls, for $55,027.43; this sum representing the unpaid principal, with interest, demanded in plaintiff's petition. From the judgment, so rendered on the verdict, the plaintiff association and Roy E. Karls prosecute separate appeals.

The following material facts were established at the trial. S. H. Grace, who had been three times consecutively elected to the position of secretary and treasurer of the plaintiff association, for a period aggregating six years, was called by plaintiff as a witness. Grace testified that, as such official, he withdrew from the defendant bank the

$65,000 which the plaintiff association had on deposit therein, in the usual and regular course of business, by obtaining from the defendant bank three cashier's checks, which were signed for the bank by "Roy E. Karls, cashier," and were made payable to the order of "S. H. Grace, Treas." All of the above cashier's checks are dated February 19, 1920. Two were for $20,000 each, and one was for $25,000, and all were paid by the First National Bank of Omaha, February 20, 1920, February 21, 1920, and February 26, 1920, respectively, as appears by the usual bank stamp of the paying bank. The indorsement of S. H. Grace, treasurer, is on the three cashier's checks, and immediately below his signature appears the signature of Guy Liggett.

Grace further testified that, as such official, he purchased three certificates of deposit from the First National Bank of Council Bluffs, payable to himself as plaintiff's treasurer. One certificate, dated February 19, 1920, is in the sum of $20,000; another, dated March 29, 1920, is in the sum of $25,000; and another, dated April 6, 1920, is in the sum of $20,000, making a total of $65,000 in certificates of deposit so purchased from the Council Bluffs bank, with plaintiff's funds, which had been theretofore deposited in the defendant bank by the association and which were payable to Grace, as treasurer. All of this, in the absence of proof to the contrary, and there is none, Grace had authority to do by virtue of his office. And the defendant bank had no notice to the contrary.

Sometime about the middle of the month of April, 1920, Grace attended the regular convention of the plaintiff association, and there exhibited the Council Bluffs bank certificates for $65,000 to its auditing committee. His report was accepted by the committee, and, before adjournment, the parent body adopted the committee's report and so ratified the purchase of the certificates. When the convention adjourned, about April 25, 1920, Grace returned to Omaha and brought the above certificates with him and placed them in the plaintiff association's safety-deposit

vault in the Omaha National Bank building. It therefore plainly appears that, at this time, all the funds of plaintiff, which are involved here, were in the hands of its duly authorized treasurer and were under plaintiff's control. And there is nothing to disclose that the defendant bank, as such, in the foregoing transactions, transgressed any banking law or any recognized custom of sound banking.

On or about May 17, 1920, according to the evidence of Grace, defendants Marion F. Shafer and Roy E. Karls came to his office in the Bee Building and said they wanted to borrow the $65,000, for a short time, which he held as plaintiff's treasurer. They told him they would make him a present of $500 if he would loan the money to them. On the same, or the following day, they returned and he loaned the money to them, for which they executed their joint note, drawn up by Karls, dated May 17, 1920, payable in 30 days to Grace as treasurer. The note, however, on its face provided that it should not bear interest. When the transaction was closed Shafer and Karls paid Grace $500 as promised. This money he invested in oil stock, not for the plaintiff association, but for himself alone. On this $65,000 note, $17,500 was paid by the makers to plaintiff, from time to time, in varying amounts, From October 1, 1920, to January 13, 1921, as shown by the indorsements. The unpaid $47,500 is the basis of plaintiff's suit.

Marion F. Shafer was at one time president and also a director of the defendant bank, but he ceased to be president June 29, 1919, and ceased to be a director in January, 1921, so that when Shafer and Karls obtained the money of the plaintiff association from Grace, its treasurer, May 17, 1920, Shafer was not president of defendant bank and was not one of its managing officers. Marion F. Shafer seems to have had much influence over Grace. He testified that Shafer told him that he and his brother, Ward E. Shafer, were worth a million dollars, and that the money would be just as safe in his hands as it would be in any bank.

Grace, sometime in September, 1921, was a witness in certain proceedings in bankruptcy, wherein M. F. Shafer & Company were adjudged bankrupts. He admitted that he there testified that, when Shafer and Karls borrowed the money in question, in answer to interrogatories, he testified as follows:

"M. F. Shafer, as I now recall, stated that he needed some available funds for a short period. He says 'You have this certificate of deposit,' he said, 'We will make a present to you of $500 for the use of your money for a short period; your money will be just as safe as in the bank.' * * * Q. And Karls was there at that time? A. Karls was there. I said to him, I said, 'That is a large amount of money, Mr. Shafer; you know the money doesn't belong to me, the money belongs to the Division here.' He went on talking about it, and I asked what security there would be on a loan of that kind. He mentioned a printing plant that was worth a half million dollars, how much money he and his brother, W. E., were worth. I guess he estimated himself, or the two of them, probably, around a million dollars. Q. Did he state they were worth about a million dollars? A. Somewhere around there."

When, in respect to the foregoing transaction, Grace was asked if the prospect of receiving $500, and a certain interest bonus of 2 per cent. out of an interest rate of 6 per cent. running to the defendant bank on a certain loan, was the inducement that caused him to loan the plaintiff's money to Shafer and Karls, he answered: "That partly, and the statement that the bank was none too safe." He also testified that he did not know "whether he (M. F. Shafer) was a director, * * * he was an officer at the bank." And he said he "knew at one time he was president." Some interest was paid on the $65,000 note of Shafer and Karls, but Grace said he was cautioned "about cashing any of the interest checks at the American State Bank for fear that they might learn something about it." As shown by his evidence, and the check exhibits, the above

interest payments were made by checks of "M. F. Shafer & Company," and some of the checks were countersigned by M. F. Shafer and some by W. E. Shafer, and they were indorsed and deposited by Grace in some other bank pursuant to the foregoing agreement. In respect of the payments on the principal sum of the $65,000 Shafer-Karls note, aggregating $17,500, Grace testified that this money was paid by cashier's checks drawn on the Omaha National Bank as above noted, and "turned over to the plaintiff." Grace admitted that there was a deficit of $47,500 in his account with the plaintiff association, and that he was no longer its secretary and treasurer. From the evidence of Grace, and it is not denied, it appears that, from its earliest inception, the plan of Shafer and Karls was to transfer the money of the plaintiff association from the defendant bank. But he testified that he did not know where the money was to be placed, because "they didn't mention any particular place at that time."

D. C. Geiselman, former assistant cashier of defendant bank, became cashier April 12, 1920, as Karls' successor. On the part of plaintiff, Geiselman testified: "Q: Mr. Karls severed his connection with the bank sometime prior to that time? A. Some few days, I think. Q. And has not been connected with the bank since? A. Not whatever." He further testified that he never saw the Council Bluffs certificates before the trial, and, so far as he knew, the defendant bank never had anything to do with their purchase.

Clearly, Karls was not in harmony with the managing officers of the bank. And the Shafers were in collusion with him to do the bank injury. In respect of the transaction under consideration, Karls acted without authority, and, so far as the record shows, without the knowledge of the bank's managing officers. On this point the court properly held that whether the Shafers and Karls had evolved a conspiracy "to rob this Division No. 1 and its amiable treasurer of $65,000" was a question for the jury.

The case was therefore submitted by the court on the question of Karls' and the Shafers' liability, and, after being properly instructed on the question of conspiracy, the jury, as above noted, found against them. Nothing in the record has been pointed out to show why the verdict of the jury should be disturbed.

Plaintiff's counsel further argue: "Karls and Shafer knew that Grace was in their power when he first yielded to temptation and accepted the offered bonus, and, in all their subsequent dealings with him, they knew that they at all times could take possession of the moneys in his hands. They permitted him to exhibit these certificates simply to lull the appellant into slumber." And referring to Karls, and his relation to the defendant bank, plaintiff in its brief designates him as "its perfidious cashier."

What are the distinguishing characteristics of a perfidious person. Obviously, he is one who is treacherous, traitorous, and false. Can the thought be entertained that such an one, as cashier of a bank, who is shown to have actively participated in the well-planned and successfully executed conspiracy, which the record discloses, was acting in good faith and in the interest of the bank while engaged in the development and the perpetration of the conspiracy? Clearly not. The undisputed facts speak for themselves. And it does not appear that the managing officers of the bank knew or, in the exercise of reasonable diligence, could have discovered the perfidy of the cashier. For aught that the record shows, the conspiracy was undiscovered until the ugly facts were disclosed by the plaintiff's treasurer at the trial. It is always the part of conspirators to conceal their evil acts, and the conspirators here acted well their disloyal part.

As tending to show the influence of the borrowers of the $65,000 over a man of Grace's confiding personality, it may be observed, as above noted, that Marion F. Shafer represented himself to be an officer of the bank at the time, and that he and his brother were men of great wealth; and

that Karls held a responsible and influential position in the business circles of a metropolitan city. Naturally, these men of reputed wealth and high position exercised a great influence over the trustful Grace. Knowing this, they worked on his vanity, to the end that they might ultimately cause him to give up the money. He could not withstand their blandishments. He was a good-natured man and he desired to please. He could not say no. He was so overpowered by the influence of stronger men, whom he believed to be both rich and influential, that he forgot the duty which he owed the parent association, which had thrice honored him with an office of trust and great responsibility. His surrender was complete. He weakly permitted Shafer and Karls to loot the fund which he held for plaintiff in a fiduciary capacity. For a mess of pottage, Grace sold his birthright and betrayed his brethren.

The court held, and we find, that there is no evidence to connect Liggett with any wrong-doing in the premises. After the money passed through the First National Bank of Omaha, by his checks, all of it came into the hands of Grace, as treasurer of the plaintiff association. In the language of the trial court: "The evidence is not sufficient to prove that he had any guilty knowledge of any plan on the part of these parties to obtain the money and convert it."

Plaintiff contends that the defendant bank accepted, and has retained, the benefits of the illegal acts of Karls and Grace and has profited greatly by the transaction. The argument is that, if the bank was guilty of converting the money in February, 1920, it then became indebted to plaintiff for the amount converted, and nothing but payment would satisfy plaintiff's claim. But, as hereinbefore pointed out, there is no evidence to show that any of the managing officers knew anything about the conspiracy which was perfidiously concocted and unlawfully perpetrated by Karls and the Shafers.

And even though Karls was the cashier during all of the

time that he and the Shafers were collusively and fraudulently acting together, as disclosed by the record before us, it is obvious that he was not acting for the bank, nor in its interest, but was acting for himself and those in collusion with him. In such case the defendant bank cannot be holden for his acts. A statement of the rule follows:

"A principal is liable to third persons for the torts of his agent when committed in the course and within the scope of the agency, although the principal never authorized, participated in or ratified the tort; but he is not liable where the tortious act was committed, not in furtherance of the principlal's business, but for a purpose personal to the agent himself." *Larson v. Fidelity Mutual Life Ass'n,* 71 Minn. 101. See *Merchants Nat. Bank v. Lovitt,* 114 Mo. 519.

In *Campbell v. Manufacturers Nat. Bank,* 67 N. J. Law, 301, this is said: "While a cashier of a bank is presumed to have all the authority he exercises in dealing with executive functions legally within the powers of the bank, or which are usually done, or held out to be done, by such an officer, still the test is whether the transaction is with the bank and in its business, or with the cashier personally and in his business. As to the former, all presumptions are in favor of its regularity and binding force. As to the latter, no such presumptions arise."

Plaintiff points out that certain collateral notes, of doubtful value, approximating $30,000 in face value, which were held by the defendant bank, apparently as security for a Shafer & Company loan, were paid off and discharged by two drafts which were brought to the bank by Ward E. Shafer, which are dated February 8, 1920. They are payable to "Roy E. Karls," and are indorsed "Roy E. Karls," and were paid March 1, 1920. Plaintiff contends that Karls purchased them with money taken from the funds of plaintiff and that this transaction was a direct benefit to the bank. D. C. Geiselman, assistant cashier at the time, testified that he did not know where the drafts came from,

other than that they were brought to the bank by Ward E. Shafer, and that he did not have any knowledge or any suspicion that this was any of the plaintiff's money. It may here be noted that the plaintiff association held a certificate of deposit issued by the defendant bank, in the principal sum of $65,000, which is dated December 30, 1919, and stamped "Paid" by the defendant bank May 5, 1920. At this time, and between these two dates, it does not appear that any other funds of the plaintiff association were in the hands of the defendant bank.

Reversible error has not been shown. The trial court did not err in denying a new trial. The judgment is

AFFIRMED.

LOUISA L. NETHAWAY, APPELLANT, V. MICHAEL CLARK, SHERIFF, APPELLEE.

FILED MARCH 6, 1925. No. 23023.

Chattel Mortgages: BILL OF SALE AS SECURITY: VALIDITY. Under the provisions of section 2550, Comp. St. 1922, a bill of sale, intended to operate as a mortgage of goods and chattels, which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the goods and chattels therein described, shall be absolutely void as against the creditor of the mortgagor, unless the bill of sale, or true copy thereof, shall be filed in the office of the county clerk of the county where the mortgagor resides.

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

Harry B. Fleharty, for appellant.

A. L. Sutton, James B. Kelkenny and *Max Fromkin, contra.*

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

PER CURIAM.

Stella Nethaway recovered a judgment for alimony, in the sum of $2,000, against her husband, Claude L. Nethaway. Execution issued thereon to the sheriff, who levied on an automobile in the possession of the defendant in that action, as his property. Louisa L. Nethaway, mother of said defendant, brought this action in replevin against the sheriff, claiming to be the owner of and entitled to the possession of the automobile. The trial resulted in a verdict for defendant, and finding that he was entitled to possession of the automobile by virtue of an execution, fixing its value at $860, and asesssing damages in favor of defendant in the sum of $920. Judgment was entered upon the verdict for defendant, for the return of the automobile, and an alternative judgment for $920 in the event the automobile was not returned to the defendant. Plaintiff appeals.

The evidence discloses that Claude L. Nethaway purchased the automobile in question and paid therefor with his own funds, and has ever since retained possession and control thereof. Prior to the seizure of the automobile, under execution, he had given to his mother, the plaintiff, a bill of sale, which was never filed for record. This bill of sale shows on its face that it was intended to operate as security for an antecedent debt due from Nethaway to his mother. This instrument may be sufficient to create a lien, valid as between the parties thereto, but, under section 2550, Comp. St. 1922, is void as to execution creditors.

Complaint is made of the giving of an instruction which is conceded to be a correct statement of the law, but which, it is claimed, is not applicable to the issues. After an examination of the record, we are satisfied that the instruction was not only a correct statement of the law, but was properly applicable to the issues and was, therefore, properly given.

It is urged that the court should not have submitted to the jury the question of the value of the automobile, because the evidence was insufficient. The evidence as to value was very meager, but it was not controverted and is sufficient to support the verdict in that respect.

Complaint is also made because there is no evidence to support an alternative judgment for any amount in excess of the value of the automobile. This assignment appears to be sustained. There is nothing in the evidence to sustain an alternative judgment for any amount greater than the value of the automobile.

The judgment will be affirmed on condition that defendant shall, within 30 days, enter a remittitur from the alternative judgment of all in excess of $860, and, upon his failure to enter such remittitur, will be reversed and the cause remanded.

AFFIRMED ON CONDITION.

NEBRASKA WESLEYAN UNIVERSITY, APPELLANT, V. H. B. SMITH, APPELLANT: HENRY C. WITTMANN, APPELLEE.

FILED MARCH 6, 1925. NO. 22976.

1. **Deeds:** DELIVERY OF DEED IN BLANK: EFFECT. The equitable title passes to a purchaser for a valuable consideration by a delivery of the deed, even though the deed does not contain the name of any grantee.
2. **Mortgages:** LIABILITY OF PURCHASER ASSUMING MORTGAGE. A purchaser, for a valuable consideration, by accepting a deed containing a clause that the grantee assumes and agrees to pay a certain mortgage, ordinarily becomes liable for the payment of such incumbrance, even though no name appears in the deed as grantee.
3. **Evidence:** PAROL EVIDENCE: RECITALS IN DEED. In an action by a mortgagee seeking to hold a third party liable for the mortgage debt under an assumption clause in an unrecorded deed, in the absence of facts creating an estoppel, such third party is entitled to show what was the real contract between himself and his grantor, even though the effect of such testimony is to vary or contradict the recitals in the deed.
4. **Evidence** examined, and *held* to sustain the decree in part.

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

Gaylord & Gaylord, for appellants.

Claude S. Wilson and *Albert S. Johnston, contra.*

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

DAY, J.

Nebraska Wesleyan University, plaintiff, brought this action against H. B. Smith and wife, and Henry C. Wittmann and wife, to foreclose two mortgages, each covering a different lot in University Place, Nebraska. The mortgages were executed by Smith and his wife to George E. Johnson, and by the latter assigned to the plaintiff. Later, Smith conveyed the mortgaged premises to Wittmann, the respective deeds reciting that the conveyance was made subject to a mortgage, specifically described, which the grantee assumed and agreed to pay.

In addition to a decree of foreclosure, the plaintiff sought a finding and decree that Smith and Wittmann were personally liable for any deficiency which might remain after the sale of the mortgaged premises. The plaintiff sought to hold Wittmann liable upon the theory that as purchaser of the mortgaged premises, and by the terms of his deeds, he had assumed and agreed to pay the mortgages.

Smith filed a cross-petition in which he prayed for a decree finding Wittmann liable for any deficiency which might arise upon the sale of the mortgaged premises.

In his answer Wittmann admitted that he received a deed from Smith for lot 7, block 105, University Place, in which he was named as grantee, and that by the terms of the deed he assumed and agreed to pay a mortgage of $200 then upon the premises. With respect to lot 8, Wittmann denied that he was named as grantee in the deed, alleged that the deed contained no name of a grantee, set out the contract between himself and Smith, and denied liability to the plaintiff or to Smith.

The court entered a decree of foreclosure of the two mortgages, and decreed Smith to be liable for any deficiency arising upon the sale of the mortgaged premises, but also

found that Wittmann was not liable. From this judgment plaintiff and Smith have appealed.

It appears that on September 23, 1911, Smith and wife executed a mortgage for $200 upon lot 7, and a mortgage for $600 upon lot 8, both in block 105, University Place, in favor of George E. Johnson. The mortgages were assigned to plaintiff on March 19, 1913. The record shows that on February 27, 1914, Smith and Wittmann entered into a written contract whereby Smith agreed to sell and convey by warranty deed lots 7 and 8, in block 105, University Place, subject to an incumbrance of $200 and $600, respectively, upon the lots. The contract recited:

"The remaining equity in the above lots, amounting to four hundred and forty dollars, will be paid by the party of the second part to the party of the first part as follows:" Then follows a description of certain personal property with the exchange value thereof, as agreed by the parties, totaling $440, which Wittmann agreed to give in exchange for the lots.

As originally drawn the proposed contract contained a recital as follows:

"Above lots are incumbered in the sum of two hundred (200) dollars and six hundred (600) dollars, respectively, which the party of the second part assumes and agrees to pay."

The contract as introduced in evidence has a line drawn through the words "which the party of the second part assumes and agrees to pay."

There is a conflict in the testimony of Wittmann and Smith as to whether the words above referred to were stricken from the proposed contract before the instrument was signed. It was Smith's theory that the line was drawn through the words after the contract was delivered and without his authority. Wittmann testified that the words were eliminated from the contract before it was signed. There are a number of circumstances which tend to corroborate Wittmann's version of striking the words mention-

ed from the contract, and we adopt his version as being correct.

With respect to the liability of Wittmann under the deed conveying lot 7, there seems to be no serious question. He admits in his answer that he received the deed conveying this lot in which he was named as grantee, and that the deed recited that it was subject to a mortgage of $200, which the grantee assumed and agreed to pay. He testified that he paid the interest on this mortgage, that he waived the privilege of his contract so far as this deed is concerned, because of Smith's insistence, and because he considered the lot as abundant security for the loan. In view of the record, we think the trial court should have entered a finding and decree that Wittmann was liable for any deficiency upon the $200 mortgage, which might arise upon the sale of lot 7.

We come now to consider the liability of Wittmann upon the deed conveying lot 8.

The record shows that the deeds for the two lots were received by Wittmann on or about March 3, 1914. When the deed to lot 8 was first received by Wittmann, his name appeared therein as grantee. The deed also contained a recital that there was a mortgage of $600 on the premises, which the grantee assumed and agreed to pay. Wittmann testified that, following the receipt of the deed, he and Smith had a conversation in which the latter suggested that the name of the grantee in the deed be erased.

On March 4, 1914, Wittmann wrote a letter to Smith, in part as follows:

"Herewith I return to you deed to lot 8, block 105, University Place, Nebraska, and beg to state that I cannot accept same as written. My attorney advises me not to erase any portion of said deed as suggested, but to return same for correction. My reason for returning this deed is that it is not executed as per contract of February 27, 1914. You have included in the above mentioned deed that the grantee assumes and agrees to pay the mortgage

on the described lot which is contrary to our contract. Kindly execute a new deed and leave out the above words or if you insist to have the same in the deed you will have to make me a deed in blank as per our agreement."

Wittmann further testified that a few days later he received a deed from Smith in which the name of the grantee was omitted; that later Wittmann traded the deed in blank to a man in Iowa. The deed to lot 8 has never been presented for record.

It was Smith's theory that Wittmann had erased his name, as grantee, in the deed and there was testimony which tended to corroborate this theory. In the view which we have taken of the case, however, it seems unnecessary to determine whether the deed contained Wittmann's name, as grantee. He accepted the deed containing a clause that the grantee assumed and agreed to pay the mortgage. Granting that the deed was blank, as to the name of the grantee, the equitable title passed to Wittmann by delivery of the deed, and under these circumstances, if the question of liability turns solely upon the recital in the deed, he would become liable for the payment of the mortgage.

It is the contention of the plaintiff that no evidence could be received which tended to contradict or vary the recital in the deed to the effect that the grantee assumed and agreed to pay the mortgage. It is argued that evidence as to what the prior contract was between the grantor and the grantee was incompetent because the contract became merged in the deed. It must be remembered, however, that as between plaintiff and Wittmann there is no privity of contract.

The rule excluding parol proof where there is a written contract or agreement does not apply where a stranger to the contract is seeking some advantage by reason of its terms. *Livingston v. Stevens,* 122 Ia. 62. It was competent, therefore, for Wittmann to show that, notwithstanding the terms of his deed, he never in fact agreed to assume and pay the mortgage. While the recital in the deed was evidence that he did assume and agree to pay

the mortgage, it was not conclusive, and the contract between himself and his grantor, in our view, entirely overcomes the recital in the deed.

As between Wittmann and Smith, his grantor in the deed, we think the evidence was properly received on the theory that there was no consideration for Wittmann to assume and agree to pay the mortgage. The contract between Smith and Wittmann, as originally drafted, contained a clause that Wittmann was to assume and pay the mortgages, but the clause was stricken out of the contract. There was no other consideration paid for the deeds than that provided in the contract. The contract plainly shows that Wittmann was purchasing Smith's equity in the lots. As we view the evidence, there was no consideration for Wittmann's assuming the liability to pay the mortgage as provided in the clause in the deed. No innocent third parties are involved in the transaction. Upon the whole record, we think the trial court was right in holding that Wittmann was not liable for the payment of any deficiency which might arise upon the sale of lot 8. For cases bearing generally on the question discussed, see *Livingston v. Stevens*, 122 Ia. 62; *Liljedahl v. Glassgow*, 190 Ia. 827; *Peters v. Goodrich*, 192 Ia. 790; *Santee v. Keefe*, 127 Ia. 128; *Gilmore v. Shearer*, 197 Ia. 506, 32 A. L. R. 733, and notes cited; *Shult v. Doyle*, 199 Ia. —.

From what has been said, it follows that the decree of the district court should be modified so as to hold Wittmann liable for any deficiency which may arise upon the sale of lot 7. The judgment of the district court is reversed in part, with directions to enter a decree conforming with this opinion.

AFFIRMED IN PART, AND REVERSED IN PART.

ALBERT F. PETERSON ET AL., APPELLANTS, V. JULIA R. KINNEY ET AL., APPELLEES.

FILED MARCH 6, 1925. No. 22985.

1. **Principal and Surety: LIABILITY OF SURETIES.** Where the liabilities of sureties in a judgment are all equal, and where the circumstances are such that one surety is not surety for another, the judgment creditor is at liberty to collect his judgment from any of the judgment debtors he may choose, and a court of equity will not ordinarily direct against whom he shall first proceed.
2. **Evidence** examined, and *held* to support the judgment.

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

George W. Ayres and *Peterson & Devoe*, for appellants.

Burkett, Wilson, Brown & Wilson and *McCandless & McGuire, contra.*

Heard before DAY, GOOD and EVANS, JJ., REDICK and SHEPHERD, District Judges.

DAY, J.

This action, as originally brought by Albert F. Peterson, sought an injunction against Julia R. Kinney and Ira Miller restraining them from selling, under execution, certain lots owned by the plaintiff. While the court did not in terms deny the injunction, its findings and judgment in favor of Julia R. Kinney granting to her the relief prayed in her cross-petition, in effect, amounted to a denial of the injunction. From this judgment Albert F. Peterson and Emma Peterson, his wife, have appealed.

Ira F. Miller is the sheriff of Lancaster county and has no personal interest in the controversy.

A brief statement of the facts will serve to make clear the points involved in this appeal.

On September 25, 1919, the Community Service Corporation borrowed $3,000 from the First National Bank of Lincoln, and gave a note therefor signed by the Community

Service Corporation, by S. A. Kinney, its president, and also by S. A. Kinney, personally. At the time the money was borrowed, Kinney agreed with the bank that the note would also be signed by Albert F. Peterson. The bank gave credit on its books to the Community Service Corporation for the amount borrowed, and some two weeks later Peterson appeared at the bank and signed the note. The note was not paid when due and suit was brought thereon by the bank against all of the signers. Kinney made default, and on May 20, 1920, a judgment was entered against him for the amount due and the cause continued as to the other defendants. On May 24, 1920, a transcript of the judgment was filed in Gage county.

On September 25, 1920, judgment was rendered against the other defendants, reciting that it was against the Community Service Corporation, as principal, and Peterson, as surety. There is no recital concerning the relationship as between Kinney and Peterson. Later, an execution was issued in Gage county and levied upon certain lands in that county belonging to Kinney. The lands were sold, but the sale was never confirmed. Afterward, on February 4, 1921, Kinney died, leaving his widow, Julia R. Kinney, as his sole legatee, who was appointed administratrix of his estate. Julia R. Kinney then bought the judgments in her individual right, paid for them with her money, and took an assignment thereof from the bank in her individual name. She then dismissed the execution levied upon the Gage county lands of her deceased husband, and ordered an execution to be issued in Lancaster county against the Community Service Corporation and Albert F. Peterson. No property of the Community Service Corporation upon which to make a levy was found, and the execution was thereupon levied upon certain lots belonging to Peterson. The present action was brought to enjoin the sale under this execution. Julia R. Kinney filed an answer and cross-petition praying that the judgment be decreed a lien upon the Peterson lots, and for other equitable relief, and also

asking that Emma Peterson, the wife of Albert F. Peterson, be made a party to the action.

It seems perfectly clear that Peterson had no greater right or equity against Julia R. Kinney than he would have had against the bank if the assignment had not been made. It is also clear that she acquired all the rights possessed by her assignor.

If the bank could have withdrawn the levy of the execution against Kinney and ordered an execution against the property of Peterson, then Mrs. Kinney, the assignee of the judgment, could do the same. The law is well settled that, when a judgment creditor has obtained a valid lien upon the property of the principal judgment debtor, he has no right to release such property to the detriment of another defendant who is merely a surety, when at the time the judgment creditor so acts he knows that the relation of suretyship exists.

The rule is equally well established that, when the liabilities of sureties in a judgment are all equal, and when the relations between them are such that one is not surety for the other, the judgment creditor is at liberty to collect his judgment from either of the sureties, and a court of equity will not assume to direct against whom he should first proceed. *Minick v. Brock*, 41 Neb. 512.

It is argued by the appellants that Kinney was the principal, or at least one of them, in borrowing the money from the bank, and that Peterson was surety. The testimony shows that, when the loan was made by the bank, the proceeds thereof were passed to the credit of the Community Service Corporation and checked out by that corporation by checks drawn by it and signed by Kinney, as president. It is true that some of these checks were payable to Kinney, but that circumstance would not necessarily establish the fact that Kinney was the principal debtor. The vice-president of the bank, who negotiated the loan, testified that the bank recognized all the signers as joint makers; that it made no distinction between principal debtor and sure-

ties. This testimony must be regarded as a mere conclusion of the witness. While the testimony on this phase of the case is such that different inferences might be drawn, we are quite convinced from the record that, so far as the bank was concerned, the Community Service Corporation was the principal debtor, and that Kinney and Peterson were co-sureties. The theory is also advanced that, as between Kinney and Peterson, Peterson was his surety. The evidence fails to sustain this theory. If Peterson was surety for Kinney, and desired to have that question adjudicated, it would seem that the proper time to have presented it was in the original action. This is one of the circumstances to be considered. While we think the bank was charged with notice that both Kinney and Peterson were sureties, the record fails to show that the bank or Mrs. Kinney, as assignee, ever knew of the alleged fact that Peterson was surety for Kinney. Upon the entire record, viewed from any standpoint, it seems clear that the relationship between Kinney and Peterson was that of co-sureties. Under the facts we think that Julia R. Kinney had the legal right to release the execution in Gage county levied upon the lands of her deceased husband, and to collect the judgment from Peterson.

Upon the trial the court entered a judgment in favor of Julia R. Kinney and made it a lien upon the Peterson property for one-half of the debt. This was done upon the suggestion of her counsel that, in view of the fact that she was the sole legatee of her husband, and inasmuch as Peterson, if compelled to pay the whole debt, would have the right of contribution against the estate of A. S. Kinney for one-half of the amount, it was no more than equitable that her claim be abated one-half.

We see no valid objection to the decree. Other questions are argued in appellants' brief which we have considered, but do not regard them of controlling importance. The judgment is

AFFIRMED.

Note—See Principal and Surety, 32 Cyc. 143.

IN RE ESTATE OF EDMUND E. WOOLSEY.
OTOE COUNTY, APPELLANT, V. FRED A. WOOLSEY, ADMINISTRATOR, ET AL, APPELLEES.

FILED MARCH 6, 1925. No. 23808.

1. **Taxation: INHERITANCE TAX: PROCEDURE TO RECOVER.** Sections 6018 and 6019, Comp. St. 1922, prescribing the procedure to recover taxes paid to the treasurer under certain circumstances, has no application to the recovery of an inheritance tax erroneously paid. In such case the procedure is governed by section 6162, Comp. St. 1922.
2. **Evidence** examined, and *held* to support the judgment of the district court.

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

W. F. Moran, for appellant.

Pitzer & Tyler and *Earl M. Cline, contra.*

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

DAY, J.

This is the second appearance of this case, our former opinion being reported in 109 Neb. 138.

The present appeal is by the county of Otoe from a judgment of the district court fixing the value of the estate of Edmund E. Woolsey, deceased, for the purpose of determining the amount of inheritance tax which should be assessed upon the several shares inherited.

In the briefs the county of Otoe is designated complainant, and the administrator and the heirs at law respondents, and for convenience will be so designated here. The respondents have taken a cross-appeal.

Edmund E. Woolsey, a resident of Otoe county, died intestate May 20, 1919, leaving a large estate consisting of real and personal property situated in Otoe county and elsewhere to be administered. The present controversy relates solely to the value of the Otoe county lands. In the

course of the probate proceedings the county court fixed the value of the lands in Otoe county at $412,205.50, fixed the value of the personal property, and computed the amount of inheritance tax to be paid upon such valuation. Exceptions were taken by the respondents to the value placed upon the Otoe county land, and an appeal perfected to the district court. On May 15, 1920, a judgment was entered in the district court fixing the value of the land in Otoe county at $387,325, and also fixing the value of the personal property at $159,948.39, and after deducting certain exemptions fixed the amount of inheritance tax at $5,215.03. From this judgment the respondents appealed to this court, where, for reasons stated in the opinion, the judgment of the district court was reversed and the case remanded for a new trial. *In re Estate of Woolsey*, 109 Neb. 138.

When the case came on for a retrial in the district court, the complainant filed a paper, which it denominated a plea in abatement, based upon the idea that pending the litigation the respondents had paid the full amount of the tax, and that therefore the litigation presented only a moot question. Testimony was taken on the issue presented by this plea and the answer thereto, and said plea was overruled. The ruling of the court on this plea is the only question presented by complainant's appeal.

The plea in abatement alleged in substance that, following the judgment of the district court on May 15, 1920, fixing the amount of inheritance tax at $5,215.03, the administrator of the estate voluntarily paid to the treasurer of Otoe county said sum, and that the treasurer issued a receipt for the amount which contained a recital: "One thousand and seventy-two and 95-100 of the total amount is paid under protest."

It was also alleged that no demand in writing was made upon the county treasurer for a refund of any part of the tax within 30 days after the payment of the same, as required by law; that no suit has been commenced to recover

the tax, and that no claim has ever been filed with the county board setting forth the amount of taxes paid under protest, as required by law.

It was evidently the intention of the pleader to show that by failing to comply with the provisions of section 6018 and section 6019, Comp. St. 1922, the respondent could not, in any view which might be taken of the case, recover any part of the tax paid to the treasurer, and hence the payment must be regarded as a full settlement of the inheritance tax.

The answer of the respondents admitted the payment to the treasurer of the full amount of the inheritance tax found by the court to be due in the judgment of May 15, 1920, but alleged that $1,072.95 of the total amount was paid under protest.

The answer further alleged that prior to the payment of the $5,215.03 to the treasurer it was agreed between attorneys for the respondents and the then county treasurer of Otoe county, who was also the attorney of record for the complainant, that the respondents could pay to the treasurer the amount of tax found to be due by the court and take a receipt for the amount deemed by the respondents to be excessive and paid under protest; that such payment should not prejudice the right of the respondents to appeal to the supreme court, nor prejudice the right of the respondents to recover from the county any excess payment which may have been made, if, upon a final determination of the case, it was disclosed that an excess payment had been made; that no separate action or proceeding would be necessary to recover any excess payment; that, relying upon the agreement, the full amount of $5,215.03 was paid to the county treasurer; that by accepting the money under the agreement and by participating in the appeal to the supreme court the complainant is estopped to claim that the excess cannot be recovered. We think the testimony sustains these allegations.

After the plea in abatement was overruled, a trial was had upon the merits of the case resulting in a judgment

fixing the value of the Otoe county land at $337,025 and the value of the personal property, upon which there was no dispute, at $159,948.39, and, after deducting certain exemptions, fixing the amount of inheritance tax at $4,687.93.

The argument is made by the complainant that by voluntarily paying the amount of the tax found to be due by the district court, and by failing to take the preliminary steps prescribed by sections 6018 and 6019, Comp. St. 1922, to recover the excess payment, the respondents have precluded themselves from recovering any part of the amount paid, and that, therefore, the payment must be regarded as a complete settlement and payment of the entire amount due.

It seems unnecessary to set forth the provisions of the foregoing sections of the statute. In a general way they provide that notice in writing should be given to the treasurer, demanding the return of the excess taxes paid within 30 days from the date of payment, and, under certain circumstances, that a claim be filed with the county board, and, if disallowed, that an appeal should be taken to the district court. It is conceded that none of the requirements of the above mentioned sections were complied with by the respondents.

We are of the view that the remedies prescribed by sections 6018 and 6019, Comp. St. 1922, have no application to cases involving the payment of an inheritance tax. The inheritance tax law is complete in itself. It provides that the amount of the tax shall first be determined by the county court, and gives the right of appeal to the county as well as to the legal representatives of the deceased. This is what is being done in this case. It also provides a remedy in case of erroneous payments. Section 6162, Comp. St. 1922, a part of the inheritance tax law, provides, in substance, that, when any amount of inheritance tax shall have been erroneously paid to the county treasurer, it shall be lawful for him, on satisfactory proof rendered to him of the erroneous payment, to refund and pay to the executor, administrator or persons who have paid any such

tax in error the amount so paid: Provided, that all applications for a repayment of such tax shall be made within two years of the date of payment. This section gives ample authority to the treasurer to refund the whole or any part of an inheritance tax which has been erroneously paid, without reference to any of the requirements of sections 6018 and 6019, Comp. St. 1922.

At the time of the payment of the tax, it was not definitely and finally determined what amount was due, and in fact will not be finally determined until the mandate in this case is filed.

In the brief of the respondents in support of the cross-appeal, it is urged with much vigor that the value of the Otoe county land, as fixed by the court upon the second trial, is still too high. There is a wide variance in the value as fixed by the witnesses for the complainant from that of the witnesses for the respondents. This is not unusual in the class of cases where value is largely a matter of opinion. Upon a review of the record, we are inclined to agree with values as fixed by the trial court.

From what has been said, it is clear that the administrator has paid more on account of the inheritance tax than is due the county, and on every principle of right and justice the excess should be repaid. The payment under protest, under all the circumstances, is a sufficient demand to comply with the statute requiring that a demand for repayment be made within two years.

The judgment of the district court is, therefore,

AFFIRMED.

MINNIE SMITH, REVIVED IN NAME OF FAYE SMITH, EXECUTRIX, APPELLEE, V. NATIONAL ACCIDENT INSURANCE COMPANY, APPELLANT.

FILED MARCH 6, 1925. NO. 23034.

1. **Insurance: CAUSE OF DEATH: CIRCUMSTANTIAL EVIDENCE.** Where an accident insurance policy provides for payment of loss when the death of the insured is caused by external, violent

and accidental means, the death of the insured in such manner, within the meaning of the terms of the policy, may be established by circumstantial evidence.

2. ———: ———: SUFFICIENCY OF EVIDENCE. Evidence examined and set out in the opinion, *held* sufficient to warrant the inference that insured fell and struck his head on a water-tank; that such fall was accidental; and that death was caused through external, violent and accidental means.

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

Hainer & Flansburg and *Julius D. Cronin,* for appellant.

J. A. Donohoe, contra.

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

GOOD, J.

This is an action on an accident insurance policy by the beneficiary therein named, to recover for the death of the insured by accidental means. The defense is that the death of the insured was not caused by external, violent and accidental means. Plaintiff recovered. Defendant appeals.

The policy in question was issued to the insured, Eugene H. Smith, insuring said Smith, for a term of five years from the date of the policy, against bodily injuries resulting in death, effected directly and independently of all other causes through external, violent and accidental means, and where there are some external and visible marks of an injury.

The following pertinent facts are shown by the record: On the morning of July 6, 1920, and within the lifetime of the policy, the insured, Eugene H. Smith, was found dead, with his head submerged in water in a small watering tank in a pasture in which insured kept a milch cow. The watering tank consisted of half of a kerosene barrel, located from six inches to three feet inside the south fence of the pasture. The fence consisted of either two or three wires, the top wire being loose enough so that a person, by press-

ing the wire down, could step over the fence at a point just east of the tank. The surface of the ground immediately around the tank for a distance of five or six feet was bare where the grass had been tramped out by the animals drinking at the tank. In the latter part of the night previous, there had been a heavy rain and the ground around the tank was soft and muddy, so that, as one witness stated, he could stick his finger into the ground to a depth of an inch or an inch and a half.

It was the custom of Mr. Smith to go to the pasture every morning at about 7 o'clock, or a little before, to milk his cow. On the day previous to his death Mr. Smith and his family had attended a celebration at Orchard, and returned to his home at Page, Nebraska, about 10:30 o'clock at night, after which he went down to the business part of the village and returned to his home about midnight. At about this hour one of Mr. Smith's daughters, who had also attended the celebration and had come home on a night train, came into the house, and her father was then reading his newspaper. She talked with her father for a few moments and he was in a pleasant, jolly mood. This was the last that was seen of him alive. At that time there were no marks or indications of any injury noticeable upon his person. The next seen of him was by a neighbor, who also kept a cow in the same pasture, and who, on going to the pasture to milk his own cow at about 7 o'clock in the morning, saw a milk pail by the side of the water-tank. On going near the tank he discovered the body of Mr. Smith lying over the tank, with his head and left arm in the tank and under the water; the right arm outside of the tank and resting upon the milk pail, with, possibly, the bail of the pail over his right arm. His head was to the west and his feet to the east, the body parallel with the fence adjacent to the tank. A careful examination of the ground around the tank was made, which disclosed no tracks leading thereto, save two foot-marks just east of the tank, indicating that Mr. Smith had stepped over the fence just east of the tank and on the toe or ball of his foot, and that the

foot had slipped in the mud, showing one foot to have slipped forward and the other slightly backward. The toe of one shoe was resting at the end of one of the marks where his foot had apparently slipped. There was no mud on his shoes. When the body was removed from the tank it was ascertained that his hat was on his head and his glasses were on, unbroken. When the hat was removed there was disclosed a bruise or abrasion over the right eye, an inch or more long and a half-inch wide. The bruised place was raised or swollen to the thickness of a lead pencil, and was slightly discolored, but the skin was not cut. There was also some blood in his mustache beneath the nose. The body was cold, but *rigor mortis* had not set in, or at least the body was not yet stiff, thus indicating that death had occurred but a short time before. There was no evidence of any struggle. There was no autopsy.

It is the theory of the plaintiff that Mr. Smith went to the pasture in the morning, as usual, to milk his cow, and that upon stepping over the fence his foot slipped and he fell, striking his head on the tank, probably rendering him unconscious, and that, with his head submerged in the water in the tank, he was drowned or suffocated.

There was evidence on behalf of defendant tending to show that nearly two years prior to this time Mr. Smith had suffered an attack of influenza, which left him with a weak heart; that at one time he fainted in a barber shop, and that at other times, in his place of business, he evinced great weakness and complained of his heart. For many years immediately preceding his death, Mr. Smith was engaged in the banking business in Page. For some time prior to his death his bank had been in an insolvent condition. There was evidence tending to show that Mr. Smith had violated the banking laws by making false entries in the bank books, and it is the theory of the defendant that Mr. Smith either committed suicide because of worry and dread over possible exposure in his banking transactions, or that the worry and fear had induced an attack of heart failure, and that his death was due either to suicide or to

his heart disease. There is evidence on behalf of the plaintiff tending to show that, while Mr. Smith had suffered from a weak heart for several months after his attack of influenza, he had entirely recovered therefrom, and for a year or more had been in his usual good health, and that he had not appeared to be laboring under any mental stress or worry.

Defendant urges that the circumstances disclosed are not sufficient to warrant the inference that death was due to violent and accidental means; that it is not proper to build one inference upon another in order to establish a fact which should be proved, and urges that in this case it is necessary, in order to permit a recovery, to infer from the facts proved: First, that Smith had a fall; second, that the fall was accidental; and third, that death was the proximate result of accident rather than of disease.

That one inference may not be based solely on another inference may be conceded to be fundamentally sound. The real question presented, however, is whether death by external, violent and accidental means, within the meaning of the insurance policy, may be proved by circumstantial evidence. An affirmative answer to this question has been so often given by the decisions of this and other courts that the rule may be said to be firmly established. In making application of the rule to the instant case, it is necessary to determine whether the circumstances proved warrant the inferences: First, that the insured fell; second, that the fall was accidental; and, third, that the fall, rather than disease, was the proximate cause of death. We are of the opinion that each and every one of these inferences may be drawn from the evidence.

The circumstances clearly indicate that Smith entered the pasture by getting over the fence immediately east of the water-tank. The circumstances also indicate that upon stepping over the fence his foot slipped, so that his toe was at the end of the mark showing where his foot had slipped, all clearly indicating a fall. There is nothing from which an inference could be fairly drawn that it was other than

accidental. The foot slipping back would naturally precipitate the body forward or toward the tank. The fact that insured's hat and glasses were on his head and that his milk pail was evidently on his arm or in his hand when he fell further indicates an accident. Besides, there is nothing to indicate, or from which one could infer, that the fall was premeditated. Therefore, we think that the inference may be fairly drawn that there was a fall and that it was accidental. The great weight of the evidence is to the effect that Mr. Smith had recovered from his attack of influenza at least a year before the accident, and there is nothing to indicate that he was suffering from any serious heart trouble at the time. The wound on his forehead would be precisely where one would expect to find it if, in the fall, he had struck his head upon the tank. As he was facing the tank, he must have been near to the right side thereof, since his right arm was hanging over the side of the tank and his left arm and head were in the tank. The wound was over the right eye and would be in the place where one would naturally expect it to be if he had fallen against the outer edge of the tank. The fact that his hat was on his head would account for the skin not being entirely cut through. The further fact that the wound was slightly discolored would indicate that it was of recent occurrence and very shortly before death. The further fact that it was raised and swollen clearly indicates that it occurred before death. The physicians testified that such a wound could produce unconsciousness, and that, with his head submerged in water, death would soon follow. If death had been due to heart disease, so that there would have been a stopping of circulation, the wound on his head would not have swollen, since circulation of the blood would be necessary to cause the swelling from the congestion of the blood. Under the facts and circumstances disclosed by the record, we think every inference that was necessary to entitle the plaintiff to recover could be drawn from the evidence before the jury.

So far as the suicide theory is concerned, it is not very

seriously argued. That such an act should have been contemplated by the insured and carried out in the manner disclosed seems highly improbable.

We are of opinion that the verdict is sustained by the evidence. The judgment is right, and is therefore

AFFIRMED.

GENERAL MOTORS ACCEPTANCE CORPORATION, APPELLEE, V. HENRY C. HUPFER, APPELLANT.

FILED MARCH 6, 1925. No. 23013.

1. **Bailment.** The legal effect of the trust receipt, set out in the opinion, considered, and *held*, to establish the relation of bailor and bailee.
2. **Sales:** Section 2464, Comp. St. 1922, does not include a mortgage.
3. **Evidence** examined, and held sufficient to support the judgment.

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

E. H. Evans, for appellant.

Halligan, Beatty & Halligan, contra.

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

THOMPSON, J.

This is an action in replevin brought in the district court for Lincoln county by plaintiff, General Motors Acceptance Corporation, against Henry C. Hupfer, defendant, to recover four automobiles which were taken under the writ and delivered to plaintiff, the value of each being admitted to be $1,000. The petition is in the ordinary form, alleging absolute ownership in plaintiff. The answer is a general denial. A jury was waived, and trial had to the court; ownership and right of possession found to be in plaintiff, damages assessed at one cent, and judgment so entered. From this judgment defendant appeals.

Plaintiff bases its right to recover the automobiles upon

a purchase made of them by it from the Oakland Motor Car Company in December, 1919. The automobiles were shipped by the Oakland company to North Platte, consigned to itself, where they were unloaded by one C. M. Trotter, a retail dealer in automobiles at that place. Prior to the unloading thereof, and prior to the delivery of the bill of lading for such cars to Trotter, the latter was required to, and did, execute to plaintiff the following trust receipt:

"I (we) hereby acknowledge that said motor vehicles are the property of said General Motors Acceptance Corporation and agree to take and hold the same for the purpose of storing said property; and I (we) hereby agree to keep said motor vehicles brand new and not to operate them for demonstrating or otherwise and to return said motor vehicles to said bank or said General Motors Acceptance Corporation or its order upon demand. I (we) agree not to sell, loan, deliver, pledge or otherwise dispose of any of said motor vehicles to any other person except upon written order from General Motors Acceptance Corporation for release from trust, upon payment to bank mentioned therein of the amount required by said order, and upon the indorsement on the back of this trust receipt by said bank of a release from trust."

Prior to the arrival of the cars or the bill of lading, and before Trotter came into possession of the cars, he executed a chattel mortgage upon them to defendant, to secure a promissory note which he had before executed to defendant, and is the mortgage upon which defendant relies in this case. About January 19, 1920, Trotter absconded. Defendant then filed his mortgage, and took possession of the cars.

Defendant contends that "the judgment of the court is contrary to the evidence," and that the "judgment of the court is contrary to law." We have carefully examined the evidence, and find that the judgment is sustained thereby. Having thus concluded, a discussion of the evidence in detail would be futile.

This leaves for our determination the question, what is the legal effect of the trust receipt? Under it, Trotter had but one use he could make of these automobiles, and that was to display them; and he had but one trust, and that was to care for and protect them. He might become the owner by complying with the terms of the receipt, but until such compliance was had he is a bailee and no more. Thus, this trust receipt was not an absolute sale, mortgage, conditional sale, or lease, and it was not necessary that it be recorded. *McClelland v. Scroggin*, 35 Neb. 536; *Singer Sewing Machine Co. v. Omaha Umbrella Mfg. Co.*, 83 Neb. 619; *In re Marks & Co.*, 222 Fed. 52; *Campbell Printing Press & Mfg. Co. v. Dyer*, 46 Neb. 830.

As Trotter was at all times without ownership in the automobiles, the mortgage to defendant is void; but, were it a valid mortgage, plaintiff's right would, nevertheless, be prior. Section 2464, Comp. St. 1922, relied upon by defendant, does not include a mortgage. *Racine-Sattley Co. v. Meinen*, 79 Neb. 32; *Campbell Printing Press & Mfg. Co. v. Dyer, supra.*

Each of defendant's other contentions has been considered. However, reversible error is not shown.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

GEORGE C. BUTE ET AL., APPELLANTS, V. HAMILTON COUNTY, APPELLEE.

FILED MARCH 6, 1925. No. 23789.

1. Taxation: EQUALIZATION: APPEAL. On appeal from the finding of a board of county commissioners sitting as a board of equalization, the issues are confined to those raised at the hearing before such commissioners.
2. ———: STOCK OF FOREIGN CORPORATION. Shares of stock in a foreign corporation, owned and in possession of a resident of this state, are taxable under section 5820, Comp. St. 1922, and not under section 5884, Comp. St., 1922, which latter provides for taxation of domestic corporations only.

3. ———: CLASSIFICATION OF STOCKS. To provide by statute for one mode of taxation as to stock in foreign corporations, and a different one for stock in domestic corporations, is a reasonable classification, and is not void for lack of uniformity.
4. ———: STOCK OF FOREIGN CORPORATION. Taxation of the capital stock of a foreign corporation at its domicile does not prevent the taxation in this state of shares of stock in such corporation, owned and possessed by a resident of this state.

APPEAL from the district court for Hamilton county: LOVEL S. HASTINGS, JUDGE. *Affirmed.*

Hainer, Craft, Edgerton & Fraizer, for appellants.

John J. Reinhardt and *M. F. Stanley, contra.*

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

THOMPSON, J.

The board of county commissioners of Hamilton county, sitting as a board of equalization, was about to list for taxation purposes shares of stock in the Buckhannon River Coal Company, and the Finke Creek Coal & Coke Company, West Virginia corporations, then and prior thereto owned and in the possession of George C. Bute *et al.*, residents of Hamilton county, when Bute, in behalf of himself and the others, interposed the following, which appears in his brief:

"In his petition, Mr. Bute, for himself and others, alleged that the Buckhannon River Coal Company is a corporation organized under the laws of and doing business in West Virginia, and is the owner of real estate, houses, lots, mining equipment and mineral rights, and that each year it has been duly and legally assessed in West Virginia on its property and has paid its legal taxes. He alleged that during the month of April, 1922, the company lost $7,000, and the same amount during the month of May, and that the company has not operated during April 1, 1922, and at the time of the filing of the petition there was no present prospect of the settlement of the strike then rampant. He alleged that the shares of stock had no mar-

ket value, and were not offered on any of the exchanges and were not bought and sold as commercial stock.

"He alleged that the Finke Creek Coal & Coke Company is incorporated in West Virginia and is the owner of certain mineral rights in that state; that these lands are far from market and inaccessible to any railroad and have no present market value because of their inaccessibility. He alleged that the company had been organized for 18 years or more and had never paid a single dividend, and had never made any development of its lands and had each year called upon its stockholders for their respective shares of the taxation and other expenses incidental to the corporation in West Virginia. He alleged that unless a railroad is built to these lands they will never have any value and the company will never reap any rewards, and that if there is any value at all now it is a mere speculative value and no real value, and that the shares of stock have no real value. He alleged that this assessment so fixed by the board of equalization of Hamilton county is unjust, unlawful, illegal, and double taxation. He asked that the shares of the Buckhannon River Coal Company be assessed not to exceed $50 a share, and that the assessment of the Finke Creek Company be stricken from the record."

In its answer, Hamilton county alleged that the Buckhannon River Coal Company was a regular operating company, and that the shares of stock on April 1, 1922, were fully worth what they were assessed, and that they were assessable in Hamilton county. The answer further alleged that enormous deposits of coal underlie the lands owned by these two companies, and that the values fixed by the board of equalization were not exorbitant and should stand.

After a hearing the board of equalization found the stock in the Buckhannon River Coal Company to be worth 100 cents on the dollar, and that in the Finke Creek Coal & Coke Company 50 cents on the dollar. From this finding appeal was had to the district court. A hearing was had on the same issues presented to the board, decree entered,

leaving the valuation of the stock in the former corporation at 100 cents, and reducing the valuation of the stock in the latter to 20 cents. From this decision, Bute and others appeal, relying for reversal upon the following propositions:

(1) "The proper method of valuing the shares of stock of these foreign corporations is the same method as defined by section 5884, for the valuation of shares of stock of Nebraska corporations. To hold that the law raises some other method for fixing the value of the West Virginia corporate stock will cause the law to violate the constitutional provision for uniformity."

(2) "The valuation placed by the court upon this stock owned by Bute and others is exorbitant and excessive."

There is an attempt, by way of a reply brief of appellants to raise questions not presented to the board of equalization. Both by statute and our previous holdings, we are limited, as was the trial court, to the issues raised at the initial hearing. *Reimers v. Merrick County*, 82 Neb. 639; *Nebraska Telephone Co. v. Hall County*, 75 Neb. 405. We shall so confine our considerations.

As to defendant's first contention, section 5884, Comp. St. 1922, as we construe it, does not include stock in a foreign corporation. The material parts of this section to the question before us are:

"Moneys, gross credits, including corporation shares or stocks, * * * shall be separately listed and shall be taxed on the basis of twenty-five per cent. of the mill rate levied upon tangible property where said intangible property is assessed, the same to be assessed and collected where the owner resides: Provided, that the value of the shares or stock of corporations organized under the laws of this state shall be determined for the purpose of this section by deducting from the actual value of the paid-up capital stock, surplus and undivided profits of such corporation available for stock dividends, the actual value of the property of the corporation, both tangible and intangible, listed and taxed in this state and the actual value of the property of the corporation outside of this state."

It will be noticed that the above proviso affords a means of finding the value of stock in corporations "organized under the laws of this state." This proviso, as here used, serves to define the words "corporation shares or stocks" appearing in the preceding part of the same section, and limits them to that of a domestic corporation only. Defendant relies upon the recent decision in *State Bank v. Endres*, 109 Neb. 753. It must be remembered that section 5887, Comp. St. 1922, therein construed, does not contain a proviso serving to define the word "bank" as used in such section. Therefore, the conclusion reached herein is not in conflict with that case.

Thus, it is considered by us that the stock sought to be subjected to taxation is covered by the provisions of section 5820, Comp. St. 1922, which is as follows: "All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value. 'Actual value,' as used in this act, shall mean its value in the market in the ordinary course of trade."

The Constitution, as it stood before the amendment of 1920, of itself supplied the classification of property for taxation purposes; the amendment vests this power in the legislature. The classifying of stock in foreign corporations different from that in domestic corporations, for assessment, does not contravene the constitutional provision for uniformity. In this conclusion we are supported by *Gaar, Scott & Co. v. Shannon*, 52 Tex. Civ. App. 634; *Ducat v. City of Chicago*, 48 Ill. 172; *Hughes v. City of Cairo*, 92 Ill. 339; *Bacon v. Board of State Tax Commissioners*, 126 Mich. 22; *Hunter v. Wells Fargo Express Co.*, 134 Ia. 358.

Appellee urges that appellant abandoned his contention of double taxation on this appeal, relied upon in the lower court, because the stock in question has been assessed in West Virginia. Whether he did or not, the contention is without merit. *Dwight v. Mayor and Aldermen of City of Boston*, 94 Mass. 316; *Bradley v. Bauder*, 36 Ohio St. 28; *Judy v. Beckwith*, 137 Ia. 24.

The evidence amply supports the finding and judgment of the district court as to the value of the stock in the Buckhannon River Coal Company, as well as that in the Finke Creek Coal & Coke Company, especially as to their respective values "in the market in the ordinary course of trade." Such valuation is neither exorbitant nor excessive.

The judgment of the district court is

AFFIRMED.

Note—See Taxation, 37 Cyc. 748 (1926 Ann.), 759, 864, 865, 1031, 1118.

PERRY C. GAINES, APPELLANT, V. STEPHEN K. WARRICK, APPELLEE.

FILED MARCH 6, 1925. No. 24404.

1. **Special Appearance.** A special appearance is in the nature of a plea in abatement, and is governed by the same rules.
2. **Abatement: SPECIAL APPEARANCE.** If the lack of jurisdiction over the person of defendant does or does not appear on the face of the record, it may be raised by special appearance, and error, if any, committed in the overruling thereof is not waived by answering over, where the objection is pleaded in the answer. All holdings of this court to the contrary overruled.
3. **Appeal: REVIEW.** Alleged errors which are predicated upon evidence at the trial will not be considered, unless such evidence is preserved in a bill of exceptions, and in the absence of such bill of exceptions this court will only determine whether the pleading sustains the judgment rendered thereon.

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

Reavis & Beghtol, for appellant.

Hainer & Flansburg, contra.

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

THOMPSON, J.

This action was begun in the district court for Lancaster county by plaintiff, Perry C. Gaines, against defendants, Stephen K. Warrick, Frank H. Koenig, and Joseph A. Rymer. Warrick and Koenig, residents of Scotts Bluff county, were served there, and Rymer, a resident of Lancaster county, was served in such county. Warrick interposed a special appearance objecting to the jurisdiction of the court over his person, which reads as follows:

"Comes now the defendant, Stephen K. Warrick, and appearing specially and for the sole purpose of objecting to the jurisdiction of the court over his person says that the court is without jurisdiction over the person of the defendant Stephen K. Warrick for the reason:

"That said Stephen K. Warrick is a nonresident of Lancaster county and is a resident of Scotts Bluff county, and that the summons in this case was served upon said defendant and upon Frank H. Koenig in Scotts Bluff county; that the cause of action set forth in the plaintiff's petition does not exist nor have any basis in fact against the said Frank H. Koenig or Joseph A. Rymer, and that Joseph A. Rymer is made a party to the suit for the sole purpose of alleging a cause of action against him so that suit could be brought in Lancaster county and service sent out of the county for the defendant Stephen K. Warrick.

"That the joinder of Joseph A. Rymer with said Stephen K. Warrick in said suit is an improper joinder of defendants.

"That said Joseph A. Rymer is not made a party defendant in good faith, but is named as a party defendant solely for the purpose of service, and that said Joseph A. Rymer and Frank H. Koenig cannot be held nor connected with the cause of action set forth in the plaintiff's petition."

Such special appearance and objection is in the nature of a plea in abatement, and is governed by the same rules. *Guthman v. Guthman,* 18 Neb. 98; 1 C. J. 32, sec. 17.

Plaintiff filed no answer or other pleading to the allegations contained in this special appearance. The special

appearance was sustained and the cause dismissed as to Warrick. Plaintiff seeks a reversal in this court.

A bill of exceptions has not been preserved and presented to us. In *Gretch v. Maxfield,* 4 Neb. (Unof.) 256, we held: "Affidavits filed in support of objections to jurisdiction over the person, to be available in proceedings in error, must be preserved by bill of exceptions." *Edwards v. Kearney,* 14 Neb. 83; *Loar v. State,* 76 Neb. 148. This rule applies as well to an appeal.

It has been the rule of this court from the beginning that when a lack of jurisdiction over the person or the subject-matter appears on the face of the record, and objection is interposed by special appearance on the part of defendant, and a hearing is had thereon, and such objection is overruled, defendant waived such error, if any, by answering over, even if such objection to jurisdiction is carried into the answer, but that, if such want of jurisdiction did not appear on the face of the record, then the plea interposed and overruled could be carried into the answer, and the error, if any, committed in overruling it was not waived by filing an answer.

These divergent rules have given rise to doubt, confusion, and uncertainty of application, and have not been, and are not now, serving a useful purpose. If the reason ever existed for their dual observance, it is no longer appealing. If the lack of jurisdiction over the person of defendant does or does not appear on the face of the record, it may be raised by special appearance, and error, if any, committed in the overruling thereof is not waived by answering over, where the objection is pleaded in the answer. All holdings of this court to the contrary overruled.

Then, since the facts set out in the special appearance were not controverted by plaintiff, they stand admitted. A careful consideration of the facts so set out convinces us that they are sufficient to support the judgment of the trial court in sustaining the special appearance and dismissing the case as to defendant Warrick.

The judgment of the district court should be, and hereby is,

AFFIRMED.

BYRON L. SCOVEL ET AL., APPELLANTS, V. ROBERT L. ISHAM ET AL., APPELLEES.

FILED MARCH 6, 1925. No. 22959.

1. **Pleading.** The allegations of a petition and the proof thereunder must agree. *Ayers v. Wolcott*, 66 Neb. 712.
2. **Fraud: EVIDENCE.** Where a recovery is sought because of damages occasioned by reason of false representations as to the solvency of a third party, the evidence as to such insolvency should be with reference to the time of the alleged false representations.
3. ———. To maintain an action for damages for false representation, the plaintiff must allege and must prove what representation was made; that it was false and so known to be by the defendant charged with making it, or else was made without knowledge as a positive statement of known fact; that the plaintiff believed the representation to be true; that he relied on and acted upon it, and was thereby injured.

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

George N. Foster, Thomas E. Dunbar, G. T. H. Babcock, Allen G. Fisher and *Frederick J. Patz*, for appellants.

E. D. Crites, F. A. Crites and *Mitchell & Gantz, contra.*

Heard before ROSE, DAY, GOOD, THOMPSON and EVANS, JJ., REDICK and SHEPHERD, District Judges.

EVANS, J.

In this action the appellants (hereinafter called the plaintiffs) sue to recover damages because of the alleged fraudulent representation made during the negotiations out of which grew the sale of the entire capital stock of Chadron State Bank to the plaintiffs. The negotiations leading up to the contract of purchase began in June 1920, and the contract was signed on July 30, 1920. The entire con-

sideration was paid and the transfer of the stock completed about August 16, 1920. In the bills receivable of the bank was a note for $6,875 signed by William Steadman and Bertha J. Steadman, dated March 24, 1920, due 90 days after date. The damages claimed are based upon the allegation that this note was taken at its face value as a part of the assets of the bank, when it was worthless, and that, had the plaintiffs been aware of its lack of value, they would have paid that much less for the stock.

The fraudulent representations complained of are set forth in the petition as follows: "That there was also in the files of said Chadron State Bank, then and prior, a letter of credit, or financial statement made by Seneca State Bank, and procured by the defendants at the request of said plaintiffs, after the execution of said contract and memo., which letter stated in substance that said William Steadman was financially solvent, and owner of much property in Thomas and Cherry counties, in this state, and that he was able to pay said note, so soon as he should ship his cattle therein described, upon the market; that the said letter was exhibited by defendants to plaintiffs, as such file of Chadron State Bank, at its banking office, and it was also known to defendants that said Steadman and wife, Bertha J. Steadman, were then and had long prior thereto been residents of Seneca, in Thomas county, and not in Chadron, but 186 miles away from Chadron, and that plaintiffs would rely upon such letter, so exhibited to them as their basis for completing their said contract and accepting the said Steadman note at its stated face value—" and that the letter in question, which was one of the files of Chadron State Bank, was not turned over to the plaintiffs with the other papers and files of the bank.

The evidence tended to establish that there had been exhibited to the plaintiffs during the negotiations a letter written upon the letter-head of the Seneca State Bank in substance as follows:

"Dear Sir: Replying to your inquiry concerning the financial condition of William Steadman, and regarding a

note held by the Chadron State Bank, will say that I have known William Steadman for a number of years, and he is honest and reliable; and while at the present time he is short of cash, he intends to ship a large number of cattle in a short while, at which time he will be able to liquidate all his indebtedness to your bank. He is perfectly responsible in every way.

"(Signed) P. C. Shockley."

And that this was the letter requested by the plaintiffs, and that upon it they relied in making their purchase of stock; that the letter was not the letter of P. C. Shockley, but a forgery used to deceive the plaintiffs. The defendants made timely objections to the admission of this evidence.

The appellants also assign as error the sustaining of the objections of the defendants to questions asked of the plaintiff Rooney as to a conversation had with the defendant Tierney subsequent to August 16, 1920; the purpose of the evidence sought to be elicited being to show that at the time of the negotiations Tierney knew Steadman was insolvent. There is in the record no evidence showing that in August, 1920, Steadman was insolvent except as it may be inferred from the fact that in 1922 he was insolvent.

When the plaintiffs had rested, the defendants each separately moved the court to dismiss the case, the reasons therefor being set forth at length, but which may be summarized as, failure of the petition to state a cause of action, and that the evidence fails to sustain the allegations of the petition, which motion was sustained and the case dismissed. The motion of the defendants was in effect a demurrer to the evidence, and if there is in the record evidence to sustain the allegations of the petition the judgment of the district court should be reversed.

The misrepresentation relied upon by the plaintiffs is that the letter exhibited to them was never written by P. C. Shockley, and that it was in fact a forgery, and that, had it not been presented to them, they would not have purchased the bank stock at the price they paid, but would have

reduced the consideration by the amount of the Steadman note.

The allegation in the petition relates to and describes a letter from Seneca State Bank. The evidence relates to and describes a purported letter from P. C. Shockley. The petition alleges that the letter from the Seneca State Bank was not delivered to the plaintiffs when the other property of the Chadron State Bank was delivered to them. The evidence tends to prove that the purported letter of P. C. Shockley was a forgery, and that, while it was exhibited by the defendant Tierney to the plaintiff and bank examiner Eastman, it was not turned over to the plaintiff with the other property of the Chadron State Bank. "The allegations of a pleading and the proofs thereunder must agree." *Ayers v. Wolcott,* 66 Neb. 712; *Omaha Consolidated Vinegar Co. v. Burns,* 44 Neb. 21; *Luce v. Foster,* 42 Neb. 818; *Traver v. Shaefle,* 33 Neb. 531; *Young v. Filley,* 19 Neb. 543. And the evidence of fraud must be confined to the matters contained in the statement relied upon. *Warfield v. Clark,* 118 Ia. 69.

There is no evidence in the record establishing the insolvency of William Steadman between June 1 and August 16, 1920, unless it could be inferred from the fact that executions in quite large amounts against him were returned unsatisfied in 1922. Evidence of insolvency ought to be with reference to the time of the alleged false representations. *Luse v. Rea,* 207 S. W. (Tex. Civ. App.) 942; *Redding v. Wright,* 49 Minn. 322.

Evidence as to William Steadman's insolvency in 1921 and 1922, when coupled and connected with other facts relating to his condition in 1920, might be material under certain conditions, but establishing that William Steadman was insolvent in 1921 or in 1922, otherwise unaided, does not sustain an allegation that he was insolvent on July 30 or August 16, 1920. Steadman, the payor of the note involved, when a witness, was asked why, when the payment of the note was demanded in September, 1920, he did not pay it, and stated :"I don't remember exactly what was said

about it. I know that I was all the time trying to pay my debts. I couldn't do it then." This is in conformity with the statement in the letter as proved by the plaintiffs, "and while at the present time he is short on cash, he intends to ship a large number of cattle," etc. There was not, therefore, sufficient evidence to support the allegation of plaintiffs' petition.

Complaint is made because of the ruling of the trial court in sustaining the defendants' objections to questions, the purpose of which was to prove that the defendant Tierney in June, July, and August, 1920, knew that Steadman was insolvent. This, under the pleadings, was immaterial.

In the petition there is no allegation of any misrepresentation by the defendant Tierney as to the financial standing of William Steadman. The plaintiff Rooney, in answer to the interrogatory, "You didn't rely wholly on what Tierney told you, then?" said, "No, I did not."

To maintain an action for damages for false representation the plaintiff must allege and must prove what representation was made; that it was false and so known to be by the defendant charged with making it, or else was made without knowledge as a positive statement of known fact; that the plaintiff believed the representation to be true; that he relied on and acted upon it, and was thereby injured. *Stetson v. Riggs*, 37 Neb. 797; *Foley v. Holtry*, 43 Neb. 133, 137.

The plaintiffs failed to prove their allegation as to false representation, and failed to establish that William Steadman and Bertha J. Steadman at the time of the negotiations in June, July and August, 1920, were insolvent. Having so failed, the district court did not err in sustaining the motion to dismiss. The judgment of the district court is

AFFIRMED.

DAVID B. MUIR, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED MARCH 6, 1925. No. 22982.

Negligence: QUESTION FOR JURY. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury.

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

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

Fleharty & Yates, contra.

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

EVANS, J.

The plaintiff sues to recover from the defendant because of injuries occasioned by a collision between a Ford automobile, in which he was riding and used as a truck, and the defendant's street car. In the district court there was a verdict and judgment for the plaintiff in the sum of $1,550. From this judgment the defendant appeals.

The Ford was backing out of an alley on Sixth street in Omaha, and, in so doing, backed in front of an on-coming street car. The plaintiff alleges negligence in the defendant, in that the car was going at a high rate of speed; was not giving warning; was not under control; and that if proper care had been used the collision need not have occurred. The defendant alleges that the plaintiff was himself negligent in backing upon the tracks at all; that it was in violation of a city ordinance; and that the plaintiff's own negligence, and not the defendant company's was the proximate cause of the injury.

The defendant assigns as error the giving to the jury of instructions No. 3 and No. 11, and that in giving instruction No. 10, which it claims was correctly given, the case should have been terminated by an instructed verdict for

the defendant, and that the court erred in not giving such instruction.

Instruction No. 3 is as follows: "Before the plaintiff can recover, he must establish to your satisfaction by a preponderance of the evidence:

"First. That defendant was guilty of negligence in driving the car at a negligent rate of speed, or without warning, or that defendant's motorman saw plaintiff, or, in the exercise of due care, could have seen plaintiff in a place of danger in time to have stopped the car and avoided the accident.

"Second. That negligence of defendant was the proximate cause of the collision.

"Third. That plaintiff was injured by the collision, and the amount of damage he sustained by the injury.

"If plaintiff has proved all of the above propositions by a preponderance of the evidence, your verdict shall be for plaintiff; but, if plaintiff has failed to prove any one of the above propositions, your verdict must be for the defendant.

"Defendant has alleged that the collision was due to plaintiff's contributory negligence in backing onto the street car track in front of the street car, and without looking, and the burden is upon defendant to prove this by a preponderance of the evidence; but evidence of contributory negligence need not come exclusively from defendant's witnesses, but is to be arrived at by you from a consideration of all the evidence and circumstances in the case."

This instruction is complained of because it is claimed there is no evidence to support the claim that the street car was operated at a "negligent rate of speed," or "without warning," or that the motorman "saw plaintiff in a place of danger in time to have stopped the car." In effect, it instructs the jury that before the plaintiff will be entitled to recover he must establish to the jury's satisfaction by a preponderance of the evidence that the negligence in the operation of the car was the proximate cause of the collision which inflicted the injury upon the plaintiff and by which

he was damaged, and that upon a failure so to do their verdict should be for the defendant.

In the assignment of errors it is urged that this instruction was in effect to unconditionally direct the jury to find for the plaintiff. This instruction, taken in connection with the other instructions given by the court, present the question of negligence fairly to the jury, and upon that issue they found for the plaintiff. There is no prejudicial error in the giving of the instruction complained of.

Complaint is also made of the giving of instruction No. 11, which reads: "You are instructed that, under the rules of the road and the ordinances of the city of Omaha, the street car had the right of way over the automobile of the plaintiff, backing out of the alley in question, and it is for you to determine whether it was therefore the duty of the plaintiff to wait and pass to the rear of said street car.

"This rule, however, is not inflexible, to such an extent that the motorman, merely because he may have had the right of way, could continue on his course negligently, and negligently run into the plaintiff's automobile."

This instruction is in conformity with the rule laid down in *Omaha Street R. Co. v. Duvall,* 40 Neb. 29, and which has since been followed by this court. In *Stevens v. Luther,* 105 Neb. 184, Judge Letton, speaking for the court, thoroughly and ably considers the question presented, and having so canvassed the subject the rule is there approved and reaffirmed.

Complaint is made because the court, having given instruction No. 10, did not instruct a verdict for the defendant. The effect of giving instruction No. 10 was to take from the jury's consideration the doctrine of the "last clear chance," and was favorable to the defendant, but did not entitle it to an instructed verdict.

The defendant insists that under the undisputed facts in this case, and the rule that "A court cannot accept as true that which the undisputed evidence demonstrates is false," the plaintiff is not entitled to recover.

Without taking up a discussion of the rule, the enforcement of which is sought, consider the facts in this case:

The plaintiff's case as to negligence on the part of the defendant rests on the speed at which the street car was traveling and the failure to control the same. The points upon which the evidence is in dispute as between the plaintiff and defendant are: Rate of speed of the street car; rate of speed of the truck as it backed from the alley onto Sixth street; range and extent of vision looking south on Sixth street; the point in the alley from which the truck started to back onto the street; the direction in which the truck was moving or standing when struck; whether, while preparing to and backing out onto the street, the plaintiff or his companion, Baker, were looking out for street cars or other vehicles, and the distance the street car ran after it hit the truck.

With reference to the extent of vision of one standing where the truck stood and looking south on sixth street, it may be observed, two witnesses testifying on plaintiff's behalf—plaintiff and Baker—limited the extent of vision to 400 feet. There was one witness on behalf of the defendant who testified that you could see a street car coming from the top of the hill, which would be about 2½ blocks. The jury viewed the place of the accident, and found, so far as this fact is concerned, in favor of the plaintiff, and against the defendant.

The conductor, the witness White, testified that he left Center street at 2:11, and that the accident occurred at 2:13. Assuming that the blocks between Center street and Williams street are similar in length north and south to the block in which the accident occurred, the street car had traversed between 1,683 feet and 1,800 feet, which would give it an average rate of speed over its whole course of approximately 10 miles an hour, in which it started, climbed the incline, and drifted to the point of the accident, and came to a stop. Such fact is not corroborative of the speed testified to by the witnesses of the defendant, who fixed the rate at the time of the approach to the alley at

14 miles an hour. The evidence of the motorman, the witness Olson, on this point may be summarized as follows: He saw the truck backing from the alley when he was a car-length (about 40 feet) south of the alley; that at the time his car was drifting, i. e., without power being applied, and he was applying air to have it under control; that immediately upon discovering the truck he applied the air, pulled the reverse, and applied sand; that by the time he struck the truck he had considerably reduced the speed of the car; that the speed of the truck in backing onto the track was 6 or 7 miles an hour, and that to run a street car down this hill, down which he was then drifting, at 40 miles an hour, it is doubtful if it would stay on the track; that the truck came onto the tracks when the car was about a half car-length south of it, and that he struck the truck when its hind wheels had reached the west rail of the east track. The evidence of defendant's witness also tends to fix the distance from the north side of the alley to the lot line of the north lot in the block at 148 feet, with 9 feet additional to the curb; the width of the alley at 20 feet; that, when the car stopped, its front end was some place between 64 and 40 feet, depending upon the width of the grocery store, south of Williams street, so that the car, after striking the truck on a line at least as far south as the south line of the alley, ran 110 or more feet.

From the foregoing facts the following is deducible: If the street car ran the last 20 feet before striking the truck, and after its speed had been considerably reduced, while the truck was going the width of the track, which is 4 feet 8½ inches, or, to make allowance for the difference between the hind end and the position of its hind wheels, say 6 feet, and the truck was moving at the rate of 6 or 7 miles an hour, the street car must, of necessity, have been moving at 18 to 22 miles an hour. This is corroborated by the fact that, although the motorman used emergency methods in his endeavor to stop the car, beginning at least 40 feet south of the alley, he was unable to stop it until within from 40 to 60 feet of the place where he was intending to

stop to take on passengers. It is proper also to take into consideration the effect of dragging the truck over the cobblestone pavement for at least 100 feet. In other words, in running 150 or 160 feet using emergency methods, the car was only from 40 to 60 feet away from its intended stop, although it had dragged the truck about two-thirds of that distance. These facts were all before the jury. They viewed the site of the accident. It presents a disputed question of fact on which the jury found against the defendant. The court did not err in refusing to instruct a verdict. The judgment is

AFFIRMED.

WILLIAM S. NICHOLSON, APPELLEE, V. JOHN W. GETCHELL, JR., ADMINISTRATOR, ET AL., APPELLANTS.

FILED MARCH 6, 1925. No. 23675.

1. Issues properly presented to the trial court and necessary to a determination of the case should be decided either by a finding by the court or a verdict of the jury.
2. Judgment: CORRECTION. A judge at chambers, except by consent of all parties to be affected, has no jurisdiction to modify or correct a decree of the district court. Comp. St. 1922, sec. 1099.

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

Samuel L. O'Brien, Fern S. Baker and *Allen G. Fisher*, for appellants.

Lee Basye, contra.

Heard before MORRISSEY, C. J., ROSE, DAY, THOMPSON and EVANS, JJ., and SHEPHERD, District Judge.

EVANS, J.

This is an action to foreclose a mortgage made by John W. Getchell to William S. Nicholson to secure the payment of a note for $23,000 due September 1, 1923. During the pendency of the action in the district court the mortgagor

defendant died. There was a decree of foreclosure, from which John W. Getchell, Jr., as administrator of John W. Getchell, deceased, and as part owner by grant and as heir of said decedent, prosecutes this appeal.

The facts out of which the action arose are as follows: On April 16, 1918, the plaintiff and appellee, with one Alvin W. Nicholson, entered into a contract with John W. Getchell, hereinafter called Getchell, Sr., for the sale and conveyance of a ranch located in Sioux county for an agreed consideration of $111,550, made up of existing incumbrances in a sum not to exceed $51,750, the payment of which the grantee assumed, a cash payment of $3,000, the additional payments in cash, the assignment of a note and mortgage and conveyance of other real estate. The contract as to the various conveyances and assignments, except as hereinafter noted, were carried out on the date of the note and mortgage in suit. In the conveyance of the ranch, section 17, covered by the contract, which, if excluded, severed the ranch into two parts, was omitted from the deed of conveyance, although included in the mortgage in suit given to secure the $23,000 note which was part of the consideration for the ranch. About the same date possession of the ranch was given to Getchell, Sr. Default was made in the payment of the interest installment due September 1, 1920, and the owner and holder thereof, the plaintiff, instituted the present action, and elected, under the conditions in the mortgage, to declare the whole debt secured due and payable. The petition to foreclose the mortgage was filed on January 26, 1922. A supplemental petition, alleging the death of the mortgagor on May 31, 1922, the appointment of John W. Getchell, Jr., as administrator of the estate of John W. Getchell, Sr., deceased, on the 10th day of July, 1922, and that the decedent left surviving him as his sole and only heirs his children, John W. Getchell, Jr., Claudia W. Warner, and Maude Marshall, and that they were proper parties defendant, was filed on November 13, 1922. There is in the record no order showing the revivor of the action against John W. Getchell, Jr., as adminis-

trator of the estate of John W. Getchell, Sr., deceased, and the said heirs.

On December 5, 1922, John W. Getchell, Jr., and John W. Getchell, Jr., as administrator of the estate of John W. Getchell, deceased, filed his answer admitting that the administrator was appointed and qualified as such, and alleged that Getchell, Sr., had answered during his lifetime, and adopted such answer as the answer of the administrator. It also includes a general denial, and alleges that John W. Getchell is the father of the defendant John W. Getchell, Jr.; that it was understood by the plaintiff and Alvin W. Nicholson, the other vendor in said contract, that Getchell, Sr., and John W. Getchell, Jr., were partners in the contract of purchase; that Getchell, Sr., had performed all of the terms of the contract on their part to be done and performed; that an undivided one-third interest in said land has been conveyed to said John W. Getchell, Jr., the failure to convey section 17 and offered to reconvey the land to the plaintiff.

On the same day was filed an answer and cross-petition by John W. Getchell, Sr., the same having been sworn to on the 23d day of March, 1922, and presented by one J. E. Porter as his attorney. In it are denied all allegations of the petition "not specifically admitted or qualified." It alleges the making of the contract to sell and convey the ranch, incorporating the contract into the answer and cross-petition by attaching it as an exhibit and making it a part thereof. It alleges performance on the part of the vendee of the contract; that the mortgage in suit and the note were made to the plaintiff in his own behalf and as trustee for Alvin W. Nicholson, who is alleged to be a necessary party; the failure to convey section 17; that the ranch was purchased because it was a contiguous tract, and that the omission of section 17 resulted in a division of the ranch into two parts and greatly reduced its value; that it was purchased for the purpose of speculation and resale, and that while land values were high and when there was a large demand for such tracts of land, the defendant

was prevented, by reason of such division of the ranch occasioned by the failure to convey section 17, from making a sale thereof; that since said time said lands have very much depreciated in value, the loss and depreciation being about $35,000, which the defendants ask to have set off against the amount due upon the mortgage, or, in the alternative, a rescission of the contract and a reconveyance, which is tendered.

On the 2d day of June, 1923, the plaintiff filed a reply to the answer of John W. Getchell, Jr., as administrator, and John W. Getchell, Jr., and his wife, and on the same day filed a reply "to the answer of the defendant John W. Getchell filed in the above-entitled action on the 5th of December, 1922." These replies admit the contract, admit the omission from the deed of section 17 but say it was a mistake of the scrivener; that as soon as attention was called to it a conveyance was made and all damages denied.

The case was tried on the 15th day of June, 1923, thirteen days after the filing of the replies. During the trial, while the evidence was being introduced on behalf of the defendants, it was testified to by Getchell, the administrator, also part owner of the property affected by the mortgage, that one Arnold, who was then at O'Neill, Nebraska, and was the prospective purchaser referred to, had been talked with over the telephone on the preceding Saturday; that he had promised to come upon telegram; that on Monday preceding the trial Getchell had sent Arnold a telegram to be there on the day of trial, June 15; that Arnold knew what had passed between the senior Getchell and himself with reference to the sale of the ranch in the fall of 1918; that witness had taken Arnold over the land, and he was pleased with it until he examined the records, and then he ceased to be interested; that as to such matters—the offer to buy and the effect of the record—Arnold would be the witness who would know. Arnold failed to come on the train as expected, and then the defendant made the following application: "The witness we have been expecting did not come, and in view of the present status of the

case I will ask for time to take depositions." The court made the following ruling: "By the court: In view of the long time this case has been pending the request will have to be denied. Defendants except."

The evidence having been concluded, the case was submitted to the court, who thereupon entered a decree finding for the plaintiff as to the mortgage and debt, and entering a decree of foreclosure and sale, but making no finding or reference to the defence and counterclaim set up by the defendants. Defendants excepted to the rulings and findings of the court. The exceptions were overruled and the defendants given 40 days in which to prepare and serve their bill of exceptions.

The appeal was filed in this court August 18, 1923. The appellants' brief was filed on February 23, 1924. On March 11, 1924, there was filed in the district court for Sioux county and under title of this action a motion for an order to enter a decree *nunc pro tunc*, and the insertion in the decree "of a finding that the cross-petition is not sustained by the evidence, and that said cross-petition be dismissed," the purpose being to incorporate such finding and decree in the decree entered on June 15, 1923, which motion by notice was set for hearing March 18, 1924, "At chambers of Honorable W. H. Westover, judge of the district court in the city of Chadron, Dawes county, Nebraska, at nine o'clock in the forenoon."

On March 18, 1924, at the chambers in Chadron, in the county of Dawes, the matter came on for hearing under the foregoing motion and notice, at which time the defendants, by their attorney, objected to the giving of any order at Chadron, in Dawes county, for the following reasons: That the order could only be made in district court in Sioux county; that an appeal of the case was then pending in the supreme court; that briefs on appellants' behalf had been filed; because the decree had been given after the court had refused a continuance to take the deposition of the witness Arnold, which deposition they were then willing to furnish and which will prove all the allegations of the

cross-petition, and the defendants renew their requests to furnish the proof if the district court for Sioux county, Nebraska, shall again assume the jurisdiction and undertake to pronounce judgment. The learned judge overruled the objections, and sustained the motion to enter a *nunc pro tunc* judgment in accordance with the plaintiff's motion.

On April 7, 1924, there was filed in this court a "motion suggesting a diminution of record and leave to file a supplemental transcript," which was allowed and a supplemental transcript filed, including, among other things, the proceedings described, an instrument filed in the district court for Sioux county on December 30, 1922, by which Claudia W. Warner, William W. Warner, Maude Marshall, and Andrew B. Marshall, each objects to the jurisdiction over the person of the defendant, "and demurs to the petition for the reason that the court has not jurisdiction of the person of this defendant, and for the reason that the petition states no facts which tend to constitute any cause of action against this defendant, who claims no interest in the subject-matter thereof;" also a request for a stay of execution signed by Fern D. Getchell, Claudia W. Warner, and Maude Marshall, and filed in the district court on June 15, 1923. It will be observed that the record is rather anomalous.

The questions presented by the record are: (a) Is a judgment or decree which ignores, both as to findings and decree, issues raised by the pleadings sufficient? (b) Can a decree of foreclosure of a mortgage conveying real estate be legally corrected or amended by a *nunc pro tunc* order made at chambers outside the county where the land is situated, when the making of such order at chambers is objected to by the parties to the suit? (c) Was there error in overruling the application of the defendants for a continuance?

In this action the defendant John W. Getchell, administrator, and John W. Getchell and wife, tendered the defense of a failure to comply with the contract for the convey-

ance of land for which the mortgage sought to be foreclosed was part of the consideration, and sought affirmative relief in damages occasioned by such failure. To the answer and cross-petition the plaintiff filed his replies joining issue with the defendants and cross-petitioners. This issue, so raised, the decree in this case wholly ignored, unless the decree is aided by the order entered at chambers, the validity of which will be discussed later.

"A judgment without a trial and determination of all the issues properly raised is erroneous." 33 C. J. 1135, sec. 84.

"Issues properly presented to a trial court must be decided either by finding by the court or verdict of the jury before a judgment can be rendered." *Foster v. Devinney*, 28 Neb. 416.

The defendants were entitled to have the issues so raised passed upon and decided, and the failure of the decree made on June 15, 1923, to fully cover the issues presented by the pleadings is error.

After the appeal from the decree had been perfected and briefs had been filed in the supreme court challenging the validity of the decree, notice was served by the plaintiff upon the defendant's attorneys to take up and hear at chambers a motion to correct the decree by a *nunc pro tunc* order, alleging in the motion that the issues raised by the cross-petition and reply had, as a matter of fact, been decided and determined on the 15th day of June, 1923, at the time the decree was entered in court in Sioux county, and seeking to correct the decree by inserting therein a finding and an adjudication to that effect.

The provisions of the statute covering the question presented are in sections 9160 and 9161, Comp. St. 1922. The correction sought in this case would fall under the third sub-division: "For mistake, neglect, or omission of the clerk, or irregularity, in obtaining a judgment or order." It should be observed that this power to vacate or modify a judgment or order is vested in the court, not in the judge. There is nowhere power given to a judge in chambers to modify or correct a judgment, except by consent of all

parties. A judge at chambers is given power to pass upon motions and demurrers. This, however, refers to motions and demurrers affecting pleadings, and not to the correction of judgments.

In *Fiske v. Thorp*, 51 Neb. 1, it was held: "A judge of the district court has no jurisdiction at chambers to hear and decide a motion to vacate a judgment made after the term at which the judgment was rendered.

"If a statute, in terms, confers jurisdiction to hear matters on a court as contradistinguished from a judge thereof, as a rule such matters must be heard in court, and not before a judge at chambers or in vacation."

See *Kime v. Fenner*, 54 Neb. 476; *Brownlee v. Davidson*, 28 Neb. 785; *Shold v. Van Treeck*, 82 Neb. 99.

It follows from the foregoing that the decree entered in this case in failing to pass upon the issues presented was erroneous, and that it could not be legally corrected by the *nunc pro tunc* order by the judge at chambers, entered in a county other than that in which the land affected was situated, except by the consent of all parties to be affected.

With reference to the application for continuance, it is well to have in mind the facts with reference to the pleadings. The petition was filed on January 26, 1922. A supplemental pleading setting forth the death of the defendant mortgagor, the appointment and qualification of his administrator, and the names of his heirs, and asking for a revivor, was filed on November 14, 1922. On December 5, following, the administrator filed his own answer, his answer as an individual, and that of his wife, adopting an answer evidently prepared by Getchell, Sr., in his lifetime, but which was not filed until the 5th of December, 1922. The latter tendered the issues to which reference has been made. This stood undenied until the 2d day of June, 1923, thirteen days before the trial of the case. It is true that nowhere in the record does the defendant set forth the particular facts to which the witness Arnold would testify. Neither does he set forth the fact that he has no other witness by which they can be proved. It does appear in the

testimony of John W. Getchell, the administrator, that the father is dead, and that the negotiations of an attempted sale were between the father and Arnold; that Arnold was conducted over the ranch by the witness Getchell; that Arnold was well satisfied with the ranch until he examined the records, when he lost all interest; that Arnold, although he lived outside the jurisdiction of the court, had promised to be present at the trial.

At the time the application was made for the *nunc pro tunc* order, the defendants again asked permission to present to the court in its proper form the evidence of this witness, and objected to the *nunc pro tunc* order at that time, or at any place except in court in Sioux county. Under such circumstances, it can scarcely be said there was a proper exercise of judicial discretion in refusing the defendants the opportunity to present the evidence of the witness in question.

This action involves the title to a large tract of land.

The pleadings, proceedings, and practically the entire record are in an unsatisfactory condition, neither party being blameless.

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

REVERSED.

IN RE ESTATE OF HOMER GRISWOLD. NEBRASKA WESLEYAN UNIVERSITY, APPELLEE, V. ESTATE OF HOMER GRISWOLD, APPELLANT.

FILED MARCH 6, 1925. NO. 24329.

1. **Wills**: CONSTRUCTION. The subscription contract set out in the opinion is not rendered testamentary in character by the fact that payment is postponed until death of maker.
2. **Subscriptions**: CONSIDERATION. The assumption of an obligation, express or implied, by a university incorporated under the laws of this state, to keep an endowment fund intact and apply the income thereof to the payment of salaries and other expenses of the institution, is a sufficient consideration for a subscription to such fund in the form of a promissory note payable at the maker's death.

3. ———: OBLIGATION: IMPLICATION. The assumption of such obligation may be implied from the acceptance of such subscription.
4. Contracts: CONSIDERATION. A valuable consideration to support a contract need not be one translatable into dollars and cents; it is sufficient if it consists of the performance, or promise thereof, which the promisor treats and considers of value to him.

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

Claude S. Wilson and *Albert S. Johnston,* for appellant.

Stewart, Perry & Stewart, contra.

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

REDICK, District Judge.

Action upon a written subscription, in the form hereinafter set out, to the endowment fund of Nebraska Wesleyan University. The claim was duly filed in the county court, and upon appeal the jury was waived and the case submitted to the district court, and resulted in a judgment for the plaintiff, from which defendant appeals; and the case is submitted to this court upon a case stated and the briefs and arguments of the parties. A summary of the facts as agreed upon by the parties will suffice for the presentation of the questions to be reviewed.

The plaintiff, the Nebraska Wesleyan University, is a corporation organized under the statutes of this state, and carried on under the auspices and control of the Methodist Episcopal Church, for the purpose of education along the usual lines pursued by universities. It is governed by a board of trustees, seven in number, and has power under its charter and the statutes of this state to receive and hold for the purposes of the corporation real and personal property by gift, grant, will, devise, bequest, or purchase. The funds of the institution are to be applied to the erection of suitable buildings, and the payment of salaries of officers, instructors, and servants, and other expenses

connected with carrying on the work of education. The articles of incorporation were filed June 7, 1904, and since about that time the institution has been successfully carried on, having at present about 1000 students, and possessing real and personal property of the value of about $700,000, and two endowment funds of $350,000 and $1,341,000, respectively, the latter amount including the $5,000 subscription in controversy. The principal of these endowment funds is held intact, and only the income therefrom may be used for the maintenance of the institution, but such income is insufficient and has to be supplemented by contributions from persons interested in the university. From about the middle of September to midnight of December 21, 1921, the university conducted an extensive campaign at an expense of many thousands of dollars for the purpose of raising funds for the maintenance of the university, which resulted in payments and pledges in the above sum of approximately $1,341,000. During this campaign, and about 8:30 p. m. of the last day, December 21, the solicitors procured from Homer Griswold a pledge in the following words:

"Nebraska Wesleyan Endowment Fund
Estate Pledge.

"$5000. Postoffice, Uni. Place. State, Neb. Date, Dec. 21, 1921.

"In consideration of my interest in Christian education and of other subscriptions to this Endowment, Building and Expense Fund, I hereby subscribe and promise to pay to the Nebraska Wesleyan University the sum of five thousand dollars. Due and payable at my death. For value received. District—Lincoln. Charge—Homer Griswold."

Indorsed across left side margin: "Solicitor—Smith, Roper, Bair."

This was the last pledge taken during the campaign, and at 10 o'clock that evening was included with other subscriptions to make the total fund above stated, and has ever since been carried upon the books of the university as

a part of its endowment fund, the principal of which, as was well understood by Griswold, was to be kept separate and intact, and the income only to be used in defraying the expenses of maintaining the university. At the time of making said instrument Griswold was in good health and of sound mind and under no disability or undue influence. "There was no consideration for said note other than is recited therein and as may be inferred from the making of said subscription. No monetary consideration was paid to Griswold by the claimant."

The defendant bases his argument for reversal upon two propositions:

(1) That the instrument in question is testamentary in character and not enforceable as a claim against the estate; (2) that the instrument in question was a mere executory promise to make a gift, not based upon a valuable consideration, and therefore revocable at the option of the maker, and for this reason was revoked by the death of the maker through operation of law.

As to the first proposition, we do not deem it necessary to consider it at any length, because it is conceded, and is undoubtedly the law, that if a promissory note or any other written contract is supported by a sufficient consideration the fact that performance is postponed until after the death of the promisor does not of itself give to the instrument a testamentary character so as to require execution in accordance with the statute of wills. And it must be likewise conceded that, not being a *donatio causa mortis,* the lack of a sufficient consideration would render the instrument unenforceable.

The decisive question, therefore, for our decision is whether or not the instrument in suit is supported by a sufficient consideration, and this question has been presented to the courts of many states, with somewhat varying conditions and facts, and opposite conclusions announced, and the case being one of first impression in this jurisdiction, its correct decision depends upon the proper application of general principles, and a careful analysis of

the reasons given in support of the diverse conclusions of other courts, and such other reasons as may be found of controlling or logical application to the problem.

In the first place, the note purports to have been given "for value received;" but this may be called in question by evidence of the entire transaction tending to show that in fact no consideration existed.

In *Homan v. Steele, Johnson & Co.*, 18 Neb. 652, quoting from 2 Kent's Commentaries, *465, it is said: "A valuable consideration is one that is either a benefit to the party promising or some trouble or prejudice to the party to whom the promise is made. Any damage, or suspension, or forbearance of a right will be sufficient to sustain a promise." Many courts have given definitions in somewhat different language, but they are all, in the ultimate conclusion, reducible to the proposition contained in the above quotation, that a consideration must be something either of benefit to the promisor or a detriment to the promisee. In cases of unconditioned contributions to charitable or educational institutions, generally speaking, the benefit to the promisor consists of that which he receives as one of the general public by the carrying on of the institutions which are the object of his bounty, and the personal satisfaction consequent upon the devotion of a portion of his property to the benefit of the public; but such gifts arise merely out of the generous motives of the donor, the benefits of which furnish no legal consideration for the promise. A somewhat different situation is presented, as will appear later, when the promise is upon condition, performance of which is required of the institution. The detriment to the promisee may consist in the forbearance of a right, the incurring of some liability, or the assuming of some obligation with reference to the fund.

It is urged by plaintiff that a sufficient consideration is established by the following facts:

(1) That the claimant expended large sums of money in procuring the subscriptions.

(2) That the promise of each subscriber to the common purpose was a sufficient consideration to support the other subscriptions.

(3) That the claimant accepted said subscription and carried it on its books as a part of the endowment fund.

(4) That by such acceptance it impliedly agreed and assumed the obligation to continue the work of the university, to keep the principal fund intact, and apply the income thereof only for the support of the university.

Of these in their order:

1. There was no request, express or implied, by the donor, resulting in this expenditure, and, therefore, this consideration fails. In *Brokaw v. McElroy*, 162 Ia. 288, Evans, J., said of a similar contention: "The suggestion is quite abhorrent and we know of no legal principle to justify it. Such an expenditure cannot be deemed a consideration. Such an expenditure is essentially different in its nature and in its equity from expenditures and obligations incurred in carrying on the enterprise for which the institution was organized, in reliance upon the promise." True, it was held in *Keuka College v. Ray*, 167 N. Y. 96, that where a large subscription had been promised on condition that $20,000 be raised from others within a given time, and defendant subscribed $500 to secure the required amount, which was afterwards completed, the continued efforts of the committee to raise the required amount furnished a sufficient consideration as having been made upon request of the donor; but that is not this case. In fact, as suggested by defendant, the subscription in question was the last one obtained, and while we do not accept the argument of defendant to its full extent, on this particular point it seems conclusive that none of the expenses were incurred on the strength of this subscription.

2. That the mutual subscriptions of the donors furnished of themselves sufficient consideration each for the other is denied in this state, unless the promisee has made some expenditures or changed his situation or done some other act in reliance upon the subscriptions, or has complied with

the conditions on which they were made. *Homan v. Steele, Johnson & Co.*, 18 Neb. 652; *Armann v. Buel*, 40 Neb. 803. It would seem unnecessary to resort to the mutual promises for a consideration in such circumstances, as the incurring of expense or compliance with the condition would be sufficient. Moreover, the mutual promises referred to in those cases were those of the subscribers, while in the instant case the promises under consideration are those of the donor and donee.

The third and fourth points may be considered together, and it is in connection with these propositions that the great divergence of the authorities is met, and it will be necessary to consider as briefly as may be a number of the principal cases relied upon by the parties, and first those cited by the appellee sustaining his position that the note is supported by sufficient legal consideration.

In *Barnett v. Franklin College*, 10 Ind. App. 103, two notes were sued upon for $5,000 each, promising payment to the college, the first one, "to be used as the capital stock of said institution is used, the principal to be loaned on real estate, and the interest only to be used for current expenses of the college," and the second one containing the words, "Given to complete James Forsyth Professorship." It was alleged in the petition that these notes, or bonds, as they were called, were accepted by the college upon the terms and conditions specified, which acceptance was duly entered of record, and it was said by the court:

"This provision in the bond, and the averment of acceptance, not to speak of the further allegation that the claimant had fully performed all the conditions on its part to be performed, and had at all times been and still was ready and willing to apply the proceeds of said bonds to the purposes and objects therein specified, are sufficient of themselves, and in the absence of the averment respecting the expenditure of money, and incurring of liabilities for improvements, in anticipation of the payment of these and other bonds, to show a valid consideration for the promise contained in the instrument in suit, and to render the

complaint, * * * sufficient to withstand the demurrer."

It was further said: "The principle upon which promises of the character of those embraced in the present case are held to be valid is the reciprocal undertaking on the part of the promisor to pay and the promisee to perform something of value to the promisor, though the value may only be of indirect benefit to the latter, such as the obligation in the present case, that the appellee will hold and apply the funds promised in compliance with the terms of the contract."

And further: "The acceptance of the obligation imposed creates a trust incapable of being subsequently renounced, and which may be enforced by proper legal proceedings. Nor is it necessary that the obligation of the trustee should be performed in advance of the payment of the fund for the very purpose of the subscription is to enable such party to perform the duty imposed, and hence the mere retaining of the instrument, and the institution of suit upon the same, is regarded as sufficient *prima facie* evidence of such acceptance (citing cases)."

In *Troy Academy v. Nelson*, 24 Vt. 189, the action was brought upon a subscription paper for the raising of a fund to pay the debts of the academy, and it was held:

"The consideration for this agreement is found in the obligation imposed upon, and assumed by the trustees of this academy to see to, and make the application of this money as directed by the subscribers to this fund, so as to enable this institution to prosecute its duties of public instruction, for which it was incorporated, thus rendering this assumed liability and promise, the consideration of the promise of the other."

Amherst Academy v. Cowls, 23 Mass. 427, was an action upon a promissory note given for the purpose of establishing a permanent fund of $50,000 for the establishment of the college which should succeed the academy, and was given to take the place of a subscription theretofore made. While some stress is laid upon the fact that the note recognized a previous liability or obligation under the subscrip-

tion contract, the decision announces the principles contended for by the claimant, the court saying:

"Was there a consideration for this note when it was given? In one sense there was not; that is, the promisor had received nothing at the time from the payees, which was of any pecuniary value. But it is quite sufficient to create a consideration, that the other party, the payee, should have assumed an obligation in consequence of receiving the note, which he was compellable either at law or equity to perform, unless the promisor should be able to show when sued, that the payee had refused, or was unable, or had unreasonably neglected to perform the engagement on his part; in which case a defense might be raised on the ground of a failure of the consideration. * * * It certainly then would seem that every contributor to the funds of a corporation authorized by law to receive moneys and apply them to the improvement, in most essential points, of the community to which he belongs, has his recompense in his share of the public good resulting from them; and if by means of his contribution, or his solemn promise to pay, the body to whom he has pledged his word should encounter expense, become under legal obligations, *or otherwise pursue the intent and purpose* of the legislature in granting them the charter, this is a sufficient legal consideration to support such a promise."

In *Furman University v. Waller*, 124 S. Car. 68, the action was brought upon a subscription to the funds of the university through the First Baptist Church, the paper being headed "The Baptist 75 Million Campaign Pledge Card." The defense was want of consideration, but the court after holding that (1) " a subscription for a charitable purpose is merely a continuing offer to make a gift, and is unenforceable until accepted and acted upon by promisee in such a manner as to establish mutuality of obligation," further held that (2) "where promisee has, before withdrawal, accepted the subscription, agreed to apply the promised contribution to the purpose for which it was subscribed, and has assumed an enforceable obligation, con-

sideration to support promisor's agreement is supplied by promisee's enforceable obligation," and supported the second proposition by the following language in the opinion: "Where the promisee has, before withdrawal, accepted the subscription, and has expressly, or by clear implication, agreed to apply the promised contribution to the purpose for which it was subscribed, and has thereby assumed the discharge of an obligation, which may be enforced in law or in equity, the element of valuable consideration to support the promisor's agreement is supplied by the enforceable covenant of the promisee; there is then promise for promise; and therefrom springs a valid and enforceable contract."

Irwin v. Lombard University, 56 Ohio St. 9, was an action upon a promissory note payable to the treasurer of the university "for the endowment of said institution," and it was held:

"Consideration for a promissory note executed to an incorporated college is the accomplishment of the purpose for which it is incorporated and in whose aid the note is executed; and such consideration is sufficient."

The court, in distinguishing between a mere gift and a promise to pay upon consideration, said: "A promise to give money to one to be used by him according to his inclination and for his personal ends is prompted only by motive. But a promise to pay money to such an institution to be used for such defined and public purposes rests upon consideration. The general course of decisions is favorable to the binding obligation of such promises."

It was further said: "It is not contemplated by the parties, nor is it required by the law, that in cases of this character the institution shall have done a particular thing in reliance upon a particular promise. Not only do the law and the parties contemplate the permanency of the institution, but all promisors understand that the proceeds of their promises will be mingled with prior and subsequent donations and together constitute the financial support of the enterprise. * * * The requirements of the law are sat-

isfied, the objects of the parties secured, and the perpetration of frauds prevented by the conclusion that the consideration for the promise in question is the accomplishment, through the university, of the purposes for which it was incorporated and in whose aid the promise was made."

In *Roche v. Roanoke Classical Seminary,* 56 Ind. 198, it is held that the only defense to a subscription to the endowment fund of an institution of learning would be an abandonment by the latter of the enterprise for which it was incorporated and in aid of which the note was executed.

Brokaw v. McElroy, 162 Ia. 288, was upon promissory notes purporting to have been given for value received for the endowment of the Kansas City University, and Evans, J. said, *arguendo:*

"If the original promise, when made, was intended to induce activities and expenditures by the beneficiary in pursuance of the purpose of its organization, and if such activities and such expenditures were induced thereby even in part, it is a sufficient consideration."

And, further: "Such notes are frequently, if not usually, executed, not as evidence of the promise to make a future gift, but for the specific purpose of creating a present asset for its beneficiary. A very substantial part of the assets of such institutions exists in this form. To lightly withhold judicial sanction from such obligations would be to destroy millions of assets of the most beneficent institutions in our land, and to render such institutions helpless to carry out the purpose of their organization."

That the acceptance by the institution is an implied promise to hold and appropriate the funds in conformity with the terms and objects of the subscription gives rise to mutual promises furnishing a sufficient consideration was held in *Ladies Collegiate Institute v. French,* 16 Gray (Mass.) 196. This is not in conflict with our holdings, because the promise here referred to is that of the donee, not the other subscribers.

A number of other cases tending to support the position of plaintiff are cited. Those above referred to are suf-

ficient to show the reasons for holding subscriptions and instruments of the character in suit to be based upon a sufficient consideration; some of the cases referred to are: *First Presbyterian Church v. Dennis,* 178 Ia. 1352; *Albert Lea College v. Brown,* 88 Minn. 524; *Collier v. Baptist Education Society,* 47 Ky. 68; *Williams College v. Danforth,* 29 Mass. 541; *Maine Central Institute v. Haskell,* 73 Me. 140; *Scott v. Triggs,* 76 Ind. App. 69.

We will now consider some of the cases taking an opposite view on the question of consideration. *Methodist Orphans' Home Ass'n v. Sharp's Exr.,* 6 Mo. App. 150, was upon a subscription for the purpose of paying the debt of the association, and it was held:

"Gratuitous subscriptions for charitable purposes cannot be enforced unless the promisee has, in reliance on the promise, done something. The mere fact that others were by the promise led to subscribe is not sufficient."

It may be remarked that, as the subscription was merely for the purpose of paying a debt already incurred, the consideration referred to in other cases of the assumption by the promisee of an obligation in connection with the subscription is absent. Though in a similar case (*Troy Academy v. Nelson,* 24 Vt. 189) it was held that the agreement to apply the fund to the purpose intended was a sufficient consideration. *University of Des Moines v. Livingston,* 57 Ia. 307, was a case in which a subscription to pay a debt already incurred was held without consideration. *Johnson v. Otterbein University,* 41 Ohio St. 527, was another case of subscription for the payment of the debts then existing of the university, and which was held without legal consideration; and, further, that the acceptance of the subscription did not give rise to a case of mutual promises in the sense requisite to constitute a consideration in law. The court refers to and distinguishes *Ohio Wesleyan Female College v. Love's Exr.,* 16 Ohio St. 20, which held that subscriptions to a college authorized by statute to receive donations, bequests, etc., and requiring them to be applied for the purposes specified in the act, or in accordance with

the designs expressed by the donors, were supported by sufficient consideration; the ground of distinction being stated as follows:

"It (the statute) names no subject of gift; and of course all things that can pass by gift are included. Gratuitous promises are not named, and, not being subjects of gift, are not included. They are left to the control of the law."

This proposition would seem, however, to be directly opposed to the later decision of *Irwin v. Lombard University, supra,* which cites the *Love* case with approval, and closes its decision with the statement:

"An examination of the digest of the decisions of the various courts of the state will show that there has been a uniform adherence to these views (expressed in the opinion) until the case of *Johnson v. Otterbein University,* 41 Ohio St. 527, was decided by the commission. A majority of the court was of the opinion that there is not such identity of facts in that case and this, that we are required to overrule it."

The lack of identity referred to, doubtless, is disclosed by the fact that in the *Johnson* case the subscription was to pay an indebtedness already contracted, while in the *Irwin* case it was to an endowment fund; a distinction easily conceivable as important upon the question of consideration. Furthermore, at the close of the decision in the *Johnson* case the court said:

"We place the reversal on these legal propositions; that the creation of a fund with which to pay the previously incurred indebtedness of the institution was not a consideration in law for the promise; and that the acceptance of the writing containing the direction to apply the fund does not, in a legal sense, give rise to a case of mutual promises."

Cottage Street Church v. Kendall, 121 Mass. 528, was on a subscription to build a chapel. The chapel was afterwards built, but whether in reliance upon the defendant's subscription was not considered by the lower court and the case was reversed for that reason.

Trustees of Hamilton College v. Stewart, 1 N. Y. 581, is specially relied upon by defendant, and was upon a subscription to a fund for the payment of the salaries of the officers of Hamilton College, and it was distinctly held that the endowment of a literary institution is not a sufficient consideration to uphold a subscription to a fund designed for that object, and that the condition that the subscribers are not bound unless a given amount shall be raised affords no implication of a request that the institution perform the services and incur the expenses necessary to fill up the subscription. It was held that the case was not one of mutual promises, because no promise by the corporation was shown; that—"The corporation do not undertake that that sum shall be subscribed, or that any other person will endeavor to procure subscriptions, or that they will make the investment or appropriate the income of the fund to the purpose designated." And it was therefore conceded, in that case, by the court that, if "the defendant agreed to pay $800 provided the plaintiffs would procure subscriptions, and should afterwards invest the money, etc., this, according to the cases, would amount to a request to perform those services, and the defendant would be liable;" which was later expressly held in *Keuka College v. Ray,* 167 N. Y. 96.

Presbyterian Church v. Cooper, 112 N. Y. 517, was another case of a subscription to pay off the debt of a church, and following the *Stewart* and *Kendall* cases above referred to. *Hull v. Pearson,* 38 App. Div. (N. Y.) 588, was upon a subscription to pay within six months a sum for the work of the German department of the Rochester Theological Seminary, and the court held that the promise was without consideration, in the absence of any request that the corporation do something which it would not have done except for this subscription, the court saying:

"He undoubtedly made the subscription for the purpose of aiding in promoting the work of the German department; but, in the absence of some act or word which clearly indicated that he accompanied his subscription by a re-

quest to do something which the corporation would not have done except for his subscription, there is no such request as would justify a constructive consideration in support of this promise."

The cases from New York, above referred to, are cited as authority in *Trustees of LaGrange College v. Parker*, 198 Mo. App. 372, where the action was upon a promissory note given as a subscription to the endowment fund of the college, and it was held lacking in consideration because the evidence failed to show that anything was paid to the maker of the note as a consideration therefor, or that the college had expended any money or incurred enforceable liabilities in reliance thereon. The question of the acceptance of the note by the college and its assumption of any obligation as to the application of the fund, as supplying the necessary consideration, is not discussed or referred to. There was some question as to the delivery of the note, but the case was decided upon the proposition that it was a mere promise to make a gift in the future, and, lacking what was deemed a sufficient consideration, the promise was held void.

Defendant further cites *Homan v. Steele, Johnson & Co.*, 18 Neb. 652, and *Armann v. Buel*, 40 Neb. 803, which held that the mutual promises of subscribers are supported by a sufficient consideration, *when the person or corporation for whose benefit they were made has incurred obligations on the faith of such subscriptions*, and has complied with the conditions on which they were made. There is practically no dispute as to the rule in such cases. These were both cases involving commercial transactions, and, of course, involved no discussion of the problem before us, do not purport to lay down a hard and fast rule on the subject of the consideration necessary to support a subscription, and therefore do not conclude us upon the perplexing problem with which we are engaged.

From a careful consideration of the cases cited, and many others, there seems to be no middle ground upon which we may take our stand; either the instrument in

question is a *nudum pactum,* or it is a valid contract supported by a sufficient consideration. The requirement of a legal consideration to the validity of a contract arises out of the necessity or propriety of protecting the promisor against fraud and overreaching; but the law's solicitude does not extend to the point of requiring the consideration to be of a specific character or amount, and leaves these questions, in the absence of fraud or mistake, to the determination of the parties. We are, therefore, not concerned with the particular thing, nor its value, which the promisor has considered a sufficient inducement for his promise. All that we are required to do is to ascertain that the subject-matter of the consideration is such as to warrant an inference of value to the promisor, or that he considered it of value; and it need not be pecuniary in the sense that it may be said to be worth so many dollars, but this quality may be found in the accomplishment, actual or secured by the promisor of some object or purpose which appeals to him of such importance that he is willing to pay a pecuniary value for it.

The argument of the defendant is based upon what seems to us a somewhat technical application of the rule that every contract must be supported by a legal consideration, but his position has considerable logical support. It is said that the promisor received no pecuniary benefit; that the promisee has incurred no liabilities upon the faith of the promise; that what the promisee agreed to do was not other or different from what he was required to do and would have done without the promise; that the perpetuity of the institution is not threatened by refusal to enforce the instrument; that the obligation on the promisee to preserve the principal and use the income only to pay the expenses of the college has no existence until the fund is received; that the promise was revocable at any time before the promisee did some act to its disadvantage or incurred some obligation, and that such revocation was accomplished by the death of the promisor.

On the other hand, the plaintiff contends that a valuable consideration is abundantly shown by the obligation impliedly undertaken to apply the funds to certain purposes; that such obligation is implied from the acceptance of the instrument and treating it as a part of the endowment fund; that the continuance of the functions of the university was one of the contemplated purposes of the promisor, and that this was done in reliance upon the endowment fund of which the instrument in question was a part; that the incurrence of liability for salaries and expenses since the establishment of the endowment was in dependence thereon (this is inferred from the recitals in the note and the making of the subscription); that the plaintiff is a corporation authorized by statute to receive donations for the purpose of carrying on the work of education, and that the statute and general benefits to defendant as one of the public, of the work of the institution, of themselves, are a sufficient consideration; that the promise was one upon conditions which the promisee has accepted and fulfilled and purposes to comply with in the future, which brings the case within the principle of mutual promises, the one furnishing consideration for the other.

Which route shall we follow? It seems to be contended that the obligation assumed by the promisee, to constitute a sufficient consideration, must be of a pecuniary nature. It was held, however, in *Hammond v. Shepard*, 29 How. Pr. (N. Y.) 188, that, while a note on its face containing a condition that the fund should be applied to college purposes did not show a consideration, the obligation of the college to hold its doors open for discussion on all moral subjects, imposed by a contemporary written instrument, was such as to supply a sufficient consideration. It was a condition which the promisor considered of value, compliance with which would support the promise; and this notwithstanding the fact that no opportunity for such use of the college had presented itself, the promise to do so being held sufficient.

While in the case of a mere promise to make a gift or donation to a college subject to no condition and imposing no obligation upon the college with respect thereto could not be enforced, we think that when, as in this case, the college is required to perform certain duties with respect to the specific fund, its acceptance thereof and reliance thereon and promise to carry out the wishes of the donor supply the consideration.

Defendant argues that, because the heir to this estate is a widowed sister of the deceased, the instrument in question should be set aside. It does not appear what portion of the estate is represented by this $5,000; the natural inference is that so generous a donation to charity would import a considerable residuum, quite sufficient for the support of one collateral relative. However, may one not do what he likes with his own? If this had been a legacy in a will, could the heir be heard to contest it upon the ground stated? Except as provided by statute, an heir has no vested interest until death of the ancestor. Why, then, defeat the laudable purpose of the donor by resort to technical rules of law, not needed for his protection, in order that a mere expectancy may not be disappointed?

No difficulty is presented by the suggestion that a donor might so deplete his estate as to require his creditors to prorate their claims with the donee, for a contract perfectly valid between the parties may be void as to creditors. Neither does the possible deprivation of his family of their support furnish good reason for avoiding the contract, unless undue influence or mental irresponsibility is shown, which is not the case here.

It seems proper further to observe that, while the evidence does not show that the college did any specific act in reliance upon the instrument in question, this was rightly said to be unnecessary by Shauck, J., in *Irwin v. Lombard University, supra* (p. 22). Furthermore, there is no direct evidence of the expenditure of any moneys by the college in such reliance, but it appears that since the date of the instrument, December 21, 1921, to May 2, 1923, when

Homer Griswold died, the institution carried on its functions, keeping its endowment fund intact, and we think the circumstances justify and require the inference that expenses were incurred during that period in reliance upon the large endowment fund of $1,341,000. And the suggestion that the loss of the amount of the note in question would not bring about the failure of the institution is of no force, when it is considered that such a result might be possible if a considerable number of the contributors to the endowment fund should join with the defendant in his contention.

The judgment of the district court is

AFFIRMED.

Note—See Wills, 40 Cyc. 1088; Subscriptions, 37 Cyc. 489.

FRANK E. MCDONALD, APPELLEE, V. HERBERT F. LESSMANN ET AL., APPELLANTS.

FILED MARCH 18, 1925. No. 23060.

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

S. G. Van Auken, Thurlow T. Taft and *Harry E. Siman,* for appellants.

A. R. Davis, Fred S. Berry and *James E. Brittain, contra.*

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

PER CURIAM.

Plaintiff brought this suit to foreclose a mortgage in the sum of $20,000 which had been executed and delivered by defendants Herbert F. Lessmann and his wife, Hazel B. Lessmann, to plaintiff, covering the northwest quarter section 34, township 27, range 3, in Wayne county. The other defendants named are junior incumbrancers. Defendants

Lessmann filed an answer and cross-petition in which they admitted the execution and delivery of the notes and mortgages set out in plaintiff's petition, but denied that there was any sum due and owing from them to plaintiff. By way of cross-petition, they alleged that, under an oral agreement made and entered into between plaintiff and Herbert F. Lessmann, he had made advances and expended in behalf of plaintiff a sum in excess of the amount due upon the notes and mortgage, and that, by virtue of such contract and the expenditures so made by defendant Lessmann, there was due from plaintiff to cross-petitioner an amount in excess of the amount due upon the notes held by plaintiff, and there was a prayer for an affirmative judgment. The junior incumbrancers filed answers and cross-petitions, and the court in its decree fixed the amount due upon their claims and the order of their priority. The real controversy is between plaintiff and the defendants Lessmann.

The court found generally in favor of plaintiff and against defendants Lessmann and entered a decree accordingly. An examination of the record discloses that the appeal presents only a question of fact. We find that the decree is fully in accord with the evidence, and the judgment entered is

AFFIRMED.

A. C. BLANCHARD, APPELLANT, V. DAN MCMILLAN ET AL., APPELLEES.

FILED MARCH 18, 1925. No. 22994.

1. **Fraudulent Conveyances: BURDEN OF PROOF.** When the effect of a conveyance from one member of a family to another member of the family is to put the property of the vendor beyond the reach of his creditors, the transaction will be closely scrutinized, and in a suit involving the right to such property between creditors of the vendor and the vendee, the burden of proof is on the vendee to establish the *bona fides* of the conveyance.

2. Creditors' Suit: CONVEYANCE FOR FUTURE SUPPORT: RIGHTS OF CREDITORS. "Property conveyed by a debtor in consideration of an agreement for his future support may be subjected to the payment of a judgment, where there is no other means of enforcing payment, to the extent that the value of the property exceeds the amount of support actually furnished by the grantee in good faith." *Cherry Co. v. Helm*, 98 Neb. 626.

APPEAL from the district court for Blaine county: BAYARD H. PAINE, JUDGE. *Reversed, with directions.*

Beal & Wilson, for appellant.

Kelly & Schnell, A. A. Rezac and *Stough & Dunn, contra.*

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

MORRISSEY, C. J.

This suit is in the nature of a creditor's bill. Plaintiff had recovered judgments aggregating more than $3,000 against defendants, Dan McMillan and Hugh McMillan. Upon execution issued, the judgment creditor was unable to recover more than a trifling sum from the defendants. He then brought this suit to set aside a deed executed by Dan McMillan to Stella McMillan, wife of the defendant Hugh McMillan.

There is little conflict in the evidence and our recitation of the facts will be of the most general kind. Dan McMillan is the father of Hugh McMillan, and at the time of the trial was 82 years of age, and a widower. Many years before becoming indebted to plaintiff, Dan McMillan and his son, Hugh McMillan, made homestead filings in the same locality, and at about the same time. Within a few days after making these filings, the wife of Dan McMillan died. Soon thereafter Hugh McMillan married. Dan McMillan continued to make his legal home on the land he had entered as a homestead, while Hugh McMillan and his wife continued to make their legal residence upon the land Hugh had entered as a homestead. The men worked together in the management of the cattle business which they con-

ducted, and, to a degree, they lived as one family. A portion of the time they occupied the house on the Dan McMillan land, and, then again, they occupied the house on the Hugh McMillan land. In the course of time they sold their real estate holdings and divided the property which they had accumulated, and each received approximately $6,000 as his share of the proceeds. Hugh McMillan purchased property in the village of Dunning, and likewise engaged in business there. Dan McMillan purchased the property involved in this suit, which lies adjacent to the village of Dunning, for $4,500, and assumed the payment of a mortgage of $1,000 then resting on the land. Hugh McMillan became indebted to the local bank and Dan McMillan signed his notes to cover his indebtedness. These notes constitute the foundation for the judgment which plaintiff, who was operating the bank at the time the indebtedness was incurred, seeks to enforce in this suit.

After the indebtedness to the bank had been incurred, and the notes signed and executed by Dan McMillan and Hugh McMillan, Dan McMillan conveyed the land in suit to defendant Stella McMillan. Plaintiff alleged that the conveyance was made for the fraudulent purpose of defeating plaintiff in the collection of his judgment, and prayed that the conveyance be set aside, and the property subjected to sale under execution for the payment of plaintiff's judgment. The answer admits the conveyance of the title to the land from Dan McMillan to Stella McMillan, but alleges that it was for a good and valid consideration. It is alleged that, for a long time prior to the making of the deed, Dan McMillan had lived in the home of Hugh McMillan and Stella McMillan, and "that long previous to the times that the said Dan McMillan assumed any of the obligations referred to in plaintiff's petition, and before such was filed and judgment had, he and the other defendants * * * agreed and understood that the said defendant Dan McMillan, being a widower of old age and infirm, would make his home during the remainder of his life with his said daughter-in-law, and that said defendant has kept, maintained,

and nursed and comforted him in his old age in her home up to the present time. When the arrangement was first made it was then understood by and between the defendants * * * that the lands herein referred to should be and become the property of defendant, Stella McMillan, and this with the understanding and agreement that said defendant, his daughter-in-law, should care for said Dan McMillan in his old age and until his death as before stated." This statement is followed by an allegation that the transfer was made in reliance upon such understanding and agreement, and that the land "belonged to the defendant Stella McMillan long before the issuance of the deed of conveyance." The concluding allegation of the answer is that Dan McMillan, "having a feeling of love and affection for the defendants, Hugh McMillan, his son, and Stella McMillan, his daughter-in-law, and being desirous of living with them during the remainder of his lifetime, knowing that he would need the care and attention of loving hands and being perfectly able to rely upon the services to be rendered him by his said daughter-in-law, conveyed the land to the defendant, Stella McMillan, believing that as a daughter-in-law she was entitled to consideration and payment for her services, and that the consideration for such transfer is good and valuable, and valid under the law."

The answer may, perhaps, be divided into two parts—one alleging a consideration moving from Stella McMillan to Dan McMillan for services rendered prior to the contraction of the debt to plaintiff and the execution of the deed sought to be avoided, and the other an agreement for services to be rendered to Dan McMillan in the future. The proof as to the value of the services actually rendered prior to the execution of the deed is indefinite and not of such character that a court may estimate it even with approximate exactness. It shows that, during the years when these people were working and living together, Dan McMillan lived to a great extent in the family of his son and daughter-in-law, but it does not show the amount which he contributed to the support of the family. During perhaps the greater portion

of this period, all the parties resided upon the premises owned by Dan McMillan, and the value of the use of these premises is not shown. The conduct of the parties indicates that there never was a definite agreement, but that they worked for the mutual advantage of all parties. It is significant that, when they sold their ranch property, there was a division of the proceeds. The total amount realized was approximately $12,000; Hugh McMillan received about $6,000 in cash; Dan McMillan received about $6,000 in notes secured by mortgages. It is hard to believe that there was then any considerable amount due from Dan McMillan to his daughter-in-law, for had there been, we may assume that it would have been adjusted in the division of the property. They subsequently removed to the village of Dunning and there they lived for a period in a building owned by the son, but it was not long until the father purchased the property herein involved, and they all removed to that property and have ever since remained thereon. It is significant, too, that at the time the deed was executed Stella McMillan executed and delivered to Dan McMillan her promissory notes in the sum of $2,500. These notes were made payable to Mr. McMillan's daughter. In passing, we may mention that he had two children only, the daughter just mentioned, and Hugh McMillan, his codebtor, and the husband of Stella McMillan. The notes made payable to the daughter were never delivered to her and she had no legal interest in them. This indicates a scheme by which defendants would put the real estate involved beyond the reach of Dan McMillan's creditors, rather than a transaction made in good faith and for a valuable consideration.

When the effect of a conveyance from one member of a family to another member of the family is to put the property of the vendor beyond the reach of his creditors, the transaction will be closely scrutinized, and in a suit involving the right to such property between creditors of the vendor and the vendee, the burden of proof is on the vendee

to establish the *bona fides* of the conveyance. *Schott v. Machamer,* 54 Neb. 514.

As to that clause in the answer which would rest a partial defense upon an agreement for future support, it is sufficient to say that, except only in so far as the service contracted for was actually performed, it does not state a defense. *Cherry Co. v. Helm,* 98 Neb. 626, 2 A. L. R. 1436, and note thereto.

The decree of the district court is reversed and the cause remanded, with directions to enter a decree canceling the deed set out in plaintiff's petition and subjecting the premises therein described to the payment of the judgment pleaded in plaintiff's petition, subject only to the mortgage lien existing thereon prior to the date of the deed from Dan McMillan to Stella McMillan, and to the homestead interest of Dan McMillan.

REVERSED, WITH DIRECTIONS.

Note—See Fraudulent Conveyances, 27 C. J. secs. 217, 407, 716.

EDWIN STANLEY, APPELLEE, V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, APPELLANT.

FILED MARCH 18, 1925. No. 23042.

1. **Railroads: COLLISION: COMPARATIVE NEGLIGENCE.** "When persons approach a railroad crossing, ordinary care for their own safety requires them to look and listen, where it will be of value to look and listen, to ascertain if trains are approaching. In the absence of facts calling for the application of the doctrine of 'the last clear chance,' one who fails to take such a precaution, without reasonable excuse, and is injured by a collision with a train or engine, may not recover, unless his contributory negligence was slight and the negligence of the defendant was gross in comparison. Rev. St. 1913, sec. 7892." *Seiffert v. Hines,* 108 Neb. 62.
2. **Negligence: INSUFFICIENT EVIDENCE.** The evidence is outlined in the opinion and *held* insufficient to sustain the verdict.

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

E. P. Holmes and *Guy C. Chambers,* for appellant.

McKensie, Cox & Harris and *Rosewater, Mecham & Burton, contra.*

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

MORRISSEY, C. J.

Plaintiff brought this action against defendant to recover for the destruction of his automobile and injuries to himself in a collision, at a road crossing, between plaintiff's automobile and one of defendant's passenger trains. The collision occurred during the daytime on July 10, 1921. Plaintiff was driving in a southeasterly direction and defendant's train was running in a southwesterly direction. The public road and the railroad crossed at right angles. At the intersection the railroad road-bed was several feet higher than the adjacent ground, and plaintiff drove up an ascending grade to reach the intersection of the two roads. The negligence charged against defendant, as stated in plaintiff's brief, is "defendant's failure to ring the bell and sound the whistle as required by law." But, as supplemental to this charge, plaintiff contends that defendant permitted weeds, brush and trees to grow upon its right of way in such a way as to prevent plaintiff's view and cut off his observation of the approaching train until he was within a few feet of the rails of defendant's track. Plaintiff had crossed the track at this intersection earlier in the day, and was aware of the presence of the railroad. Plaintiff testified that he was on the lookout for a train, but did not see it until his automobile was within 4 or 5 feet of the rail, when his wife, who was riding in the car with him, made an outcry and jumped from the automobile; that the train was then only 25 to 40 feet distant; that he disengaged the clutch and applied the brake, but before he

could bring the car to a full stop, the front end of the car had passed over the nearest rail; that he threw the lever into reverse, but before he could back the car from the track, it was struck by the oncoming locomotive, which was moving at the rate of 40 miles an hour. The cause was submitted to the jury, which returned a verdict in favor of plaintiff, and defendant prosecutes this appeal from the judgment entered thereon.

There is but one substantial issue presented, namely: Is the evidence sufficient to support the verdict? In support of plaintiff's charge of negligence, there is evidence from which the jury might find that the locomotive bell was not rung for the crossing and that the whistle was not blown, as required by statute. Indeed, according to plaintiff's testimony, the whistle was not blown until plaintiff was within 4 or 5 feet of the rail and the locomotive not more than 40 feet distant from the intersection, so we will assume that there was evidence to substantiate the charge of negligence made in plaintiff's petition. As to the presence of the obstructions alleged to have been upon defendant's right of way, the evidence is conflicting. Plaintiff testified that the weeds, brush and trees growing upon the right of way were 10 or 12 feet high, and this testimony is supported by that given by his wife and by other witnesses. However, as we construe the testimony, the trees mentioned were growing along the right of way fence, and were not in a location where they obstructed plaintiff's view after he had passed the line of the right of way fence. Granting that the trees may have obstructed the view while he was a considerable distance from the crossing, still, had he been watchful while traversing the 50 or 100 feet immediately before reaching the rails of defendant's track, the trees would not have obscured his observation of the approaching train. But, in addition to the trees we have just mentioned, plaintiff claims that there were other obstructions. He was asked the direct question: "Now, about how high did these weeds and trees and brush grow at the time of this accident? A. Oh, I should judge about from 3 to 5 or 6

feet." Plaintiff's wife testified that, as they ascended the grade and neared the crossing, she kept a lookout for a train, but did not see one approaching because of the obstructions, and stated that there were weeds, brush and trees on the right of way, "some of them as high as 10 feet." But when we turn to the testimony of plaintiff, it does not appear that the obstructions were the cause of his failure to see the approaching train. He was driving to the southeast; the train approached from the northeast; the automobile was equipped with the now obsolete right-hand steering post, and he was seated on the right-hand side of the car, the side farthest from the approaching train. On cross-examination, he gave the following testimony: "Q. So, as you went upon the track, you weren't looking for the approaching train? A. I was looking west. Q. You were looking the other way? A. Yes, sir. Q. Not east? A. No, sir. * * * Q. When you went up there you kept your eyes to the west, I understand? A. Yes, sir. Q. All the time? A. That is the way I was looking; yes, sir."

The train was approaching from the northeast, and it was the duty of plaintiff in approaching the track to look to the northeast, as well as to the west, or southwest. *Hall v. Union P. R. Co., ante,* p. 9.

After giving full effect to the testimony submitted on behalf of plaintiff, can it be said that the negligence proved against defendant was gross, and the negligence of plaintiff only slight in comparison therewith? In approaching this crossing, which, according to plaintiff's own testimony, was in a dangerous condition, he took no precaution for his own safety; not even glancing in the direction from which the train causing the injury came. And no excuse for a failure to look in that direction is even suggested.

"When persons approach a railroad crossing, ordinary care for their own safety requires them to look and listen, where it will be of value to look and listen, to ascertain if trains are approaching. In the absence of facts calling for the application of the doctrine of 'the last clear chance,' one who fails to take such a precaution, without reasonable

excuse, and is injured by a collision with a train or engine, may not recover, unless his contributory negligence was slight and the negligence of the defendant was gross in comparison. Rev. St. 1913, sec. 7892." *Seiffert v. Hines*, 108 Neb. 62.

On the record presented, we are constrained to hold that the evidence is not sufficient to sustain the verdict, and the judgment is reversed and the cause remanded.

REVERSED.

LENA LINDEMANN ET AL, APPELLEES, V. ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY, APPELLANT.

FILED MARCH 18, 1925. No. 23041.

1. **States: LAWS: SAVING CLAUSE.** The Constitution of 1866, and the territorial laws enacted thereunder, were approved by the Congress when Nebraska was admitted to the Union, and all laws then in force were then, and thereby, saved to the state.
2. **Railroads: RIGHT OF WAY: POLICE POWER.** A right of way granted through the public domain within a state is amenable to the police power of the state. *Northern P. R. Co. v. Townsend*, 190 U. S. 267.
3. **Police Power.** "The essential quality of the police power as a governmental agency is that it imposes upon persons and property burdens designed to promote the safety and welfare of the public at large." *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549, affirmed, 170 U. S. 57.

APPEAL from the State Railway Commission. *Affirmed.*

Robert A. Brown, C. A. Magaw and *R. L. Douglas*, for appellant.

O. S. Spillman, Attorney General, and *Hugh LaMaster, contra.*

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

DEAN, J.

Lena Lindemann and William Lindemann, her husband,

are the owners of, reside on and cultivate a farm described as the northwest quarter of section 25, township 6, range 8, in Clay county. Besides the dwelling-house, the farm is equipped with the usual complement of farm buildings. The St. Joseph & Grand Island Railway Company, defendant, is a common carrier of passengers and freight in Nebraska and elsewhere. Defendants right of way extends diagonally in a northwesterly and southeasterly direction through a part of plaintiff's farm. There is no public or private crossing connecting plaintiffs' lands, which lie on either side of defendant's right of way, except the public crossings, or highways, on the section lines which adjoin the farm.

Defendant having been requested, and having refused, to construct a private crossing at plaintiffs request, which was made pursuant to section 4, ch. 261, Laws 1921, now section 5527, Comp. St. 1922, a formal complaint was filed before the Nebraska state railway commission, and, after an investigation and hearing, it was duly ordered by the commission that the defendant railway company, within 60 days from the date of the order, "construct at its own expense one private grade crossing between the portions of complainants' farm, described in this finding, with grading and planking in conformity with the standard practices of defendant company in construction of similar crossings." From this order defendant has appealed.

Among other things defendant railway company pleaded the following:

"Further answering, the defendant states that it is the legal successor of the St. Joseph & Denver City Railroad Company, to which the United States granted, by Act of Congress approved July 23, 1866, a right of way two hundred (200) feet in width, 100 feet in width on each side of the road where it may pass through the public domain, together with all necessary grounds for station buildings, depots, switches, side-tracks and so forth, and that the right of way and premises owned by the defendant in the quarter section described in the complaint filed herein are

a part of the right of way so granted to the defendant's predecessor, said St. Joseph & Denver City Railroad Company, and are owned by defendant in fee simple pursuant to such grant." See 14 U. S. St. at Large, ch. 212, p. 210. "The defendant further states that by the same Act of Congress, approved July 23, 1866, there was granted to the state of Kansas, for the use and benefit of the St. Joseph & Denver City Railroad Company, the odd-numbered sections, ten sections in width on each side of the railroad of the defendant's predecessor, the St. Joseph & Denver City Railroad Company; that the St. Joseph & Denver City Railroad Company duly accepted said Act and filed its plat of the location of its railroad, and that thereafter that part of section twenty-five (25) in the township, range and county aforesaid, exclusive of the right of way two hundred (200) feet in width, was patented to the St. Joseph & Denver City Railroad Company in aid of the construction of its railroad; and that the portions of the northwest quarter of said section twenty-five (25) above described lying on either side of said railroad right of way, so granted as aforesaid, were conveyed to the complainant's predecessors in title by the said St. Joseph & Denver City Railroad Company or its successors, after the date of the construction of the railroad upon and along the right of way granted by the aforesaid Act of Congress, and after said quarter section had been physically divided by the construction of said railroad."

It seems that the section of railroad here involved was built in 1871, and that in 1875 defendant's predecessor, namely, the St. Joseph & Denver City Railroad Company, conveyed the section of land, which included that now owned by plaintiffs, to plaintiffs' predecessor, and that, among other things, the deed of conveyance reserved a strip of land 100 feet wide on each side of the center of the railroad track. The conveyance above referred to, which is dated October 26, 1875, upon which defendant in part relies, contains this recital:

"Reserving, however, to the St. Joseph & Denver City Railroad Company all that portion of the land hereby conveyed, if any such there be, which lies within lines drawn parallel with and one hundred feet on each side distant from the center line of its road as now constructed, and any greater width when necessary permanently to include all their cuts, embankments and ditches and other works necessary to secure and protect their main lines."

And on this point defendant argues: "The conveyance of the railroad company to appellees' grantor of the lands owned by appellees does not recognize any right of the grantees to a private crossing." And in its answer it is pleaded that, in view of the facts it "is not required under the statutes and laws of the state of Nebraska to make the private crossing prayed for in the complaint filed herein, and that to require it to make such private crossing under the circumstances hereinabove recited would unlawfully take the property of the defendant for private use, and deprive it of its property without due process of law, in violation of and contravention of its rights under the Constitution of the United States, and more particularly under section 1 of the Fourteenth Amendment thereto."

A statute which required railroads to erect crossings over lands of persons which were located on both sides of a railroad was enacted by the territorial legislature in 1866. The act reads:

"When any person owns land on both sides of any railroad, the corporation owning such railroad shall, when required so to do, make and keep in good repair one causeway or other adequate means of crossing the same." Rev. St. 1866, ch. 25, sec. 106.

July 1, 1866, the above territorial act was in force. This was prior to the congressional grant of the right of way to defendant's predecessor. And the act was in full force and effect when the Constitution of 1866, and the territorial laws, were approved by the congress when Nebraska was subsequently admitted to the Union. So that it

follows that the above act, together with all territorial laws then in force, were then, and thereby, saved to the state.

The above territorial act remained in full force and effect until 1921, when it was amended to read as follows:

"When any person owns land on both sides of the right of way of any railroad, such railroad shall provide and keep in repair at least one adequate means for such landowner to cross the right of way. Any interested landowner with land on both sides of the right of way of any railroad may file written complaint with the state railway commission against any such railroad that the crossing is not adequate, and the commission thereupon shall make such investigation and hold such hearing as may be necessary, and shall issue such orders as it shall deem necessary, proper and adequate. If circumstances warrant, the commission may require overhead, underground or grade crossings and require wing fences at underground crossings, but where such special crossing involves an expenditure of more than six hundred ($600) dollars the landowner shall bear one-half the expense in excess of six hundred ($600) dollars." Laws 1921, ch. 261, sec. 4.

In the case under consideration the facts are undisputed and questions of law alone are here involved. Counsel for the commission, in behalf of plaintiffs, argues that defendant's right of way, as pointed out in *Northern P. R. Co. v. Townsend*, 190 U. S. 267, 271, was, in effect, "a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted." In the *Townsend* case it was decided that no part of a right of way of a railroad company, which was granted by an Act of Congress, could be held by adverse possession. However, in the same case the court held that the grantee of such right of way was not absolved from the operation of police regulations. On this point the court said:

"Of course, nothing that has been said in any wise imports that a right of way granted through the public domain within a state is not amenable to the police power of

the state. Congress must have assumed when making this grant, for instance, that in the natural order of events, as settlements were made along the line of the railroad, crossings of the right of way would become necessary, and that other limitations in favor of the general public upon an exclusive right of occupancy by the railroad of its right of way might be justly imposed. But such limitations are in no sense analogous to claim of adverse ownership for private use."

In Illinois it was held that, because of the public nature of its business, railroad corporations are within the operation of all reasonable police regulations. *Illinois C. R. Co. v. Willenborg,* 117 Ill. 203. See *Fremont, E. & M. V. R. Co. v. Lamb,* 11 Neb. 592.

In a case which, on appeal, was affirmed by the supreme court of the United States, we held that the police power is one, "which cannot be surrendered, to require persons and corporations to so exercise and enjoy their rights as not unnecessarily to injure others. That the principle stated is especially applicable to existing rights, without regard to the time of their acquirement or to the source from whence they are derived, appears to us a self-evident proposition not requiring argument." *Chicago, B. & Q. R. Co. v. State,* 47 Neb. 549, affirmed on appeal, 170 U. S. 57.

Defendant has cited cases which do not appear to be in point, and we do not find it necessary to notice them further. In view, therefore, of the record, and of the decisions applicable thereto, we conclude that deprivation of property without due process has not been shown. The findings and order of the Nebraska railway commission, therefore, must be, and they are, hereby, in all things

AFFIRMED.

EMMA S. HALL, ADMINISTRATRIX, APPELLANT, V. B. F. ROGERS, APPELLEE.

FILED MARCH 18, 1925. No. 22993.

1. **Limitation of Actions: PRINCIPAL AND SURETY.** The payment of interest or a part of the principal on a note by a principal debtor, without the authority or consent of the surety, will not stop the running of the statute of limitations as to the surety. *Dwire v. Gentry*, 95 Neb. 150.
2. ———: JOINT DEBTORS. A payment by one of several joint debtors on a note, without the authority or consent of the others, will not toll the statute of limitations as to them.

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

Sinclair & McDermott, for appellant.

N. P. McDonald, contra.

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

DAY, J.

Action by Emma S. Hall, administratrix of the estate of George Hall, against A. V. Rogers and B. F. Rogers upon a promissory note signed by defendants. The answer of A. V. Rogers admitted his liability. B. F. Rogers pleaded the statute of limitations as a defense. At the conclusion of the testimony, on motion of B. F. Rogers, the trial court discharged the jury and rendered judgment in favor of the plaintiff against A. V. Rogers and dismissed the action as to B. F. Rogers. From the judgment in favor of B. F. Rogers, plaintiff appeals.

The petition is in the usual form of an action upon a promissory note and charges that both defendants executed the note. The note is dated January 30, 1915, and by its terms became due January 31, 1916. This action was commenced November 8, 1921. The petition alleges that payments had been made on the note as follows:

"Interest paid to Jan. 31, 1916, and time extended one year to Jan. 31, 1917. Int. paid to Jan. 31, 1917. Indorsed Mar. 17, 1917, $1,000. Int. paid to Jan. 31, 1918. Int. paid to Jan. 31, 1919. Int. paid to Jan. 31, 1920."

It is apparent that unless there was a valid extension of the time of payment of the note, or unless the payments thereon tolled the statute of limitations as to B. F. Rogers, the five years' statutory period of limitations applying to actions of this character had expired at the time the action was brought.

The amended answer of B. F. Rogers admits that he signed the note, but alleges that he was only a surety, which fact was well known to George Hall, the payee. He alleges that all the payments on the note charged in the petition to have been made were paid by A. V. Rogers; that B. F. Rogers never paid any part thereof and never knew or consented to the payments; that the cause of action accrued February 1, 1916, more than five years prior to the commencement of the action; that the action was barred by the statute of limitations, and that no valid extension of the time of payment of the note had ever been made.

We think it is extremely doubtful whether there is any allegation in the petition which fairly charges that there was an extension of the time of the payment of the note. Assuming that there was such a charge, the amended petition denies that there had been an extension of the time of payment, and thus an issue was raised upon that question. The record shows that the plaintiff offered in evidence the note with all the indorsements thereon. The defendant, B. F. Rogers, objected to the offer of the indorsement as incompetent, irrelevant, immaterial, and no foundation laid. Thereupon the court admitted the note in evidence, but announced that "the objection is sustained as to the statement on the back of the note wherein it says that the note is extended for one year. The objection to that part is sustained as no foundation laid." No further attempt was made to show that the time of payment had been extended.

While it is true that in the original answer filed by B. F. Rogers he alleged that the time of payment of the note had been extended, in his amended answer he denied that there was an extension. By filing an amended answer he abandoned the allegations of his original answer. The original answer was not offered in evidence and appears only in the transcript. There is no evidence in the record to show that an extension of time of payment was made, and hence we must conclude that the note was due and payable on January 31, 1916, as provided by its terms.

Did the payments on the note toll the statute as to B. F. Rogers?

The testimony shows that all the payments were made by A. V. Rogers without the authority, knowledge or consent of B. F. Rogers. Some argument is made as to whether B. F. Rogers was a surety or a joint obligor on the note. As we view the law, it is immaterial whether he was a surety or a joint obligor, so far as concerns his liability to the payee. If he were a surety, the case would fall clearly within the rule announced in *Dwire v. Gentry*, 95 Neb. 150, wherein it is held:

"The payment of interest on a note by a principal without the authority, knowledge or consent of the surety will not stop the running of the statute of limitations as to the surety."

Other cases are also cited to support this rule.

While the courts are not in harmony as to the effect of a partial payment made by one of several joint debtors without the acquiescence of the others, the weight of authority supports the rule that such a payment does not toll the statute as to the debtor who does not consent to the payment. *Mayberry v. Willoughby*, 5 Neb. 368; 25 Cyc. 1385; 33 Century Digest, Limitations of Actions, sec. 624.

The judgment of the district court is

AFFIRMED.

FARM MORTGAGE & LOAN COMPANY, APPELLANT, V. S. M. BEALE, APPELLEE.

FILED MARCH 18, 1925. NO. 23040.

1. Bills and Notes: LAW GOVERNING. Where a promissory note is made in one state, to be performed in another state, it is, ordinarily, to be regulated and governed by the law of the place of performance, without regard to the place at which it was written, dated, or signed, unless it clearly appears that the parties intended that the contract should be governed by the law of the place where made.
2. ———: ———. Where two or more persons, residing in different states, enter into a contract, it is competent for them to select the laws of either state to govern their contract. When, by the terms of the contract, they have fixed and determined upon a place for its performance, ordinarily the law of that place will govern, unless a contrary intention is made to appear.

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

W. F. Zumbrunn and *C. H. Hendrickson,* for appellant.

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

GOOD, J.

Action on a promissory note, executed by G. W. and S. M. Beale, husband and wife. Plaintiff, a holder in due course, recovered a judgment against the husband, but the wife, S. M. Beale, was held not liable, on the ground of coverture. Plaintiff appeals.

The undisputed facts are that G. W. Beale entered into a contract with the Rio Grande Valley Land Corporation, of Kansas City, Missouri, for the purchase of a tract of land in the state of Texas. The note in question was given in part payment for the agreed purchase price. On its face, the note appears to be dated at Kansas City, Missouri, and is made payable to the Rio Grande Land Corporation, at its office in that city. The note was actually signed by Mrs. Beale at her home in Wayne county, Nebraska.

We are required to determine whether the defense of

coverture is available to Mrs. Beale. This presents purely a law question, viz., whether the contract is governed by the law of Missouri or by the law of Nebraska.

Under the law of Missouri a married woman is liable upon her contract the same as a *feme sole,* while in Nebraska the disability of a married woman to make a valid contract remains the same as at common law, except in so far as such disability has been removed by our statute. The statute has removed the common-law disability of a married woman to make contracts only in cases where the contract made has reference to her separate property, trade, or business, or was made on the faith or credit thereof, and with the intent on her part to thereby bind her separate property. *Hale v. Christy,* 8 Neb. 264; *Godfrey v. Megahan,* 38 Neb. 748; *Grand Island Banking Co. v. Wright,* 53 Neb. 574; *Smith v. Bond,* 56 Neb. 529; *Farmers Bank v. Boyd,* 67 Neb. 497; *Northwall Co. v. Osgood,* 80 Neb. 764; *Marsh v. Marsh,* 92 Neb. 189.

Plaintiff contends that, since the note bears date in Kansas City, Missouri, and is made payable in that state, the validity of the note must be determined by the law of that state; while the defendant contends that the note, having been signed by Mrs. Beale in Nebraska, is to be governed by the law of this state.

The precise question seems not to have been hitherto decided by this court. The question, however, has been frequently decided in other jurisdictions. While those decisions are not entirely harmonious, the greater weight of authority is to the effect that, where a promissory note is made in one state, to be performed in another state, it is to be regulated and governed by the law of the place of performance, without regard to the place at which it was written, dated or signed, unless it clearly appears that the parties intended that the contract should be governed by the law of the place where made. Among the many authorities sustaining this view are the following: *Brown v. Gates,* 120 Wis. 349, 1 Am. & Eng. Ann. Cas. 85, and note, p. 88; *Bigelow v. Burnham,* 83 Ia. 120, 32 Am. St. Rep. 294; *Mayer v.*

Roche, 77 N. J. Law, 681; *Milliken v. Pratt,* 125 Mass. 374; *Emanuel & Barnett v. White,* 34 Miss. 56; *Cromwell v. Sac County,* 96 U. S. 51; *First Nat. Bank v. Mitchell,* 92 Fed. 565; *Sturdivant v. Memphis Nat. Bank,* 60 Fed. 730; *Chemical Nat. Bank v. Kellogg,* 183 N. Y. 92, 2 L. R. A. n. s. 299; *Bright v. Judson,* 47 Barb. (N. Y.) 29. See, also, 8 C. J. 95, sec. 164, note 30; 8 C. J. 92, sec. 153, notes 63, 64; 3 R. C. L. 1137, sec. 352.

Defendant insists that this court has adopted the view that the validity of a contract is to be determined by the law of the place where the contract is signed and delivered, and cites, as sustaining this view, *Benton v. German-American Nat. Bank,* 45 Neb. 850. In that case an action was brought in Nebraska against a married woman on a promissory note, which she had indorsed in the state of Missouri, and which was dated and made payable in Missouri. She set up the defense of coverture, and this court held the defense was unavailing, because the contract was governed by the laws of Missouri. In the body of the opinion there is a quotation from a Tennessee case in which it is said, in effect, that the validity of a contract, the obligation thereof, and the capacity of the parties thereto are to be determined by the *lex loci contractus,* unless there be something in the contract which is deemed hurtful to the good morals or injurious to the rights of its own citizens. Counsel for defendant assume that the term *lex loci contractus* means the law of the place where the contract is signed.

The phrase *lex loci contractus,* literally translated, means the law of the place of the contract. It is used in a double sense, to mean sometimes the law of the place where the contract is made, and sometimes that of the place of its performance. It was undoubtedly in the latter sense that the expression was used in the body of the opinion in *Benton v. German-American Nat. Bank, supra.* Among the authorities holding that the term *lex loci contractus* means the law of the place of performance are *Gibson v. Connecticut Fire Ins. Co.,* 77 Fed. 561, and the cases therein cited.

Where two or more parties, residing in different states,

enter into a contract, it is competent for them to select the laws of either state to govern their contract. When, by the terms of the contract, they have fixed and determined upon the place for its performance, ordinarily, the law of that place will govern, unless a contrary intention is made to appear.

In the instant case one of the parties resided in Missouri; the other in Nebraska. The contract was entered into, to be performed in the state of Missouri. There is nothing in the contract or in the evidence from which it can be inferred that the parties intended that the contract should be governed by any other law than that of the place of performance, viz., Missouri. It necessarily follows that the defense of coverture is not available to Mrs. Beale in this action.

The judgment of the district court, in so far as it holds that Mrs. Beale is not liable, is reversed, and the cause remanded for further proceedings.

REVERSED.

CHARLES A. STUKENHOLTZ, APPELLANT, V. ORA I. PARRIOTT, AND WILLIAM E. FOSHIER, INTERVENER, APPELLEES.

FILED MARCH 18, 1925. NO. 23020.

1. **Vendor and Purchaser: POSSESSION.** A vendee under a contract for sale of real estate is not entitled to possession until full performance, unless the contract so provides.
2. **———: POSSESSION BY TENANT.** The possession of real estate by a tenant is that of the holder of the legal title as against a vendee under an executory contract of purchase which does not give him the present right of possession.
3. **———: ———: NOTICE.** Under such circumstances, the possession of the tenant is not constructive notice to a subsequent purchaser from the holder of the legal title of the claims of the vendee in the first executory contract, even though such tenant has attorned to the latter by accepting a lease from him.

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

Pitzer & Tyler, for appellant.

F. A. Wright, Floyd E. Wright, Williams, Hurd & Neighbors and *Robert G. Simmons, contra.*

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

REDICK, District Judge.

Action of replevin. Plaintiff took from defendant Parriott by writ of replevin certain hay and grain of the agreed value of $1,867, which represented the landlord's share of the crop of certain land for the year 1919. Parriott was the tenant and made no claim to the crop, but answered that Foshier claimed it, and Foshier was made defendant. The contest is between plaintiff and Foshier. A jury was waived and trial to the court resulted in a judgment for Foshier for return of the chattels or their value against plaintiff and Parriott, and plaintiff appeals.

The evidence establishes the following facts: One John M. Bennett was the owner of the land in 1918 and leased it to Parriott. December 23, 1918, Bennett entered into a contract with W. F. Austin to sell him the land for $14,400, to be paid, $800 cash, a conveyance of lots in Bayard at $4,400, and a mortgage on the land for $6,000, the "contract to be closed and the deeds executed and delivered and cash balance of $3,200 paid on or before March 10, 1919. * * * And it is further agreed that, in case either of the parties hereto shall fail to perform the stipulations of this contract or any part of the same, the failing party shall pay the other party to this contract the sum of $500 as damages for nonfulfilment of contract." The contract was not acknowledged, but was recorded June 26, 1919, at 9 a. m. Nothing further was done toward carrying out this contract. February 18, 1919, Austin made a contract to exchange the land for lands of plaintiff, Stukenholtz; this contract was not acknowledged nor recorded.

In January, 1919, Parriott applied to Bennett for a lease for 1919, and was told that he had sold the land to Austin.

Parriott then applied to Austin, who made a verbal lease with him, but later told Parriott that he had sold the land to plaintiff. Parriott and Stukenholtz then, on March 18, 1919, entered into a written lease for 1919; there was no change of possession, Parriott remaining on the land as before.

June 9, 1919, Bennett sold and deeded the land to one Hookstra, the deed being recorded June 26, 1919, at 9 a. m.; and June 28, 1919, Hookstra sold and conveyed to W. E. Foshier, appellee, the deed being recorded June 28. Neither Hookstra nor Foshier had any actual notice of the Austin or Stukenholtz contracts, and the record of the Austin contract did not give notice, as the contract was not acknowledged, and therefore not entitled to record, but it is claimed by plaintiff that the possession of Parriott was constructive notice, not only of the tenant's interest, but also of the title and interest of his landlord, the plaintiff.

The principle of law contended for may be conceded, but who *was* Parriott's landlord?

A purchaser of land under a contract of sale is not entitled to possession until full performance by him, unless the contract contains provisions giving him possession. *Way v. Root,* 174 Mich. 418; *Wood v. Irving,* 159 Ia. 658; 39 Cyc. 1620. The contract from Bennett to Austin contained no provision regarding possession, and it seems clear that the clause providing that the contract be closed and deeds delivered and balance of cash payment made March 10, 1919, fixed the date when possession would be delivered. The statement to Parriott by Bennett that he had sold the land to Austin was before Austin had made default; and while, as between Bennett and Parriott, Bennett might be estopped to question Austin's right of possession, no such question arises here. As between Bennett and Austin, Bennett was entitled to possession until full performance; so also as to Austin's vendee. If neither Austin nor his vendee was entitled to possession, they had no right to lease the land to Parriott, and the latter simply held over as the tenant of Bennett. *Perkins v. Potts,* 52

Neb. 110, in which it was held: "Where a tenant in possession without his landlord's consent attorns to a third party —the latter not having acquired the interest of the landlord in the real estate either by grant or operation of law— the possessory rights of the landlord are not thereby affected, as such an attornment is void." Such possession could not operate as constructive notice of the claim of plaintiff, for the obvious reason that plaintiff had no right of possession which he could transfer to the tenant and thus constitute such tenant his representative. The lease from Stukenholtz to Parriott was void as against Bennett and his grantees.

The deed to Hookstra contained the clause, "also subject to * * * lease for year 1919," and it is claimed that this was a reservation of the rent for the use of plaintiff; but we think the words will not bear that construction; their only office was to protect the grantor upon his covenants by reason of the possession of the lessee.

Finally, could Stukenholtz enforce specific performance of the Austin contract against Bennett? Clearly not, for the reason that such contract was in default, and by its terms might be disregarded by Bennett electing to retain the $500 as damages. This provision, while it could be waived, prevented either party from seeking specific performance in the absence of controlling equities, which are not here present. His rights against Bennett's successors in legal title are no greater.

The judgment of the district court is

AFFIRMED.

Note—See Vendor and Purchaser 39 Cyc. 1620, 1621, 1624, 1758.

UNION LIFE & ACCIDENT INSURANCE COMPANY, APPELLEE, V. AMERICAN SURETY COMPANY OF NEW YORK, APPELLANT.

FILED MARCH 18, 1925. No. 23047.

1. **Indemnity Bond:** MISTAKE OF FACT. Where at the time of execution of the instrument there exists a mutual mistake of the parties as to the existence of a certain state of facts material to their purpose, there is no contract.
2. ———: SUIT TO CANCEL: TENDER OF CONSIDERATION. In such case it is not necessary to make a tender of the consideration paid before bringing suit to cancel the contract, a tender in the petition being sufficient.
3. ———: MISTAKE OF FACT: ESTOPPEL. In cases of mutual mistake as to a material fact upon the existence of which the contract is based, the parties are not estopped from asserting the truth by the recitals or assumptions of the contract with relation thereto.
4. ———: DEPOSITOR. One who has sold and transferred a certificate of deposit of a bank is not thereafter a depositor within the meaning of a bank depository bond because of the fact that he is liable as indorser upon said certificate.
5. ———: BANK DEPOSITS: LIABILITY. When a bank suspends payment and does not again open its doors, the liability on a depository bond is then fixed, and only deposits belonging to the obligee at that time are entitled to the protection of the bond.

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

Montgomery, Hall & Young, for appellant.

Doyle & Halligan, G. E. Hager and *A. Moore Berry, contra.*

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

REDICK, District Judge.

This action is brought to recover upon three bank depository bonds issued to the plaintiff, and two other corporations to be named later, under which plaintiff claims by assignment, which bonds were executed as indemnity

against loss upon deposits made and to be made in certain banks named in a schedule attached to said bonds. The bond to plaintiff was dated August 5, 1920, and on November 12, 1920, there was added to the schedule the name of Corn Belt National Bank of Scotland, South Dakota, in the sum of $2,650, deposits in which are the ones in controversy, and which bank failed and did not pay said deposits. Plaintiff had judgment below, and defendant appeals.

The terms of the three bonds are identical, with the exception of the date and name of obligee, and the condition thereof is in the following words: "Now, therefore, the condition of this obligation is such that if said banks shall, during the term of this bond, faithfully account for and pay on legal demand all moneys deposited with them by and on behalf of said obligee, and shall not suspend payment during the term hereof, then this obligation shall be null and void; otherwise to remain in full force and effect." A further provision was as follows: "The obligee may apply to the surety to have other banks added to said schedule from time to time, which by an acceptance in writing by the surety will bind the surety to the same extent as though said bank or banks were originally listed herein." The term of said bonds was one year, and during that period plaintiff deposited in said bank the total sum of $3,564.20, receiving therefor six certificates of deposit, for the failure to pay which the action is brought. The defendant, however, conceded its liability as to four of said certificates and has paid the same, so that the only ones in controversy are No. 967, dated June 19, 1920, due in one year, for $1,110, and No. 981, dated July 3, 1920, due in one year, for $700, both at 5 per cent. interest.

August 21, 1920, plaintiff for value sold and assigned certificate No. 967 to Union Automobile Insurance Company, and December 21, 1920, sold and assigned for value certificate No. 981 for $700 to Union Fire Insurance Company. The depository bonds of these two companies were dated August 24, 1920, for the term of one year, but did not include the Corn Belt National Bank, and on January

24, 1921, the assignees each applied to defendant to extend the coverage on its bonds issued to them, respectively, so as to include the Corn Belt National Bank. On January 27, 1921, the defendant accepted said applications and extended the coverage requested to the Union Automobile Insurance Company in the sum of $1,125, and the Union Fire Insurance Company in the sum of $700.

On January 21, 1921, by order of its directors, the Corn Belt National Bank closed its doors and thereafter the bank transacted no business, and on January 22, 1921, National Bank Examiner Smiley took charge of the affairs of the bank for the comptroller of the currency. These facts were unknown to the Union Automobile Insurance Company and the Union Fire Insurance Company at the time they made application to defendant to extend the coverage of its bonds so as to include said bank, and were unknown to defendant January 27, 1921, when it accepted said applications and issued its contract in compliance therewith; all of the parties concerned believing and assuming that at the date of said transactions the Corn Belt National Bank was still functioning and a going concern. On February 3, 1921, the defendant discovered that the Corn Belt National Bank had closed its business on January 21, and thereupon demanded of the plaintiff a return of said coverage contract issued January 27, but which by its terms was to go into effect January 24, 1921, on the ground that at the time the same was issued the defendant did not know that the bank had suspended, and later on deposited with the clerk of the court the amount of premiums paid for said coverage contracts, $5.80, for the use of plaintiff.

At the time of sale of said certificates they were transferred by general indorsement of the plaintiff, which claims it thereby became liable for their payment, and on May 18, 1921, plaintiff repurchased said certificates 967 and 981, and has owned the same ever since, taking assignments thereof and of the coverage contracts relating thereto. The above facts are stipulated. In addition thereto the defend-

ant produced evidence to the effect that it would not have issued said coverage agreements if it had known that the bank had suspended, and evidence tending to establish that said contracts were issued through a mistake in its office, but this latter fact we deem immaterial in view of our conclusion. The defenses relied upon are: That the plaintiff was not a depositor in the Corn Belt National Bank when it failed; and that the two coverage contracts dated January 27 never came into existence because based upon a mutual mistake of fact.

The plaintiff bases its right to recover upon two propositions: (1) As a depositor of the Corn Belt National Bank under its own bond; and (2) as the assignee of the Union Automobile Insurance Company and the Union Fire Insurance Company of their rights under the coverage contracts effective January 24 and dated January 27, 1921.

We deem it convenient to first discuss the second proposition. The facts are undisputed: At the time of the issuance of the two coverage contracts both of the parties thereto were in ignorance of the failure of the Corn Belt National Bank and assumed that it was a going concern, and the contracts would not have been made had the facts been known. Thus is presented a clear case of mutual mistake as to the existence of a fact upon which the obligations of the contract were based, viz., the existence of the Corn Belt National Bank. It is obvious that when the contract speaks of a bank it implies a going concern engaged in the business of banking, not a defunct institution whose doors have been closed and which is prohibited by law from continuing its business. It seems futile to discuss the question whether or not the contracts of coverage would have been issued if the defendant had been advised that the bank had suspended and was in the hands of the bank examiner. A contract of indemnity under such conditions would be essentially different from one under the condition of facts assumed by the parties and with reference to which they entered into the contracts. The rule in such cases is, we believe, without exception, that there is no contract. It is

sometimes said that the contract is void, but we think the situation is better expressed by saying that the contract never had any existence. In 9 Cyc. 399, the rule is stated: "Where certain facts assumed by both parties are the basis of a contract, and it subsequently appears that such facts did not exist, there is no agreement." And the text is supported by citations from numerous states and England. "When an alleged agreement was entered into by an honest misunderstanding and through a mutual mistake of the parties, there is no legal contract." *Boehm v. Yanquell,* 15 Ohio C. C. Rep. 454. In *Scriba v. Insurance Company of North Amercia,* 2 Wash. C. C. (U. S.) 107, it was held that a policy of insurance upon a cargo loaded or to be loaded upon a certain vessel at La Vera Cruz for shipment to New York never became a binding contract when no such cargo was ever loaded, as there was no subject-matter upon which the contract could operate. In *Gibson v. Pelkie,* 37 Mich. 380, the contract was based upon the supposed existence of a judgment, but there was none, and it was held there was no contract for lack of subject-matter. In *Nordyke & Marmon Co. v. Kehlor,* 155 Mo. 643, the contract was made under an assumption that the articles contracted for would comply with a certain test which both parties mistakenly assumed could be made, and it was held there was no contract, the court saying that the parties were in the attitude of contracting with reference to something which did not exist. So here, the parties contracted with reference to the Corn Belt National Bank, which did not exist for the purposes contemplated by the supposed contract. There was no person for whose default the contract of indemnity could be called into operation. See, also, *Geib v. Reynolds,* 35 Minn. 331; *Carey v. Gunnison,* 65 Ia., 702. We are clearly of the opinion that the contracts of coverage dated January 27, 1921, never came into existence as completed agreements, and that therefore plaintiff's action must fail so far as it is based thereon.

It is contended that defendant's failure to tender the premium received on the supposed contracts until after

suit begun defeats his rights to rescind the contracts on familiar principles; but they have no application here because the right of rescission is based upon the at-one-time existence of the contract. But where, as in the present case, there never was any contract in law, such tender was unnecessary, although the defendant would doubtless be liable as for money had and received.

It is further contended that defendant is estopped by its contract from asserting that the bank had no existence. Can it be, if A. contracts in writing to buy B.'s horse for $100, both parties believing that the horse is alive, whereas in fact it was dead at the time the contract was made, that B. can recover the money? It is true that Mark Twain records an instance of the purchase by him of a dead mule, but the estoppel in that case was the persuasiveness of a revolver in the hands of the vendor. The courts, however, would have come to Mark's assistance if he had been afforded time to apply for relief. The cases cited by plaintiff do not sustain him. The doctrine of estoppel is not a favored one, as it operates to prevent a full disclosure of the truth, and cannot be successfully invoked in aid of fraud or a contract founded on mutual mistake. As we read the case of *Rudd v. Hanna*, 20 Ky. *528, relied upon by plaintiff, the plea did not allege that Palmer was not within the bounds at the time of the execution of the bond, but that he had broken the bounds previously. The declaration averred an after breach. Furthermore, the court said: "It (the plea) does not attempt to make a case of fraud to avoid the deed; nor even aver that Rudd was ignorant of the fact"—thus indicating that in case of fraud or mistake estoppel would not be declared. Moreover, at the time of the repurchase of the certificates, plaintiff had actual notice that defendant claimed the coverage contracts were void, and therefore was not justified in relying upon them.

We now come to the first contention of plaintiff, that it was a depositor in the Corn Belt National Bank at the time of its failure. Let us recall the facts: The two certificates in question were sold by plaintiff to the automobile

insurance company August 21, and to the fire insurance company December 21, 1920; and thereupon, without doubt, the purchasers became depositors in place of the plaintiff. Thereafter, January 21, 1921, the bank suspended payment, and May 18, thereafter, plaintiffs in compliance with their contract as indorsers paid and took an assignment of the certificates. The claim is that by reason of their continued liability for the final payment of the certificates representing deposits in the Corn Belt National Bank they were entitled to the protection of the bond in suit.

The bond in question contained the following recital:

"Whereas, the obligee has deposited or will hereafter deposit with certain banks or banking institutions certain funds belonging to the obligee, represented either by checking accounts or by certificates of deposit issued by said banks or banking institutions, and has applied to the surety for protection against loss caused by the failure of any one or more of said banks, in the penalties shown in the schedule hereto attached, which is hereby referred to and made a part hereof."

From this it appears that the condition upon which liability of the surety must be predicated is, that the obligee had a deposit in the bank at the time of its failure. In *Farrens v. Farmers State Bank,* 101 Neb. 285, a depositor is defined as "One who delivers to or leaves with a bank money subject to his order, either upon time deposit or subject to check." Was the plaintiff a depositor within this definition at the time of the failure of the bank in January, 1921? It seems clear that when plaintiff assigned the certificates in question it ceased to be a depositor, the assignee being substituted in its place. And this situation remained unchanged until May, when plaintiff repurchased the certificates, and in the meantime the bank failed. Unless, by relation, the repurchase of the certificates reconstituted plaintiff a depositor from the date of their original transfer, plaintiff's position cannot be maintained. It seems to be the contention that the plaintiff became invested with all the rights of the transferees under the certificates, and this may be

conceded so far as the bank is concerned. And if he had repurchased the securities before the failure of the bank, he would have been a depositor entitled to the protection of the bond in suit. Also, if the certificates in the hands of the automobile and fire insurance companies had been protected by the coverage contracts of January 27, plaintiff would have succeeded to their rights; but we have shown there were no such contracts.

But when the bank failed the liability of defendant under the bond became fixed, subject only to determination of the amount of the loss on deposits of plaintiff in the bank at that time. If this is true, nothing that plaintiff subsequently did, without participation of defendant, could enlarge that liability. No deposits could be added, and it must be remembered that the automobile and fire insurance companies were not parties to this bond nor protected thereby. If plaintiff had indorsed the certificates without recourse, it would have suffered no loss. It is therefore apparent that its loss, if any, was proximately caused by its independent undertaking, and not by the failure of the bank. The effect of plaintiff's contention would be to bring the transferees of the certificates who were not named in the bond within the protection thereof, or to read into the bond a clause indemnifying plaintiff against loss upon his collateral contract of indorsement. Surely this cannot be done; the liability of the surety may not be extended beyond the terms of the bond. Suppose I have my house insured against fire for a year, and within the term I sell and convey it to another who fails to insure it, and the house is destroyed by fire, could I by a repurchase of the property after the fire reinstate the policy and become an insured? The question answers itself. Again, suppose plaintiff refused to take up the certificates and judgment was recovered against it by the transferees upon its indorsement, would the plaintiff be heard to say that he was a depositor within the meaning of the bond, and recover the amount of the judgment? Clearly not, for the loss he sustained arises exclusively out of the collateral agreement.

We conclude that the plaintiff has no cause of action upon either of the theories presented by him, and that the judgment of the lower court to the contrary is erroneous and must be reversed and plaintiff's action dismissed, and the district court directed to enter decree upon defendant's cross-petition as prayed.

REVERSED, WITH DIRECTIONS.

JAMES R. MCLAUGHLIN, APPELLANT, V. ROBERT F. NELSON, APPELLEE.

FILED MARCH 18, 1925. No. 22997.

1. **Vendor and Purchaser:** TIME OF PERFORMANCE. Time will be held to be of the essence of the contract, and enforced in the absence of waiver or estoppel, where it is so provided by the express language of the contract and so intended by the parties.
2. ———: TENDER. Failure to make tender may be excused, where it appears that such tender would be refused, on the principle that the law does not require a vain and useless thing.
3. **Estates:** MERGER. Whenever a person acquires a greater and a lesser estate in the same property and there is no intervening estate, the lesser does not further exist as a separate estate, but it is destroyed by, or is considered in law as merged in, the greater.

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

Hoagland & Carr, for appellant.

Beeler, Crosby & Baskins, contra.

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

SHEPHERD, District Judge.

Plaintiff, McLaughlin, sued the defendant, Nelson, for $1,400 paid on a real estate purchase, which was not consummated, because, as he claimed, a merchantable title was

not furnished. By written agreement entered into on the 7th day of August, 1919, between Nelson, as vendor, and McLaughlin, as vendee, the former was to furnish the latter good and merchantable title, together with deed and abstract, on or before March 1, 1920, and time was made an essential element of the contract. A portion of the land had an unreleased mortgage on it, bearing date January 4, 1900, and being due December 16, 1901. The record shows that the maker of this mortgage had quitclaimed the land to his mortgagee during November of 1901, and that shortly thereafter the latter had conveyed the same to one McAllister by warranty deed. In addition to this, the abstract shows an affidavit reciting that in receiving said quitclaim it was the intention of the mortgagee to merge the mortgage in the deed.

Promptly upon examination of the abstract, which occurred a few days after the execution of the purchase contract, plaintiff returned the same to the defendant with an attorney's opinion to the effect that said unreleased mortgage was a cloud upon the title which would have to be removed by release or court decree. Defendant seems to have paid no immediate attention to this, except to secure a contrary opinion from his own attorney. As time of settlement drew near, however, on or about February 28, 1920, he told the plaintiff that he considered the title good as it stood. But plaintiff had had disparaging comment upon it from other sources to supplement his attorney's opinion, and replied that it would have to be cleared, as suggested, by March 1 or the deal could not go through. And he stuck to this, although defendant offered to get a decree quieting the title as to the mortgage within 15 or 20 days, and to put up sufficient money to make good his agreement in this regard. It followed that defendant made no tender on March 1, though plaintiff was on hand, and ready, willing and able to perform according to his word, and that on the next day plaintiff declared a rescission of the contract, notifying the defendant thereof and demanding a return of his $1,400 of earnest money. On the 4th

of March defendant tendered deed and abstract, together with a written promise (subsequently kept) that he would proceed immediately to secure the order of court originally demanded. But such tender was refused.

The district court found against the plaintiff on his contention that the title was unmerchantable and that no sufficient tender was made, and in favor of the defendant on his cross-petition praying for specific performance. A decree was entered providing that, in case of the failure of the plaintiff to take the land and to pay the consideration within 60 days, his earnest money should be forfeited to the defendant, and title to the property should be quieted in the latter.

In this state time is held to be of the essence of the contract, in the absence of waiver or estoppel, where it is so provided by the express language of the contract, and so intended by the parties. Such was the case here. But it is clear from the evidence that plaintiff was emphatic in his statement to defendant on the 28th of February that he would not take the title unless a decree or a release was obtained before March 1st. Accordingly, it would have been a vain thing for defendant to have tendered deed and abstract without decree or release, and the fact that he did not do so cannot avail the plaintiff, provided the title was good without such decree or release. Where a tender would be of no avail if made, and the fact in this regard is beyond dispute, a failure to make the tender in question will not militate against the party from whom the tender is required.

The whole question, then, is whether or not the title originally presented by the abstract was good and merchantable. If it was, the district court was right in his findings and decree. If it was not, the plaintiff is entitled to a reversal. Merchantable means "vendible because of its fitness to serve its proper purpose." Anderson's Dictionary of Law. Fitness to serve its proper purpose includes defensibility and salability. But it does not follow that a title, to be good and merchantable, must be beyond the possibility

of attack. It simply means that it is subject to no reasonable doubt.

The doctrine that a merger at law follows inevitably upon the union of a greater and less estate in the same ownership, and that a deed by a mortgagor of premises upon which he has given a mortgage to the mortgagee extinguishes the mortgage, has long been recognized in this state. It is true that where it was not the intention of the parties that such should take place the doctrine is not favored in equity. But in this case the mortgage, which was 20 years old at the time that the contract was entered into, was made by one Rogers to a Mr. Fisher, and afterwards, and before the mortgage was due, Rogers, who was the title owner as well as the mortgagor, deeded the land covered by the mortgage to said Fisher. And it also appears that shortly thereafter Fisher deeded the land by warranty deed to McAllister, also that subsequently thereto the property was conveyed a number of times by deeds of full warranty. Under these circumstances it seems to this court that the title was sufficiently good to exclude all reasonable doubt as to its merchantable character. Equity certainly would not hear a holder of the mortgage, even if it had been assigned to him before the deed was made from Rogers to Fisher, as against the purchaser of the property from the defendant in this case, provided the assignment of said mortgage, had not been filed for record.

It is ingeniously argued by the plaintiff, on the authority of *Mathews v. Jones*, 47 Neb. 616, that Rogers' title came from Fisher upon a consideration of $500, while Rogers' quitclaim to Fisher after the execution of the mortgage states the same consideration, and that Fisher would not have accepted such conveyance from Rogers upon that consideration with the intention of canceling the said mortgage, because he would have been losing about $300 thereby. This must be admitted, he says, because the doctrine of the cases is that Fisher would be presumed to intend that which was advantageous to him, and no more. But many other considerations may have been present to influence the

parties. It is well known that the stated consideration of deeds frequently does not reflect the facts. And under the circumstances this court is constrained to hold that the rule of merger, taken in connection with the subsequent warranty deed which was made and the lapse of time, made the title in question good and merchantable beyond reasonable doubt.

As the defendant says in his brief: "At law it is declared to be the inflexible rule that a merger always takes place when a greater and less estate coincide and meet in the same person in one and the same right without any intermediate estate. * * * When the circumstances under which merger ordinarily takes place are shown, the burden rests upon him who alleges that there was no merger to prove a contrary intention, or to prove facts and circumstances from which such an intention may be presumed." 10 R. C. L. 666, sec. 27. *Downing v. Hartshorn*, 69 Neb. 364; *Mathews v. Jones*, 47 Neb. 616; *Wyatt-Bullard Lumber Co. v. Bourke*, 55 Neb. 9; *Whipple v. Fowler*, 41 Neb. 675. Whenever a person acquires a greater and a lesser estate in the same property and there is no intervening estate, the lesser does not further exist as a separate estate, but is destroyed by or is considered in law as merged in the greater.

This principle seems the more certain of application in the case at bar, since the rule in regard to mortgages stated in *Justice v. Button*, 89 Neb. 367 has been practically abrogated by subsequent statute. Section 5680, Comp. St. 1922, now provides that a decree quieting title to land incumbered by a mortgage may be obtained upon proper ground without alleging the payment of the mortgage. And it may also be said, in passing, that the case cited has little application to the case at bar, because no question of merger was there presented.

It is urged by appellant that, in first filing an answer claiming forfeiture of the earnest money paid, appellee elected the law remedy, and could not later be permitted to ask equitable relief by way of specific performance. But the facts pleaded in his answer and cross-petition are not

inconsistent with the averments of his original answer, and, moreover, he could not in any event have had a remedy at law. Accordingly, the contention of appellant on this point cannot be sustained.

The appellee, Nelson, was by no means without fault, in failing to give the appellant more timely notice of his intention to stand upon the title as proffered. In view of this, it will be equitable to give the latter 60 days from the entry of judgment upon the mandate in which to perform the contract, if he so elects. With this provision, the decree of the district court is

AFFIRMED ON CONDITION.

CAROLINE M. BECHTEL, APPELLANT, V. ALBERT PRICE ET AL., APPELLEES.

FILED MARCH 18, 1925. No. 23022.

1. **Deeds**: CONSIDERATION. Though the consideration paid be greatly less than the value of the property purchased, that fact is not of itself sufficient to impeach the validity of the transaction, particularly when it appears that the vendor is competent and not under undue influence.
2. ———: CANCELATION. Evidence examined, and *held* that the plaintiff's decedent was not incompetent to make the conveyance of land complained of; also, that at the time of settlement for said land and payment of the balance of the consideration named in the deed, said decedent was in the full possession of his faculties and well knew and understood the purpose and effect of the transaction entered into; and, further, that he was under no undue influence either in making said deed or receiving said settlement.

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

Hastings & Hastings and *J. J. Laton*, for appellant.

Scott & Scott, contra.

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

SHEPHERD, District Judge.

James Bechtel, appellant's husband and her decedent, had been a merchant at Madrid, Nebraska, where he had accumulated considerable property, including certain accounts and choses in action, a store building, and the real estate involved in this controversy, 480 acres of land. In May of 1918 he became ill in mind and body, and on the 5th day of June following was duly placed under guardianship as an incompetent. After some months in hospitals at North Platte and Omaha, he spent perhaps 90 days at the home of the appellant, who was a trained nurse living in Denver, apparently then and there contracting the attachment for her which later resulted in their marriage. About March 20, 1919, he returned to Madrid, and applied for and obtained a discharge from guardianship, together with the restoration of his property. All this seems to have been by orderly proceedings in the county court and without objection on the part of his relatives or anybody else. On the 3d day of April, 1919, he conveyed the said land to Albert Price for a consideration of $9,600, as stated in the deed.

He then left Price in charge of his store building, collections, and business generally at Madrid, giving him a power of attorney authorizing him in that behalf, and went to Denver, where he married the appellant on the 15th day of May of the same year. He died in February of 1921, leaving a will made shortly after his marriage, by which he bequeathed and devised all his property to the appellant.

This suit was brought to set aside the deed from Bechtel to Price, on the ground of insufficent consideration, mental incompetency on the part of the former, and undue influence on the part of the latter. Hicks was made a party defendant because he, the father-in-law of Price, took a mortgage on the land to secure him for money advanced to pay Bechtel. The district court found against appellant, who was plaintiff

below, and in favor of the appellees, who were defendants.

An examination of the record leaves no doubt in the mind of the court that the value of the land was greatly in excess of the amount paid for it. It was probably worth $20,000.

Price was evidently considered a friend by Bechtel. He had represented him some years before in a dispute over corn. Bechtel invariably addressed him in his letters as "Dear friend;" he addressed Bechtel as "Dear Jim," and signed himself "Buster." But he was not Bechtel's attorney in fact until some time after the making of the deed. Otherwise, there is nothing to indicate that he possessed any particular influence over the decedent, or that he dealt with him other than at arm's length.

There is question as to the amount actually paid for the land. But we think it was $9,600. Besides the stated consideration of the deed, Price testified that he gave Bechtel a purchase money note and mortgage for that much at the time he received the deed. This stands unchallenged in the record. The evidence further conclusively shows that he paid $6,500 on this indebtedness at appellant's home in Denver on the 10th and 16th days of July, 1919; and that at said time he took an order from Bechtel upon the latter's attorney, Theodore F. Barnes, for the return of said note and mortgage. It also shows that Price and Bechtel met and transacted business at Sterling, Colorado, on the 23d day of April, 1919. Price testified that at this time and place he paid Bechtel $3,100 on the land. Similar testimony on the part of Hicks, who was present, was offered. But this was excluded; and that of Price in regard to such payment was stricken out.

The proof fairly shows, despite the fact that Mrs. Bechtel testified that her husband received no payments from Price except said $6,500 and a remittance of $75, that the consideration was not only $9,600, but that the same was fully paid. Taking into account her interest in the event of the suit, and the further fact that she was not in a position to

know what her husband had received, the evidence preponderates in favor of the appellees on this point.

The condition of plaintiff's decedent at the time of the settlement at Denver, together with the low price received for the land, must determine the controversy. Moreover, the testimony of the appellant, who describes what took place upon that occasion, must largely support the claim of her petition if she is to prevail in her suit. For it is patent that the mental state of Bechtel on July 10, 1919, is the thing to consider, and not his mental state of the preceding March, or earlier, when he was under guardianship, and when a few of his acquaintances thought that he was not in a condition to do business.

Mrs. Bechtel testifies that at the time in question, while Price and Hicks were there to settle, Bechtel was excited, walking the floor, complaining that Price had the advantage of him in having the possession of the land, and accusing him of wanting to get his property away from him. She also stated in her testimony that Price first attempted to get him to take less than $6,500, offered him $4,000, then a little more, and then the $6,500 which was accepted. She testifies, too, that both Price and Hicks sought to work upon Bechtel's fears by suggesting to him that he had better get his money and property into the state of Colorado lest his relatives in Nebraska should again try to put him under guardianship. And it is strongly urged by counsel for the appellant that what Bechtel did in accepting the settlement was done only because he considered it a matter of necessity. It also appears from the correspondence between the parties, prior to the settlement, that Price occasionally hinted at the disposition of the Nebraska relatives to make him trouble.

On the other hand, it appears that upon the day of settlement the appellant was at all times present by the request of her husband, and that she knew and stated at the time that Bechtel need be in no fear of guardianship proceedings because he was in Colorado, and because she would have the first say in regard to such a step, and would not permit it. It further appears by her own testimony that she advised

her husband during the negotiations to step to the telephone and call up a lawyer friend for advice, and that he did so; and further that Price and Hicks left the house upon two different occasions during the negotiations in order that Bechtel and appellant might have opportunity to confer privately. She further testifies that when Bechtel came to her house in November of 1918, and for three months thereafter he seemed to be in full possession of his faculties, although he was under the doctor's care; and that up to the time that Price came to settle she had never seen anything wrong with him. This last statement is of more than ordinary significance, since she had known Bechtel for a period of nearly eight months immediately antedating that time, during which she was almost constantly with him and had every reason to observe him carefully, first as his nurse, then as a woman sought by him in marriage, and finally as a husband and provider.

In addition to all of this, we must reckon with some very significant circumstances in connection with his condition. He was released from guardianship upon finding by the court of his return to health and mental competency. No one made any objection to it, not even his guardian or his relatives, his guardian making due account to him of some $2,600 of money which he had in his hands. With all of the opportunity in the world to know of his condition, as heretofore suggested, this trained nurse married him within a month or so after such release. His letters to Price, covering a considerable period, evince no infirmity of mind. He conducted his business from the time of his release, had moneys collected, sold the store building which he owned in Madrid through an agent, and otherwise acted as a competent person. He made a will within a few months after such release, which will was probated both in Colorado and in Nebraska, apparently without any objection. The appellant claims under said will.

From what has been shown the court is convinced that the appellant was not under any undue influence. On the contrary, it seems that he had sufficient power of mind to

exclude that hypothesis, and it is obvious that in any event he was protected by his residence in Colorado, by the presence of his wife, and by the society of his friends.

The appellee Hicks testifies that no such conversations and negotiations as appellant testifies to were had. But, supposing they were, the remarks which she says were made by her husband were not enough of themselves to indicate any lack of mental capacity on his part. They were such as might naturally have been made by a man who wanted all that was coming to him in a trade. Not a word was said in denial of his right to deal or not to deal. He was apparently in good memory and sound mind, and he had the benefit of both the advice of his wife and his attorney.

Under these circumstances it seems to the court that, even had the deed of April 3, 1919, been assailable, the settlement arrived at on the 10th of July, 1919, was enough to make the transaction good, and was sufficient to amply sustain the judgment and finding of the court below.

There are, we think, no questions of law to be decided. Though familiar with the cases cited by counsel for the appellant, we have reexamined them. Conceding the rule to be as in said brief stated, and conceding that the trial is *de novo* in this court, we arrive at the same conclusion as did the learned trial court, and the judgment of that court must be, and is,

AFFIRMED.

JOHN W. MOSIER, APPELLANT, V. A. H. HERMAN, APPELLEE.

FILED MARCH 18, 1925. No. 23038.

1. **Highways: ESTABLISHMENT.** A board of county commissioners may, without petition or notice, make a preliminary order establishing a section line road, by declaring that it shall be opened; but before it can be actually opened there must be proceedings upon proper notice to ascertain damages. *Barry v. Deloughrey*, 47 Neb. 354.

2. ———: ———. *Held*, in this case, that the proceedings of the county commissioners were not effectual to establish the public road claimed by the appellee.
3. ———: ———: USER. The fact that the county goes upon the land of an owner and uses it for a road, by the passive permission of said owner or without his knowledge, is not sufficient, even though the county commissioners have without jurisdiction declared the road established by consent, to secure said land for said road, unless the user has been for the prescriptive period.
4. ———: ———: PRESCRIPTION. *Held*, in the instant case, that the evidence is insufficient to show the establishment of a public road by prescription.

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

R. O. Canaday, C. G. Perry and *B. R. Coulter*, for appellant.

O. A. Torgerson, contra.

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

SHEPHERD, District Judge.

Plaintiff, Mosier, owns substantially three quarter sections of land lying on the east side of sections 22 and 27, township 19, range 53, in Banner county. His east fence stands practically on the section line dividing 22 and 27 on the west from 23 and 26 on the east. The road overseer, A. H. Herman, was proceeding to remove the fence, on the theory that it occupied a public road. Plaintiff brought this action to enjoin him. Decree was entered in the district court denying the injunction, and plaintiff appeals; assigning that the court erred, (1) in holding the proceedings of the county commissioners were sufficient to establish a road; (2) in holding that the fence was on the road established, if the road was established; and (3) in holding that the road had not been abandoned.

All that the county records show as to the proceedings of the county commissioners is stipulated as follows:

"Office of County Commissioners. * * * July 1, 1889, * * * Board met pursuant to adjournment. All members present. * * * The following consent road was established, said road commencing at the southeast corner of section fifteen, township nineteen, range fifty-three, running thence south on section line four miles."

This is not enough of itself to establish a road. It is true that, in establishing a road on a section line, neither a petition nor a record that the board found that the public good required the road is necessary. *Howard v. Brown*, 37 Neb. 902; *Barry v. Deloughrey*, 47 Neb. 354. But even in such a case there must be notice and proceedings with respect to damages. "The county board may, without petition or notice, make a preliminary order establishing a section line road, by declaring that it shall be opened; but before it can be actually opened there must be proceedings upon proper notice to ascertain damages." *Barry v. Deloughrey, supra.* So much appears to be jurisdictional in the absence of written consent or dedication by deed.

In the instant case the order made can be regarded as no more than a preliminary order. The burden of proof was upon the county, and consequently upon the defendant or appellee, to prove the additional proceedings necessary to really establish and open the road in question. *Henry v. Ward*, 49 Neb. 392; *Van Wanning v. Deeter*, 78 Neb. 284; *Postal v. Martin*, 4 Neb. (Unof.) 534. In the first of the above cases, which contains a valuable discussion of the effect of the act of 1879 on all previous acts with respect to roads of this character, Commissioner Irvine laid down the doctrine which has been subsequently followed in this state. He said:

"Under the present law (Compiled Statutes, ch. 78; Session Laws, 1879, p. 120), all section lines are declared to be public roads, but they cannot be opened as such, nor can lands be appropriated therefor, until the steps provided by statute have been taken for opening such roads and ascertaining the damages."

We are convinced, therefore, that the proceedings of the county commissioners were not effectual, in and of themselves, to establish the public road claimed by the appellee.

It follows that, if the section line in question ever was opened and became a county road, it was by consent or dedication. It must be conceded that where the county has made an attempt to establish, however irregular, and such attempt has been followed by an opening and using of the road contemplated, with the knowledge and consent of the adjoining landowners, the courts of Nebraska have been exceedingly loath to deny the existence of the road as a public road. But in no case, so far as the writer has been able to discover, has the property of a landowner been taken without compensation, unless there was an actual user for the prescriptive period. In the case of *Wecker v. Dommer,* 97 Neb. 728, Judge Sedgwick did, indeed, stress the fact that an attempt to establish a highway by prescription is greatly aided when the proper authorities have taken steps to establish such highway. But in that case the significant fact shown by the evidence was that the adjoining owner had set back his fence in such wise as to indicate his intention to dedicate a portion of his land to the road contemplated. And the language quoted from *Anderson v. Nelson,* 86 Neb. 752, if a proper statement of the law at all, was unnecessary to the decision of the case, and could only be proper as applied to the peculiar facts of that particular case.

The evidence in the case at bar shows that many years ago, about 1892, a bridge was built across a small stream on the section line in question; and that this bridge was constructed by settlers who cut and hauled posts from the hills, and did the work of setting them, the county commissioners furnishing the planking. This bridge was washed out within a year or two thereafter, and from that time the travel went far east of the section line to cross the creek upon a dam, and then proceeded entirely upon the east side of the fence, which was, as has been stated, upon the section line. It appears also that in 1918 the fence was torn down at the intersection of the line with the stream, and the bridge re-

paired or rebuilt. But this was without the knowledge of the plaintiff and appellant, and the repaired bridge was washed out almost immediately. It is quite obvious from a reading of the record that no consent or dedication of the plaintiff's land, either by himself or by his grantees, was ever given or made; and that if any right to travel along the section line was acquired by prescription it was on the land of adjoining owners to the east. The building of the bridge is doubtless relied upon by the appellee as an evidence of dedication or consent on the part of the owners of the Mosier land. But, as held in the *Postal* case, *supra*: "The passive permission by the owners of lands of the use of them by the public is not alone evidence of an intent to dedicate them to such use." The bridge was evidently a very small affair, It was not maintained. There is some further evidence that the county was undertaking to use the land in question, but not much, and of very unsatisfactory character, as, for instance, the testimony of the old county commissioner, who could not remember, but who concluded that everybody interested was satisfied in regard to the fact.

In order to find that Mosier or his grantees made a valid dedication of the land involved for the purposes of this public highway, it must appear clearly from the proofs that a dedication for that purpose was intended by the owner, and that the public accepted by user or otherwise. In the matter of dedication of land for a road, the rule is that the owner must absolutely intend to dedicate it, or must abandon it or set it over to the public use. *Close v. Swanson*, 64 Neb. 389.

The court concludes that the case at bar is ruled by the decision in *Scotts Bluff County v. Tri-State Land Co.*, 93 Neb. 805, which will be found to be in consonance with the views hereinbefore expressed. In that case the court said, after an extended discussion of the statutory law and of the decisions upon the subject, that a county which attempts to open a public road on a section line without giving notice or fixing a time for a hearing on the landowner's claim for

damages, and without paying or providing for the payment of such damages, is no more than a trespasser. Holding, as we do, that no right was acquired by user or by dedication upon the land belonging to the plaintiff, we must adhere to the established doctrine, and decide that the district court was in error in its findings and decree, and that its judgment must be reversed.

Reversed and remanded, with instructions to enter a decree in accordance with this opinion.

REVERSED, WITH DIRECTIONS.

FARMING CORPORATION ET AL., APPELLANTS, V. BRIDGEPORT BANK, APPELLEE.

FILED MARCH 18, 1925. No. 23039.

1. **Conversion.** A *bona fide* reasonable detention of property by one who has assumed some duty respecting it, for the purpose of ascertaining its true ownership, or of determining the right of the demandant to receive it, will not sustain an action for conversion.
2. **Escrows: INTERPLEADER.** An escrow holder, the depositary, cannot be made guilty of a tort in honestly attempting to find out which of the two parties concerned is entitled to the property deposited in escrow, provided there is dispute, and provided he is not partisan in what he does; and, if he makes no claim to it himself and produces it in court, the statute in regard to interpleader is available to him to protect him from the vexation and expense of litigation to decide the dispute.

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

Ritchie, Canaday & Swenson, for appellants.

Williams, Hurd & Neighbors, contra.

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

SHEPHERD, District Judge.

This is a case in which the plaintiffs sue the defendant for the conversion of $1,500 in cash and a $2,750 mortgage deposited by them in escrow with it, alleging that, because of the failure of the Bridgeport Irrigation District to extend and improve its ditches according to a contract with plaintiffs (which contract was deposited in escrow with the money and mortgage), said money and mortgage should have been returned to them, but was not, although they made due demand for the same.

The defendant, which is a bank, filed an affidavit of interpleader, in which it says that the Bridgeport Irrigation District, without collusion with the defendant or any of its officers, makes claim to the subject-matter of the action, and has notified the defendant that it expects to hold it liable if the property is delivered to the plaintiffs; that defendant has no claim to said property in its own right and is ready to dispose of it as the court may direct; that the claim of plaintiffs is based upon contract and is for the recovery of personal property; and that defendant prays an order of court requiring said Bridgeport Irrigation District to appear and maintain or relinquish its claim against the defendant.

To this affidavit of interpleader the plaintiffs file an answer, denying that their claim is for the recovery of personal property, denying that the Bridgeport Irrigation District makes claim as stated in the affidavit, denying all other allegations of said affidavit, and alleging that the action is one for conversion, and based upon a tort by the defendant.

The question was determined upon the pleadings, and the district court entered an order of interpleader, requiring defendant to deliver said property to the clerk, requiring the Bridgeport Irrigation District to appear within 30 days and maintain or relinquish its claim against the defendant, ordering that, in case said Bridgeport Irrigation District fails to appear, it shall be barred to claim said property, and providing that, in case it does appear, it

shall be substituted for the defendant. Exception was duly taken, and the case appealed to this court.

We are convinced that the order made by the district court was proper, and that its judgment in that behalf should be affirmed.

It seems plain that when an escrow contract has been made, and the property deposited, the depositary becomes the agent of both parties and becomes subject to relations of trust to each of them. This being the case, if a dispute arises between the principals over the delivery of the property, both of them claiming the same and notifying the depositary, the refusal of said depositary to deliver to the one or the other until their controversy has been determined cannot be said to be a conversion of the property. This appears from cases cited by both plaintiffs and the defendant. "A *bona fide* reasonable detention of goods by one who has assumed some duty respecting them, for the purpose of ascertaining their true ownership, or of determining the right of demandant to receive them, will not sustain an action for conversion." 38 Cyc. 2029. See *Sliscovich v. Scandanavian-American Bank,* 88 Wash. 674; *Cummins v. People's Building, Loan & Savings Ass'n,* 61 Neb. 728. The *Sliscovich* case was upon facts of close similarity to those of the case at bar.

This might not be a complete answer to the plaintiffs' contentions in this case. But in the case of *Shellenberg v. Fremont, E. & M. V. R. Co.,* 45 Neb. 487, which was a case to recover for the conversion of certain personal property, the court said:

"There is no doubt that the assertion of conflicting claims has been the occasion of frequent embarrassment to bailees, particularly common carriers, who are bound to receive goods offered for transportation, although there has been suggested no sufficient reason for excepting them from the operation of the rule by which the rightful owner is permitted to reclaim property wherever found. We are aware of exceptions to the rule, but they rest upon equitable considerations, none of which are presented by the record in

this case and need not, therefore, be noticed; but whatever may have been the embarassment and inconvenience of the bailee under the former practice, his remedy under our system, by an answer in the nature of a bill of interpleader, thus making the adverse claimant a party to the controversy, and requiring such claimants to litigate the question of title between themselves, is ample and complete."

Also, in the case of *Jaques v. Dawes*, 3 Neb. (Unof.) 752, one of the syllabus points is as follows: "One who has purchased corn relying upon the title of the seller, but who is later advised of the claims of a third party, may protect himself in the event of suit on behalf of either claimant by filing an affidavit in the nature of a bill of interpleader provided for by section 48 of the Code."

Certainly one who has bought an article is under contractual duty to pay for it which is closely akin to the duty of the escrow agent to deliver it to the proper party. And if one who is under such contractual obligation to pay for what he has purchased may resort to interpleader in case of a dispute as to the title of the porperty sold to him, the escrow agent in this case may properly protect itself by the interpleader provided by statute. It may be said that in the escrow case the depositary receives the property charged with the duty to deliver it to the proper person according to the terms of the contract. But the purchaser receives the corn, flour or other commodity which he buys with a positive duty to pay for it, and yet his obligation to do so goes no further than that he shall pay the right party, that is to say, the party who had title to it. The gist of the thing is that he cannot be made guilty of a tort in honestly attempting to find who is entitled to payment. And the statute in regard to interpleader is available to him for that purpose, and in order to protect him from loss and costs.

Our statute is, as the defendant puts it in his brief on the authority of the case of the *Hartford Life & Annuity Co. v. Cummings*, 50 Neb. 236, a substitute for the remedy of interpleader, but the statute is broader than the chancery

rule. The rule was applied on the theory that at law no adequate protection was afforded a defendant who was sued for a fund or property in his possession which was claimed by some person not a party to the suit, and to prevent the holder from being put to costs and expenses with respect to property which he does not himself claim.

Even the chancery rule, we think, would protect the appellee and uphold the trial court. In his valuable work on equity jurisprudence (5 Pomeroy Equity Jurisprudence (3d ed.) sec. 43) Professor Pomeroy says: Interpleader "depends upon and requires the existence of the four following elements, which may be regarded as its essential conditions: (1) The same thing, debt or duty, must be claimed by both or all of the parties against whom the relief is demanded. (2) All their adverse titles or claims must be dependent, or be derived from a common source. (3) The person asking the relief—the plaintiff—must not have nor claim any interest in the subject-matter. (4) He must have incurred no independent liability to either of the claimants; that is, he must stand perfectly indifferent between them, in the position merely of a stakeholder." Measured by this analysis, the bank was entitled to interpleader.

These considerations, together with the Nebraska cases cited by the appellee, are fully persuasive to the court. We have examined the cases cited in appellants' brief with care, but, aside from rules laid down upon a different state of facts, we find nothing in said cases to militate against the conclusion which we have reached.

The judgment of the district court is therefore

AFFIRMED.

WILLIAM F. GREBE ET AL. V. STATE OF NEBRASKA.

FILED MARCH 18, 1925. No. 24270.

1. Officers: USURPATION OF OFFICE. There is no state sheriff in Nebraska, and no criminal charge for usurpation of an office

so designated can be sustained. Nor can one be convicted of usurpation of any office without proof that his usurpation is wilful or mischievous.

2. **False Imprisonment.** False imprisonment is the unlawful restraint of a person without his consent, either with or without process of law.

3. ———. *Held,* in this case, that there was error in the conviction of plaintiffs in error upon counts one, two, and three of the information.

ERROR to the district court for Sarpy County: JAMES T. BEGLEY, JUDGE. *Affirmed in part, and reversed in part.*

C. J. Campbell, A. L. Tidd and *A. E. Langdon,* for plaintiffs in error.

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

Heard before MORRISSEY, C. J., ROSE, DAY, THOMPSON, and EVANS, JJ., and SHEPHERD, District Judge.

SHEPHERD, District Judge.

Plaintiffs in error were convicted on all four counts charging as follows: First, that on the 4th day of November, 1923, they had usurped the office of deputy state sheriff; second, that on the 28th day of November of the same year they had been guilty of a like offense; third, that on the 4th day of November, 1923, they had falsely imprisoned William Schwartz by directing him to appear at the office of the sheriff of Sarpy county on the day following; and, fourth, that on said 28th day of November they had unlawfully assaulted Schwartz. They were each fined $50 on count one, $50 on count two, $250 on count three, and $50 on count four.

In this court they present a large number of assignments of error. Many of these deal with the matter of usurping the office of deputy state sheriff. There is no state sheriff in Nebraska, and no deputy state sheriff. It is true that the governor is made chief law enforcement officer in the matter of offenses against the liquor laws of the state, and

is empowered to call citizens to his assistance in this behalf. Mr. Carroll was the governor's duly appointed deputy, and signed his official communications as deputy chief law enforcement officer. Other persons named in the evidence were appointed by the governor to assist, and were continuously employed.

The parties agree in their briefs that the statute under which the information was filed is section 9713, Comp. St. 1922, which reads as follows:

"Whoever shall take upon himself to exercise or officiate in any other office or place of authority, in this state, without being legally authorized, shall be fined in a sum not exceeding two hundred dollars, or imprisoned in the jail of the county, and be fed on bread and water only, not exceeding ten days, or both."

It is insisted that, since there was no such office as deputy state sheriff, no crime of the kind charged in these two counts was committed, or could have been committed. It would seem impossible for any one to usurp an office which does not exist. The language of the statute, as interpreted in *Kreidler v. State,* 24 Ohio St. 22, and *Eubank v. Commonwealth,* 126 Ky. 348, assists us in arriving at this conclusion. Nor do we doubt that it was the duty of the court to say whether or not the thing charged constituted a crime. The court left the question to the jury, and this we think was reversible error in itself. In the second place, even had there been such an office as deputy state sheriff, there was no evidence to establish a usurpation of such office. In the case of *Kreidler v. State, supra,* the court said that to be guilty under the statute (the Ohio statute is similar to ours) the accused must occupy and act without color of right, and his assumption to act must be such as to indicate wilful usurpation. This applies directly to the case of plaintiffs in error. These young men were appointed by the deputy state law enforcement officer, Mr. Carroll. The governor's secretary testified that persons so appointed were confirmed and certified by his chief as a matter of course. They were given a star or badge which was in-

scribed with the words "Deputy State Sheriff." Under the circumstances and under the proofs it is indisputable that they did what they are charged with doing under color of office and without intent to wilfully usurp.

We agree also with counsel for plaintiffs in error that the charge of false imprisonment was not sustained by the evidence. The evidence shows beyond dispute that the accused found the complaining witness, Schwartz, in the commission of an unlawful act, the keeping of more intoxicating liquor than was reasonably sufficient for his personal use and needs. The statute provides that "no person shall keep or possess intoxicating liquor in his private dwelling-house in an amount more than is reasonably sufficient for his personal use and needs," and makes the matter of possession *prima facie* evidence of guilty purpose. Comp. St. 1922, sec. 3247. It also makes such keeping a misdemeanor. The culmination of the direction to Schwartz to appear in Papillion the next day was that he reported at the county attorney's office on the 5th, and a day or two after pleaded guilty to the misdemeanor in question. Plaintiffs in error and Mrs. Schwartz testified that the deputy sheriff of the county, who was called and who came to the house immediately after the discovery of the liquor, gave said direction to appear. Schwartz himself swore that all the deputy said to him was, "Hello, Bill," a statement scarcely believable in view of the fact that the two men were well acquainted, and that the deputy was there a long time loading the liquor into his truck, and then remained 15 or 20 minutes after the others had departed.

Obviously the deputy had the right to arrest Schwartz then and there without warrant, because he was then and there committing a misdemeanor. If the deputy directed him to come in, and no one ought to be permitted to question it, in the state of the record, it was manifestly an authorized act, and even if the plaintiffs in error gave a like direction the unauthorized act must be held to have merged in the authorized act, and to have been accordingly ineffective to constitute an imprisonment by the accused.

The unauthorized command to the same end as the authorized command which has to be obeyed, and is obeyed, cannot by any sound reasoning operate as an unlawful restraint.

We are constrained also to hold that, because the complaining witness was unquestionably found in the commission of a misdemeanor, and because the direction to appear resulted in his conviction therefor upon his own plea of guilty, and because such direction, whether given by the plaintiffs in error or not, was in the presence of the deputy sheriff of the county and while the latter was an eye-witness to said misdemeanor, there was no false imprisonment involved in what transpired.

"False imprisonment is the unlawful restraint of a person without his consent either with or without process of law." *Johnson v. Bouton,* 35 Neb. 898. In the case of *Harness v. Steele,* 159 Ind. 286, which is much relied upon by the state, a boy of 14 was charged with larcency. The sheriff told him to get his hat and go with him, and took him past the county jail, telling him that unless he confessed he would have to lock him up in said jail. And thereafter, upon profession of innocence by the boy, he told him to go home and to remain there until he came for him. Under that state of facts it was held by the Indiana court that there was an arrest and an imprisonment. This, however, was a taking into custody, a detention in the hands of the officer, a compulsion to attend upon the sheriff, and a requirement to remain at a place certain. This was actual physical restraint, and differs very greatly from what occurred in the case at bar. There was no threat employed in this case, no requirement that the complaining witness accompany plaintiffs in error, no commitment to any particular place, nothing to put in fear. There was no false imprisonment in this. It was so held in *Lawson v. Buzines,* 3 Del. 416; *Hill v. Taylor,* 50 Mich. 549; *Emery v. Chesley,* 18 N. H. 198; *Williams v. State,* 53 Tex. Cr. Rep. 2.

The fourth count was for assault. While there is little to support the charge that plaintiff in error Holmes drew

a revolver upon the complaining witness and told him that he would shoot, and that plaintiff in error Grebe participated in the act, there is sufficient in the evidence to sustain the finding of the jury. We are unable to disturb that finding. Indeed, the plaintiffs in error fail to raise any considerable question as to it. We have examined the argument and authorities of their brief, and their assignment of error on this point cannot be entertained.

It follows from what has been said that the district court was wrong in submitting the case upon the first three counts set forth in the information, and that the verdict and the judgment against the plaintiffs in error upon these three counts must be reversed. It is equally clear that the conviction upon the fourth count of the information was without reversible error, and that the same must be sustained. The judgment is therefore reversed, and the cause dismissed, in so far as counts one, two, and three of the information are concerned; and it is affirmed as to the conviction of plaintiffs in error on the fourth count of said information.

AFFIRMED IN PART, AND REVERSED IN PART.

FRANK VAN HORN ET AL., APPELLEES, V. ERICSON LAKE COMPANY: SOUTHERN SURETY COMPANY, APPELLANT.

FILED APRIL 16, 1925. No. 23044.

1. **Damages.** In cases where the amount of damages incident to the breach of a contract is uncertain, speculative and incapable of being definitely computed, a recovery may be allowed for the amount of the undertaking.
2. **Assignments** set out in the brief of appellant have been examined, but, on a consideration of the entire record, it is *held* that they are not well taken.

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

George A. Keyser, James C. Kinsler and *Ralph G. Coad,* for appellant.

Prince & Prince and *A. L. Bishop, contra.*

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

MORRISSEY, C. J.

This is an action at law brought by plaintiff Frank Van Horn and others against the Ericson Lake Company and the Southern Surety Company in the district court for Wheeler county, to recover damages for the breach of a contract entered into by plaintiffs and the Ericson Lake Company, and to enforce a liability for such breach, upon the bond given by the Southern Surety Company as a guarantor of the performance of the contract by the Ericson Lake Company. A judgment for $3,725.60 against both defendants was entered for plaintiffs by default, which judgment was later set aside as to the Southern Surety Company, but not set aside as to the principal, and trial was had to the court without a jury.

The Ericson Lake Company was a corporation organized for the purpose of developing a pleasure resort on the Cedar river in Wheeler county. The lake company had constructed a dam across the Cedar river forming a lake which was to be a part of the pleasure resort, and was engaged, at the time the contract here in suit was entered into, in the business of disposing of lots near the lake to persons desiring to build cottages for summer occupancy. Plaintiffs, residents of the village of Ericson, being desirous of obtaining electric current for their village and the inhabitants thereof, entered into a contract with the Ericson Lake Company for a supply of current. The contract between plaintiffs and the Ericson Lake Company provided that the lake company should install an electric lighting plant and construct a transmission line to a point within the village of Ericson, and from this plant and line, furnish plaintiffs a current of 2,200 volts in ample amount and power for com-

mercial and power purposes. The life of the contract was to be 15 years. There was the further obligation on the part of the lake company to give bond in the sum of $3,300 "as a guarantee of this contract," which bond is the foundation for this action against the Southern Surety Company. Under the terms of the contract, plaintiffs agreed to construct and maintain electric lines within the village; to use no other current than that furnished by the Ericson Lake Company for the life of the contract, and to pay, on the first of every month, for current used during the preceding month. There was a further provision that plaintiffs should pay to defendants the sum of $3,300 and take from them deeds to 22 of the lots owned by the lake company. The bond in suit was duly executed by the lake company with the Southern Surety Company as surety.

The Ericson Lake Company built its power plant and proceeded to supply electric current in compliance with its contract. There were negotiations between plaintiffs and the village of Ericson looking to the acquisition by the village of the contract rights of plaintiffs, and, indeed, for a time, the village officers assumed the burden of collecting from the users of current for the current used, and performed other of the plaintiffs' duties under the contract, but the record is clear that no formal assignment of the contract was ever made.

After the plant had been in operation for a time, the dam of the Ericson Lake Company was washed out by high water. The dam was never replaced and the Ericson Lake Company breached its contract, and its property was later sold under a mortgage foreclosure. Under these facts the court found for plaintiffs and against the defendant Southern Surety Company for the full amount of the bond, and for attorney's fees.

Appellant first makes the contention that the court erred in allowing recovery for the full amount of the bond, and urges that the recovery, if any be allowed, should be for only the amount of plaintiffs' actual damage. This makes it necessary that a construction be put upon the bond to

determine whether it is an undertaking for liquidated damages, in case of breach of the contract, or a penal bond binding the surety to pay the actual damages, not exceeding the amount fixed. The contract under which the bond was given and which is incorporated into the bond contains the following provision:

"Party of the first part does hereby agree to give bond to the amount of $3,300 (thirty-three hundred dollars) as a guarantee of the fulfilment of this contract, unless said contract shall be terminated by mutual agreement by parties of the first and second part at an earlier date."

In the bond the liability assumed is referred to as "the penalty of this bond." When this language is considered in connection with the nature of the undertaking which the bond was designed to guarantee, and the uncertainty, if not the impossibility of accurately computing the amount of damage which a breach of the contract would occasion, it may reasonably be said that the bond provided for liquidated damages, rather than for a penalty. And we may assume that the parties to this contract realized the uncertainty of the damages and intended that the amount written in this bond should be the sum recoverable in case of a breach of the contract.

In cases where the amount of damages incident to the breach of contract is uncertain, speculative and incapable of being definitely computed, a recovery may be allowed for the amount of the undertaking. 8 R. C. L. 569, sec. 118, 17 C. J. 941, sec. 237. See, also, Am. Ann. Cas. 1912C, 1026.

It follows that the trial court did not err in allowing plaintiff to recover for the full amount of the bond.

It is also urged by appellant that the contract between plaintiffs and the Ericson Lake Company is void for lack of mutuality; and that plaintiffs are not the real parties in interest. The right of a surety to raise these questions after a final judgment against its principal may be questioned. However, the court resolved these issues in favor

of plaintiffs, and the record fully sustains its findings. Other assignments of errors are made in appellant's brief; but, having resolved the main questions presented in favor of appellee, a discussion of these assignments is unnecessary. The record is free from error and the judgment is

AFFIRMED.

STANTON NATIONAL BANK, APPELLEE, V. CHARLES H. SWALLOW, APPELLANT.

FILED APRIL 16, 1925. No. 23014.

1. **Trusts:** PROMISE BY TRUSTEE. A promise by a trustee is his personal obligation, unless he stipulates to the contrary and makes the trust estate the sole recourse of the other party.
2. **Parol Evidence:** SUBSTITUTED CONTRACT. A written contract for the sale and purchase of a tract of land may be shown by parol to have been substituted by the parties for a former written contract between the same parties for the sale and purchase of a different tract of land.
3. ———: ———: CONSIDERATION. It may be shown by parol that part of the consideration for the substitution of a new land contract for a former one was an oral promise by the vendor to pay a purchase-money note accepted by him under the former contract, but which he sold in the meantime and indorsed without recourse.
4. **Statute of Frauds:** ORAL PROMISE: CONSIDERATION. An oral promise by a vendor of land to pay a promissory note accepted by him as part of the purchase price, but which he subsequently transferred to an innocent holder, is not a promise to answer for the debt of another within the meaning of the statute of frauds, where the oral promise was based on a new, independent and valuable consideration.
5. **Principal and Agent:** CONTRACTS: RATIFICATION. In an action on a promise made by an agent in the name of his principal, proof that the agent was authorized in advance to make the promise is unnecessary, where it is shown by competent evidence that the principal, with full knowledge of the facts, made the promise his own by accepting and retaining the consideration therefor.
6. **Contracts:** ENFORCEMENT BY PARTY IN INTEREST. A promise by one contracting party to another for the benefit of a third person

may be enforced by the latter in an action in his own name, though the consideration did not move directly from him.

7. Judgment: RES JUDICATA. The mere dismissal of a case as to a defendant against whom no cause of action has been stated in the petition is not available as a defense in a subsequent action against the same defendant on an obligation not pleaded in the former case.

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

Burkett, Wilson, Brown & Wilson and *Reavis & Beghtol,* for appellant.

George A. Eberly and *Fred C. Foster, contra.*

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

ROSE, J.

This is an action on an unperformed oral promise, in connection with the purchase of two tracts of land in Texas, to take up or pay a promissory note for $6,500, dated October 22, 1919, and payable December 22, 1919. By purchase in good faith November 7, 1919, the Stanton National Bank, plaintiff, became the holder of the note. Charles H. Swallow is defendant. Plaintiff, though not a party to the transactions resulting in the execution and delivery of the note nor to the alleged oral promise by defendant to pay it, claims that, for a new and valuable consideration, the promise was made and that it inures to plaintiff's benefit. W. J. Patterson was maker and C. H. Swallow & Company payee. Not long after the date of the note it was indorsed thus: "Without recourse. C. H. Swallow & Co." In this form Ervin Nye, an agent of payee, received it, sold it to plaintiff November 7, 1919, and remitted to defendant net proceeds to the extent of $6,200.

The alleged oral promise by payee Swallow to pay the note after he had indorsed it "without recourse" grew out of the following transactions and circumstances: October 22, 1919, Patterson executed and delivered the note to payee

in part payment of the purchase price of 40 acres of land in Texas. Patterson was named in the land contract, which was in writing, as vendee, and C. H. Swallow & Company, "An Express Trust of Hidalgo County, Texas," as vendor. The written terms of sale were as follows: Consideration, $18,000; first payment, $9,000, consisting of a check for $2,500 and a note for $6.500—the note in controversy; remainder in five equal annual instalments evidenced by promissory notes secured by vendor's liens on the land purchased. Patterson was a farmer residing at Pilger, Nebraska. He inspected the land before agreeing to purchase it. On his way home from Texas he signed the sale contract on the train. He made the trip to and from Texas with a party of prospective purchasers accompanied by selling agents with whom he dealt. The principal office of vendor was in Lincoln, Nebraska. Ervin Nye, who sold the 6,500-dollar note to plaintiff and remitted the net proceeds to Swallow, was the latter's agent at Stanton, Nebraska. John T. Smith and H. R. Ryan were vendor's agents at Sioux City, Iowa. The petition, in substance, contains pleas that Patterson visited the Sioux City agency February 2, 1920, and then and there entered into an arrangement for the substitution of the 40-acre purchase for the purchase of other Texas land consisting of a 20-acre tract; that the substituted agreement was partly reduced to a writing which disclosed the following terms: Consideration or purchase price, $9,000; first payment, $3,600, being $2,500 paid October 22, 1919, and a check for $1,100; remainder of $5,400 payable in six equal annual instalments evidenced by promissory notes secured by vendor's liens on the 20-acre tract purchased; that Patterson paid, and Swallow received, the new and additional consideration of $1,100, agreeing to apply also on the second contract the 2,500-dollar payment on the first, to take up the 6,500-dollar note, which in the meantime he had sold and indorsed "without recourse," and to surrender the old contract. Plaintiff as an innocent purchaser of the latter note demanded judgment against Swallow on his promise to pay

it. This is a mere outline of plaintiff's case. Though assailed by demurrer, the petition states a cause of action.

In addition to a general denial, defendant pleaded the statute of frauds and a former adjudication in his favor. The trial court submitted the issues to a jury and on their verdict a judgment was entered in favor of plaintiff for the full amount of its claim. Defendant has appealed.

The paramount error, as the record is reviewed by defendant, was the failure of the trial court to direct a verdict against plaintiff on motion of defendant. Under this head it is argued that there is nothing to show that the promise of Charles H. Swallow & Company, "An Express Trust of Hidalgo County, Texas," was the individual obligation of Charles H. Swallow; that there was no evidence to submit to the jury on the issue of defendant's agreement to pay the 6,500-dollar note; that any such agreement, if made, would be an oral promise to answer for the debt of another and as such would be unenforceable under the statute of frauds; that the contract to purchase the 20-acre tract was reduced to writing and contained no agreement on the part of defendant to pay the note in controversy, and that oral proof of such a promise was inadmissible for the reason that it would vary or contradict the written instrument; that plaintiff failed to prove that defendant, either by himself or his duly authorized agents, made such a promise for a valuable consideration at Sioux City, February 2, 1920, and that authority of the agents to make the promise on which the action is based was not shown.

Each of the positions thus taken by defendant seems upon examination to be untenable. For the purposes of this case "Charles H. Swallow," defendant, and "Charles H. Swallow & Company, An Express Trust of Hidalgo County, Texas," are identical. The record contains a copy of the declaration of trust. It shows that Charles H. Swallow conveyed to himself and another as trustees extensive interests in land, including title to the tracts described in the petition, and authorized the trustees to manage, sell and convey the trust property in the name of C. H. Swallow &

Company. In the land contracts there was no stipulation protecting Charles H. Swallow from personal liability by making the trust estate the sole recourse of Patterson. The principles of law applicable to the facts are as follows:

"When a trustee contracts as such, unless he is bound no one is bound, for he has no principal. The trust estate cannot promise; the contract is therefore the personal undertaking of the trustee. As a trustee holds the estate, although only with the power and for the purpose of managing it, he is personally bound by the contracts he makes as trustee, even when designating himself as such. The mere use by the promisor of the name of trustee or any other name of office or employment will not discharge him."

"If a trustee contracting for the benefit of a trust wants to protect himself from individual liability on the contract, he must stipulate that he is not to be personally responsible, but that the other party is to look solely to the trust estate." *Taylor v. Davis*, 110 U. S. 330.

This view of the law was recently adopted in *Fay v. Day*, 106 Neb. 370, and is authority for holding that defendant did not escape any liability to plaintiff by transacting business in the name of the trust.

Objections to oral testimony under the statute of frauds sometimes result in subtleties which almost defy analysis, but the arbitrary rule of the legislature should not be unnecessarily employed to conceal or defeat honest obligations fairly assumed for value received.

The two written instruments evidencing the sale and purchase of two separate tracts of land in Texas, one dated October 22, 1919, and the other February 2, 1920, do not necessarily exclude oral proof that the second was substituted for the first. With outstanding obligations of $15,500, Patterson, according to oral proofs, told the agents at Sioux City that he was unable to make the payments on the 40-acre contract, and that he would agree, instead of it, to enter into another contract for 20 acres and to make thereon a new payment of $1,100, if vendor would apply

also on the substituted purchase the previous payment of $2,500 on the 40-acre tract, take up the 6,500-dollar note and surrender the original contract. To these terms the agents of Swallow, acting for him, agreed. Pursuant thereto Patterson paid, and Swallow received and retained, the new consideration of $1,100. The substitution of the new contract, which could be performed, for the old contract, which could not be performed, and the new mutual promises, payments and liens were valuable considerations for the oral promise to pay the note in controversy. The writings show on their face that the new instrument follows generally the language of the old—a partly printed and partly written form of Swallow & Company containing no provision for the substitution of one contract for another. Under date of February 2, 1920, the new writing evidencing the purchase of the 20 acres of land reads in part:

"Said purchaser has this day purchased said described real estate from the said company and for himself and his legal representatives hereby covenants and agrees that he will pay the said company * * * $9,000 for said described real estate at the time and in the manner as follows: $2,500 paid October 22, 1919, a first payment in the sum of $3,600, being check or draft for $1,100."

It took the two payments, $2,500 October 22, 1919, and $1,100 February 2, 1920, the former on the first contract and the latter on the second, to make what is described in the foregoing excerpt as "a first payment in the sum of $3,600." The date and the amount of the 2,500-dollar item correspond to terms of the original instrument. What the parties meant by the written promise of Patterson, February 2, 1920, to pay the $2,500 which he had already paid October 22, 1919, the receipt and the credit of that sum on the new contract and the real consideration for the acknowledged receipt of the additional payment of $1,100 were open to oral explanation. Parol testimony is often admitted in evidence to prove that the grantee in a deed orally promised to pay an outstanding incumbrance as a part of the consideration for the land purchased by him. By analogy

parol evidence was admissible to show that Swallow orally promised to pay the note as part of the consideration for the substitution of the old contract of sale for the new and as part of the consideration for the sale of the second tract, as well as for the new payments and the new vendor's liens, since the transactions included in effect a repurchase by Swallow of the 40-acre tract which he had sold to Patterson.

Was the agreement to pay the note an unenforceable oral promise to answer for the debt of another? Though Patterson, as maker of the note, was individually liable thereon to plaintiff, an innocent holder, Swallow, who was not liable on the note itself after he had indorsed it "without recourse," bound himself by a subsequent, independent promise, for a new and valuable consideration, to pay it. Under principles often announced, the obligation was a promise to pay the individual debt of the promisor, and was not, therefore, within the statute of frauds. Comp. St. 1922, sec. 2458.

Is the evidence insufficient for want of proof that the agency at Sioux City had never been authorized in advance to bind Swallow by an oral promise to pay the 6,500-dollar note? The new contract was signed on behalf of vendor as follows: "C. H. Swallow & Company, by John T. Smith, Sales Manager." Smith was present during the negotiations at Sioux City. H. R. Ryan, another agent of Swallow, was also present. Asked to repeat a conversation in reference to the 6,500-dollar note, Ryan testified without objection:

"It was agreed by Mr. Smith that the contracts on the 20 acres would be presented to Swallow & Co., and that if accepted the $6,500 note would be taken care of by Swallow & Co."

Swallow was fully informed in regard to the terms of the substitution, including the oral promise. This is shown by documentary evidence. Letters written by Swallow himself show that he afterward retained the new consideration of $1,100 which he had received as payment on the

20-acre tract and subsequently exercised dominion over the 40-acre tract by reselling it. He thus made the oral promise his own, and consequently proof that the agents had authority in advance to make it for him was unnecessary. The trial court made no mistake in overruling the motion of defendant to direct a verdict in his favor. The judgment is sustained by the evidence.

The right to maintain the action is questioned on the ground that plaintiff was not a party to or a beneficiary under the oral promise. Plaintiff was an innocent holder of the note and the promise of defendant to pay it inured to the former's benefit. The action is maintainable under the rule that a promise by one party to another for the benefit of a third person may be enforced by the latter in an action in his own name, though the consideration did not move directly from him.

One of the assignments of error is directed to an order striking from the answer a plea of former adjudication. The present action was prosecuted to judgment in the district court for Lancaster county. The answer herein shows that plaintiff, in a former case in the district court for Wayne county, procured a judgment against Patterson on the note in controversy. The former case was a suit against the maker by the holder of the note to recover the amount due thereon, and the latter is a suit on a subsequent oral promise to pay the note—a promise to another party for a different consideration. In addition to Patterson, the petition in the district court for Wayne county named Charles H. Swallow and Charles H. Swallow & Company as defendants, but no cause of action against them was stated, and as to them the case was dismissed without prejudice. The dismissal was not an adjudication of the matters now in controversy. It follows that the plea of former adjudication was properly stricken from the answer. No error appearing in the record, the judgment below is

AFFIRMED.

Note—See Trusts, 39 Cyc. 333, 334.

CARL MEIER, APPELLANT, V. BRIDGEPORT IRRIGATION DISTRICT, APPELLEE.

FILED APRIL 16, 1925. No. 23029.

1. Waters: IRRIGATION DISTRICTS: LIABILITY. An irrigation district organized under the law should apportion and distribute upon fair and equitable terms and conditions available water to which landowners are entitled, and a failure to perform that duty may create a liability for resulting damages.
2. New Trial: DAMAGES: DISREGARD OF INSTRUCTIONS. Where the jury violates an instruction to allow plaintiff, in the event of a verdict in his favor, substantial damages of which there is sufficient evidence, the failure to set aside a verdict for nominal damages only is erroneous.

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

R. O. Canaday and *Ritchie, Canaday & Swenson*, for appellant.

Williams, Hurd & Neighbors, contra.

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

ROSE, J.

This is an action to recover damages to crops on account of the failure of defendant, an irrigation district, to furnish to plaintiff his proportionate share of available water during the growing season of 1920. The irrigating system was in operation and the land on which the crops were growing was in the irrigation district. It was alleged in the petition that defendant negligently failed to apportion and distribute to plaintiff the water to which he was entitled and that the resulting damages were $13,340. The answer contained a general denial and a plea of contributory negligence. Upon a trial of the issues, the jury rendered a verdict in favor of plaintiff for one dollar only, and from a judgment thereon he has appealed.

The assigned error upon which plaintiff relies for a reversal is the failure of the trial court to set aside the ver-

dict. The assignment is based on the propositions that plaintiff, under the instructions of the court and the evidence, was entitled to substantial damages in the event of a verdict in his favor, and that the verdict for nominal damages only was contrary to the law and the evidence. As the case was tried and presented to the jury, there does not seem to be any escape from a reversal. Under the law defendant was organized for the main purpose of furnishing to landowners within the irrigation district available water upon fair and equitable terms and conditions. *State v. Gering Irrigation District,* 109 Neb. 642. The verdict in favor of plaintiff for nominal damages was equivalent to a finding that defendant neglected its duties to plaintiff. There was evidence to sustain the finding. There was also evidence of substantial damages to a crop of beets at least. The jury were instructed in substance to allow plaintiff the actual damages sustained by him in the event of a verdict in his favor. According to the instruction the evidence was sufficient to sustain a verdict for substantial damages, if the jury believed the witnesses who testified on behalf of plaintiff. The instruction did not permit a verdict for nominal damages only. A determination of the questions submitted required either a verdict in favor of defendant or a verdict in favor of plaintiff for substantial damages. The jury therefore disregarded both the instruction of the court and the evidence which the court deemed sufficient to sustain a verdict for substantial damages. To meet the logic of these deductions, defendant argues that the jury had a right to disregard as preposterous the testimony of plaintiff and his witnesses. If the jury were at liberty to do so, they took the opposite course, refused to discredit as a whole the evidence on behalf of plaintiff and found the issues in his favor. The verdict should have been set aside. For the error in failing to grant a new trial, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

EXCHANGE NATIONAL BANK, APPELLEE, V. STEPHEN SCHULTZ ET AL., APPELLANTS.

FILED APRIL 16, 1925. No. 23043.

1. **Bills and Notes:** PAYMENT. The making and the accepting of a new promissory note for an existing one is not a payment of the maker's original indebtedness, unless there is a specific agreement to that effect.
2. **Appeal:** HARMLESS ERROR. Putting the burden of proof on the wrong party is not a ground for reversing a judgment, where the record shows that the error did not prejudice appellant.
3. ———: CONFLICT OF EVIDENCE. Where the evidence is in substantial conflict, but sufficient to sustain the finding of the jury, their verdict on the issue of fact is conclusive.

APPEAL from the district court for Adams county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

Bruckman & Paulson and *James & Danly,* for appellants.

Tibbets, Dungan & Tibbets, contra.

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

ROSE, J.

This is an action on a promissory note for $2,000 dated March 22, 1917, and payable 60 days hence. The payee was the Exchange National Bank of Hastings, plaintiff. The makers were Stephen Schultz, Harry E. Schultz, and Ezra E. Schultz, defendants. The answer contained an admission that defendants executed the note, but there was a denial of other facts alleged in the petition. The real defense pleaded was the making and the accepting of a new note in payment of the indebtedness evidenced by the note in suit. This was denied by a reply. The action was dismissed as to Stephen Schultz on the ground that he had been discharged in bankruptcy. The evidence showed that by the payment of interest and the application of dividends declared in the bankruptcy court plaintiff's claim was reduced to $1,857. For that sum the jury rendered

a verdict in favor of plaintiff and against Harry E. and Ezra E. Schultz, who will be designated as "defendants." The latter have appealed.

Defendants contend that plaintiff did not make a case and that there should have been a nonsuit. After the evidence had been adduced on both sides, the trial court reduced the controversy to a single inquiry: Did the makers of the note in suit execute a new note which the payee in both accepted as a payment of the indebtedness evidenced by the former note? This question was submitted to the jury under the rule of law that the making and accepting of a new promissory note for an existing one is not a payment of the maker's original indebtedness, unless there is a specific agreement to that effect. *Berwyn State Bank v. Swanson,* 111 Neb. 141. A critical examination of the entire record leads to the conclusion that the only defense available to defendants under the pleadings and the proof was payment in the manner indicated. On behalf of defendants, witnesses testified, in substance, that a new note was given and accepted in payment and discharge of the indebtedness evidenced by the former note and that the managing officer of plaintiff agreed to cancel the note in suit and return it to defendants. On the contrary, that officer testified in effect that the new note was given and accepted as a renewal under an agreement permitting plaintiff to retain the old note as evidence of the original indebtedness and of the liability of each of the makers for the payment thereof. In addition, plaintiff in fact retained the note on which the action is based. There was therefore a substantial conflict of testimony on the vital issue in the case. The evidence being sufficient to sustain a judgment in favor of plaintiff, the verdict of the jury is conclusive.

There is further contention that the trial court erroneously put the burden of proof on defendants. Assuming, but not deciding, there was error in this respect, prejudice to defendants is not shown. They were permitted to present fully their only defense under the pleadings and they

had the advantage of the opening and the closing. No error prejudicial to defendants has been pointed out or found.

AFFIRMED.

STATE, EX REL. CLARENCE A. DAVIS, ATTORNEY GENERAL, APPELLEE, V. FARMERS STATE BANK, APPELLEE.

UNITED STATES NATIONAL BANK, CLAIMANT, APPELLANT, V. LAWRENCE A. FRICKE, RECEIVER, APPELLEE.

FILED APRIL 16, 1925. No. 23300.

Banks and Banking: GUARANTY FUND: LIABILITY. The bank guaranty law in denying to a stockholder the right of priority, if he borrows money for the bank instead of the bank borrowing it for itself, or bases his claim to priority on an evidence of indebtedness representing money obtained by him for the purpose of effecting a loan of funds to the bank, does not prevent a stockholder from individually depositing his own money in the bank in good faith for his own benefit, nor from participating individually in the bank guaranty fund, where he does nothing to forfeit that right.

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

Mothersead & York and *Morsman, Maxwell & Haggart*, for appellant.

Williams, Hurd & Neighbors and *C. M. Skiles, contra.*

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

ROSE, J.

This is a controversy between the receiver of the Farmers State Bank of Bayard, an insolvent corporation, and the United States National Bank of Omaha, claimant, over the payment of four certificates of deposit out of the bank

guaranty fund. In a proceeding by the state for the appointment of a receiver, claimant filed a petition for the allowance of claims based on certificates of deposit issued by insolvent as follows: To A. A. Ericson July 13, 1921, due January 13, 1922, $2,000; to A. A. Ericson October 15, 1921, due April 15, 1922, $6,000; to J. A. Cavett September 22, 1921, due November 20, 1921, $5,000; to T. E. Williams September 22, 1921, due November 20, 1921, $5,000; each bearing interest at the rate of 5 per cent. per annum. Claimant pleaded that these certificates of deposit were assigned to it in due course of business, that they are unpaid, and that they are protected by the bank guaranty fund. The receiver in an answer to the petition of claimant resisted the allowance of the claims as charges against the bank guaranty fund on the grounds that the certificates of deposit evidenced loans to the bank instead of deposits therein, that the payees were stockholders whose claims were not within the protection of the bank guaranty fund, and that claimant acquired by assignment no greater right. The statute on which the receiver relies contains this provision:

"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 a failed bank." Comp. St. 1922, sec. 8033.

Upon a trial of the issues the district court allowed the certificates of deposit as general claims aggregating $19,093.98, including interest, against the assets of insolvent, but denied recourse to the bank guaranty fund. Claimant has appealed.

Did the certificates of deposit issued by insolvent to Ericson evidence valid claims against the bank guaranty fund? He was a stockholder from the time the bank was organized

until it was closed, a period of several years. He was also a depositor of his own money subject to check. When the solvency of the bank was not in question he exchanged a 2,000-dollar check against his own account for a time certificate of deposit in the same amount. The 2,000-dollar certificate of deposit in controversy is the last of a series of renewals having their origin in the earlier deposits. It evidences an honest deposit of Ericson's money, left with the bank in good faith and accepted without fraud or collusion. As a deposit the other item, $6,000, is also above reasonable suspicion. Ericson had been a partner in the drug business at Bayard for 12 years. The drug store was sold in 1919 for $14,445 in cash. The firm had $16,000 on deposit in the bank, now insolvent. Of that sum $8,000 belonged to Ericson and he deposited it in his own name in an open account subject to check. Later he put $6,000 of this money into a certificate of deposit of which the one in controversy is the last of a series of renewals. He was an individual depositor in his own behalf all the time. His relation to the bank was not changed by the substitution of a time certificate of deposit for its equivalent in deposits subject to check, nor by renewals. There was a mere change from deposits payable by check on demand to a deposit payable at a definite time in the future. The subsequent failure of the bank and the resulting disaster visited upon Ericson as a stockholder did not destroy his previous rights as an individual depositor of his own money for his own benefit. In absence of fraud or collusion, the law does not prevent a stockholder in a state bank from depositing his own money therein, nor prevent a recourse by him to the bank guaranty fund, where he does nothing to forfeit that right. The statute was recently so construed, the court saying:

"One of the purposes was to deny to a stockholder the right of priority upon a claim, based upon evidence of indebtedness which represents money obtained by such stockholder from himself or others, for the purpose of effecting

a loan of funds to such bank." *State v. Farmers State Bank, ante,* p. 82.

The inhibitions of the statute did not apply to the certificates of deposit issued to Ericson. He was not a stockholder borrowing money instead of the bank, nor was the claim to priority as to these items based on an evidence of indebtedness representing money obtained by a stockholder. He did nothing for the purpose of effecting a loan of money to the bank from any source. His certificates represented deposits within the meaning of the bank guaranty law. He had a right to sell them and his interests therein were transferred to claimant by assignment. The conclusion is that the trial court erred in rejecting the two items, one for $2,000 and one for $6,000, as claims against the bank guaranty fund.

The other two items are on a different footing. While Williams and Cavett were stockholders, each borrowed from claimant $5,000 at a time when the deposits in the Farmers State Bank of Bayard were running down. Each left that sum with the bank named and received therefor a 5,000-dollar certificate of deposit which he assigned to claimant. The time covered by these transactions was a day or two. Williams testified that he borrowed the money intending to deposit it in the bank now insolvent, that in a way he borrowed it for the benefit of the bank, and that he did so "for the purpose of keeping the deposits up." Cavett's transactions were of the same character. Both of these certificates of deposit represented loans procured by stockholders for the benefit of the bank and they were not valid claims against the bank guaranty fund. The evidence will admit of no other conclusion. That part of the judgment rejecting them as such is affirmed. As to the items of $2,000 and $6,000, respectively, the judgment is reversed for the purpose of directing payment thereof out of the bank guaranty fund.

AFFIRMED IN PART, AND REVERSED IN PART.

CARL R. GOUCHER V. STATE OF NEBRASKA.

FILED APRIL 16, 1925. No. 23894.

1. **Criminal Law**: ABETTING FORGERY: PROOF. Under an indictment accusing defendant of aiding and abetting a county clerk in forging a county warrant, the evidence will not sustain a conviction, where there is no proof of the forgery.
2. **Forgery**. The forgery statute is directed principally against the false making of an instrument in writing.
3. ———. The genuine making of a false instrument in writing is not generally a forgery, and this is the usual interpretation of the courts unless otherwise provided by the forgery statutes themselves.
4. ———. The genuine making of a false instrument in writing is not generally within a criminal statute directed against the false making of an instrument.
5. ———: COUNTY WARRANT. A county warrant if the making is genuine is not generally a forgery, though the warrant itself is false and intended as a means of defrauding the county or the payee.

ERROR to the district court for Lincoln county: J. LEONARD TEWELL, JUDGE. *Reversed.*

Arthur F. Mullen, Sullivan & Squires and *Beeler, Crosby & Baskins*, for plaintiff in error.

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

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

ROSE, J.

In the district court for Lincoln county, Carl R. Goucher, defendant, was indicted for aiding and abetting the county clerk, Arthur S. Allen, in the forgery of a county warrant for $845 payable to the Omaha Printing Company. Defendant pleaded not guilty. Upon a trial he was convicted and sentenced to the penitentiary for not less than one nor

more than ten years and to pay a fine of $100. As plaintiff in error he has presented for review the record of his conviction.

The sufficiency of the evidence to sustain the verdict of guilty is challenged as a ground for a reversal. This question requires a consideration of the statutes under which defendant was accused, the nature of the indictment against him, and the proofs, if any, on the essential element of forgery against which the criminal law is directed. As applied to this case the statute in a material respect declares, in substance, that whoever falsely makes, alters, forges, counterfeits, prints or photographs any county warrant for the payment of money, with the intent to damage or defraud the county, shall upon conviction be imprisoned in the penitentiary not more than 20 years nor less than one year and pay a fine not exceeding $500. Comp. St. 1922, sec. 9683. The warrant set out in the indictment as a forgery by Allen, the county clerk, is in this form:

"Lincoln County.

Claim No. 11407-A221. War. No. 22263.

"Office of County Clerk.

"WARRANT. $845.00

"North Platte, Nebr., 11-20, 1922.

"The Treasurer of said county will pay Omaha Printing Company, or order, eight hundred forty-five and no-100 dollars, out of any money not otherwise appropriated in the general fund.

"For supplies.

"Amt. levied 1922.....$55,840.00

"Amt. transferred.....$.....

"Amt. issued.....$38,971.06

"E. H. Springer, Chairman County Commissioners.

"Attest: A. S. Allen, County Clerk."

The county treasurer paid this warrant from the funds of the county. The warrant did not represent a valid indebtedness of or claim against the county. It was the means, however, of procuring from the county treasurer

unlawfully $845. The theory of the state is that the warrant was forged by Allen, the county clerk; that defendant aided and abetted in the commission of the forgery; that defendant was punishable to the same extent as Allen, under the statute relating to accessories, and that the indictment so charges. Comp. St. 1922, sec. 9541. Defendant also takes the position that the indictment charged Allen, the county clerk, with forgery. Assuming, but not passing on, the sufficiency of the accusation in this respect, did the state prove that Allen committed a forgery within the meaning of the statute on that subject? If Allen did not commit a forgery, defendant of course was not guilty of aiding and abetting him in the commission of a forgery. The statute declares the false making of the instrument to be an essential element of forgery. The genuine making of a false instrument is not generally a forgery, and this is the usual interpretation of the courts, unless otherwise provided in the statutes themselves. The decisions are nearly unanimous that the making of a false instrument is not within a criminal statute directed against the false making of an instrument. *Territory of New Mexico v. Gutierrez*, 13 N. M. 312, 5 L. R. A. n. s. 375, note; *DeRose v. People*, 64 Colo., 332, L. R. A. 1918C, 1193. This is not a mere play on words. It is a substantive distinction by which even a knave is protected in prosecution under legislative enactments authorizing punishments for different species of fraudulent acts such as forgery, obtaining money by false pretenses, larceny and embezzlement. Statutes like the one under consideration are generally considered to be forgery statutes. There is a distinction between forgery and obtaining property by a false writing. 25 C. J. 658, sec. 99; *Hoge v. Chicago First Nat. Bank*, 18 Ill. App. 501; *State v. Stewart*, 9 N. Dak. 409; *Commonwealth v. Sankey*, 22 Pa. St. 390; *Hill v. State*, 1 Yerg. (Tenn.) 76. The essence of forgery is the making of a false writing with the intent that it shall be received as the act of another than the party signing it. 26 C. J. 898, sec. 5; *Ex parte Geissler*, 196 Fed. 168; *Barron v. State*, 12 Ga. App.

342; *Commonwealth v. Foster*, 114 Mass. 311; *Edwards v. State*, 53 Tex. Cr. Rep. 50. Forgery cannot be committed by the making of a genuine instrument, though the statements made therein are untrue. 26 C. J. 898, sec. 5; *United States v. Glasener*, 81 Fed. 566; *DeRose v. People*, 64 Colo. 332; *Barron v. State*, 12 Ga. App. 342; *State v. Young*, 46 N. H. 266; *Territory of New Mexico v. Gutierrez*, 13 N. M. 312. The words "whoever falsely makes" generally apply to the false making of the writing as distinguished from the contents of the instrument itself. 26 C. J. 898, sec. 5; *State v. Young*, 46 N. H. 266; *State v. Willson*, 28 Minn. 52. Owing to differences in statutes and to circumstances not applicable to the present inquiry, there are a few exceptions to the general principles stated.

A check bearing the genuine signature of the maker, though drawn on a bank in which the maker has no money or credit, with the intention of cheating the payee or the bank, is not a forgery. For the same reason the warrant or note of a county, if the making is genuine, is not a forgery, though the instrument itself is false and intended as a means of defrauding the county or the payee. *Mann v. People*, 15 Hun (N. Y.) 155, affirmed in 75 N. Y. 484.

Is there any evidence of the false making of the county warrant issued by Allen, county clerk? The negative is conclusively established. In the making of the warrant a partially printed genuine form in general use for lawful county purposes was used. The genuine signature of Allen as county clerk appears on the warrant in the proper place. The signature of the county commissioner who approved the warrant is likewise genuine. These are the officers charged by law with the duties which they assumed to perform. There was no false making whatever within the meaning of the forgery statute. The instrument itself was shown to be false, but the false making against which the statute is directed is not shown. There is therefore no evidence of a forgery, and consequently defendant was not legally convicted of aiding and abetting Allen in the commission of a forgery. There is no escape from this conclu-

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

REVERSED.

EDMOND DOUGHERTY, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED APRIL 16, 1925. No. 23109.

1. **Street Railways: LIABILITY.** Where an electrically propelled street car runs against a person to his injury, liability arises when the peril is discovered by the motorman or, by the exercise of ordinary care, should have been discovered by him in time to have avoided the injury.
2. **Appeal: REVIEW.** Where questions of fact have been properly submitted, and have been determined by the jury, which has seen and heard and observed the demeanor of the witnesses, we will not, ordinarily, disturb the verdict.
3. **Negligence: QUESTION FOR JURY.** It is elementary that, in a jury trial, when different minds may reasonably reach different conclusions from a given state of facts as to whether negligence has been established, the question of negligence is for the jury.

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

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

Herman Aye and *L. J. TePoel, contra.*

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

DEAN, J.

Plaintiff recovered a verdict for $6,000, and judgment thereon, for personal injuries sustained from coming in collision with one of defendant's street cars in Omaha, while he was afoot and crossing Tenth street, between the block bounded by Harney street on the north and Howard street on the south. Defendant, alleging prejudicial error, has brought the record here to have it reviewed.

Defendant's south-bound Tenth street cars run on the west-side tracks and its north-bound cars on the east-side

tracks. Plaintiff testified in substance that, on May 17, soon after 7 o'clock in the forenoon, he drove from his home, and, after parking his car on the east side of Tenth street, about 25 feet north of Howard street, he walked west across the street, and that, very shortly thereafter, when he was in the street on his return to his car, he saw a south-bound street car rapidly approaching; that, when this car passed, he looked to the north and saw an automobile on the west side of Tenth street approaching him from that direction; that he walked toward the east track at a gait of about 3 miles an hour; that the south-bound car ran at the rate of 15 to 18 miles an hour, and had gone at least 10 or 12 feet before he stepped on the east track, and the north-bound car was not then in sight; that it came on, without a warning sound of any sort, and so close to him that he could not get off the track, and could do nothing except put his hands against the front end of the oncoming car, and in this manner he was pushed and slid along the street for some distance, until he fell beneath the car. He further testified that, when he was taken out from the front car fender, he was removed to and remained at St. Joseph's Hospital about six weeks; that a hip was fractured and lungs injured and his head and face cut, and "pneumonia set in after the fourth day." This statement was substantially corroborated by an attending physician. On cross-examination defendant testified that he did not look for the approach of the north-bound car before he stepped on the east track.

Plaintiff was 50 when the accident occurred, and he was then employed as a stationary fireman by the M. E. Smith Company, and his earnings at the company's plant, together with his earnings from some other outside employment, such as unloading coal after 4 o'clock in the afternoon, gave him an income, before the injury, of about $206 a month.

A witness called by plaintiff, who was a passenger on the north-bound car, testified that it stopped at the south side of Howard street, and when it reached the north side

of the street it was going between a "15 and 20 mile gait," and after the accident it stopped with "a sudden jerk" about 15 feet south of the alley which is midway between Howard and Harney streets, and that the car ran probably 8 or 10 feet after the air lever was applied; that he did not hear the gong sounded nor any signal given by the motorman before the impact; that when the car stopped, Jansen, the motorman, "got down and looked under," and said: "My, God! there is a man under the car." Another passenger testified, on the part of plaintiff, that the gong was not sounded nor was a signal given to warn pedestrians of the car's approach to the point of impact, and that it then "was going about 15 miles an hour," and when the air was applied it ran about 8 or 10 feet.

In respect of the operation of the car fender, in case of accident, a former motorman testified in substance, on the part of plaintiff, that, when an object the size of a man's body is lying between the rails, it comes in contact with a bar which causes the fender to drop and the motorman is thereby advised of the obstruction by the sound of the drop and also by the rattling of the released fender as the car proceeds. He further testified that, when the fender drops, a pin protrudes through the floor from below, and this also advises the motorman that the fender is down, and it is then his duty to replace it by pressing down on the pin with his foot, and this can readily be done unless it is weighted down by a heavy object.

Among others, defendant called the following witnesses: James Jansen, motorman, in charge of the car which inflicted the injury, testified that he first saw plaintiff when he stepped over the rail of the west track from behind a car going south, when the front end of his car was about even with the rear end of the passing car, which was moving at the rate of about 5 or 6 miles an hour, and that his car was running north at the rate of 8 or 10 miles an hour; that plaintiff took two steps after the witness saw him and ran into the front left-hand corner of his car and fell down right over the track; that he promptly ap-

plied the emergency brake and the air brake, and that his car ran between 12 or 15 feet before it stopped about 8 feet south of the alley; that, as he approached the place where plaintiff was struck, he continuously sounded his gong; that he did not see plaintiff's approach because he was behind the south-bound car, which obstructed his vision. The motorman also testified that plaintiff told him, before the ambulance took him away, that he did not see the approach of the north-bound car.

The motorman of the south-bound car testified that plaintiff crossed Tenth street from the west on a run, and within 5 or 6 feet of the rear end of a south-bound car which was ahead of his car; that plaintiff was looking east when the car struck him and it "knocked him ahead perhaps several feet, * * * knocked him flat," the north-bound car then running at the rate of 3 to 5 miles an hour. He further testified that the street cars at that time of day passed the place where the accident occurred about every minute. F. J. McEvoy, a passenger on the north-bound car, testified that he saw plaintiff's approach to the car, but whether he was walking or running he did not know; that the car that struck plaintiff was going at the rate of 10 or 15 miles an hour, and that it ran 15 or 20 feet before it stopped. Another passenger on the south-bound car testified that he heard no gong sounded or other signal; that he first saw plaintiff when the car turned into Tenth street, but did not know whether plaintiff was running toward the car, but that he saw him fall. Another witness was on the north-bound car, and in his opinion it ran at the rate of 8 miles an hour, and that plaintiff was "trotting" east from behind the car going south. In his opinion the north-bound car stopped about 8 feet after plaintiff went down. Another passenger testified that the car came to a sudden stop, and that after plaintiff was taken out from under the car he "understood him to say" that he "was going around behind another car, and he stepped in front of this one." The conductor of the north-bound car testified that his attention was first called to the accident when the car

"came to a sudden jerk," and that at the time the car was going 6 or 8 miles an hour. No inquiry was made, however, of at least three of defendant's witnesses as to whether the gong was sounded or any other signal of the car's approach was given by the motorman.

Much evidence was introduced by the parties as to whether the accident happened at or close to the intersection of Howard and Tenth streets or close to the alley which is midway between Howard and Harney streets, and in respect of the speed of the street car, and as to whether plaintiff ran or walked upon the track just before the impact, and as to whether the gong was sounded by the motorman. The evidence conflicts in respect of all the material facts. But questions of fact are for the jury, as has often been said. One of the most vital points in the case is whether motorman Jansen saw or, by the exercise of ordinary care, should have seen plaintiff on the track, and in a place of peril, in time to have stopped the car before he was struck, even though plaintiff was oblivious of danger.

Defendant's counsel argue: "Under any reasonable view of the facts in this case, plaintiff's own negligence continued up to and was the proximate cause of his injury. The facts in the case furnish no room for the 'last clear chance' doctrine. * * * The court should have sustained defendant's motion for directed verdict."

We do not agree with counsel. In this jurisdiction the rule is well settled that, where an electrically propelled street car runs against a person, to his injury, liability arises when the peril is discovered by the motorman or, by the exercise of ordinary care, should have been discovered by him in time to have avoided the injury. *Omaha Street R. Co. v. Duvall,* 40 Neb. 29; *Lucas v. Omaha & C. B. Street R. Co.,* 104 Neb. 432. See, also, *Wilson v. Union P. R. Co.,* 107 Neb. 111, where the same principle is involved.

Did the motorman exercise ordinary care? Was it the dropping of the fender alone that apprised him that something was wrong, and was it this which caused him to

stop his car with a sudden jerk? And was the motorman surprised when, as one witness testified, he "got down and looked under," and exclaimed, "My, God! there is a man under the car?" Did his exclamation cause the jury to believe that, when he "got down and looked under," he saw plaintiff for the first time? It may be. Anyhow, this evidence, together with all the evidence in the case, was for the jury. In such case, where questions of fact have been properly submitted, and have been determined by the jury, which has seen and heard and observed the demeanor of the witnesses, we will not, ordinarily, disturb the verdict. We think the record discloses sufficient competent evidence to support the verdict. It is elementary that, in a jury trial, when different minds may reasonably reach different conclusions from a given state of facts as to whether negligence has been established, the question of negligence is for the jury. *Oakes v. Omaha & C. B. Street R. Co.*, 104 Neb. 788.

In addition to the foregoing assignments of alleged error, we have examined the instructions given by the court, over defendant's objections, and those requested by defendant, and refused, and, in view of the record before us, we conclude that reversible error cannot be predicated thereon.

The judgment is

AFFIRMED.

FIRST BANK OF ULYSSES, APPELLEE, V. MERRITT C. WARREN ET AL., APPELLANTS.

FILED APRIL 16, 1925. No. 23069.

1. **Process:** SUMMONS TO ANOTHER COUNTY. In an action for a money judgment, a summons cannot be lawfully sent to a county other than the one where the action is pending, unless there is a joint demand against the non-resident defendant and the defendant summoned where the action was commenced.
2. **Pleading.** Petition, the substance of which is set out in the opinion, examined, and *held* to state a cause of action only against the maker of the notes sued on, and that as to other defendants no joint liability is alleged.

APPEAL from the district court for Butler county: GEORGE F. CORCORAN, JUDGE. *Reversed and dismissed.*

P. A. Tomek and *Roper & Fuller,* for appellants.

Coufal & Shaw and *Thomas, Vail & Stoner, contra.*.

Heard befor MORRISSEY, C. J., DAY, THOMPSON and EVANS, JJ.

DAY, J.

In an action by the First Bank of Ulysses against Willard B. Warren *et al.*, based upon 13 promissory notes, a judgment was entered against Willard B. Warren for $25,664.39 and certain attached property ordered sold. A personal judgment was also entered against Merritt C. Warren and Henry Warren for $10,400. The two latter defendants have appealed.

The action was commenced in the district court for Butler county, the residence of Willard B. Warren, and he was served with a summons in that county. Merritt C. Warren resided in Douglas county and was served with summons there. Henry Warren was served with summons in Buffalo county, where he resided.

The appellants, each for himself, filed a special appearance objecting to the jurisdiction of the court over his person upon the ground that the petition disclosed that there was no joint liability of the appellants with the defendant Willard B. Warren. The special appearances were overruled and appellants filed answers, preserving in their respective answers the objections to the jurisdiction of the court.

Appellants now urge that the court erred in overruling the special appearances and objections to the jurisdiction of the court. The rule is well settled in this state that in an action for a money judgment a summons cannot be lawfully sent to a county other than the one where the action is pending, unless there is a joint demand against the nonresident defendant and the defendant summoned in the

county where the action was commenced. *Barry v. Wachosky*, 57 Neb. 534; *Seiver v. Union P. R. Co.*, 68 Neb. 91; *Stull Bros. v. Powell*, 70 Neb. 152; *Ayres v. West*, 86 Neb. 297.

Does the petition state a joint demand against Willard B. Warren and the appellants? A determination of this question involves an examination of the petition.

The petition alleges in substance that Willard B. Warren executed and delivered to the plaintiff certain promissory notes, copies of which are set out in the petition; that prior to the execution of the notes Willard B. Warren was the owner of a one-fifth interest in a farm in Butler county; that he owned a large amount of personal property in said county; that he had a one-half interest in a quarter section of land in Buffalo county, subject to mortgage, and that he had a one-half interest in a farm in the state of Wyoming; that the defendants conspired and confederated to cheat and defraud the plaintiff and to hinder and delay it in the collection of its debts; that in pursuance of the conspiracy Willard B. Warren executed a mortgage upon his interest in the lands in Butler county to one Frank C. Burkhart; that he mortgaged all of his personal property to Carl C. Wilson and that he conveyed by deed his interest in the Buffalo county land and the land in Wyoming to Henry Warren; that Merritt C. Warren, under the pretense that there was a wrong description of an unrecorded mortgage held by the plaintiff upon the Wyoming land, secured the possession of the mortgage for the purpose of making a correction in the description, which mortgage he failed to return. The prayer of the petition was for a money judgment against Willard B. Warren and for "like judgments" against all the other defendants. An injunction was also prayed enjoining the defendants against any further conveyance of the property owned by Willard B. Warren. Attachments were issued and levied upon the lands in Butler county and Buffalo county, and while it is not entirely clear that the attachment was levied upon the personal property, the final judgment declared it to be a lien upon

the personal property, and it, as well as the attached real estate, was ordered sold to satisfy the judgment. It will be noted that there is no allegation or prayer that any of the alleged fraudulent conveyances be canceled, nor is there a prayer to impress a trust upon any of the property as belonging to Willard B. Warren. The action, as we view it, is a law action against Willard B. Warren to recover a money judgment based upon the promissory notes sued on.

The allegations of the petition with respect to a conspiracy are merely incidental to the main purposes of the action. An action on contract as against one defendant cannot be joined with an action on tort against several defendants. This is elementary. We will hardly presume that it was the intention of the pleader to improperly join causes of action. Besides this it is extremely doubtful whether the petition states a cause of action based on tort. The plaintiff's cause of action had not been reduced to judgment. The weight of authority supports the view that a conspiracy to aid a debtor in removing or concealing his property so that it may not be reached by legal process is not actionable in favor of a general creditor. Authorities sustaining this view may be found in *Fairbanks, Morse & Co. v. Welshans & Co.*, 55 Neb. 362, and *Field v. Siegel*, 99 Wis. 605, 47 L. R. A. 433, and note.

It is the contention of the appellee that appellants by answering to the merits after the special appearances to the jurisdiction had been overruled, thereby entered a general appearance in the case. Cases are cited in this court which sustain this view. Since the briefs have been filed, however, this court has recently had occasion to examine the effect of answering to the merits, after a special appearance to the jurisdiction has been overruled, and has announced the rule that when the objections to the jurisdiction are preserved in the answer the defendant does not by answering to the merits thereby waive the right to have the question of jurisdiction determined on appeal. *Gaines v. Warrick, ante*, p. 235; *Adams v. Guthrie & Co., ante*, p. 192.

Appellants also urge that the testimony is not sufficient to support a judgment against them. As we have determined that the court had no jurisdiction over the persons of the appellants, it seems unnecessary to discuss the merits of the case. For the reasons stated the judgment of the district court, in so far as it applies to the appellants, is reversed, and, as to them, the cause is dismissed.

REVERSED AND DISMISSED.

Note—See Process, 32 Cyc. 427.

SKINNER MANUFACTURING COMPANY, APPELLANT, V. CARRIER ENGINEERING CORPORATION, APPELLEE.

FILED APRIL 16, 1925. No. 23046.

1. **Sales:** ACCEPTANCE. Where a purchaser of warranted machinery asks for and is given a definite, reasonable time in which to make a full, fair test thereof to enable him to determine whether the machinery is satisfactory and complies with the warranty and who does make a full, fair test for the specified time, and thereafter, without objection or complaint, continues to use the machinery, he will, ordinarily, be deemed to have accepted it.
2. ———: ———: LIABILITY. A purchaser of warranted machinery who accepts it, after a full, fair trial thereof, thereby renders himself liable for its fair and reasonable value, in the absence of an agreement as to the purchase price.
3. **Appeal:** INSTRUCTIONS. The giving of an erroneous instruction is not ground for reversal, unless prejudicial to the complaining party.

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

Kennedy, Holland, DeLacy & McLaughlin, for appellant.

Mitchell & Staples and *Gaines, Van Orsdel & Gaines, contra.*

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

GOOD, J.

Skinner Manufacturing Company, plaintiff, brought this action against Carrier Engineering Corporation, defendant, to recover the amount paid by plaintiff to defendant on a written contract for the installation, in plaintiff's macaroni factory, of a system for drying macaroni and kindred products; also to recover the cost of removal of the machinery and equipment from its factory, expense of storage, and for damages for macaroni spoiled in the process of testing the machinery.

A copy of the contract is made a part of the petition, and among other things provides: That defendant shall install, on the fourth floor of plaintiff's factory in Omaha, a system for drying macaroni and kindred products; warrants that the machinery, when installed, will handle and thoroughly and uniformly dry 40,000 pounds of macaroni and kindred products within 24 hours, the finished product to be free from checks, cracks, splits and molds. It further provides that, in the event the system installed fails to meet the contract requirements, the defendant shall remove the machinery and appliances at its own expense and restore plaintiff's building as nearly as possible to its original condition, and that defendant shall return to plaintiff any sums that have been paid on the purchase price of the machinery.

Plaintiff alleges that the machinery installed failed to meet the requirements of the contract; that, although requested so to do, defendant failed to remove the machinery from the manufacturing plant, and that it was removed by plaintiff at its own cost. Plaintiff also alleges that it has paid to defendant $13,936.23 on the purchase price of the machinery; that it has sustained damages in the cost of its removal and storage, also for macaroni spoiled in the process of testing the drying system, and prays for judgment in the aggregate sum of $49,544.45.

Defendant in its answer admits the making of the contract; the installation of the machinery; that it failed to meet the contract requirements to dry 40,000 pounds of

macaroni in 24 hours, and that $13,936.23 has been paid on the purchase price, but alleges that the machinery would properly dry the required amount of macaroni within a period of 48 hours; that the contract was then modified so as to provide that plaintiff would waive the time limit of 40,000 pounds within 24 hours, and accept the plant, provided defendant would install cams on the machinery, said cams, so requested, not being called for by the plans and specifications, and provided further that plaintiff be given an opportunity of testing the same for a period of 60 days; that, in reliance upon the contract as modified, defendant added to the plant the cams at a cost of approximately $2,000, and delivered the completed plant to plaintiff on October 1, 1919, for the purpose of permitting plaintiff to test the same and to determine whether or not the conditions of the contract, as modified, were complied with; that such test was made during the period of time from October 1, 1919, to December 1, 1919, when the completed plant was turned over and accepted by the plaintiff. Defendant further alleges that during all of said time the plant and equipment complied with each and every condition called for by the contract, as modified; that after plaintiff accepted such plant, on December 1, 1919, it continued to use and operate the machinery for its business, without any demand, request or complaint of any kind or character, until March 1, 1921; that plaintiff knew the kind and character of the product produced by the machinery, and that it had continued to use the same from the 1st of October, 1919, down to the time of bringing the action, and that it is thereby estopped from claiming that the machinery does not comply with all the terms and conditions of the contract.

Defendant filed a counterclaim for the reasonable value of the machinery, which it alleges to be in excess of $41,000, and asks for judgment therefor, less the amount that has been paid on the purchase price.

Plaintiff in its reply denies that the written contract was modified as alleged by defendant, and further alleges

that in the early part of 1919 the defendant admitted that it was unable to fulfil its written contract, and requested permission to endeavor to so arrange the machinery and appliances, to see if it could accomplish the drying of 40,000 pounds of macaroni within a 48-hour period, with the purpose of then seeing if the system, so arranged, would be desired by plaintiff, and, if so, on what basis, and alleges that defendant failed in its efforts to make the system properly dry 40,000 pounds of macaroni within the 48-hour period, and that after defendant had ceased work upon its system plaintiff made every reasonable effort to test out the system, to see if it would uniformly dry 40,000 pounds of macaroni within the 48-hour period, and that the result of such test proved that the machinery could not and did not properly dry that amount of macaroni within the 48-hour period. A trial of the issues to a jury resulted adversely to plaintiff and in a verdict and judgment thereon for defendant on its counterclaim in the sum of $20,000. Plaintiff appeals.

There are numerous assignments of error, but the only ones argued and relied upon are that the verdict is not supported by the evidence and is contrary to law; error in giving certain instructions, and error in excluding certain exhibits offered in evidence by plaintiff.

As to many of the facts in issue, the evidence is in sharp conflict. Plaintiff's evidence tends to show that it thoroughly tried and tested the machinery, and that at no time would it properly dry 40,000 pounds of macaroni in 24 hours, or even in 48 hours, and that a large percentage of the product checked and cracked to such an extent that it was unfit for market; that, after thorough trial and testing, plaintiff requested defendant to remove the machinery from the factory; that defendant failed so to do, and thereupon plaintiff removed the machinery at its own expense. The evidence tends to show that a very large amount of the product that was attempted to be dried by the machinery and equipment, installed by defendant, checked and

cracked so that it was unmarketable and, as a consequence, plaintiff sustained great damage.

It is conceded by defendant that it was unable to make the machinery properly dry the macaroni within the 24-hour period, but its evidence tends very strongly to show that it was able to and did properly dry the required amount of macaroni in 48 hours; that this product was used and marketed by the plaintiff, and that only a small amount of dried product was unfit for use, but that some macaroni was spoiled while defendant was endeavoring to make the plant operate on a 24-hour basis, and that plaintiff was allowed credit for the spoiled product, in accordance with statements of the amount thereof rendered by plaintiff. Defendant's evidence further tends strongly to show that in the early part of 1919 there was a modification of the contract, substantially as alleged by defendant; that defendant agreed to install the cams, and that after they were installed the plaintiff should be allowed 60 days in which to test the system with its own employees, to ascertain if it would operate satisfactorily on the 48-hour basis, and, if so, that the price should be thereafter agreed to by the parties; that the cams were installed on the machinery, and that the system was turned over to plaintiff on the 1st of October, 1919, for the 60-day test by plaintiff with its own operatives, at the end of which time plaintiff was to determine whether or not it would keep the plant. Defendant called a number of persons, who were employed by plaintiff at the time of making the test and subsequent thereto, and their evidence is to the effect that during all the 60-day test and for a long time thereafter the drying apparatus was used continuously; that it would properly dry 40,000 pounds of macaroni in 48 hours; that the product was of high quality, free from checks, cracks, splits and molds. The evidence further tends to show that shortly after the expiration of the 60-day test plaintiff's manager or superintendent stated that the test had been satisfactory.

On December 10, 1919, defendant sent to plaintiff a bill for the machinery, allowing credit for the amount pre-

viously paid, and also credit for spoiled macaroni and other items, aggregating $1,503.97, and claiming a balance due of $19,896.03. On several occasions thereafter defendant requested plaintiff to state definitely whether or not it desired to accept the drying apparatus, but plaintiff neglected and failed to give any answer, except that in one letter it stated that the damage it had sustained was greater than the value of the plant, and that it would prepare and forward a statement of the damage sustained. The evidence further shows that for a period of 15 months after the expiration of the test the plaintiff, for a greater part of the time, used and operated the drying system successfully and satisfactorily. Finally, on the 31st of March, 1921, plaintiff wrote defendant, stating that the drying apparatus was unsatisfactory and demanding its removal from its factory. The evidence tends to show that, even after this, some parts of the machinery were used and that some of the appliances were being used at the time of the trial in the district court. The evidence also tends to show that the reasonable value of the machinery installed is in excess of $40,000, and that, after allowing plaintiff credit for payments made and for damage sustained on account of spoiled macaroni, as per the statements it had rendered to defendant, there was a balance due defendant, exclusive of interest, of approximately $20,000.

The issues of fact as presented by the evidence were submitted to the jury, and its verdict, based on conflicting evidence, is conclusive.

Plaintiff argues that, even if it retained the machinery in its factory after the expiration of the specified time for testing and using it in making further tests, this fact would not constitute an acceptance. Had the contract remained unmodified, the argument would be persuasive. Under the contract as modified, plaintiff was given a reasonable and definite time in which to fully and fairly test the machinery with its own operatives. This was in addition to the tests that had been made in its factory by the defendant and of which it had full knowledge. If it desired additional

time and opportunity to further test the machinery before accepting it, it should have asked and obtained leave so to do. No such request was made. Under the terms of the contract as modified, it was plaintiff's duty, at the end of the 60-day test, to determine whether it desired to keep the machinery. If it did not so desire, it should have then given notice to defendant. Instead, without complaint and without objection, it continued to use and operate the machinery, and this in the face of repeated demands by defendant that plaintiff signify whether it desired to accept the machinery.

Where a purchaser of warranted machinery asks for and is given a definite, reasonable time in which to make a full, fair test thereof, to enable him to determine whether the machinery is satisfactory and complies with the warranty, and who does make a full fair test for the specified time, and thereafter, without objection or complaint, continues to use the machinery, he will, ordinarily, be deemed to have accepted it. A purchaser of warranted machinery who accepts it, after a full, fair trial thereof, thereby renders himself liable for its fair and reasonable value, in the absence of an agreement as to the purchase price.

The rule here announced is, in a general way, supported by the following authorities: *McCormick Harvesting Machine Co. v. Martin,* 32 Neb. 723; *Hercules Iron Works v. Dodsworth,* 57 Fed. 556, on appeal *Dodsworth v. Hercules Iron Works,* 66 Fed. 483; *Brown v. Foster,* 108 N. Y. 387; *Barber Mining & Fertilizing Co. v. Brown Hoisting Machinery Co.,* 258 Fed 1; *Crescent Milling Co. v. Strait Mfg. Co.* 227 Fed. 804; *Thomas China Co. v. C. W. Raymond Co.,* 135 Fed. 25; *Chambers v. Lancaster,* 160 N. Y. 342.

Plaintiff complains of certain instructions given the jury. One of them apparently imposes on plaintiff the burden of proving the modification of the written contract. This modification was pleaded by defendant and denied by plaintiff in its reply. The burden of establishing it, therefore, rested on defendant. However, the overwhelming weight of the evidence shows that the contract was modified, and

plaintiff's own evidence and written admissions in letters practically concede that it was modified. While the instruction was technically erroneous, it was harmless error. The giving of an erroneous but harmless instruction is not ground for reversal. *Phelps v. Williams*, 112 Neb. 667. Plaintiff insists that another instruction gives a wrong impression to the jury. Its criticism, however, is based on taking a single sentence from the instruction. Taken as a whole, the instruction does not at all convey the meaning attributed to it by plaintiff. The third instruction of which complaint is made conforms to the rules announced in this opinion, and we think was properly applicable to the evidence.

Complaint is made of certain rulings of the court excluding three exhibits, offered in evidence by plaintiff. We have examined these exhibits and in our opinion they have no bearing upon any of the issues involved. They tend neither to support nor to controvert any issue presented. There was no error in their exclusion.

We find no prejudicial error in the record. The judgment of the district court is

AFFIRMED.

Note—See Sales, 35 Cyc. 432, 580.

MARY HANSEN, APPELLANT, V. MABEL JASMER, APPELLEE.

FILED APRIL 16, 1925. No. 23049.

Master and Servant: DUTY OF MASTER. The law imposes upon an employer the duty of exercising ordinary care and caution to provide a reasonably safe place for his servant to work, and also imposes a like duty upon the employer not to send or direct his servant to go into a place of danger without warning him, where the danger is not apparent and is unknown to the servant.

APPEAL from the district court for Knox county: WILLIAM V. ALLEN, JUDGE. *Reversed.*

J. F. Green and *M. F. Harrington*, for appellant.

Fred H. Free and *Richard Steele, contra.*

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

GOOD, J.

Action for personal injuries by a servant against her master, grounded on the alleged negligence of defendant in failing to use ordinary care to provide plaintiff a safe place in which to work, and in sending her into a place of danger without warning. At the conclusion of plaintiff's evidence, there was a directed verdict for defendant. Plaintiff appeals.

The appeal presents but one question, viz.: Was there sufficient evidence of defendant's negligence to require the submission of the case to the jury?

Plaintiff was employed in defendant's home to perform household work. Within an hour after she began work, plaintiff was directed to carry a pail of rubbish or refuse to the furnace room in the basement. To reach the furnace room she was required to pass through a laundry room in the basement, and thence through a doorway into the furnace room. The floor of the latter was about 18 inches lower than that of the laundry room. In the furnace room, directly in front of the doorway from the laundry, was a step made of a 2-inch board resting at either end upon blocks, which were not fastened or secured to the floor. It is not quite clear whether the board, constituting the tread of the step, was fastened to the blocks. In entering the furnace room plaintiff was required to use this step, and in doing so either the board slipped from the blocks or the step, with the blocks, turned over, precipitating plaintiff to the cement floor and thereby injuring her knee. It further appears that this was the first time that plaintiff had been in the house or had used the step, and that she had no knowledge that it was dangerous or unsafe, or that the board was loose, or that the step was liable to topple over. It also appears that the step had been in this condition for

a long time, and that it had turned over when other persons had stepped thereon, and that this fact was known to defendant. It therefore appears that defendant had knowledge that the step was unsafe and dangerous, and liable to topple over, and that, without warning, she directed plaintiff to go to the furnace room, where she would necessarily have to use the step in question.

The law imposes upon an employer the duty of exercising ordinary care and caution to provide a reasonably safe place for his servant to work, and also not to send or direct the servant to go into a place of danger without warning him, where the danger is not apparent and is unknown to the servant. *Riley v. Cudahy Packing Co.*, 82 Neb. 319; *Johnson v. Model Steam Laundry Co.*, 88 Neb. 12; *Gundy v. Nye-Schneider-Fowler Co.*, 89 Neb. 599; *Elliott v. General Construction Co.*, 93 Neb. 453; *Schramm v. Casey*, 110 Neb. 194; *Morris v. Hines*, 107 Neb. 788.

We think there was sufficient evidence to have justified the jury in finding that defendant was guilty of the negligence of which complaint is made.

In directing a verdict for defendant, the trial court committed reversible error. Judgment reversed and cause remanded.

REVERSED.

Note—See Master and Servant, 26 Cyc. 1098, 1102, 1166.

RAY SANDLOVICH ET AL., APPELLANTS, V. W. A. HAWES, APPELLEE.

FILED APRIL 16, 1925. No. 23093.

1. **Intoxicating Liquors: TRANSPORTATION: FORFEITURE OF VEHICLE.** Section 3274, Comp. St. 1922, authorizes the forfeiture of a vehicle which is used in the unlawful transportation of intoxicating liquors, when the owner of such vehicle has voluntarily placed it in the possession of the person who uses it for such unlawful purpose.

2. ———: ———: ———. When an automobile has been legally forfeited and sold because of its use in the unlawful transportation of intoxicating liquors, the owner thereof has no greater right to the proceeds of such sale than he had to the vehicle.

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

T. S. Allen, for appellants.

Charles E. Matson, Max G. Towle and *L. R. Doyle, contra.*

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

GOOD, J.

This is an action to enjoin a justice of the peace from turning over to the state school fund the proceeds of the sale of an automobile under an order of the justice court, entered pursuant to the provisions of section 3274, Comp. St. 1922. It was also sought to have the plaintiffs adjudged to be the owners and entitled to the fund arising from the sale of the automobile. From an adverse judgment, plaintiffs appeal.

Plaintiffs are engaged in the business of renting automobiles for hire, the leased vehicles to be driven by the lessees. Plaintiffs leased a Ford car to Fred Tucker, who used the car for the unlawful transportation of intoxicating liquors. Complaint was filed in justice court against Tucker and the automobile, charging unlawful transportation of intoxicants. Tucker was convicted and adjudged to pay a fine, and the vehicle was declared forfeited and ordered sold, under the provisions of section 3274, Comp. St. 1922.

Plaintiffs claim they had no notice or information that the vehicle was made a defendant and declared forfeited, until after the entry of the order of forfeiture and sale, and that they were deprived of an opportunity to be heard in court as to their property rights in the automobile. They also claim that they did not know or suspect that Tucker was intending to use the vehicle for any unlawful purpose. Plaintiffs purchased the automobile at the sale, had under

order of the court, paid into court the purchase price, and then brought this action to enjoin the justice from turning over to the state school fund the proceeds arising from the sale of the automobile.

Plaintiffs argue that the legislature, in the enactment of section 3274, *supra,* never intended to forfeit the property of innocent persons, and that under the facts shown plaintiffs are entitled to the relief demanded, and that the district court erred in denying such relief. The statute, prior to the amendment of 1919, was much less specific and drastic. Under that statute this court held, in *State v. Jones-Hansen Cadillac Co.*, 103 Neb. 353:

"In ascertaining the legislative will, it must be borne in mind that forfeitures are not favored in the law, and even this statute must not be construed to forfeit the property of innocent citizens, unless, from the statute in the light of its object and existing conditions, it is manifest that the legislature considered such forfeiture necessary for the 'preservation of the public peace, health and safety.' "

In that case, a dealer sold an automobile, received a part of the purchase price and took back a chattel mortgage for the remainder. Soon thereafter the vendee delivered the automobile to a third person, who used it in illegally transporting intoxicating liquors. The mortgagee had no knowledge that the vehicle was to be used, or allowed to be used, for any unlawful purpose, and it was decided that the mortgagee, under such circumstances, could not be deprived of his property under the statute.

After that decision the statute was amended. It is now more specific and drastic, and leaves no room for doubt as to the legislative intent to make any vehicle, used in the unlawful transportation of intoxicating liquors, subject to forfeiture, when the person so using it came into possession thereof by consent of the owner, and innocence of the owner makes no difference. Under the statute as it now exists, this court in *Robinson Cadillac Motor Car Co. v. Ratekin,* 104 Neb. 369, held that the statute (Comp. St. 1922, sec. 3274) contemplates the forfeiture of vehicles of

owners and lienors who have voluntarily parted with cars, used in the unlawful transportation of intoxicating liquors. Counsel for plaintiffs argue that our holding in that case was too broad and ask us to reconsider the ruling therein made. The question was thoroughly considered in the case referred to, and the rule was announced after mature deliberation. We see no reason for departing from or modifying the views therein expressed.

In the instant case, it appears that plaintiffs voluntarily parted with possession of their automobile for hire, and placed it in the possession of one who was using it for unlawful purposes. The automobile, while being used by plaintiffs' lessee in the unlawful transportation of intoxicating liquors, was subject to forfeiture by the state. The plaintiffs could not regain possession of the car, nor could they have prevented its being forfeited and sold. It is idle to contend that, if the car was properly forfeited, plaintiffs could reach the proceeds arising from its sale, pursuant to the order of the court. Their right to the proceeds of the sale can be no greater than their right to the automobile.

The judgment of the district court is right and is therefore

AFFIRMED.

Note—See Intoxicating Liquors, 33 C. J. secs. 363, 397.

MARY C. KELLEY, APPELLANT, V. ADAMS COUNTY, APPELLEE.

FILED APRIL 16, 1925. No. 23059.

1. New Trial: DISQUALIFICATION OF JUROR. Where a juror, during the trial, unofficially visits the *locus in quo*, and reaches a conclusion therefrom in reference to material facts in the case, he thereby disqualifies himself as such juror.
2. ———: ———. Where a juror has previous knowledge of facts or circumstances material to the case, and on his *voir dire*, upon proper inquiry being made, fails to disclose same, and where the complaining party could not, in the exercise of reason-

able diligence, have discovered such failure before the verdict was rendered, ordinarily a new trial should be granted.

3. ———: ———. In such cases, the fact that it is not shown that the juror conveyed the knowledge thus gained to the other jurors, or that such knowledge in no manner influenced his verdict, is not of itself controlling. The test is, are the facts thus gained of such weight as to enable a reviewing court to say that they had no part in the juror reaching the verdict rendered?

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

Bruckman & Paulson, for appellant.

James E. Addie, contra.

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

THOMPSON, J.

Mary C. Kelley, appellant, brought this action against Adams county, appellee, to recover for personal injuries. She alleges in her petition, in substance, that defendant was negligent in constructing and maintaining a bridge and wings thereto on one of the public highways of defendant county, in that holes were allowed to remain on the sides of the roadway within such wings; that, without negligence on her part, an automobile in which she was riding ran into one of said holes, as a result of which she is damaged in the sum of $10,000.

The answer, besides containing a general denial, alleges that the injuries complained of were caused by the defective condition of the steering wheel of the automobile in which plaintiff was riding when injured, of which plaintiff had full knowledge; that her minor son was negligently driving the automobile at the time, which contributed to the injury; that his negligence in law was her negligence.

The reply denies all new matter contained in the answer. Case tried to a jury, verdict for defendant. Motion for a new trial; one ground relied upon being that of misconduct of certain members of the jury. Motion overruled, and plaintiff appeals.

As to this misconduct, complaint is made that after the jury had been selected, and while the trial was in progress, one of the jurors, during a recess, drove to the place of the accident and examined the ground and situation relating to the matters in dispute, and covered by evidence theretofore introduced; that after such examination he remarked to those of his family with him that the situation was different from that presented by either party to the suit; that, while it is not shown that he told his fellow jurors what he had discovered, nevertheless such unofficial examination rendered him incompetent to afterward act as an impartial juror, and to render his verdict solely on the evidence introduced at the trial; that this instance did not come to the attention of plaintiff or others interested until after the verdict was rendered; that this is an error so prejudicial as to demand the setting aside of the verdict and the granting of a new trial.

On the hearing of this part of the motion, this juror testified to the substance of the foregoing relating to his visit to the *locus in quo*. After an adjournment, and on cross-examination, he said, in substance, that he was not sure that the place he examined was the place where the accident occurred; that what he saw in no manner influenced him, or had any weight in his joining in the verdict; that he had no intent of wrong-doing in visiting the place.

As to his being void of intentional personal misconduct as a juror may be conceded. However, in our practice, we have a jury of twelve men, each sworn to try the case solely on the evidence introduced, and the law as given by the court, and thus be able to render a true verdict. As to the facts in dispute, the evidence thereof must come within the purview of the court, at the trial, and not by a gleaning outside by one or more of the jurors, independent of the others, without the court's supervision. The fact that it is not shown that this juror conveyed the knowledge thus gained to his associates on the jury, or that such knowledge in no manner influenced his verdict, is not in itself controlling. The test is, are the facts thus gained by the unofficial exam-

ination of such weight as to enable us to say on review of the record thereof that they had no part in the juror's reaching the verdict rendered? This we cannot say, and neither can we say that "it is plain that such examination was not influential in obtaining a verdict." *Chicago, B. & Q. R. Co. v. Oyster*, 58 Neb. 1.

The location of the place of the accident as to the bridge, and the construction of the wing (approach) thereto, were material issues at the trial, which gave rise to critical examination of witnesses, and stressed these points on the juror's mind to the extent of impelling him, as he testifies, to select this particular highway for a drive with his family, although he had never traveled over it before, having lived close by for years. In the cases where we have held that an unofficial examination of the *locus in quo* by a juror did not constitute reversible error, it has been where the surroundings of such place at the time of the examination were not material to the issues before the jury. As held in *Falls City v. Sperry*, 68 Neb. 420:

"The modern jury must arrive at its verdict from evidence regularly produced in the course of the trial proceedings. That evidence may be no different from such as might be acquired by the jurors unofficially, but still the latter could not be considered. Thus, the jury under the proper supervision may view the premises in controversy, and in this state such view may afford a proper basis for their verdict. *Chicago, R. I. & P. R. Co. v. Farwell*, 60 Neb. 322. But if one or more of the jurors should visit unofficially the same locality during the progress of the trial and reach a conclusion as a result of such inspection, the verdict would be vitiated."

Plaintiff complains further of the disqualification of another juror, for the reason that, in answer to questions asked him on his *voir dire*, he did not disclose that as a member of the board of supervisors of defendant county, immediately after the accident, he had heard, at a meeting of such board, the county attorney and a member thereof, who had visited the scene of the accident, and examined

the automobile in which plaintiff was riding at the time, which still remained in the hole where it had lodged during the accident, report in substance as follows: That the hole alleged to have caused the accident was not included in the bridge or in the wings (approaches) thereto; that from an examination of the automobile the steering wheel was found to have been broken at the time of the accident, which prevented the driver from guiding the machine, and that this defect was the cause of the accident; that in the opinion of the county attorney the county was not liable. Plaintiff alleges that neither she nor her attorney knew of this report having been made until after the verdict had been rendered.

We find from the record that this juror was a member of the county board, and heard the report, as set out above, and that plaintiff could not, under the facts disclosed by the record, in the exercise of reasonable diligence, have discovered this sooner than she did. When sworn during the hearing upon the motion for a new trial, this juror testified that the above circumstance in no manner influenced him in arriving at the verdict, as he reached his conclusions solely from the testimony which he heard at the trial. We have no doubt but what this is his honest belief, yet it seems impossible that he could have done so under the circumstances. The rule hereinbefore announced as to the other juror complained of applies here. We cannot say that the knowledge gained by this juror as a member of the county board had no part in his reaching the verdict, or did not prevent plaintiff from having a trial by a fair and impartial jury. *Pearcy v. Michigan Life Ins. Co.*, 111 Ind. 59, 60 Am. Rep. 673.

For the foregoing reasons, the motion for a new trial should have been sustained, and the overruling thereof is reversible error. In view of this conclusion, we find it unnecessary to consider the other alleged errors presented.

REVERSED AND REMANDED.

ELIZA LACKEY, APPELLEE, V. HENRY YEKEL ET AL., APPELLANTS.

FILED APRIL 16, 1925. No. 23078.

1. Mortgages: APPOINTMENT OF RECEIVER. Whether or not a receiver should be appointed is a matter resting in the sound discretion of the court under the conditions shown at the trial, and within the statutory limitations.
2. ———: ———: NOTICE. When a cause of action for the foreclosure of a real estate mortgage and the appointment of a receiver are combined in one petition, and defendant joins issue therewith, no other notice or application need be had.
3. ———: ———: EFFECT OF STAY. The taking of a stay of sale at the time or after a decree is entered, granting foreclosure of a mortgage and appointing a receiver, waives all previous errors which may have occurred in appointing a receiver, as well as in granting the foreclosure.

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

Morrow & Morrow, for appellants.

L. L. Raymond, contra.

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

THOMPSON, J.

In this case plaintiff seeks to foreclose, as a mortgage, a contract for the sale of certain real estate in Scotts Bluff county. The petition is in apt terms, and contains by actual incorporation the contract sought to be foreclosed (as in *Holt County Bank v. Holt County,* 53 Neb. 827), a material part of which is:

"For any failure to make said payments of instalments of principal except as herein stated and the interest and taxes herein provided, the first party may at her option declare the total amount due under the contract and may proceed to foreclose in the manner provided by law for the foreclosure of real estate mortgages, and may in such proceedings have a receiver appointed by the court to receive

the rents and profits of said premises, the same to be applied under the order of the court."

The answer admits the contract, and all allegations except those which charge default on defendants' part, which latter are denied. Trial had to the court, and a decree entered granting foreclosure, and appointing a receiver. The record shows that defendants then requested in open court the statutory stay of sale, which was granted and made a part of the decree. Defendants except to the finding and judgment of the court, and appeal.

The only errors alleged relate to the appointment of the receiver. The above provision for the appointment of a receiver neither adds to, nor detracts from, what the contract would be if such provision were omitted. Such a provision is simply declaratory of that which the law would imply without it. Whether or not a receiver should be appointed is a matter resting in the sound discretion of the court under the conditions shown at the trial, and within the statutory limitations. *Baker v. Varney,* 129 Cal. 564; *Scott v. Hotchkiss,* 115 Cal. 89; *Cameron v. Groveland Improvement Co.,* 20 Wash. 169, 72 Am. St. Rep. 26, and note. Had this contract contained a stipulation for arbitration, such could not oust the court of jurisdiction. *National Masonic Accident Ass'n v. Burr,* 44 Neb. 256.

It will be seen that defendants, as a part of their contract, agreed to pay the taxes on the land. The petition charges that they did not do this, and that they failed to make the payments on the purchase price, as provided in the contract. Plaintiff then elected to declare the entire sum due, foreclose the contract, and apply for a receiver.

It is urged that the petition does not state facts sufficient to warrant the appointment of a receiver. Section 8754, Comp. St. 1922, provides: "A receiver may be appointed * * * in an action for the foreclosure of a mortgage, when the mortgaged property is in danger of being lost, removed or materially injured, or is probably insufficient to discharge the mortgage debt." The parties admit that there is due $3,139.15 in taxes on the land (and the record

shows much of this is delinquent, which of itself materially injures the property, and endangers the security), and that the Scotts Bluff National Bank has an interest in the land by virtue of a $10,000 mortgage. In *Philadelphia Mortgage & Trust Co. v. Oyler,* 61 Neb. 702, we held: "Where mortgaged premises are probably insufficient to satisfy the mortgage debt, and the property is allowed to deteriorate and taxes to accumulate, these are grounds sufficient to justify the appointment of a receiver to take charge of the mortgaged premises, collect the rents and apply them in such manner as to preserve the property for the satisfaction of the debt for which it is pledged." Thus, we conclude that the petition did state a cause of action sufficiently broad to authorize such appointment.

Defendants contend, further, that as plaintiff failed to comply with section 8755, Comp. St. 1922, requiring independent application for the appointment of a receiver, and notice thereof, the appointment is void. In support of this they rely upon *Johnson v. Powers,* 21 Neb. 292. It must be remembered that in that case neither defendant nor his attorney had notice or knowledge of the application for a receiver until several days after one was appointed, and, of course, neither appeared in the proceeding. In the instant case the petition served as the application, and by joining issue therewith defendants waived the statutory requirement for notice. The record shows that the appointment of a receiver was at all times one of the acute issues in the case, and defendants, by not objecting to the irregular application made by the petition, if such were irregular, thereby waived it. Defendants' contention is not in harmony with our holdings in *Robertson v. Ostrom,* 1 Neb. (Unof.) 200, and *Farmers & Merchants Bank v. German Nat. Bank,* 59 Neb. 229.

Furthermore, as hereinbefore mentioned, defendants took the statutory stay of sale at the time of the decree granting the foreclosure and appointing the receiver. In *Ecklund v. Willis,* 42 Neb. 737, plaintiff brought an action to foreclose a mortgage, and in his petition applied for a

receiver. The foreclosure was granted and a receiver appointed, after which defendant availed himself of the stay. On appeal he objected to the appointment of the receiver. We held: "There is another reason why the case should not be reversed. It appears from the transcript that, after making the order of which complaint is made, a decree of foreclosure was rendered in the action against the defendants, and the appellant applied for, and obtained, a stay of the order of sale. This step is a waiver of the right to have reviewed any of the proceedings in the case prior to the taking of such stay." Numerous authorities are then cited. In *Gilbert v. Provident Life & Trust Co.*, 1 Neb. (Unof.) 282, the third syllabus point is as follows: "When defendants in a suit to foreclose a mortgage avail themselves of the statutory stay of judgment, they are estopped from attacking such judgment in any manner." *Ecklund v. Willis, supra,* is cited in that opinion. The rule announced in these cases is controlling in this one.

The judgment of the district court is in all things

AFFIRMED.

GOULD LAND & CATTLE COMPANY, APPELLANT, V. COMMERCIAL UNION ASSURANCE COMPANY, APPELLEE.

FILED APRIL 16, 1925. No. 23115.

1. **Insurance**: POLICY: CANCELATION. When a parol agreement is entered into between one seeking insurance and an insurance company, which provides that a policy shall be written and held by the company, undelivered, and as its own, until the premium is paid, and, if not paid by a date certain, the policy shall thereupon be canceled by the company, a failure to pay such premium at the time agreed upon warrants the cancelation of the policy, and an action for recovery for a subsequent loss cannot be maintained.
2. **Pleadings** and evidence examined, and *held* to support the judgment.

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

Pratt, Hamer & Beynon, for appellant.

W. L. Minor and *W. E. Balcom, contra.*

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

THOMPSON, J.

Plaintiff brought this action to recover $2,500 for the total destruction of an elevator by fire, December 16, 1921, upon which it alleges defendant company issued a policy of insurance. The petition is one in the usual form. Defendant answered, admitting the incorporation of both plaintiff and defendant; that plaintiff was the owner of the building; that it was destroyed by fire; and that defendant refused to adjust the loss after being duly notified thereof. The answer then denies all other allegations in the petition, and alleges:

"That it had insured the property described in plaintiff's petition for a period of time extending from August 24, 1920, to August 24, 1921; that on the expiration of said policy, defendant, through its local agency, the firm of Berbig & Maus, notified the plaintiff that its policy of insurance on said property had expired, and that it was indebted already to the local agency for premiums on insurance issued on its various properties for the years 1920 and 1921, in the sum of $411, and that it could not issue insurance further on said property until the indebtedness had been paid and the premium paid for the policy about to be issued; that plaintiff thereupon represented to the defendant, through its local agency, that, if they would prepare a policy of insurance for it, it would pay for the same by the 1st day of October, 1921; that defendant, through its agents, notified the plaintiff that they could not deliver any policy of insurance to it until it was paid for, but that they would hold the policy until the 1st day of

October, 1921, and if it paid the premium at that time they would deliver it the policy; that upon the 1st of October the defendant called upon E. D. Gould, president and manager of the plaintiff, and tendered him the policy on condition that the premium be paid in cash, but that plaintiff failed and refused to pay said premium; that defendant made several subsequent trips to the office of the plaintiff at Kearney, and demanded the payment of the premium, and on the 15th day of October, 1921, they returned said policy to the main office of defendant, where it was duly canceled for nonpayment of premium on the 24th day of October, 1921."

The reply, in substance, alleged that theretofore a custom had existed, by which defendant company carried plaintiff in the payment of premiums, and that it relied on such custom in this case, as it had a right to do; that it at all times stood ready and willing to pay; that it was not notified that the policy would be or had been canceled prior to the fire, or afterwards; that defendant was without authority to cancel or annul the policy. It then denied each and every allegation.

A jury being waived, the case was tried to the court, finding generally in favor of defendant, and judgment entered accordingly. Plaintiff seeks reversal in this court upon the ground that the judgment is contrary to the evidence and the law applicable.

Defendant's agents, Berbig and Maus, each testify to facts which sustain each and all allegations of the answer, above extended. Plaintiff introduced no rebuttal as to this agreement. This leaves us to apply the law to virtually admitted facts.

The policy in dispute was based on an agreement of the parties that it was to be written (which it was) and held by defendant as its own, and not delivered until the premium was paid, which was to be done not later than October 1, 1921. If the premium was not then paid (and it was not) then the policy was to be sent to the company for can-

celation, without charge to any one (which was done long before the fire). Plaintiff was never ready and willing to pay before cancelation took place or even before the fire. In neither its petition nor its reply does it express a willingness to pay. This is not controlling, but it serves to illumine the controversy as to the real status of the parties as to this oral contract at the time of the cancelation. Until payment of the premium, the provisions of the policy would never become operative. *Hartford Fire Ins. Co. v. Whitman,* 75 Ohio St. 312. Hence, the oral agreement and not the policy's provisions govern, and notice of cancelation was not required. Under the agreement, refusal to pay the premium on October 1, 1921, when requested by defendant, implied consent on the part of plaintiff to the cancelation.

Further, as to the custom alleged to have existed between the parties, by which defendant extended credit to plaintiff for premiums due from previous transactions, the evidence shows that Berbig and Maus, individually, and not as agents of defendant, carried the previous premiums, remitting the amounts thereof to defendant, and accepting plaintiff's obligations running to themselves, in lieu of same. Therefore, if such a custom did exist, it is immaterial to the issues in this case, for it was one to which defendant was not a party, and in no manner binding upon it. And even if the custom existed between plaintiff and defendant, the agreement that this particular premium was to be paid before the plaintiff secured any rights under the policy abrogated such custom.

Then, if this policy had been delivered to plaintiff, and it had contained a provision, as the oral agreement did, that payment of the premium was a condition precedent to the right of plaintiff to recover, it would fail in this action, as a waiver of such payment is not shown. *German Ins. Co. v. Shader,* 1 Neb. (Unof.) 704; *Modern Woodman Accident Ass'n v. Kline,* 50 Neb. 345; *Anders v. Life Insurance Clearing Co.,* 62 Neb. 585.

The judgment of the trial court under this record, and the law applicable, is the only one that could have been entered, and it should be, and is,

AFFIRMED.

DUNDEE REALTY COMPANY ET AL., APPELLEES, V. ROBERT NICHOLS ET AL., APPELLANTS.

FILED APRIL 16, 1925. NO. 23127.

Deeds: RESTRICTIVE COVENANTS: ENFORCEMENT. When the owner of a tract of land, in laying it out into lots, blocks, streets and alleys as an addition to a city, adopts a general scheme for its development and improvement by way of certain restrictions, makes the same public, and in each conveyance imposes such restrictions on the lots conveyed thereby, and when it is shown that such restrictions are for the improvement of the entire tract covered thereby, and for the benefit of each owner, any lot owner may enforce such restrictions against other owners purchasing with notice, actual or constructive.

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

J. E. von Dorn, for appellants.

McGilton & Smith, contra.

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

THOMPSON, J.

Plaintiffs, appellees, brought this action in the district court for Douglas county against defendants, appellants, by petition in equity, seeking to enforce a building restriction imposed upon certain residence property in the city of Omaha, one lot of which is owned by defendants. The petition alleges, in substance, that plaintiff, Dundee Realty Company, conveyed the lot in question to one Anna K. Lind, the deed containing the following restriction, among others:

"No building nor any part nor projection thereof, except the cornice of the roof, shall at any time within said period

(February 27, 1919, to January 1, 1930) be erected or located on said premises within forty-five (45) feet of Fiftieth avenue nor within twenty-five (25) feet of Farnum street, except that an open porch and roof thereon, or a terrace, may be attached to the building between it and the said street lines."

It is further alleged that Lind conveyed the lot to defendants, expressly subject to these same restrictions. After setting forth conveyances to the other plaintiffs of lots in the same plat by the Dundee Realty Company, which conveyances also contain the restriction above set out, the petition states that defendants are erecting a dwelling on the lot in question, a sun parlor of which extends several feet over the restricted line; that plaintiffs, and each thereof, are the owners of lots in the same plat, including some in the same block as the one in question. The prayer is that defendants be required to observe the restriction imposed, and that in furtherance thereof a mandatory injunction be granted.

The answer, after admitting the formal allegations in the petition, denies all others, and alleges that defendants made a *bona fide* effort to comply with the restriction, and believed at the time of the construction that the portion of the building complained of was within the restricted line; that plaintiffs observed the construction, and permitted defendants to continue without interference, and, therefore, they are estopped from being heard to complain. The reply denies all allegations of new matter in the answer.

Trial had to the court, which found generally and specifically in favor of plaintiffs and against defendants upon each issue, and entered judgment as prayed, to reverse which defendants appeal, relying upon eighteen alleged errors. These, however, resolve themselves into three, namely: That the judgment is contrary to the evidence; that it is contrary to the law applicable thereto; and that plaintiffs are guilty of laches.

From the record we find that plaintiff, Dundee Realty Company, platted a tract of land as an addition to the city

of Omaha, which was duly recorded, known as "Dundee Place," in furtherance of a general scheme of improvement and development of the tract. The conveyance of each lot in such tract, when sold, contained the restriction hereinbefore quoted, together with others, which provided, in substance, that the premises are to be used for residence purposes exclusively; residences erected thereon are to be two full stories in height, and to cost not less than $4,000; garages and other outbuildings if erected, are to be of the same material and architecture as the residence. All restrictions are to remain in force until January 1, 1930. It appears that they had all been observed by plaintiff, Dundee Realty Company, and by each grantee, the first deviation therefrom being that of defendants in erecting the dwelling in question.

These restrictions were imposed on this tract for the benefit of the whole, and not for any particular lot or lots. Thus, the law announced in *De Gray v. Monmouth Beach Club House Co.*, 50 N. J. Eq. 329, is so applicable that we quote with approval the third paragraph of the syllabus:

"Where there is a general scheme or plan, adopted and made public by the owner of a tract, for the development and improvement of the property, by which it is divided into streets, avenues and lots, and contemplating a restriction as to the uses to which buildings or lots may be put, to be secured by a covenant embodying the restriction, to be inserted in each deed to a purchaser; and it appears, by writings or by circumstances, that such covenants are intended for the benefit of all the lands, and that each purchaser is to be subject to and to have the benefit thereof; and the covenants are actually inserted in all deeds for lots sold in pursuance of the plan; one purchaser and his assigns may enforce the covenant against any other purchaser and his assigns, if he has bought with knowledge of the scheme and the covenant has been part of the subject-matter of his purchase."

See, also, *Wright v. Pfrimmer*, 99 Neb. 447.

It will be remembered that defendants state in their answer that they made a *bona fide* effort to comply with the restriction. Therefore, they admit actual knowledge thereof. Furthermore, the record shows that defendants were expressly told and warned by plaintiff, on several occasions, the first being when the foundation was constructed, that if the room complained of was to be inclosed it was beyond the restricted limit for such room, and would have to be moved back, to which defendant Robert Nichols replied that he would not so move it. Defendants completed the construction of the residence as commenced, which completion was subsequent to the bringing of this suit.

Defendant's contention that plaintiffs are estopped to prosecute this action because of laches is not well taken. The provisions of the restriction hereinbefore set out would not be violated unless the portion of the dwelling extending over the restricted line were inclosed. Therefore, plaintiff had a right to await partial completion of such dwelling before they could determine whether a cause of action had accrued, which was on or about June 1, 1921. The original petition was filed June 15, 1921. There is nothing that indicates laches on the part of plaintiffs or that defendants changed their plans because of any act or word of plaintiffs, or were in any manner damaged by delay, if any, in bringing this suit. The record shows that they did not stop construction of the sun parlor even when suit was brought, but, instead, they proceeded as if no protest had been made. See *Bischof v. Merchants Nat. Bank*, 75 Neb. 838.

A remedy at law would be inadequate, and would lead to a multiplicity of actions, and the subversion of this ideal scheme of improvement and development would still remain. This dwelling, as located, is a clear and direct violation of the letter as well as the spirit of the restrictive covenant, and is an irreparable injury to each of plaintiffs, and to each lot owner in the addition, thus creating a condition which is appealing to a court of equity, in the exercise of its extraordinary power. The relief sought by plaintiffs is fair, equitable, and just.

The judgment of the district court is in all things right, and should be, and hereby is,

AFFIRMED.

REGINE OSTEGAARD, APPELLEE, V. ADAMS & KELLY COMPANY, APPELLANT.

FILED APRIL 16, 1925. No. 24483.

1. **Master and Servant: WORKMEN'S COMPENSATION: LUMP-SUM SETTLEMENT.** Under the workmen's compensation act, one who relies on a lump-sum payment or settlement must bring himself clearly within the statute as to facts entering into such adjustment, as well as the law governing same.
2. ———: ———: **SETTLEMENT: AVOIDANCE.** When a settlement and release of damages for personal injuries has been had under the workmen's compensation act, and one party seeks to avoid same on the ground of mutual mistake of fact, the burden is upon such person to allege and prove that the mistake related to facts which were material to the contract of settlement, and that the injury complained of existed at the time of such settlement, but was not known to the party interposing the objection thereto, and could not have been known by the exercise of reasonable diligence.

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

Dressler & Neely, for appellant.

Rosewater, Mecham & Burton, contra.

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

THOMPSON, J.

This action was originally brought by Peter Ostegaard before the compensation commissioner, to recover as an employee of and against Adams & Kelly Company, appellant herein, for damages alleged to have been sustained by him while in the employment of such company on January 21, 1922, and which resulted in the loss of his left eye, and

that as a result of such injury he became and was afflicted with tuberculosis and was permanently and totally disabled thereby. The company resisted, alleging, among other things, a settlement and previous adjudication of all matters in dispute. Compensation officer found for claimant. Adams & Kelly Company appealed to the district court for Douglas county, alleging, in substance, a previous adjudication, in that on May 5, 1922, a lump-sum settlement was had, as by law in such cases made and provided, between plaintiff and defendant, wherein plaintiff was paid $1,621.19; that, while this settlement was made because of injury to the eye, it also covered the entire injury and consequential damages, and that the judgments then entered are a bar to this action under any and all conditions. Defendant also interposes a specific denial of the allegation that the tuberculosis resulted from the injury or shock, or that it existed at the time of settlement.

Ostegaard answered, in substance admitting the settlement, payment and judgment rendered for the eye, but further alleged that the injury caused him to have and be afflicted with tuberculosis, which tuberculosis he had at the time of the settlement for the eye, and judgment affirming and approving same entered, but that he was not at the time cognizant of the fact that he had tuberculosis; and neither was defendant, and neither could have had such knowledge by the exercise of reasonable diligence; that such tuberculosis was rapidly progressive, which depleted him both mentally and physically, and so undermined his health as to permanently and totally disable him. The reply denies all new matter in the answer, except as it specifically admits allegations of the company's pleading.

While the case was pending, Ostegaard died, and the action was then revived as to him in the name of Regine Ostegaard, his widow, as a dependent. Pleadings were remodelled so far as alleging his death and her relation to him and her dependency.

On the issues thus joined, trial was had to the court and judgment entered for appellee Regine Ostegaard for 225

weeks of compensation at $15 a week as such dependent, to commence 125 weeks from and after January 21, 1922, to reverse which the company appeals.

We have considered the evidence in the light of the able briefs of the parties and fully realize that the authorities are not uniform in their holdings. This, however, is largely owing to the different wording of the different statutes. We are committed to the rule that this act has for its object to deal justly as between employee and employer; that the statute is made broad, so as to include, as it does necessarily, the improvident as well as the provident, thus the state becomes an interested party, as the improvident may become charges, demanding its care and supervision. Also, on the line of good citizenship, for as is its citizenship, so is the state; that small payments from time to time tend to prevent precipitate waste, and are favored; that one who relies on a lump-sum payment or settlement must bring himself clearly within the statute as to the facts entering into such adjustment as well as the law governing same. *Bailey v. United States Fidelity & Guaranty Co.*, 99 Neb. 109; *Perry v. Huffman Automobile Co.*, 104 Neb. 211.

In this case the evidence sustains the trial court, and the record warrants concluding, as we do, that the settlement was for the loss of the eye and the usual, or reasonably to be expected, consequences thereof, and no more; that Ostegaard at the time of the settlement and at the time of the rendition of the respective judgments affirming and approving same, by reason of such injury, became and was afflicted with tuberculosis, from which disease he afterward died; that the settlement as made and approved was clearly as to both plaintiff and defendant buttressed on a mistake of fact; that neither party knew, or by reasonable diligence could have known, of such affliction, and that such tuberculosis was not for that reason taken into consideration at the time of settlement; that as to the contention involved herein their minds did not, and could not, have met; hence, as to it they did not contract, and neither was it covered by the settlement or judgments, and that plaintiff has

not received compensation; that the settlement and respective judgments set forth in the answer do not prevent a recovery as prayed for on the part of the widow. *McGuire v. Phelan-Shirley Co.*, 111 Neb. 609. To avoid the harsh rules of law applied in such cases, courts of equity take cognizance of mistakes of this nature and apply the rule of conscience to the facts disclosed by the evidence. In this case neither party has parted with anything or been placed in a worse position by reason of the settlement. Plaintiff received settlement for the loss of an eye, and no more. He did not intend to, and did not, make settlement for his tubercular affliction, and neither did appellant intend to, nor did it, pay for this affliction. In equity and good conscience, under the facts as well as the law, the mistake was mutual and one against which equity will relieve. *Moore v. Scott*, 47 Neb. 346. This is not enlarging the scope of the statute, for its provisions provide for just compensation for the injury inflicted, and not for a part thereof.

The judgment of the trial court follows the law as announced by us in *Simpson v. Omaha & C. B. Street R. Co.*, 107 Neb. 779. There is no controversy as to the right of the widow as a dependent to recover, as such, if the husband, if living, could recover. The judgment of the trial court should be, and is,

AFFIRMED.

WORLD REALTY COMPANY, APPELLEE, V. CITY OF OMAHA ET AL., APPELLEES:
JULIUS ORKIN ET AL., INTERVENERS, APPELLANTS.

FILED APRIL 16, 1925. No. 23011.

1. **Highways: NUISANCE.** Not every invasion of, or structure upon, a public highway is unlawful, but that they may legally exist, the authority therefor must have its ultimate source in the legislature of the state in whose jurisdiction the highway exists.
2. **Injunction.** One who seeks the extraordinary remedy of injunction must establish by competent evidence every controverted fact necessary to entitle the party to the relief to be granted.

3. **Nuisance:** INJUNCTION. A private person or corporation seeking the aid of equity to restrain a public nuisance must show some special injury peculiar to such person or corporation, aside from and independent of the general injury to the public. *Bischof v. Merchants Nat. Bank*, 75 Neb. 838.
4. **Municipal Corporations:** EASEMENTS: INJUNCTION. Where an abutting owner's easement of light, air and view over and from a public street is interfered with by a private structure extending into or within such street and, by reason of which, the owner suffers material injury peculiar to himself and aside from and independent of the general injury to the public, equity will protect such easement by injunction.

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

Arthur F. Mullen and *William H. Herdman*, for appellants.

Gaines, Van Orsdel & Gaines, William Baird & Sons and *Dana B. Van Dusen, contra.*

Heard before MORRISSEY, C. J., ROSE, DAY, THOMPSON and EVANS, JJ., and SHEPHERD, District Judge.

EVANS, J.

In this action the plaintiff and appellee (hereinafter called the plaintiff) sued for a decree enjoining the defendants, the city of Omaha and certain of its officers (hereinafter called the defendants), from interfering with the construction and maintenance of a canopy in connection with a theater building which, at the time of the commencement of this action, was being erected by the plaintiff. Julius Orkin and the Blank Realty Company, interveners and appellants (hereinafter called the interveners), after obtaining leave from the court so to do, each filed a separate petition of intervention. Issue being joined, the evidence was taken, and the court below found for the plaintiffs, made a final decree perpetually enjoining the defendants as prayed, and dismissed the petitions of the interveners. The interveners each prosecutes an appeal to this court to reverse the decree so entered. The city of Omaha and its officers do

not appeal and appear in this court in the character of appellees.

The facts out of which the controversy arose are as follows:

In the city of Omaha, Douglas street extends east and west, and Fifteenth street extends north and south, intersecting each other at right angles. The streets are 100 feet in width from lot line to lot line, and at their point of intersection are main thoroughfares of the city of Omaha, and the intersection is, approximately, the center of the moving picture business in the city. The sidewalk on the street over which the canopy was constructed is 17 feet in width from lot line to curb. The plaintiff, as tenant under a 99-year lease, occupies, on the northwest corner of the intersection, a parcel of land 132 feet by 110 feet, the latter frontage being on Douglas street, and at the time this controversy arose was engaged in the construction of a theater building upon said parcel of land, the same to cost upwards of $300,000. The intervener, Julius Orkin, occupies as a tenant, under a lease expiring in 1931 a parcel of land adjoining plaintiff's land on the west, with a south frontage on Douglas street of 22 feet and a depth of 132 feet, upon which premises is a four-story brick building of like frontage and occupied as a retail store. The first-story front of this building is of glass flushed with the north line of Douglas street, in which intervener Orkin displays at all times, for sale and advertising purposes, merchandise kept for sale in said building. There is also on the front of said building a large sign, and in the front of said building and extending south therefrom a vertical sign showing the intervener's name, the sign extending from the second floor to the top of the building. It does not appear that plaintiff's canopy seriously obstructs the show-windows of this intervener, but it would obscure to quite an extent the view from the street of said intervener's sign that is placed flat upon the front of his store. The intervener, the Blank Realty Company, occupies under a 99-year lease a parcel of ground 133 feet square located on the northeast corner

of the intersection of Douglas and Fifteenth streets. Upon said premises the intervener has a theater building three stories in height recently constructed at a cost upwards of $300,000, and upon the front of said building intervener has placed and maintains lighting, illuminating, and advertising devices, the same being placed flat upon said building and representing an investment of several thousand dollars and which are maintained continuously, the cost thereof being a very considerable sum. The canopy constructed by plaintiff extends along the south side of the building on Douglas street, having a length of 76 feet 6 inches, and projecting out over the sidewalk 15 feet, and at its lowest point being 10 feet 3 inches above the level of the sidewalk. Its construction is fire-proof and is entirely supported by cables attached to the building from which it projects. The plans therefor provide for the lighting of the entrance to the theatre and the lobby from lights installed in the canopy, and for the lighting of the front of the building by means of lights installed in the roof of the canopy. The effect of the canopy is to obstruct the view from and, to an extent, hide the fronts of the building of each of the interveners, Julius Orkin and Blank Realty Company. On July 30, 1921, on application of plaintiff to R. E. Edgecomb, signing as "building inspector," a permit was issued for the construction of a three-story building. This permit was a conditional permit and a letter of the "chief engineer" accompanying the permit called attention to the conditions. The conditions specially referred to, however, had to do with the structure inside the lot lines, and not to projections extending into the street. The plans submitted at the time this permit was issued showed the canopy proposed to be constructed practically as the same now is. On October 10, 1921, a permit was issued by R. E. Edgecomb, signing as "chief engineer in charge of the building department," purporting to authorize the construction of a canopy, and the canopy involved in this controversy is within the limitations fixed in this permit. On October 17, 1921, the Blank Realty Company filed with the defendants, the commission

of the defendant city, a protest against the construction of the proposed canopy, alleging, among other reasons therefor, that if the canopy is constructed it will cause great and irreparable damage to the business and property of the company, and that the permit is unlawful, an invasion of property right of the company, and is "an attempt to give to private people a franchise and right to use a part of the streets" for private purposes, and requesting a revocation of the permit. Julius Orkin, the other intervener, at the same time filed a similar protest. On October 18, 1921, the following resolution was adopted by the city council:

"Resolved, that the permit granted by the building department upon October 10, 1921, to World Realty Company to erect a canopy or permanent awning over the sidewalk around the east two-thirds of lot seven, block one-hundred and six, Original City of Omaha, be revoked."

On October 20, R. E. Edgecomb, as "chief engineer of the building department" of the defendant city, notified the construction company, to whom the permit had been issued, of the resolution, and that the canopy could not be constructed. The resolution of revocation was passed without notice to the plaintiff and without a hearing at which plaintiff was represented. At that time no material part of the canopy had been constructed. The actual work on the canopy upon the ground was not commenced until about January, 1922. The work of construction was under an inclosed shed, and neither the defendant city nor either of the interveners had knowledge of its construction until in March, 1922.

The questions presented for decision are: (1) Was there a lawful authorization for the construction of the canopy in question? (2) Can the authorities of a metropolitan city authorize such a construction in a public street and by so doing deprive adjoining and adjacent abutting property owners of their right to light, air and view over such a street to the material damage of such owners?

Omaha is a city of the metropolitan class. Its charter is subject to the limits of the Constitution and laws of the

state. Const., art. XI, sec. 5. It is given authority and control over the streets and sidewalks to be exercised by ordinances. Comp. St. 1922, sec. 3489, subds. XII, XXI. Under this section the ordinance received in evidence was passed. There was a permit received in evidence which granted to the plaintiff the right to erect a three-story building on its property at the intersection of Douglas and Fifteenth streets in the city of Omaha, but such permit does not confer the right to construct a canopy out into the street. The fact that the plans had incorporated in them the proposed canopy in no way binds the city, as canopies are specially mentioned in the ordinance offered in evidence and require a special permit by a particular officer. The plaintiff recognized this fact, in that it subsequently applied for a permit to construct the canopy involved in the controversy, and without which the construction of the canopy could have subjected the person engaging in its construction to a prosecution for a violation of the very ordinance under which the plaintiff claims protection.

Not every invasion of or structure upon a public highway is unlawful, but that they may exist legally, the authority therefor must have its ultimate source in the legislature of the state within whose jurisdiction the highway exists. "The legislature of the state represents the public at large, and has full and paramount authority over all public ways and all public places." 1 Elliott, Roads and Streets (3d ed.) sec. 540. The legislature usually delegates this power to control and regulate streets to the local authorities. How far these powers extend in a given case must be determined from the charter or enactment. 1 Elliott, Roads and Streets (3d ed.) sec. 540; 2 Dillon, Municipal Corporations (4th ed.) sec. 656, and cases cited in note. But a city cannot contract away its power over streets when public good requires it to act. 2 Elliott, Roads and Streets (3d ed.) sec. 840, cases cited in note 82, and sec. 882; cases cited in Cooley, Constitutional Limitations (5th ed.) * 206 *et seq.*

The plaintiff seeks the extraordinary remedy of injunction, and to be entitled to the relief sought must establish each and every fact necessary to entitle it to the relief prayed for, and this includes a permit from the duly constituted authorities having jurisdiction over the subject-matter—in this case the construction of the canopy over sidewalks on Omaha's public street. The canopy in question, as to size, drainage, character of construction, and support, may be conceded to be within the limitations fixed by the ordinances, but was there a permit issued and granted by "the department or officer of the city in which or whom is vested by law or ordinance the authority to issue building permits?" If so, was such permit in force at the time this litigation was commenced? It is not made apparent by proof that the permit, under which it is claimed that the canopy is constructed, was granted "by the department or officer" designated in the ordinance to grant the permit. For the same reason it is uncertain whether the permit so relied upon was not legally revoked. The city of Omaha and its officers, the defendants in this action, have not appealed, and, as between the plaintiff and defendants, the decree of the district court stands unquestioned. This places upon the interveners the burden of establishing facts entitling them or one of them to the affirmative relief sought by them—a permanent injunction prohibiting the maintenance of the canopy on plaintiff's building—and the interveners' rights must rest upon injuries not common to the public, but such as are special and peculiar to them.

A canopy 76½ feet in length, 15 feet in width, not less than 10 feet above the sidewalk, located as described in the pleadings and evidence in this case, does affect injuriously the interveners' easement of light, air and view over the street into which it extends in a manner aside from and independent of the general injury to the public. The effect of the canopy is to utilize the property of the public for increasing the plaintiff's advertising and lighting facilities, and at the same time, to quite an extent, lessening

the effect of its competitor's efforts in the matter of advertising; that too, when the competitor is remaining strictly within the limits of its own property, or to state it differently, the canopy if allowed to remain as it is rewards one who unduly encroaches upon the streets and punishes that one who does not so encroach.

If we assume that the permit is without warrant or authority, or that it was legally revoked by the resolution of October 17 and the notice of October 20, then the case of *Bischof v. Merchants Nat. Bank*, 75 Neb. 838, is controlling and the canopy is a nuisance *per se* and should be abated. On the other hand, assume that the permit is sufficient and that it is effective and in force so far as to satisfy the ordinance in evidence, what is the rule?

No estoppel against a municipal corporation can arise from an act of such corporation or its officers done either in violation of law or without proper legal authority. *Philadelphia Mortgage & Trust Co. v. Omaha*, 63 Neb. 280; *Chapman v. City of Lincoln*, 84 Neb. 534; *Hibbard, Spencer, Bartlett & Co. v. City of Chicago*, 173 Ill. 91. The plaintiff acted with knowledge of the objections made to the erection of the canopy. If there is no estoppel as to the city, there can be none as to the interveners who were without knowledge of plaintiff's proposed action and moved promptly when action by them was called for.

"The consent of a city council to the erection of a structure for private use in a public street creates no vested rights, nor can the owner enjoin the removal of the structure on the ground that it does not injure or obstruct any person, as the sole question in such case is, is the structure an encroachment upon the public street." *Hibbard, Spencer, Bartlett & Co., v. City of Chicago, supra.*

The foregoing case, it will be noted, is an action in which the municipality is the party, and is only applicable in the present case in so far as it relates to the question of a vested right in an encroachment upon the public highways.

There is conflict in the authorities as to whether a private individual can enjoin the maintenance of an obstruc-

tion in a public street on the sole ground that it affects his easement of light, air and view. There is one line of cases which holds to the rule that an "owner of a lot abutting on a city street has an easement in the light and air afforded by such a street, and is entitled to injunction to prevent the erection of a structure across the street which materially diminishes the supply of light and air to his lot, although such structure is authorized by municipal ordinance, because such an ordinance, made for the benefit of an individual, is invalid." *Townsend, Grace & Co. v. Epstein,* 93 Md. 537. See *Davis v. Spragg,* 72 W. Va. 672; *First Nat. Bank v. Tyson,* 133 Ala. 459; *Field v. Barling,* 149 Ill. 556; *Farrell v. Mayor of the City of New York,* 5 N. Y. Supp. 672; 2 Elliott, Roads and Streets (3d ed.) sec. 850. In Maryland a contrary view is expressed in an earlier case *Garrett v. Janes,* 65 Md. 260.

In *Field v. Barling, supra,* it is held: "Irreparable injury, as used in the law of injunction, does not necessarily mean that the injury is beyond the possibility of compensation in damages, nor that it must be very great; and the fact that no actual damages can be proved, so that in an action at law the jury could award nominal damages, only, often furnishes the best reason why a court of equity should interfere in a case where the nuisance is a continuing one."

In *Hoey v. Gilroy,* 129 N. Y. 132, the court refused to enjoin the maintenance of a structure 110 feet long, 19 feet wide (covering the whole width of sidewalk), supported by iron columns 3½ inches in diameter. The action was between the owner of the structure and the city. The matter of easement of light, air and view as between abutting owners was not involved. It should be born in mind, however, that this structure had originally been erected in conformity with an ordinance of the city, later, on the amendment of the ordinance, made to conform to the amended ordinance, and that there was no ordinance existing which made it an unlawful structure. The court concluded, so long as the city authorities had power to

authorize the erection and had exercised that power, that the court could not ignore that action, and that the common council can at any time abate such obstruction and prevent them in the future by repeal or modification of the ordinance.

In *Davis v. Spragg, supra,* it is held: "In addition to his right to use the highway in common with the general public, an abutting owner has also a special right to access thereto and to light, air and view therefrom. These are property rights and exist regardless of the ownership of the fee in the highway." But in such cases the private individual must show that he suffers serious injury differing from the general public. The latter case, after reviewing the cases of *First Nat. Bank v. Tyson, supra,* and *Bischof v. Merchants Nat. Bank, supra,* said: "We are inclined to think that these cases determine the law correctly, and that, if plaintiffs in this case had proved that the obstruction of the view from the street to the front of their buildings seriously and injuriously affected their actual or rental value, they would have been entitled to relief." The chancellor found they had failed to prove any such damage and this finding was approved by the reviewing court.

In *Krueger v. Wisconsin Telephone Co.,* 50 L. R. A. 298 (106 Wis. 96) it is held: "An unsightly telephone pole erected without right in a street, where it obstructs to some extent a show-window of the owner of the fee in that part of the street, constitutes a continuing trespass against which an injunction may be granted."

But in *Hay v. Weber,* 79 Wis. 587, from the same state, it is held that an owner of a store building cannot enjoin the construction of a bay window on an adjoining building extending 18 to 20 inches into the street, the damages because of obstructed view being too remote and speculative to constitute a cause of action. This case arose in Oshkosh and, from the opinion, there seems to have been a custom in that city permitting a display by the merchants of their merchandise upon the sidewalks in front of their places of

business and the bay window in question was apparently for such purpose, and this fact was considered by the court.

There is a group of cases arising out of covered excavations under some portion of the street or sidewalk, and in this class of cases the private individual has usually failed to prove injury peculiar to himself and aside from that suffered by the general public, and for that reason has failed to maintain his action. In this group is *Tiernan v. Thorp*, 88 Neb. 662; *Gleason v. Loose-Wiles Cracker & Candy Co.*, 88 Neb. 83; *State v. Armstrong*, 97 Neb. 343 (see opinion, Letton, J.).

Another line of cases hold, as in *Hay v. Weber, supra*, that the injury or damage flowing from the obstruction of view and prospect are too remote and speculative, and refuse injunctive relief. *Commonwealth v. First Nat. Bank*, 207 Pa. St. 255. This decision was by an equally divided court on a case of encroachment to the extent of 2 feet 9 inches in area, and on such divided opinion the decision of the court below was affirmed.

The case of *Mint Realty Co. v. Wanamaker*, 231 Pa. St. 277, involved an 8-foot extension, in conformity with a custom in the city, on a building 240 feet high, when the surrounding buildings were less than 100 feet high.

The case of the *City of Indianapolis v. Central Amusement Co.*, 187 Ind. 387, was an action instituted to compel the commissioner of buildings of that city to approve certain plans for a metal canopy over a sidewalk in front of the theater of the amusement company. The ordinance of the city provided: "Canvas awnings of the folding or hinged class or metal awnings may be erected beyond the building line, when the same are not less than 8 feet above the sidewalk." The plans presented for approval were within the provisions of the ordinance. The court held they were entitled to the relief asked.

Gundlach v. Hamm, 62 Minn. 42, holds to the rule that a private individual must show special damages before he can maintain an action to enjoin. In *Hawkins v. Sanders*,

45 Mich. 491, because no damage was shown, the bill was dismissed.

State v. Wightman, 78 Conn. 86, was a prosecution under an ordinance prohibiting the placing of signs so they extended into the street in excess of three feet and made violation thereof a misdemeanor. The ordinance was sustained under the act of the legislature authorizing it. Other cases cited by the parties to this action hold along the lines above indicated or else were not in point.

In *State v. Armstrong, supra,* there was an attempt by the relator to compel the mayor and council of the city of Lincoln to cause an "open area in the public sidewalk" to be closed. The issues raised were found in favor of the respondents and the proceedings dismissed. It does not appear that the relator was in any way injured, and the matter of allowing and regulating entrances to basements through sidewalks was held to be within the reasonable discretion of the city authorities, and that the case presented did not show an abuse of that discretion.

City of Omaha v. Flood, 57 Neb. 124, is relied upon by the appellees as establishing in this jurisdiction the rule: "That which the law authorizes is legal and cannot be enjoined as a nuisance." As has been hereinbefore pointed out, the assumption that the canopy in question was legally authorized is unwarranted and not necessarily involved in the decision of this case. However, the case is properly distinguished from the present one, in that the work complained of was that which tended to fit the street for public use and was done in a lawful manner, and that for the damage suffered by Flood there was an adequate remedy by an action for damage. In this case it is the effect of an act by a private individual which attempts to transfer a right from one individual to another without the consent of the latter.

The weight of authority is with the rule that, where an abutting owner's easement of light, air and view over and from a public street is interfered with by a private structure extending into or within such street, and, by reason

of which, such owner suffers material injury peculiar to himself and aside from and independent of the general injury to the public, equity will protect such easement by injunction. This court in the case of *Bischof v. Merchants Nat. Bank, supra,* recognized and announced the principle, and no good reason has been assigned, or is apparent, for a departure from or a modification thereof. The interveners do and would suffer such injury if the canopy is permitted to remain, and are entitled to have it abated. The decree of the trial court is therefore reversed and the case remanded, with direction to enter a decree in accordance with this opinion.

REVERSED.

FRED E. BODIE, RECEIVER, APPELLEE, V. W. A. ROBERTSON, TRUSTEE ET AL., APPELLEES: WILLIAM F. GILLISPIE ET AL., APPELLANTS.

FILED APRIL 16, 1925. No. 23037.

Evidence examined, and *held* sufficient to support the findings and decree of the district court.

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

D. O. Dwyer, for appellants.

Gaines, Van Orsdel & Gaines, C. A. Rawls, A. G. Cole, C. E. Tefft and *W. A. Robertson, contra.*

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

EVANS, J.

This is an action originally brought by the Bank of Cass County to subject the real estate hereinafter described, the title to which at the commencement of the action was standing in the name of W. A. Robertson, to the payment of a certain indebtedness growing out of notes of J. H. McMaken due to it. The Nehawka Bank of Nehawka and the

First National Bank of Plattsmouth also held notes, the payment of which was secured by the same real estate, and for that reason they were made parties. The origin of this indebtedness was also in the McMaken notes. The appellants claimed a prior lien by reason of attachments issued in suits brought by them in which Charles C. Parmele was defendant and levied upon the said real estate as his property. There was a finding and decree against the attaching creditors of Parmele as to priority, from which decree both creditors appeal.

The facts are as follows: On or about September 16, 1918, J. H. McMaken executed and delivered a warranty deed, absolute in form, conveying lots 1, 2, 3, and 4, in block 22, city of Plattsmouth, to Charles C. Parmele, the consideration mentioned in the deed being $55,000, that amount being approximately the indebtedness of McMaken to the Bank of Cass County, the Nehawka Bank of Nehawka, the First National Bank of Plattsmouth, and the Pacific Junction Bank. Upon the indebtedness held by the Nehawka Bank and the First National Bank, Parmele or the Bank of Cass County, or both, admitted liability as if indorsers of the notes. Parmele was at that time the president of the Cass county bank. The possession of the property conveyed remained in McMaken, and the deed, in effect, was a mortgage to secure the indebtedness mentioned. On April 28, 1921, McMaken remained indebted to the Bank of Cass County upon four promissory notes aggregating with interest the sum of $17,919.57. At the same time he was indebted to the Nehawka Bank, on a note transferred to it by the Bank of Cass County, in the sum of $5,000 and interest, the interest on May 16, 1921, amounting to $326.56. He was also indebted to the First National Bank on a promissory note transferred to it by Charles C. Parmele in the sum of $5,000. During all of this time Parmele had been president or director of the Cass county bank. Prior to April 28, 1921, Parmele was required by the department of trade and commerce of the state to take out of the Cass county bank enough of the McMaken notes to reduce its

holdings to the legal limitations—$15,000. The Nehawka Bank demanded and received better security for its $5,000 and interest. This was accomplished by surrendering to McMaken all of his outstanding notes. He, in turn, conveyed to Parmele, by quitclaim deed, the real estate heretofore mentioned, and delivered possession thereof to Parmele. W. A. Robertson joined Parmele in notes to the Nehawka bank in the amount due it, and Parmele conveyed the real estate to Robertson to secure him against loss by reason of the notes so given to the Nehawka Bank. Parmele and Robertson were both directors of the Bank of Cass County. On November 12, 1921, the Nehawka Bank insisted upon and received from W. A. Robertson a mortgage on the same real estate in terms securing the notes held by it. On about December 13, 1921, the Bank of Cass County ceased to do business as a bank, and Fred E. Bodie was appointed, qualified, and became receiver of said bank. The appellant Gillispie, being a creditor of said Charles C. Parmele in a sum of about $2,700, on August 18, 1921, began a suit against the latter and caused a writ of attachment to be issued and levied upon the real estate above described, on the grounds that it had been conveyed in fraud of creditors and without consideration. On November 25, 1921, judgment against Parmele was rendered in that action in the sum of $2,812.88 and special execution issued for the sale of the property. At the same time the appellant Morgan Waybright, following the course of procedure above outlined, secured judgment against Parmele on November 25, 1921, for $6,478 and had special execution issued against the real estate mentioned herein. By stipulation of all parties interested the sale was postponed 30 days to await the decision of this case. The decree of the district court found in favor of the receiver of the Bank of Cass County, the Nehawka Bank of Nehawka, the First National Bank of Plattsmouth, and as to priority against the appellants. The decree awarded a first lien to the Nehawka Bank in the sum of $5,813.73, a second lien to Fred E. Bodie, as receiver of the Bank of Cass County,

and the First National Bank of Plattsmouth to *pro rate* in accordance with the amounts due each, being $19,059.63 and $5,527.78, respectively, requiring, however, that the First National Bank should first exhaust the collateral security held by it, and awarded the appellants a third lien prorated in accordance with the amounts due each. There is no appeal by the receiver or either of the banks. The question presented is: Do the attachments levied by appellants have priority over the liens of the banks and receiver, the principal contention of the appellants being that the deed from Charles C. Parmele to W. A. Robertson is void in so far as it is sought thereby to create or preserve liens prior to the attachments of the appellants in favor of the banks or the receiver? There is practically no dispute as to the facts.

The real estate in controversy was conveyed and possession thereof delivered to Parmele in June, 1921. The consideration to McMaken, which passed when the deed was delivered, was the return to him of all his notes, including those held by the Nehawka Bank and the First National Bank, as well as those in the Bank of Cass County, and, in addition, there was an agreement requiring Charles C. Parmele to convey to W. A. Robertson the real estate in question, which was taken by him, charged with the indebtedness of McMaken to the Bank of Cass County and First National Bank. Active fraud is nowhere shown or suggested in this transaction. The consideration comes from the three banks, and the transfer to Robertson brings the case clearly within the rule heretofore announced by this court. The consideration for the conveyance of the land by McMaken to Parmele was the cancelation of his indebtedness to the banks, and while the title was taken in the name of Parmele it was held for the benefit of the banks, and Parmele at no time claimed the property as his own. He was then president of the Bank of Cass County, through whom the indebtedness held by the other banks was negotiated, and his conduct throughout the series of transactions is entirely consistent with the conditions stated. The representatives of the vari-

ous banks interested acted in good faith. "Where one person buys land in his own name, but with money, and for the use of another, the latter is the equitable owner of the property and the former holds the title in trust. A resulting trust is not within the statute of frauds, and parol testimony is admissible to prove the purchase for, and payment of the consideration by, the beneficiary, even though the deed recites the consideration was paid by the grantee." *Chicago, B. & Q. R. Co. v. First Nat. Bank,* 58 Neb. 548. See, also, *Doll v. Doll,* 99 Neb. 82; *Kuncl v. Kuncl,* 99 Neb. 390; *Ahrens v. Simon,* 101 Neb. 739; *Bear v. Koenigstein,* 16 Neb. 65.

The appellants urge the statute of frauds in their own behalf and against the recognition of a trust in favor of the receiver and the banks. The statutory provisions applicable are as follows: "No estate or interest in land, other than leases for a term of one year from the making thereof, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by operation of law, or by deed of conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same." Comp. St. 1922, sec. 2451. "The preceding section shall not be construed to affect in any manner the power of a testator in the disposition of his real estate by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law." Comp. St. 1922, sec. 2452. These sections have been before this court frequently for application and construction and it has been held:

"The statute of frauds does not render a contract void, but voidable at the option of either party. But it does not require a party to ignore considerations of moral obligation, equity, and good faith, by pleading the same; and a creditor cannot do so." *Cresswell v. McCaig,* 11 Neb. 222; approved in *First Nat. Bank v. Blair State Bank,* 80 Neb. 400. See, also, *Rickards v. Cunningham,* 10 Neb. 417; *Happ v. Ducey,* 110 Neb. 429; *Greusel v. Payne,* 107 Neb. 84.

The appellants stand in the position of private creditors of Charles C. Parmele. "The private creditors of the trustee have no claim on trust property where the trust has been created by or the fund has proceeded from some person other than the debtor, and their attachment of it will not hold, though the title stands in the name of the trustee as an individual, and the creditor has no notice of the trust." 2 Perry, Trusts (6th ed.) sec. 815*b*. See *Raasch v. Lund Land Co.*, 103 Neb. 157.

So far as the appellants are concerned, this is not an action to enforce a trust against a resisting trustee. If it were, many of the authorities they cite would be in point. But in this case both Charles C. Parmele and W. A. Robertson were, at all times material to this controversy, directors of the Bank of Cass County. "The rule is thoroughly imbedded in the general jurisprudence of both America and England that the status of directors is such that they occupy a fiduciary relation toward the corporation and its stockholders, and are treated by courts of equity as trustees. * * * The fiduciary relation is so vital that directors are not only prohibited from making profit out of corporate contracts, and from dealing with the corporation except upon the most open and on the fairest terms, but the rule of accountability is so strict that they are not permitted to anticipate the corporation in the acquisition of property reasonably necessary for carrying out the corporate purposes or conducting the corporate business." 2 Thompson, Corporations (2d ed.) secs. 1215, 1246. See *Nebraska Power Co. v. Koenig*, 93 Neb. 68. And if, as between the corporation and the director, strict accountability is so required, where the directors, as in this case, are both endeavoring to perform their duties consistently and honestly, private creditors of one of them will not be permitted to interfere with the performance of the duty so imposed and sought to be performed.

The decree of the district court is correct, and is

AFFIRMED.

GERTRUDE D. REED, APPELLEE, V. THEODORE F. BARNES ET AL., APPELLANTS.

FILED APRIL 16, 1925. No. 23086.

1. **Limitations of Actions: PLEA IN AVOIDANCE.** In order to avoid the statute of limitations in a suit to set aside a deed for fraud, the plaintiff must aver and prove the impediments to an earlier prosecution of the claim, all facts which relate to or explain a failure to prosecute, and when he, or those through whom he claims, first obtained knowledge of the matters alleged as an excuse for the failure to prosecute.
2. **Fraudulent Conveyances: BONA FIDE PURCHASER.** A son who, without knowledge of other obligations of his father, accepts a conveyance of real estate formerly owned by his father, and in which the father, up to the time of the conveyance, claimed an equitable interest, and who, as the consideration for the conveyance, pays the debts of the father with which the real estate conveyed then stands charged, by giving his own personal notes secured by mortgage upon the real estate conveyed, the amount of such notes being the full value of the property conveyed, in the absence of other circumstances tending to show fraud, is a good faith purchaser for value.

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

Grant G. Martin, for appellants.

Hall, Baird & Williams and *R. H. Hagelin, contra.*

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

EVANS, J.

This is an action in the nature of a creditor's bill seeking to subject 678 acres of land, situated in Lancaster county, the title to which is now standing in the name of Lafayette P. Barnes, to the payment of three judgments against Theodore F. Barnes, aggregating about $2,200, and the interest thereon and costs. The judgments were transcripted to the district court for Lancaster county. Having become dormant they were revived. After the revivor, execution was issued thereon and "returned wholly unsatisfied." The

judgments were each assigned to the plaintiff prior to the commencement of this action for the purpose of collection. The petition, after setting forth the foregoing as to the judgments, alleges that the defendant Theodore F. Barnes is the equitable owner of the real estate sought to be charged, and that a certain deed from Edward G. Titus to Lafayette P. Barnes conveying the real estate in question was without consideration and for the purpose of hindering and defrauding the plaintiff (Gertrude D. Reed) and her assignors and other creditors of Theodore F. Barnes, as said "Lafayette P. Barnes then well knew;" that Theodore F. Barnes is the father of Lafayette P. Barnes. The defendants Theodore F. Barnes and Lafayette P. Barnes in their answer deny all allegations in the petition not expressly admitted, but admit that up to 1916 Theodore F. Barnes was the owner of the real estate involved; that on January 4, 1906, he conveyed the premises to Edward G. Titus subject to an existing incumbrance amounting to $20,000 and to secure the additional sum of $6,000 owed by Theodore F. Barnes to Titus; that while the deed to Titus was absolute in form it was, in fact, a mortgage; that in 1916 Edward G. Titus conveyed the premises to Lafayette P. Barnes, the consideration therefor being the assumption by Lafayette P. Barnes of the $20,000 incumbrance above referred to, and a second mortgage of $10,000, which was made up of $8,500 due to Titus, $1,000 due to W. E. Barkley from Theodore F. Barnes, and $500 commission for the negotiation of the two mortgage loans, the first for $20,000 and the second for $10,000; that this consideration was paid and the agreement carried into effect by the execution of the notes and mortgage of Lafayette P. Barnes and wife for the respective amounts, the $20,000 note and mortgage running to the Lincoln Safe Deposit Company, paying off the prior mortgage for that sum, and the $10,000 note and mortgage being a second lien and running to J. M. Hayes; that the delivery of the deed from Titus to Lafayette P. Barnes and the execution and delivery of the notes and mortgage by Lafayette P. Barnes to the holders of said indebtedness

were concurrent; that Lafayette P. Barnes, at the time he purchased and assumed the ownership of said premises and gave the notes and mortgages above described, did not know that the defendant Theodore F. Barnes was indebted to the persons from whom the plaintiff holds as assignee and did not know of the existence of the judgments above described. The defendants also plead the statute of limitations. There is no reply on file, but the case was tried as if the allegations of the answer, as to the *bona fides* of the conveyance to Lafayette P. Barnes, were denied. The Lincoln Safe Deposit Company and Harry B. Grainger and Joseph Grainger, by permission of the court, intervene in the action. The Lincoln Safe Deposit Company is the mortgagor and owner of the first mortgage for $20,000. Harry B. Grainger and Joseph Grainger, as assignees of J. M. Hayes, are the owners and assignees of the second mortgage for $10,000. The petitions in intervention are not included in the transcript. The decree of the district court finds the two mortgages as first and second liens, respectively, and, subject to these incumbrances, decrees that Theodore F. Barnes since November 6, 1916, has at all times been the equitable owner of the real estate, and that Lafayette P. Barnes holds the legal title in trust for Theodore F. Barnes, and orders within 20 days that Lafayette P. Barnes execute and deliver to Theodore F. Barnes a deed to all of said real estate, and that Theodore F. Barnes, upon the delivery, record the same in the office of the register of deeds of Lancaster county, and, in default of such conveyance and record, provides that the decree shall stand in lieu thereof; that the judgments are held to be liens upon said real estate, and in default of payment thereof the sheriff is directed to proceed as upon execution to sell the real estate subject to the mortgage liens and bring the proceeds to be applied in the satisfaction of the judgment. From this decree defendants appeal.

There is set up as a defense the fact that Theodore F. Barnes has been adjudged a bankrupt; that these judgments were listed among his liabilities; but, as the petition in this case was filed more than four months before the dis-

charge in bankruptcy, it will be considered as unaffected thereby.

There are a number of transactions antedating the deed which is attacked in plaintiff's petition, and as to which proof was offered, which cannot affect the facts upon which the decision in this case must rest and they will not therefore receive further comment.

The deed sought to be set aside is dated January 24, 1916. It was recorded on November 6, 1916. The petition was filed in this case on August 9, 1921, more than four years after the record of the deed. The defendants in their answer plead the statute of limitations. The plaintiff neither by plea nor proof attempts to avoid the effect of the statute, and under the rule heretofore announced by this court the plaintiff must fail in this action. Where the statute of limitations is pleaded, the plaintiff, to avoid the effect thereof, must aver and prove that the fraud was not discovered immediately and the right to sue did not accrue at once, but this will not be presumed: The burden is upon the plaintiff to make it appear by proper averment. *Newman Grove State Bank v. Linderholm,* 68 Neb. 364; *Weckerly v. Taylor,* 74 Neb. 84; *Westervelt v. Filter,* 2 Neb. (Unof.) 731; *State Bank of Pender v. Frey,* 3 Neb. (Unof.) 83. A reading of the record discloses that at the time of the conveyance complained of these judgments were dormant; that no one was seeking to enforce them; that the grantee made the existing incumbrances, and additional indebtedness of his father's, his, the grantee's, personal obligation; that the consideration stated in the deed was, even at the time of the trial, the full value of the land; that the grantee had no knowledge of the existence of the judgments or other indebtedness of his father and codefendant Theodore F. Barnes; and that the conveyance was a good faith transaction without fraudulent intent on the part of the grantee and for full value. The decree of the district court is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

Note—See Fraudulent Conveyances, 27 C. J. sec. 290.